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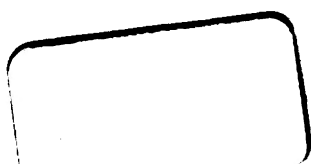
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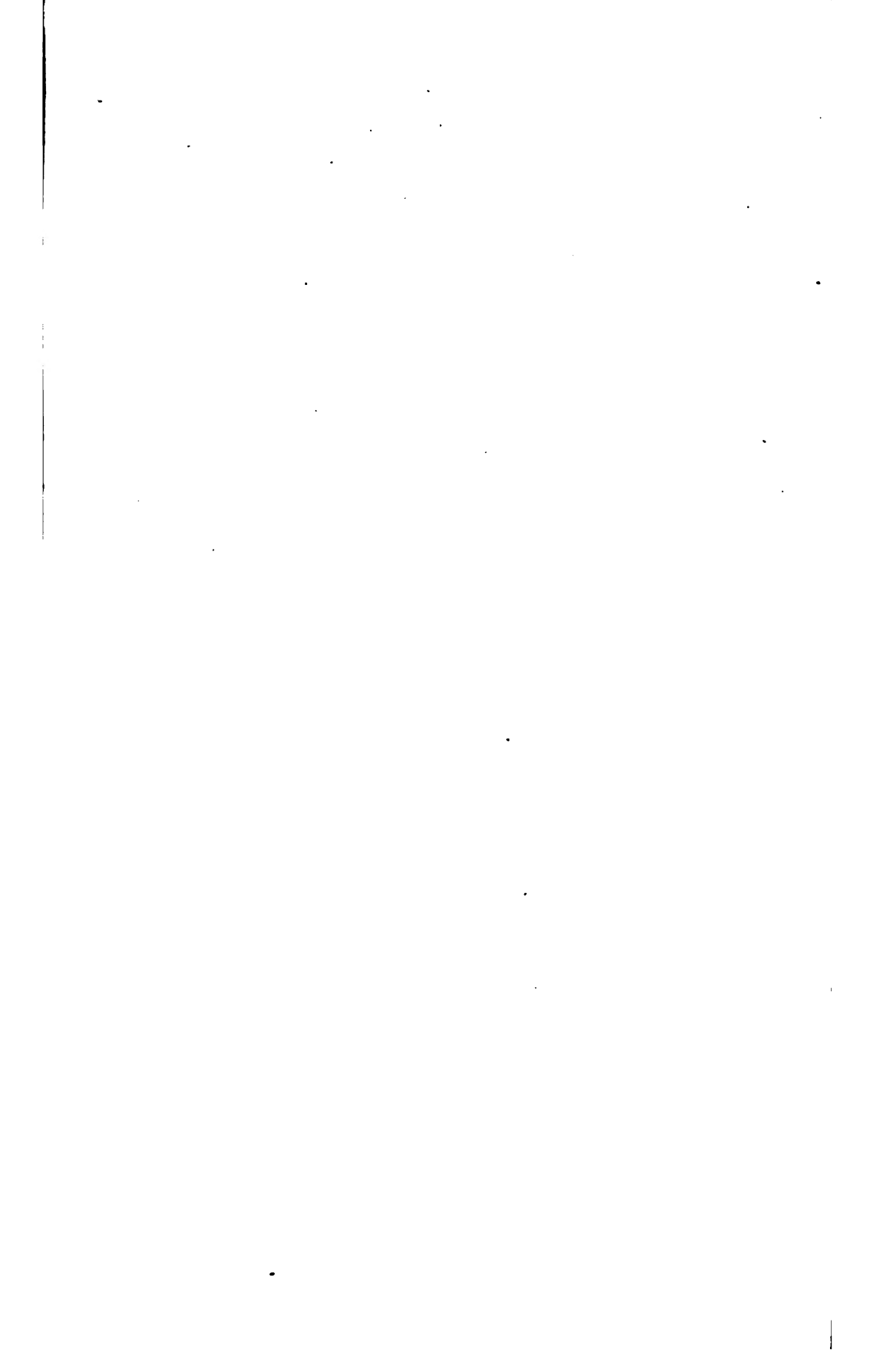
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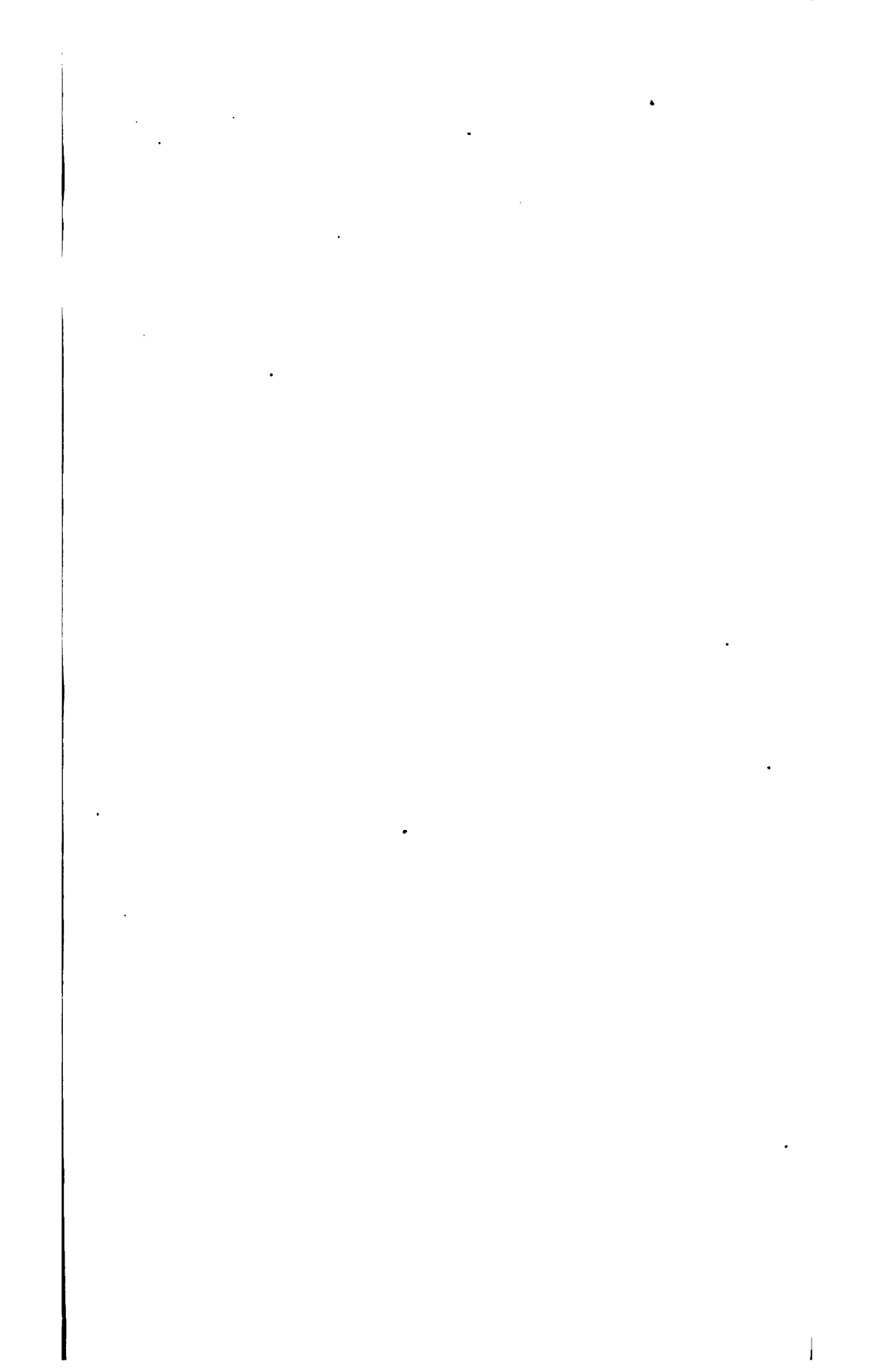
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THE LAWYERS REPORTS ANNOTATED

BOOK LVII.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH AND HENRY P.

FARNHAM, EDITORS.

ROCHESTER, N. Y.

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TABLE

OF

CASES REPORTED

IN

LAWYERS' REPORTS, ANNOTATED, BOOK LVII.

A.	
Ainsworth v. Lakin (Mass.).....	132
Aldrich v. Bank of Ohiowa (Neb.)....	920
v. Metropolitan West Side Elev.	
R. Co. (Ill.).....	237
Americus v. Perry (Ga.).....	230
Anchor Mut. F. Ins. Co., Taylor v.	
(Iowa).....	328
Anne Arundel County Comrs., Bembe	
v. (Md.).....	279
Armwood, Herring v. (N. C.).....	958
Ascher, Re (Mich.).....	806
Atkins, Bain v. (Mass.).....	791
B.	
Bain v. Atkins (Mass.).....	791
Baldwin v. Tucker (Ky.).....	451
Ball, State ex rel., Indiana Natural &	
Illum. Gas Co. v. (Ind.).....	761
Bancroft, Chicago Lumber Co. v.	
(Neb.).....	910
Bank, Chemical Nat., Critten v. (N.	
Y.).....	529
First Nat., Hindman v. (C. C.	
App. 6th C.).....	108
Movius State, Drinkall v. (N.	
D.).....	341
National Valley, v. Hancock	
(Va.).....	728
of Ohiowa, Aldrich v. (Neb.)....	920
Tecumseh Nat., v. Chamberlain	
Bkg. House (Neb.).....	811
Union Nat., v. Chapman (N.	
Y.).....	513
Bankers' L. Ins. Co. v. Howland (Vt.)	374
Barker, State ex rel. White v. (Iowa)	244
Bates, Oliver Ditson Co. v. (Mass.)...	289
Bathgate, Ryerson v. (N. J.).....	307
Belles v. Kellner (N. J.).....	627
Bellevue, South Covington & C. Street	
R. Co. v. (Ky.).....	50
* Bembe v. Anne Arundel County Comrs.	
(Md.).....	279
Benedict v. Minneapolis & St. L. R. Co.	
(Minn.).....	639
Benge, Reid v. (Ky.).....	253
Benjamin, Presby v. (N. Y.).....	317
Biesecker, People v. (N. Y.).....	178
Bigby v. Warnock (Ga.).....	754
Bishop, Madisonville v. (Ky.).....	130
57 L. R. A.	
Blake, Byrbee v. (Conn.).....	222
Bleise, Swift v. (Neb.).....	147
Blochman v. Spreckels (Cal.).....	213
Blyth v. Pinkerton (Wyo.).....	468
Boisseau use of Robinson v. Penn (Va.)	380
Boston Elev. R. Co., Homans v.	
(Mass.).....	291
Bowen v. Lansing (Mich.).....	643
Boyd v. Portland General Electric Co.	
(Or.).....	619
Brady v. Chicago & G. W. R. Co. (C. C.	
App. 8th C.).....	712
Brahan, National Mut. Bldg. & Loan	
Asso. v. (Miss.).....	793
Braun, Stimson Mill Co. v. (Cal.)....	720
Brinkley Car Works Mfg. Co. v. Cooper	
(Ark.).....	724
Brown v. Jacobs Pharmacy Co. (Ga.)..	547
Burgess Sulphite Fibre Co., Reynolds v.	
(N. H.).....	949
Burlington, C. R. & N. R. Co., Edging-	
ton v. (Iowa).....	561
Butler, George v. (Wash.).....	396
Byrbee v. Blake (Conn.).....	222
C.	
Cadigan, State v. (Vt.).....	666
Capital City Dairy Co., State ex rel.	
Monnett v. (Ohio).....	181
Carter, Re (Mo.).....	654
Cate, Lowery v. (Tenn.).....	673
Central Iron & Steel Co., O'Brien v.	
(Ind.).....	508
Chamberlain Bkg. House, Tecumseh	
Nat. Bank v. (Neb.).....	811
Chapin, Kitchen v. (Neb.).....	914
Chapman, Union Nat. Bank v. (N. Y.)	513
Charles, United States Fidelity & Guar-	
anty Co. v. (Ala.).....	212
Chemical Nat. Bank, Critten v. (N.	
Y.).....	529
Chicago v. Wilson (Ill.).....	127
Chicago & G. W. R. Co., Brady v. (C.	
C. App. 8th C.).....	712
Chicago Lumber Co. v. Bancroft (Neb.)	910
Chicago, R. I. & P. R. Co. v. Sattler	
(Neb.).....	890
Church, Western U. Teleg. Co. v.	
(Neb.).....	905
Cincinnati, N. O. & T. P. R. Co. v. Fin-	
nell (Ky.).....	266

Insurance Co., National L., New Hampshire F. Ins. Co. v. (C. C. App. 8th C.).....	692
New Hampshire F., v. National L. Ins. Co. (C. C. App. 8th C.)	692
Phoenix v. Schwartz (Ga.).....	752
Travelers', State v. (Conn.).....	481
Travelers', Tomasecek v. (Wis.).....	455
Travelers', Worcester & Suburban Street R. Co. v. (Mass.).....	629

J.

Jackson, Peters v. (W. Va.).....	428
Jacobs Pharmacy Co., Brown v. (Ga.).....	547
Jeakins, Frazier v. (Kan.).....	575
Jenkins v. Pennsylvania R. Co. (N. J.).....	309
John Hancock Mut. L. Ins. Co., O'Rourke v. (R. I.).....	496
Johnson, Reed v. (Wash.).....	404
Johnson Forge Co. v. Leonard (Del.).....	225
Jones v. Com. (Ky.).....	432
Judson, Commercial Electric Light & P. Co. v. (Wash.).....	78
Judy v. Lashley (W. Va.).....	413

K.

Kansas City Bolt & Nut Co., Cold Blast Transp. Co. v. (C. C. App. 8th C.).....	696
Keller, Des Moines v. (Iowa).....	243
Kellner, Belles v. (N. J.).....	627
Kelly v. New Haven Steamboat Co. (Conn.)	494
Kentucky & I. Bridge Co. v. Montgomery (Ky.).....	781
Kitchen v. Chapin (Neb.).....	914
Koenig, Henderson v. (Mo.).....	659

L.

Laconia, Cram v. (N. H.).....	282
La Crosse City R. Co., Gerrard v. (Wis.)	465
Lakin, Ainsworth v. (Mass.).....	132
Landers, Rush v. (La.).....	353
Lansing, Bowen v. (Mich.).....	643
Larson, Meeker v. (Neb.).....	901
Lashley, Judy v. (W. Va.).....	413
Lathrope v. Flood (Cal.).....	215
Lawrence v. Nelson (Iowa).....	583
Leonard, Johnson Forge Co. v. (Del.).....	225
Lexington v. Thompson (Ky.).....	775
Lincoln Sav. Bank & Safe Deposit Co. v. Morrison (Neb.).....	885
Little, Re (Mich.).....	295
Livermore v. Crane (Wash.).....	401
Louisville & N. R. Co. v. Hull (Ky.).....	771
Louisville Tobacco Warehouse Co. v. Com. (Ky.)	33
Lowery v. Cate (Tenn.).....	673

M.

McGuckin, University of Michigan v. (Neb.)	917
Madisonville v. Bishop (Ky.).....	130
57 L. R. A.	

Marks v. New Orleans Cold Storage Co. (La.)	271
Maxwell, Hutchinson v. (Va.).....	384
Meeker v. Larson (Neb.).....	901
Metropolitan L. Ins. Co., Sternaman v. (N. Y.)	318
Metropolitan West Side Elev. R. Co., Aldrich v. (Ill.).....	237
Minneapolis & St. L. R. Co., Benedict v. (Minn.)	639
Missouri, K. & T. R. Co. v. Simonson (Kan.)	765
Monnett, State ex rel. v. Capital City Dairy Co. (Ohio).....	181
Montgomery, Kentucky & I. Bridge Co. v. (Ky.)	781
Morrison, Lincoln Sav. Bank & Safe Deposit Co. v. (Neb.).....	885
Moses v. Teetors (Kan.).....	267
Movius State Bank, Drinkall v. (N. D.).....	341
Mutual Ben. L. Ins. Co., Phippen v. (N. C.)	505

N.

National L. Ins. Co., New Hampshire F. Ins. Co. v. (C. C. App. 8th C.)	692
National Mut. Bldg. & Loan Assn. v. Brahan (Miss.).....	793
National Valley Bank v. Hancock (Va.)	728
Nelson, Lawrence v. (Iowa).....	583
Newark Electric Light & P. Co. v. Ruddy (N. J.).....	624
New Hampshire F. Ins. Co. v. National L. Ins. Co. (C. C. App. 8th C.).....	692
New Haven Steamboat Co., Kelly v. (Conn.)	494
New Orleans Cold Storage Co., Marks v. (La.)	271
Niagara Falls Tower Co., Davis v. (N. Y.)	545
North Carolina R. Co., Coley v. (N. C.).....	817
Northern P. R. Co. v. Owens (Minn.).....	634

O.

O'Brien v. Central Iron & Steel Co. (Ind.)	508
Oliver Ditson Co. v. Bates (Mass.).....	289
Omaha, Philadelphia Mortg. & T. Co. v. (Neb.)	150
O'Rourke v. John Hancock Mut. L. Ins. Co. (R. I.).....	496
Owens, Northern P. R. Co. v. (Minn.).....	634

P.

Page v. Shainwald (N. Y.).....	173
Parker, Roberts v. (Iowa).....	764
Pell, Re (N. Y.).....	540
Penn. Boisseau use of Robinson v. (W. Va.)	380
Pennsylvania Co. v. Philadelphia Contributionship (Pa.)	510
Pennsylvania R. Co., Jenkins v. (N. J.).....	309
People v. Biesecker (N. Y.).....	178
Perry, Americus v. (Ga.).....	230

Peters v. Jackson (W. Va.).....	428	Robinson, Boisseau use of, Penn v. (Va.)	380
Philadelphia Contributionship, Penn- sylvania Co. v. (Pa.).....	510	v. Western U. Teleg. Co. (Ky.)	611
Philadelphia Mortg. & T. Co. v. Omaha (Neb.)	150	Rosenbloom v. State (Neb.).....	922
Phoenix Ins. Co. v. Schwartz (Ga.)....	752	Rosenthal v. Weir (N. Y.).....	527
Pinkerton, Blyth v. (Wyo.).....	468	Ross, Iler v. (Neb.).....	895
Pippen v. Mutual Ben. L. Ins. Co. (N. C.)	505	Ruddy, Newark Electric Light & P. Co. v. (N. J.).....	624
Portland General Electric Co., Boyd v. (Or.)	619	Rush v. Landers (La.).....	353
Presby v. Benjamin (N. Y.).....	317	Ryerson v. Bathgate (N. J.).....	307
Prioleau, Protestant Episcopal Church v. (S. C.).....	606	S.	
Protestant Episcopal Church v. Prioleau (S. C.).....	606	St. Louis, Fuchs v. (Mo.).....	136
Purple v. Union P. R. Co. (C. C. App. 8th C.)	700	Sample v. Consolidated Light & R. Co. (W. Va.)	186
R.		Sattler, Chicago, R. I. & P. R. Co. v. (Neb.)	890
Railroad Co., Louisville & N., v. Hull (Ky.)	771	Schellenberg v. Detroit Heating & Lighting Co. (Mich.).....	632
Metropolitan West Side Elev., Aldrich v. (Ill.).....	237	Schoer, Southern P. Co. v. (C. C. App. 8th C.)	707
Minneapolis & St. L., Benedict v. (Minn.)	639	Schwartz, Phoenix Ins. Co. v. (Ga.)....	752
North Carolina, Coley v. (N. C.)	817	Shainwald, Page v. (N. Y.).....	173
Pennsylvania, Jenkins v. (N. J.)	309	Shannon v. Georgia State Bldg. & Loan Asso. (Miss.)	900
Union P., Purple v. (C. C. App. 8th C.)	700	Sharpe v. United States (C. C. App. 3d C.)	932
Railway Co., Boston Elev., Homans v. (Mass.)	291	Sicilian Asphalt Paving Co., Reilly v. (N. Y.)	176
Burlington, C. R. & N., Edging- ton v. (Iowa).....	561	Simmons v. Western U. Teleg. Co. (S. C.)	607
Chicago & G. W., Brady v. (C. C. App. 8th C.).....	712	Simonson, Missouri, K. & T. R. Co. v. (Kan.)	765
Chicago, R. I. & P., v. Sattler (Neb.)	890	South Covington & C. Street R. Co. v. Bellevue (Ky.)	50
Cincinnati, N. O. & T. P., v. Finnell (Ky.)	266	v. Stroh (Ky.).....	875
Consolidated Light & Sample v. (W. Va.)	186	Southern P. Co., Richmond v. (Or.)....	616
Duluth Street, State v. (Minn.)	63	v. Schoer (C. C. App. 8th C.)....	707
Great Northern, Herrman v. (Wash.)	390	Spreckels, Blochman v. (Cal.).....	213
La Crosse City, Gerrard v. (Wis.)	465	State v. Cadigan (Vt.).....	666
Missouri, K. & T., v. Simonson (Kan.)	765	v. Duluth Gas & Water Co. (Minn.)	63
Northern P., v. Owens (Minn.)	634	v. Duluth Street R. Co. (Minn.)	63
South Covington & C. Street, v. Bellevue (Ky.)	50	v. Duluth Water & Light Co. (Minn.)	63
South Covington & C. Street, v. Stroh (Ky.)	875	v. Gillilan (W. Va.).....	426
Worcester & Suburban Street, v. Travelers' Ins. Co. (Mass.)	629	v. Hayme (Mo.)	846
Re Ascher (Mich.).....	806	v. Hartman General Electric Co. (Minn.)	63
Carter (Mo.).....	654	Hills v. (Neb.).....	155
Devoe (N. Y.).....	536	Rosenbloom v. (Neb.).....	922
Little (Mich.)	295	v. Travelers' Ins. Co. (Conn.)..	481
Pell (N. Y.).....	540	v. West Duluth Electric Co. (Minn.)	63
Reed v. Johnson (Wash.).....	404	State ex rel. White v. Barker (Iowa)..<	244
Reid v. Bengé (Ky.).....	253	Monnett v. Capital City Dairy Co. (Ohio)	181
Reilly v. Sicilian Asphalt Paving Co. (N. Y.)	176	Ball, Indiana Natural & Illum. Gas Co. v. (Ind.).....	761
Reynolds v. Burgess Sulphite Fibre Co. (N. H.)	949	Douglas v. Westfall (Minn.)....	297
Rhodes, Gardner v. (Ga.).....	749	State, Clifford, Prosecutor, v. Heller (N. J.)	312
Richmond v. Southern P. Co. (Or.)....	616	Sternaman v. Metropolitan L. Ins. Co. (N. Y.)	318
Robb, French v. (N. J.).....	956	Stimson Mill Co. v. Braun (Cal.).....	726
Roberts v. Parker (Iowa).....	764	Stroh, South Covington & C. Street R. Co. v. (Ky.).....	875
57 L. R. A.		Swift v. Bleise (Neb.).....	147
		Swift Creek Mill Co., Hicks Bros. v. (Ala.)	720

T.

Taylor v. Anchor Mut. F. Ins. Co.	
(Iowa)	328
Taylor Coal Co., Foreman v. (Ky.)	447
Tecumseh Nat. Bank v. Chamberlain	
Bkg. House (Neb.).....	811
Teetors, Moses v. (Kan.)	267
Thompson, Lexington v. (Ky.)	775
Thomssen v. Hall County (Neb.)	303
Tillman v. Dunman (Ga.)	784
Titusville, Com. use of, v. Clark (Pa.)	348
Tomsecek v. Travelers' Ins. Co. (Wis.)	455
Tootle v. Coleman (C. C. App. 8th C.)	120
Travelers' Ins. Co., State v. (Conn.) ..	481
Tomsecek v. (Wis.).....	455
Worcester & Suburban Street R.	
Co. v. (Mass.).....	629
Tucker, Baldwin v. (Ky.)	451

U.

Union Nat. Bank v. Chapman (N. Y.)	513
Union P. R. Co., Purple v. (C. C. App.	
8th C.)	700
United Railways & Electric Co. v.	
Hardesty (Md.)	275
United States, Sharpe v. (C. C. App. 3d	
C.)	932
57 L. R. A.	

United States Fidelity & Guaranty Co.	
v. Charles (Ala.).....	212
University of Michigan v. McGuckin	
(Neb.)	917

V.

Vieth v. Hope Salt & Coal Co. (W. Va.)	410
---	-----

W.

Warnock, Bigby v. (Ga.)	754
Waterbury, Colwell v. (Conn.)	218
Watson v. Dilts (Iowa)	559
Weir, Rosenthal v. (N. Y.)	527
West Duluth Electric Co., State v.	
(Minn.)	63
Western U. Teleg. Co. v. Church (Neb.)	905
Com. v. (Ky.).....	614
Robinson v. (Ky.)	611
Simmons v. (S. C.)	607
Westfall, State ex rel. Douglas v.	
(Minn.)	297
White v. Cook (W. Va.)	417
State ex rel., v. Barker (Iowa).	244
Williams v. Greenville (N. C.)	207
Wilson, Chicago v. (Ill.)	127
Worcester & Suburban Street R. Co. v.	
Travelers' Ins. Co. (Mass.)	629
Wright v. Du Bignon (Ga.)	669



CITATIONS

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

Abbott v. Macfie, 2 Hurst. & C. 744.....	565
Abernathy v. Stowe, 92 N. C. 213.....	840
Adams v. Chicago, B. & N. R. Co. 39 Minn. 297, 1 L. R. A. 493, 39 N. W. 629.....	286
v. Helbing, 107 Cal. 298, 40 Pac. 422.....	214
v. Lee, 31 Mich. 440.....	633
v. Rowan, 8 Suedes & M. 624.....	344
Adams Exp. Co. v. Kentucky, 168 U. S. 180, 41 L. ed. 963, 17 Sup. Ct. Rep. 530.....	36
Adden v. White Mountains N. H. R. Co. 55 N. H. 413, 20 Am. Rep. 220.....	284
Addington v. Etheridge, 12 Gratt. 436.....	872
v. Seston, 17 Wis. 328, 84 Am. Dec. 745.....	420
Agricultural Ins. Co. v. Hamilton, 82 Md. 85, 30 L. R. A. 633, 33 Atl. 429.....	331
Aiken v. Short, 37 Eng. L. & Eq. 592.....	691
Ainsworth v. Mt. Moriah Lodge, A. F. & A. M. 172 Mass. 254, 52 N. E. 81.....	135
Alameda Macadamizing Co. v. Pringle, 130 Cal. 226, 52 L. R. A. 264, 62 Pac. 394.....	215
Aldricks v. Higgins, 16 Serg. & R. 212.....	478
Alexander v. Duluth, 77 Minn. 448, 80 N. W. 623.....	299
v. Germania F. Ins. Co. 66 N. Y. 464, 23 Am. Rep. 76, 323, 326, 328.....	540
v. Wallace, 8 Lea. 569.....	256
v. Waller, 6 Bush, 330.....	209
Allen v. Boston, 159 Mass. 324, 34 N. E. 519.....	208
v. Froman, 96 Ky. 313, 28 S. W. 497.....	256
v. German American Ins. Co. 123 N. Y. 6, 25 N. E. 309, 323, 324, 326.....	587
v. Macellen, 12 Pa. 328, 51 Am. Dec. 608.....	851
Allentown v. Gross, 132 Pa. 322, 19 Atl. 269.....	724
Alley v. Daniel, 75 Ala. 408.....	795
Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427 795.....	799
Alpers v. San Francisco, 32 Fed. 508.....	899
Amboy v. Sleeper, 31 Ill. 499.....	415
American Brewing Asso. v. Talbot, 141 Mo. 683, 42 S. W. 682.....	144
American Cotton Oil Co. v. Kirk, 15 C. C. A. 540, 34 U. S. App. 60, 68 Fed. 791.....	699
American Employer's Liability Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051.....	792
American Waterworks Co. v. State ex rel. Walker, 46 Neb. 194, 30 L. R. A. 447, 64 N. W. 711.....	762
Americus Bd. of Public Edu. v. Barlow, 49 Ga. 232.....	233
Amherst Bank v. Root, 2 Met. 536.....	235
Amherst College v. Ritch, 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876.....	305
534.....	535
Anderson v. Arnold, 79 Ky. 370.....	451
v. Baxter, 4 Or. 105.....	400
v. Blakely, 2 Watts & S. 237.....	473
v. East, 117 Ind. 128, 2 L. R. A. 712, 19 N. E. 726.....	185
v. Jett, 89 Ky. 375, 6 L. R. A. 390, 12 S. W. 670.....	551
v. Prindle, 23 Wend. 616.....	223
Andrews v. Mockford [1896] 1 Q. B. 372.....	118
v. Poud, 13 Pet. 65, 10 L. ed. 61.....	805
Angell v. Steere, 16 R. 1, 200, 14 Atl. 81.....	648
Anne Arundel County v. Duckett, 20 Md. 468, 83 Am. Dec. 557.....	251
57 L. R. A.	

Anoka Lumber Co. v. Fidelity & C. Co. 63 Minn. 256, 30 L. R. A. 689, 65 N. W. 353.....	792
Anonymous, 2 Ves. Sr. 620.....	961
Ansen v. Tuska, 1 Robt. 663.....	952, 953
Anasley v. Wilson, 50 Ga. 425.....	558
Anstruther v. Adair, 2 Myl. & K. 272.....	805
Anthracite Ina. Co. v. Sears, 109 Mass. 383.....	388
Appleton v. Hopkins, 5 Gray, 530.....	924
Arlington State Bank v. Paulsen, 57 Neb. 717, 78 N. W. 303.....	904
Armstrong v. Pitts, 13 Gratt. 285.....	389
v. Toler, 11 Wheat. 258, 6 L. ed. 468.....	409
Arnold, Ex parte, 128 Mo. 256, 83 L. R. A. 386, 30 S. W. 768.....	662
v. Illinois C. R. Co. 83 Ill. 278, 25 Am. Rep. 386.....	619
v. Pawtuxet Valley Water Co. 18 R. I. 189, 19 L. R. A. 602, 26 Atl. 55.....	958
Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190.....	554
Asbestos Pulp Co. v. Gardner, 57 N. Y. Supp. 353.....	908
Ashcroft v. Butterworth, 136 Mass. 511.....	699
Asha v. De Rossett, 50 N. C. (5 Jones L.) 301, 72 Am. Dec. 552.....	960
Atchison v. Chicago, R. I. & P. R. Co. 80 Mo. 213.....	142
Atchison v. N. R. Co. v. Bailey, 11 Neb. 332, 9 N. W. 50.....	570
Atchison, T. & S. F. R. Co. v. Ganta, 38 Kan. 608, 17 Pac. 54.....	763
v. McClurg, 8 C. C. A. 322, 19 U. S. App. 846, 59 Fed. 862.....	783
v. Matthews, 58 Kan. 447, 49 Pac. 602 Aff'd 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.....	768
v. Shean, 18 Colo. 888, 20 L. R. A. 729, 38 Pac. 108.....	898
Atkins v. Randolph, 31 Vt. 226.....	251
Atkinson v. Pack, 114 N. C. 597, 19 S. E. 628.....	403
Atlanta v. Stein, 111 Ga. 789, 51 L. R. A. 335, 36 S. E. 932.....	557
v. Warnock, 91 Ga. 210, 23 L. R. A. 801, 18 S. E. 135.....	141
Atty. Gen. v. Chambers, 12 Beav. 159.....	952
v. Thompson, 8 Hare, 108.....	953
Atwood v. Chicago, R. I. & P. R. Co. 72 Fed. 447.....	717
v. Flak, 101 Mass. 363, 100 Am. Dec. 124.....	845
Aultman v. Lee, 43 Iowa, 404.....	453
Avera v. Sexton, 35 N. C. (13 Ired. L.) 247.....	840
Axt v. Jackson School Twp. 90 Ind. 101.....	154
Ayar's Appeal, 122 Pa. 277, 2 L. R. A. 584, 16 Atl. 363.....	850
B.	
Bachelor v. Korb, 58 Neb. 122, 78 N. W. 485.....	579
Bacon v. Brown, 9 Conn. 334.....	223
Bahr v. Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167.....	625
Bailey v. Austrian, 19 Minn. 535, Gil. 465.....	699
v. Bensley, 87 Ill. 556.....	270
v. Master Plumbers' Assn. 103 Tenn. 99, 46 L. R. A. 561, 52 S. W. 853.....	554, 557
v. Philadelphia, W. & B. R. Co. 4 Harr. (Del.) 389, 44 Am. Dec. 593.....	250
v. State, 36 Neb. 808, 55 N. W. 241.....	919
Balmbridge v. Louisville, 83 Ky. 285.....	346
Baker v. Arnot, 67 N. Y. 448.....	691
v. Kelly, 11 Minn. 480, Gil. 358, 301, 302 v. Band, 13 Barb. 152.....	472

Baldwin v. Bridges, 2 J. J. Marsh. 8. 420, 422	Bellefontaine & I. R. Co. v. Snyder, 18 Ohio St. 399, 98 Am. Dec. 175	566
Rail v. Nye, 99 Mass. 582, 97 Am. Dec. 56. 134	Bellevue Improv. Co. v. Bellevue, 39 Neb. 885, 58 N. W. 446. 152, 155	
Baltimore v. Brannan, 14 Md. 227. 282	Bellows v. Sackett, 15 Barb. 96. 546, 547	
v. Radecke, 49 Md. 217, 38 Am. Rep. 239. 900	Bender v. Luckenbach, 162 Pa. 22, 29 Atl. 293. 649	
v. State ex rel. Bd. of Police, 15 Md. 376, 74 Am. Dec. 572, 284. 235	Benedict v. Arnoux, 154 N. Y. 715, 49 N. E. 326. 535	
Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914. 711	Bennett v. Louisville & N. R. Co. 102 U. S. 577, 26 L. ed. 235. 395	
v. Blocher, 27 Md. 277. 708, 711	Benson v. Goodwin, 147 Mass. 237, 17 N. E. 517. 495	
v. Gallahue, 14 Gratt. 563. 382	Bergen County Traction Co. v. Heltman, 61 N. J. L. 682, 40 Atl. 651. 183	
v. McCullough, 12 Gratt. 595. 382	Bergmann v. Jones, 94 N. Y. 51. 480, 481	
Baltimore & O. S. W. R. Co. v. Volgt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385. 617	Bernard v. United L. Ins. Asso. 14 App. Div. 142, 43 N. Y. Supp. 527. 326, 327	
Baltimore, C. & A. R. Co. v. Kirby, 88 Md. 409, 41 Atl. 777. 278	Berna v. Gaston Gas Coal Co. 27 W. Va. 285, 55 Am. Rep. 304. 412	
Bank of Augusta v. Earle, 13 Pet. 519, 589, 10 L. ed. 274, 308. 805	Berry v. Bickford, 63 N. H. 328. 154	
Bank of British Columbia v. Page, 6 Or. 431. 794	Berryman v. Cincinnati Southern R. Co. 14 Bush, 755. 409	
Bank of Metropolis v. Gutschlick, 14 Pet. 19, 10 L. ed. 335. 148	Bertholf v. Quinlan Bros. 68 Ill. 297. 453	
Bank of Newport v. Cook (Ark.) 46 Am. St. Rep. 171. 805	Bess v. Chesapeake & O. R. Co. 35 W. Va. 492, 14 S. E. 234. 413	
Barber v. Babel, 36 Cal. 11. 399	Bestor v. Wathen, 60 Ill. 138. 408	
Barbler v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357. 610	Bethell v. Moore, 19 N. C. (2 Dev. & B. L.) 311. 210, 211	
Barbour v. Louisville, 83 Ky. 102. 40	Betsinger v. Chapman, 88 N. Y. 487. 538, 540	
v. Louisville Bd. of Trade, 82 Ky. 653. 41	Bevan v. Hayden, 13 Iowa, 122. 764	
Barclay v. Howell, 6 Pet. 498, 8 L. ed. 477. 958	Bibb v. Hitchcock, 49 Ala. 468, 20 Am. Rep. 288. 213	
Barnes v. Ward, 9 C. B. 420, 2 Car. & K. 661. 566	Blenenstok v. Ammdown, 1,5 N. Y. 47, 49 N. E. 321. 535	
Barney v. Barney, 14 Iowa, 189. 585	Biggs v. Consolidated Barn-Wire Co. 60 Kan. 217, 44 L. R. A. 655, 56 Pac. 4. 566	
v. Lowell, 98 Mass. 570. 221	Billingsley v. Clelland, 41 W. Va. 234, 23 S. E. 812. 736	
Barns v. Barrow, 61 N. Y. 39, 19 Am. Rep. 247. 472	Billington v. Wagoner, 33 N. Y. 31. 914	
Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881. 554, 555, 558	Bircher v. Walther, 168 Mo. 461, 63 S. W. 691. 887, 888	
v. Oskaloosa, 45 Iowa, 275. 286	Birdsall v. Heacock, 32 Ohio St. 177, 30 Am. Rep. 572. 473	
Barrett v. Dolan, 180 Mass. 866, 39 Am. Rep. 456. 630	Birge v. Gardiner, 19 Conn. 507, 50 Am. Dec. 261. 566, 571	
v. Southern P. R. Co. 91 Cal. 296, 27 Pac. 666. 569	Blahop v. Averill, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024. 403	
Barry v. Croskey, 2 Johns. & H. 1. 118	v. Weber, 159 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154. 431	
Bartle v. Nutt, 4 Pet. 184, 7 L. ed. 825. 409	Blackford v. Preston, 8 T. R. 89. 419, 420	
Bartlett v. Goodrich, 153 N. Y. 421, 47 N. E. 794. 534	Black v. Walker, 7 N. D. 414, 75 N. W. 787. 346	
Barton v. Port Jackson & U. F. Pl. Road Co. 17 Barb. 397. 409	Blackburn v. Relly, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27. 228	
Bartram v. Sharon, 71 Conn. 586, 46 L. R. A. 144, 43 Atl. 143. 220	Blair v. Smith, 114 Ind. 118, 15 N. E. 817. 758	
Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259. 117	Blake v. Blake, 56 Wis. 392, 14 N. W. 173. 462	
Bassett v. Shoemaker, 46 N. J. Eq. 538, 20 Atl. 52. 579	v. Hall, 19 La. Ann. 52. 359	
Bates v. Old Colony R. Co. 147 Mass. 255, 17 N. E. 633. 617, 618	v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165, 488, 489	
Batterson v. Hartford, 50 Conn. 538. 491	v. Williams, 6 Pick. 286, 17 Am. Dec. 372. 124	
Batterson's Appeal, 72 Conn. 375, 44 Atl. 546. 491	Blank v. Illinois C. R. Co. 182 Ill. 332, 55 N. E. 332. 617	
Battle v. Petway, 27 N. C. (5 Ired. L.) 576, 44 Am. Dec. 59. 649	Blanton v. Com. 22 Ky. L. Rep. 515, 58 S. W. 422. 436	
Baxter v. Robinson, 11 Mich. 522. 649	Blindell v. Hagan, 54 Fed. 40, Aff'd 56 Fed. 696. 558	
Beacon Lamp Co. v. Travellers' Ins. Co. 62 N. J. Eq. 59, 47 Atl. 579. 792	Bliss v. Matteson, 52 Barb. 335. 409	
Beal v. South Devon R. Co. 3 Hurlst. & C. 337. 705	v. New York C. & H. R. Co. 160 Mass. 447, 36 N. E. 65. 177	
Beall v. Beall, 8 Ga. 212. 285	Block v. Milwaukee Street R. Co. 89 Wis. 371, 27 L. R. A. 365, 61 N. W. 1101. 908	
Beard v. Independent District, 31 C. C. A. 562, 60 U. S. App. 372, 88 Fed. 375. 888	Blood Balm Co. v. Cooper, 83 Ga. 457, 5 L. R. A. 612, 10 S. E. 118. 430	
Beasley v. State, 2 Yerg. 481. 676	Bloomer v. Stolley, 5 McLean, 158, Fed. Cas. No. 1,559. 851	
Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L. R. A. 407, 77 N. W. 13. 553	Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 121, 30 L. ed. 923, 7 Sup. Ct. Rep. 865. 249	
Becker v. Ten Eyck, 6 Palge, 68. 420	Blossom v. Milwaukee & C. R. Co. 3 Wall. 196, 18 L. ed. 43. 790	
Bedford v. Bagshaw, 4 Hurlst. & N. 536. 117, 118	Blumenberg v. Myres, 32 Cal. 93, 91 Am. Dec. 560. 223	
v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597. 795, 796, 800	Bly v. Second Nat. Bank, 79 Pa. 453. 425	
Beers v. Beers, 4 Conn. 535, 10 Am. Dec. 186. 855	Boardman v. Willard, 73 Iowa, 20, 34 N. W. 487. 649	
Belknap v. National Bank, 100 Mass. 380, 97 Am. Dec. 105. 532	Board of Justices v. Fennimore, 1 N. J. L. 242. 307	
Bell v. Lent, 24 Wend. 230. 913	Boehm v. Baltimore, 61 Md. 259. 898	
v. State, 92 Ga. 49, 18 S. E. 186. 758	Bogle v. Bogle, 41 Wis. 209. 462, 464	
Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533. 487		
57 L. R. A.		

Bogk v. Gassert, 140 U. S. 25, 37 L. ed. 635, 13 Sup. Ct. Rep. 738....	113	Brown v. Combs, 29 N. J. L. 36.....	957
Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 21 L. R. A. 337, 55 N. W. 1119.....	557	v. Dewey, 1 Sandf. Ch. 57.....	914
v. Northwestern Lumberman's Assn., 54 Minn. 223, 21 L. R. A. 337, 55 N. W. 1119.....	557	v. First Nat. Bank, 137 Ind. 655, 24 L. R. A. 200, 37 N. E. 158....	409
Boite v. Third Ave. R. Co. 38 App. Div. 234, 56 N. Y. Supp. 1038.....	879	v. Jenks, 98 Cal. 10, 32 Pac. 701....	215
Bomsta v. Johnson, 38 Minn. 230, 36 N. W. 341.....	585	v. Ricketts, 4 Johns. Ch. 303, 2 Am. Dec. 567.....	889
Bonham's Case, 8 Coke, 118.....	492	Browne v. Moore, 3 Bligh. 178 note. 951, 952	952
Bonsall v. State, 35 Ind. 462.....	858	v. Paull, 1 Sim. N. S. 92.....	740
Boody v. Watson, 64 N. H. 162, 9 Atl. 794.....	955	Brownlie v. Campbell, L. R. 5 App. Cas. 925.....	119
Boomer v. Wilbur, 176 Mass. 482, 53 L. R. A. 172, 57 N. E. 1004.....	135	Brownville v. Cook, 4 Neb. 101.....	415
Boone County Nat. Bank v. Latimer, 67 Fed. 27.....	888	Brunsdon v. Humphrey, L. R. 14 Q. B. Div. 141.....	177
Booth v. Woodbury, 32 Conn. 127.....	493	Bryan v. National Life Ins. Asso. 21 R. I. 149, 42 Atl. 513.....	499
Botchick v. Kelzer, 4 J. J. Marsh. 597, 20 Am. Dec. 237.....	649	Bryant v. Chicago, St. P. M. & O. R. Co. 4 C. C. A. 146, 12 U. S. App. 115, 53 Fed. 907.....	707
Botwick v. Champion, 11 Wend. 571.....	720	Buchanan v. Kerr, 159 Pa. 433, 28 Atl. 195.....	557
Boaswell v. Carlisle, 70 Ala. 244.....	724	Buck v. Albee, 20 Vt. 184, 62 Am. Dec. 564	409
Boutwell v. Marr, 71 Vt. 1, 43 L. R. A. 803, 42 Atl. 607.....	553, 555, 558	Buckton v. Hay, L. R. 11 Ch. Div. 645.....	388
Bovill v. Moore, 2 Coop. Ch. Cas. 56	951, 952	Buenemann v. St. Paul, M. & M. R. Co. 32 Minn. 390, 20 N. W. 379.....	396
Bowen v. Clifton, 105 Ga. 459, 31 S. E. 147.....	235	Buhl v. Ft. Street Union Depot Co. 98 Mich. 596, 23 L. R. A. 392, 57 N. W. 829.....	286
v. Matheson, 14 Allen, 499.....	557	Building & L. Asso. v. Griffin, 90 Tex. 488, 39 S. W. 659.....	802
Bower v. Peate, L. R. 1 Q. B. Div. 321.....	135	v. Leonard, 74 Miss. 810, 21 So. 53	806
Bowes v. Boston, 155 Mass. 344, 15 L. R. A. 365, 29 N. E. 633.....	630	Bull v. Com. 14 Gratt. 613.....	748
Bowman v. Lewis, 191 U. S. 22, 25 L. ed. 989.....	487	Burbank v. Crooker, 7 Gray, 158, 66 Am. Dec. 470.....	291
v. Middleton, 1 Bay, 252.....	492	Burk v. Hollis, 98 Mass. 55.....	134
Boyden v. United States, 13 Wall. 17, 20 L. ed. 327.....	638	Burke v. Norwlich & W. R. Co. 34 Conn. 474.....	495
Boylan v. Hot Springs R. Co. 132 U. S. 146, 33 L. ed. 290, 10 Sup. Ct. Rep. 50.....	278	Burlington v. Leeblick, 43 Iowa, 253.....	252
Bozeman v. Cadwell, 14 Mont. 480, 36 Pac. 1042.....	924	Burlington Ins. Co. v. Johnson, 120 Ill. 622, 12 N. E. 205.....	472
Bradley v. New York & N. H. R. Co. 21 Conn. 305.....	493	Burnet v. Crane, 56 N. J. L. 288, 28 Atl. 591.....	957, 958
Brady v. Chicago & G. T. R. Co. 114 Fed. 100.....	709	Burnham v. Milwaukee, 69 Wis. 379, 34 N. W. 389.....	148
Brakken v. Minneapolis & St. L. R. Co. 29 Minn. 41, 11 N. W. 124.....	286	Burnhise v. Firman, 22 Wall. 170, 22 L. ed. 766.....	913
Branch v. Haas, 16 Fed. 53.....	409	Burrell v. Nicholson, 1 Myl. & K. 680, 951	953
Brandon v. Robinson, 18 Ves. Jr. 429 387, 388	566, 567	Busenbark v. Busenbark, 33 Kan. 572, 7 Pac. 245.....	578
Bransom v. Labrot, 81 Ky. 638, 50 Am. Rep. 193.....	566, 567	Busb v. Johnson County, 48 Neb. 1, 32 L. R. A. 223, 66 N. W. 1023.....	307
Braudiaht, Ex parte, 2 Hill, 367, 38 Am. Dec. 593.....	417	v. State, 77 Ala. 83.....	748
Braun v. Craven, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. 657.....	561	Butler v. Hicks, 11 Smedes & M. 78.....	889
Breen v. St. Louis Cooperage Co. 50 Mo. App. 202.....	140	v. Rockwell, 14 Colo. 125, 23 Pac. 462.....	648
Brennan v. Fair Haven & W. R. Co. 46 Conn. 284, 20 Am. Rep. 679.....	566	Byers v. Com. 42 Pa. 89.....	853
Bresnahan v. Bresnahan, 46 Wis. 385, 1 N. W. 38.....	462	Byrne v. Kansas City, Ft. S. & M. R. Co. 24 L. R. A. 693, 9 C. C. A. 668, 22 U. S. App. 220, 61 Fed. 605	715, 717
Breull, Ex parte, L. R. 16 Ch. Div. 484.....	294	v. McGrath, 130 Cal. 316, 62 Pac. 559.....	888, 889
Brewer v. Knapp, 1 Pick. 332.....	223	C.	
Brewster v. C. Miller's Sons Co. 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 801.....	558	Cable v. Southern R. Co. 122 N. C. 892, 29 S. E. 377.....	841
Bridgeport v. Housatonic R. Co. 15 Conn. 497.....	493	Cabot v. Kingman, 166 Mass. 403, 83 L. R. A. 45, 44 N. E. 344.....	135
Bridger v. Asheville & S. R. Co. 25 S. C. 24.....	570	Cahoon v. Morgan, 38 Vt. 236.....	124
Bridges v. North London R. Co. L. R. 6 Q. B. 377.....	625	Calder v. Bull, 3 Dall. 388, 1 L. ed. 648.....	492
Bright v. McQuat, 40 Ind. 527.....	223	Calhoun v. Little, 106 Ga. 336, 43 L. R. A. 630, 32 S. E. 86.....	671
Brightman v. Hicks, 108 Mass. 246.....	723	Callahan v. Eel River & E. R. Co. 92 Cal. 89, 28 Pac. 104.....	569, 574
Brill v. Tuttle, 81 N. Y. 464, 37 Am. Rep. 515.....	691	Camp v. Cleary, 76 Va. 140.....	387
Brinkley v. Wilmington & W. R. Co. 126 N. C. 88, 35 S. E. 238.....	841	Campbell v. Anthony, 40 Kan. 652, 20 Pac. 492.....	924
Brinkley Car Co. v. Cooper, 60 Ark. 545, 31 S. W. 154.....	566	v. Lambert, 36 La. Ann. 35, 51 Am. Rep. 1.....	699
British America Assur. Co. v. Bradford, 60 Kan. 82, 55 Pac. 335.....	768	Campfield v. Johnson, 5 N. J. Eq. 245.....	649
Brittain v. West End Street R. Co. 168 Mass. 10, 46 N. E. 111.....	709	Candia v. Chandler, 58 N. H. 127, 284, 287	288
Brockenbrough v. Ward, 4 Rand. (Va.) 352.....	382	Candleas v. Richmond & D. R. Co. 38 S. C. 116, 18 L. R. A. 440, 16 S. E. 429.....	610
Brockman v. Creston, 79 Iowa, 587, 44 N. W. 822.....	248	Canning v. Williamstown, 1 Cush. 451.....	292
Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732.....	425	Cannon, Re, 47 Mead. 481, 11 N. W. 280	297
Brown v. Brown, 50 N. H. 542.....	560	Cansler v. Penland, 125 N. C. 578, 43 L. R. A. 441, 34 S. E. 683.....	421
57 L. R. A.		Capital Nat. Bank v. Coldwater Nat. Bank, 49 Neb. 786, 69 N. W. 115, 888	887
		Capital Printing Co. v. Raleigh, 126 N. C. 516, 36 S. E. 33.....	841
		Cardigan v. Page, 6 N. H. 162.....	426

- Cardose v. Swift, 113 Mass. 250..... 409
 Carew v. Rutherford, 108 Mass. 1, 8 Am. Rep. 287..... 558
 Carey v. Berkshire R. Co. 1 Cuah. 475, 48 Am. Dec. 616..... 630
 Carleton v. Whitchee, 5 N. H. 196..... 420
 Carl v. Stillwater Street R. & Transfer Co. 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205..... 75
 Carman v. Harris, 61 Neb. 635, 85 N. W. 848..... 152
 Carpenter v. Barber, 44 Vt. 441..... 178
 v. Landaff, 42 N. H. 218..... 284
 Carrico v. West Virginia C. & P. R. Co. 85 W. Va. 389, 14 S. E. 12..... 641
 Carson v. Chicago, R. I. & P. R. Co. 96 Iowa, 583, 65 N. W. 831..... 563
 Carstairs v. Taylor, L. R. 6 Exch. 217..... 185
 Cary v. Richardson, 35 La. Ann. 505..... 350
 Case v. Dewey, 55 Mich. 116, 20 N. W. 817, 21 N. W. 911..... 382
 Case of Election Supers. 114 Mass. 247, 19 Am. Rep. 341..... 252
 Casdilly v. Rhodes, 12 Ohio, 88..... 921
 Castle v. Berkshire County, 11 Gray, 28..... 286
 Catawissa R. Co. v. Armstrong, 49 Pa. 186..... 719
 Catlin v. Adirondack Co. 11 Abb. N. C. 377 529
 Cavendar v. Waddingham, 2 Mo. App. 561 403
 Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504..... 888
 Center v. Davis, 39 Ga. 210..... 751
 Central Land Co. v. Laidley, 159 U. S. 109, 40 L. ed. 94, 16 Sup. Ct. Rep. 80..... 350
 Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 698..... 889
 Central P. R. Co. v. State Bd. of Equalization, 60 Cal. 85..... 89
 Central R. Co. v. Collins, 40 Ga. 588..... 557
 v. Stoermer, 2 C. C. A. 360, 1 U. S. App. 276, 51 Fed. 518..... 719
 Central Trust Co. v. Denver & R. G. R. Co. 38 C. C. A. 148, 97 Fed. 239..... 715
 Chadwick v. Bowman, L. R. 16 Q. B. Div. 561..... 951
 v. Turner, L. R. 1 Ch. App. 310..... 259
 Chaffe v. Wilson, 59 Miss. 42..... 802
 Chambers v. Alabama Iron Co. 67 Ala. 357 723
 Champion v. Brown, 6 Johns. Ch. 400, 10 Am. Dec. 343..... 647, 648
 Chapin v. Dake, 57 Ill. 295, 11 Am. Rep. 15 344
 Chapman v. Western U. Tele. Co. 90 Ky. 265, 13 S. W. 880..... 613, 778
 Charles Brown Grocery Co. v. Becket, 22 Ky. L. Rep. 393, 57 S. W. 458..... 452
 Charleston v. Oliver, 16 S. C. 47..... 929
 Charleston & W. C. R. Co. v. Hughes, 105 Ga. 23, 30 S. E. 972..... 672
 Chase, Re (Conn.) 44 Atl. 1099..... 491
 v. Washburn, 1 Ohio St. 244, 59 Am. Dec. 623..... 269, 270
 Chase's Appeal, 73 Conn. 288, 47 Atl. 243. 490
 Chenango County v. Birdsall, 4 Wend. 453 307
 Chesapeake & O. R. Co. v. Dixon, 104 Ky. 608, 47 S. W. 615..... 267
 v. Gunter, 21 Ky. L. Rep. 1803, 56 S. W. 527..... 880
 v. Miller, 114 U. S. 186, 29 L. ed. 124, 5 Sup. Ct. Rep. 813..... 89
 Chester v. Pennell, 169 Pa. 300, 32 Atl. 408..... 348
 Chicago v. Baker, 30 C. C. A. 364, 53 U. S. App. 569, 86 Fed. 753, 39 C. C. A. 318, 98 Fed. 830..... 286, 287, 288
 v. Burcky, 158 Ill. 103, 29 L. R. A. 568, 42 N. E. 178. 284, 286, 287
 v. Hesling, 83 Ill. 204, 25 Am. Rep. 378..... 189
 v. Robbins, 2 Black, 418, 17 L. ed. 298..... 135
 v. Sexton, 115 Ill. 230, 2 N. E. 263. 153
 v. Spoor, 190 Ill. 340, 60 N. E. 540 288
 v. Union Stock Yards & Transit Co. 164 Ill. 224, 35 L. R. A. 281, 45 N. E. 430..... 242
 Chicago & A. R. Co. v. Becker, 84 Ill. 483. 574
 v. Jones, 53 Ill. App. 431..... 690
 v. Michle, 83 Ill. 427..... 699, 707
 Chicago & N. W. R. Co. v. Fuller, 17 Wall. 560, 21 L. ed. 710..... 768
 v. Hoag, 90 Ill. 339..... 311
 Chicago, B. & Q. R. Co. v. Cass County, 51 Neb. 369, 70 N. W. 955..... 152, 154, 155
 v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581..... 763
 v. Cutts, 94 U. S. 164, 24 L. ed. 94..... 349, 350, 351
 v. Iowa, 94 U. S. 164, 24 L. ed. 94..... 349, 350, 351
 v. Landauer, 39 Neb. 803, 58 N. W. 434..... 894
 v. Mehlisack, 181 Ill. 64, 22 N. E. 812..... 703
 v. Oyater, 58 Neb. 1, 78 N. W. 359. 149
 Chicago K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585..... 837
 Chicago, M. & St. P. R. Co. v. Darke, 148 Ill. 226, 35 N. E. 750..... 242
 v. Lowell, 151 U. S. 209, 38 L. ed. 131, 14 Sup. Ct. Rep. 284..... 842
 v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 8 Inters. Com. Rep. 200, 10 Sup. Ct. Rep. 462, 767. 760
 v. Ross, 112 U. S. 377, 28 L. ed. 737, 5 Sup. Ct. Rep. 184..... 711
 v. Wallace, 30 L. R. A. 161, 14 C. C. A. 257, 24 U. S. App. 589, 6 Fed. 506..... 618
 Chicago, P. & St. L. R. Co. v. Leah, 152 Ill. 249, 35 N. E. 556..... 242
 Chicago, R. I. & P. R. Co. v. O'Neill, 58 Neb. 239, 78 N. W. 521..... 908
 v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797 123, 124
 Chicago, St. L. & P. R. Co. v. Eisert, 127 Ind. 156, 26 N. E. 769..... 509
 Chicago, St. P. M. & O. R. Co. v. Bellwith, 28 C. C. A. 358, 55 U. S. App. 118, 83 Fed. 437..... 716
 Church v. Chicago, M. & St. P. R. Co. (Minn.) 16 L. R. A. 861..... 287
 Churchill v. Walker, 68 Ga. 681..... 233, 248
 Cincinnati v. Buckingham, 10 Ohio, 257. 924
 v. White, 6 Pet. 481, 8 L. ed. 452..... 957, 958
 Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 322, 20 L. ed. 414, 6 Sup. Ct. Rep. 57..... 349
 Cincinnati, W. & Z. R. Co. v. Clinton Co. 1 Ohio St. 77..... 776
 Citizens' Loan Assn. v. Nugent, 40 N. J. L. 215, 29 Am. Rep. 280..... 306
 Citizens' Nat. Bank v. Graham, 147 Mo., loc. cit. 257, 48 S. W. 910. 662, 861
 Citizens' Sav. & L. Assn. v. Topeka, 20 Wall. 655, 22 L. ed. 455..... 493
 Cladin v. Foley, 22 W. Va. 434..... 872
 v. United States Credit System Co. 165 Mass. 501, 43 N. E. 293..... 409
 Claiborne v. State, 51 Ark. 88, 9 S. W. 851 748
 Clamptt v. Chicago, St. P. & K. C. R. Co. 84 Iowa, 71, 50 N. W. 673..... 572
 Clanton v. Scruggs, 95 Ala. 282, 10 So. 758..... 723
 Clark, Re, 65 Conn. 17, 28 L. R. A. 242, 31 Atl. 522..... 483
 v. Beecher, 154 U. S. 631, 24 L. ed. 705, 14 Sup. Ct. Rep. 1184..... 757
 v. Chambers, L. R. 3 Q. B. Div. 327..... 565, 574
 v. Chicago, B. & Q. R. Co. 92 Ill. 43 715
 v. Louisville Water Co. 90 Ky. 515, 14 S. W. 502..... 41
 v. Providence, 10 R. I. 437..... 286
 Clarke v. Nassau Electric R. Co. 9 App. Div. 51, 41 N. Y. Supp. 78..... 626
 Cleveland, C. C. & I. R. Co. v. Closer, 126 Ind. 348, 9 L. R. A. 754, 3 Inters. Com. Rep. 387, 26 N. E. 159..... 763
 Clough v. Thompson, 7 Gratt. 26..... 787
 Clusman v. Long Island R. Co. 9 Hun, 618..... 892
 Coale v. Moline Plow Co. 134 Ill. 350, 25 N. E. 1016..... 757
 Cochran v. McCleary, 22 Iowa, 75..... 248
 v. Strong, 44 Ga. 636..... 346
 Cochrane v. Gilbert, 41 La. Ann. 735, 6 So. 731..... 370
 Coe v. Columbus, P. & I. R. Co. 10 Ohio St. 372, 75 Am. Dec. 518..... 44
 Coffin v. Lunt, 2 Pick. 70..... 223

Cofrode v. Gartner, 79 Mich. 332, 7 L. R. A. 511, 44 N. W. 623.....	124	Cooper v. Savannah, 4 Ga. 68.....	928
Cogdell v. Wilmington & W. R. Co. 124 N. C. 302, 32 S. E. 706.....	841	v. Schlesinger, 111 U. S. 148, 28 L. ed. 382, 4 Sup. Ct. Rep. 360..	119
Coggill v. Hartford & N. H. R. Co. 3 Gray, 545.....	291	Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739.....	794
Cogswell v. West Street & N. E. Electric R. Co. 5 Wash. 46, 31 Pac. 411.....	394	Copley v. Sanford, 2 La. Ann. 335, 46 Am. Dec. 548.....	369
Colchester v. Brooke, 7 Q. B. 377.....	571	Coppell v. Hall, 7 Wall. 542, 19 L. ed. 244	409
Cole v. Cassidy, 138 Mass. 437, 52 Am. Rep. 284.....	119	Coppner v. Pennsylvania Co. 12 Ill. App. 600.....	588
Collier v. Collier, 3 Ohio St. 369.....	540	Corbitt v. Corbitt, 54 N. C. (1 Jones Eq.) 114.....	540
Collins v. Johnson, 57 Ala. 304.....	721	Corder v. Talbott, 14 W. Va. 277.....	190
v. Lewis, 60 N. J. Eq. 488, 46 Atl. 1098.....	887	Corey v. Smalley, 106 Mich. 260, 84 N. W. 13.....	646
v. Steuart, 58 N. J. Eq. 392, 44 Atl. 467.....	887	Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230.....	488
v. Swanson, 121 N. C. 67, 28 S. E. 65.....	841	Corryolles v. Mossy, 2 La. 504.....	790
v. Toledo, A. A. & N. M. R. Co. 80 Mich. 390, 45 N. W. 178.....	396	Coster v. Albany, 43 N. Y. 399.....	286
Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302	861	Cosulich v. Standard Oil Co. 122 N. Y. 118, 25 N. E. 259.....	144, 412, 413
Columbus Home Ins. Co. v. Curtis, 32 Mich. 402.....	457	Cote v. Murphy, 159 Pa. 420, 23 L. R. A. 135, 28 Atl. 191.....	557
Colvin v. Johnston, 104 La. Ann. 655, 29 So. 274.....	367	Cotting v. Godard, 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.....	544
Commercial Nat. Bank v. Spalds, 8 Ill. App. 493.....	346	v. Kansas City Stock Yards Co. 183 U. S. 79, 46 L. ed. 93, 22 Sup. Ct. Rep. 30.....	544
Com. v. Boston & L. R. Corp. 184 Mass. 211.....	630	Cottrell, Ex parte, 13 Neb. 193, 13 N. W. 114.....	924
v. Byrne, 20 Gratt. 165.....	924	Coughtry v. Globe Woolen Co. 56 N. Y. 124, 15 Am. Rep. 387.....	431
v. Clark, 7 Watts & S. 127.....	642	Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195	658
v. Davis, 23 Ky. L. Rep. 1717, 66 S. W. 27.....	436	County Seat of Linn County, Re, 15 Kan. 500.....	769
v. Delaware Division Canal Co. 123 Pa. 620, 2 L. R. A. 798, 16 Atl. 584.....	350	Coup v. Wabash, St. L. & P. R. Co. 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215.....	618
v. Germania Brewing Co. 145 Pa. 84, 22 Atl. 240.....	349, 350	Covington v. Kentucky, 173 U. S. 231, 48 L. ed. 679, 19 Sup. Ct. Rep. 383	249
v. Goodhue, 2 Met. 193.....	858	Cowles v. McNeill, 125 N. C. 385, 34 S. E. 499.....	841
v. Ladd, 15 Mass. 528.....	748	v. Richmond & D. R. Co. 84 N. C. 312, 37 Am. Rep. 620.....	824
v. Linton, 2 Va. Cas. 476.....	746	Cowley v. Northern P. R. Co. 159 U. S. 569, 40 L. ed. 263, 16 Sup. Ct. Rep. 127.....	124
v. Lowell Gaslight Co. 12 Allen, 75.....	91	Cox, Re, 46 N. C. (1 Jones L.) 321.....	212
v. McMichael, 8 Pa. Dist. R. 157.....	663	v. Arnsmann, 76 Ind. 210.....	649
v. McPike, 3 Cush. 181, 50 Am. Dec. 727.....	857	v. Norfolk & C. R. Co. 123 N. C. 604, 31 S. E. 848.....	841
v. Makibben, 90 Ky. 384, 14 S. W. 372.....	41	Coy v. Indianapolis Gas Co. 146 Ind. 655, 36 L. R. A. 535, 46 N. E. 17	762
v. New England Slate & Tile Co. 13 Allen, 391.....	90	Craft v. McCounoughy, 79 Ill. 346, 22 Am. Rep. 171.....	555
v. Plaisted, 148 Mass. 375, 2 L. R. A. 142, 19 N. E. 224.....	234	v. Parker, W. & Co. 96 Mich. 245, 21 L. R. A. 139, 55 N. W. 812	430, 431
v. Sharon Coal Co. 164 Pa. 305, 30 Atl. 127.....	349, 350	Craig v. Missouri, 4 Pet. 410, 7 L. ed. 903	409
Com. ex rel. Chew v. Carlisle, Brightly (Pa.) 38.....	555	Crane v. C. Crane & Co. 45 C. C. A. 96, 105 Fed. 869.....	699
Yard v. Meeser, 44 Pa. 341.....	248	v. Hubbel, 7 Paige, 413.....	914
Compo v. Jackson Iron Co. 49 Mich. 44, 12 N. W. 901.....	649	Crawford v. Gray, 131 Ind. 53, 30 N. E. 883.....	579, 581
Conaway v. Stealey, 44 W. Va. 163, 28 S. E. 793.....	871, 872, 874	v. West Side Bank, 100 N. Y. 50, 58 Am. Rep. 152, 2 N. E. 881.....	532
Concord's Petition, 50 N. H. 530.....	288	Cremer v. Higginson, 1 Mason, 323, Fed. Cas. No. 3,383.....	473
Condran v. Chicago, M. & St. P. R. Co. 28 L. R. A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522.....	703	Crete v. Childs, 11 Neb. 252, 9 N. W. 55.....	149
Congdon v. Read, 7 R. I. 576.....	473	Creve Cœur Lake Ice Co. v. Tamm, 138 Mo. 385, 39 S. W. 791.....	855, 859, 860
Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347.....	345	Cricknet v. State, 18 Ohio St. 22.....	663
Conigland v. Smith, 79 N. C. 303.....	507	Crippen v. Lighthouse, 69 N. H. 540, 46 L. R. A. 467, 44 Atl. 538.....	804
Conklin v. Roberts, 36 Conn. 461.....	345	Croghan v. State, 22 Wis. 444.....	857
Conley v. Buck, 100 Ga. 188, 28 S. E. 97	756	Crook v. Pitcher, 61 Md. 510.....	281
Connecticut River R. Co. v. Franklin County, 127 Mass. 50, 34 Am. Rep. 338.....	417	Croom v. Herring, 11 N. C. (4 Hawks) 393.....	540
Conner v. Paul, 12 Bush, 145.....	450	Cross v. Allen, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67.....	400
Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.....	559	v. Lake Shore & M. S. R. Co. 69 Mich. 363, 37 N. W. 361.....	396
Consolidated Tank-Line Co. v. Hunt, 83 Iowa, 6, 12 L. R. A. 476, 48 N. W. 1067.....	764	v. O'Donnell, 44 N. Y. 661, 4 Am. Rep. 721.....	528
Continental Ins. Co. v. Fire Underwriters, 67 Fed. 310.....	558	Crutchfield v. Richmond & D. R. Co. 78 N. C. 300.....	824
v. Pratt, 8 Kan. App. 424, 55 Pac. 671.....	908	Crystal Ice Co. v. Sherlock, 37 Neb. 19, 55 N. W. 294.....	148
Cook v. Barnes, 36 N. Y. 520.....	913	Cullen v. Com. 24 Gratt. 624.....	657
v. Bath, L. R. 6 Eq. 177.....	281	Cumberland Bldg. & L. Asso. v. Sparks, 49 C. C. A. 510, 111 Fed. 647.....	904
Cooke v. Lalance Grojean Mfg. Co. 29 Hun, 641.....	952, 953	Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618.....	509
57 L. R. A.			

- Cunningham v. International R. Co. 51 Tex. 503, 32 Am. Rep. 632.... 394
 Currie v. Waverly & N. Y. B. R. Co. 52 N. J. L. 392, 20 Atl. 66..... 940
 Curtis, Re, 142 N. Y. 219, 36 N. E. 887.... 543
 v. Kiley, 153 Mass. 123, 26 N. E. 421..... 185
 Cushing v. Cable, 48 Minn. 3, 50 N. W. 891 472
 Cuthbertson v. Carolina Home Ins. Co. 96 N. C. 480, 2 S. D. E. 58..... 331
- D.**
- Daggett v. Everett, 19 Me. 373..... 924
 Daggs v. Orient Ins. Co. 136 Mo. 882, 35 L. R. A. 227, 38 S. W. 85..... 770
 Daley v. Norwich & W. R. Co. 26 Conn. 591, 68 Am. Dec. 413..... 566
 Dalton v. Angus, L. R. 6 App. Cas. 740.... 135
 Daly v. New Haven, 69 Conn. 644, 38 Atl. 397..... 220, 221
 Damon v. Leque, 17 Wash. 573, 50 Pac. 485..... 398, 399
 Dans v. National Bank, 132 Mass. 156.... 533
 Danbury & N. R. Co. v. Norwalk, 37 Conn. 109..... 221
 Daniels v. New York & N. E. R. Co. 154 Mass. 349, 13 L. R. A. 248, 28 N. E. 283..... 570
 Danks v. Quackenbush, 3 Denio, 594..... 542
 Dantzer v. Indianapolis Union R. Co. 141 Ind. 604, 34 L. R. A. 769, 39 N. E. 223..... 285, 288, 509
 Dantzler v. De Bardeleben Coal & I. Co. 101 Ala. 309, 22 L. R. A. 361, 14 So. 10..... 709
 Danville Bank v. Waddill, 31 Gratt. 469.... 748
 Darrigan v. New York & N. E. R. Co. 52 Conn. 285, 52 Am. Rep. 590.... 495
 Darrow v. People, 8 Colo. 417, 8 Pac. 661 248
 Dartmouth College v. Woodward, 4 Wheat. 694, 4 L. ed. 673..... 251
 Dash v. Van Kleeck, 7 Johns. 477, 5 Am. Dec. 291..... 252, 542
 Dassler, Re, 35 Kan. 678, 12 Pac. 130, 924, 929
 Davenport Plow Co. v. Lamp, 80 Iowa, 722, 45 N. W. 1049..... 887
 Davey v. Ward (1877-78) L. R. 7 Ch. Div. 754..... 739
 Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 618..... 487
 Davie v. Lumberman's Min. Co. 93 Mich. 491, 24 L. R. A. 357, 53 N. W. 623..... 699
 Davies v. Maun, 10 Mees. & W. 546..... 571
 Davis v. Clark, 106 Pa. 384..... 662
 v. Com. 21 Ky. L. Rep. 1295 54 S. W. 959..... 436
 v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350..... 430
 v. Hampshire County, 153 Mass. 218, 11 L. R. A. 750, 26 N. E. 848..... 284, 285, 288
 v. Hull, 1 Litt. (Ky.) 9..... 420, 421
 v. Humphrey, 22 Iowa, 137..... 764
 v. Young, 20 Ala. 151..... 724
 Davison v. Champlin, 7 Conn. 244..... 483
 Davock v. Moore, 105 Mich. 120, 28 L. R. A. 783, 68 N. W. 424..... 250
 Davone v. Fanning, 2 Johns. Ch. 252. 578, 582
 Day v. New England L. Ins. Co. 111 Pa. 507, 56 Am. Rep. 297, 4 Atl. 748..... 382
 v. Slaughter, 87 Va. 758, 13 L. R. A. 212, 13 S. E. 478..... 387
 Dayton, W. Valley & X. Turnp. Co. v. Coy, 13 Ohio St. 84..... 699
 Deans v. McLendon, 30 Miss. 343..... 409
 Dearden v. Adams, 19 R. I. 217, 36 Atl. 3.... 502
 Decker v. Evansville Suburban & N. R. Co. 133 Ind. 493, 33 N. E. 349.... 509
 De Ferlet v. Bank of America, 23 La. Ann. 310, 8 Am. Rep. 597..... 533
 De Groat v. People, 39 Mich. 124..... 858
 De Jarnette v. Verner, 40 Kan. 224, 19 Pac. 666..... 579
 De Kay v. Chicago, M. & St. P. R. Co. 41 Minn. 178, 4 L. R. A. 632, 43 N. W. 182..... 892
 Delaware, L. & W. R. Co. v. Central Stock-Yard & Transit Co. 45 N. J. Eq. 50, 6 L. R. A. 855, 17 Atl. 146 762
 v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569..... 716
 57 L. R. A.
- Delaware, L. & W. R. Co. v. Reich, 61 N. J. L. 635, 41 L. R. A. 831, 40 Atl. 682..... 570, 571, 572
 Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 889..... 489
 Dell v. Oppenheimer, 9 Neb. 454, 4 N. W. 51..... 914
 Delong v. Delong, 56 Wis. 514, 14 N. W. 591..... 462
 De Lucas v. New Orleans & C. B. Co. 38 La. Ann. 930..... 279
 Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 282, 15 L. ed. 376..... 610
 Obert v. Hammel, 18 N. J. L. 73... 580
 Denham v. Cornell, 67 N. Y. 556..... 649
 Denison v. Gibson, 24 Mich. 194..... 816
 Dennis's Appeal, 72 Conn. 369, 44 Atl. 545 491
 Denver & R. G. R. Co. v. Harris, 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286..... 117
 Denver City R. Co. v. Denver, 21 Colo. 350, 29 L. R. A. 603, 41 Pac. 826.... 924
 Denver Consol. Electric Co. v. Simpson, 21 Colo. 371, 31 L. R. A. 506, 41 Pac. 499..... 622
 Derby Case, The Joy, Confessions, 220.... 810
 Derocher v. Continental Mills, 58 Me. 217, 4 Am. Rep. 286..... 502, 503
 Derry v. Peek, L. R. 14 App. Cas. 337.... 119
 Detroit v. Detroit & H. Pl. Road Co. 43 Mich. 140, 5 N. W. 275..... 251
 Devereaux v. Cooper, 11 Vt. 103..... 464
 Devine v. Cook County, 84 Ill. 590.... 663
 v. Fond du Lac (Wis.) 88 N. W. 913..... 468
 Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 315..... 431
 De Voegler v. Western U. Teleg. Co. 10 Tex. Civ. App. 229, 30 S. W. 1107..... 614
 De Voss v. Richmond, 18 Gratt. 338, 98 Am. Dec. 647..... 251
 Dial v. Wood, 9 Baxt. 296..... 676
 Diamond v. Cain, 21 La. Ann. 309..... 234
 Dickinson v. Edwards, 77 N. Y. 573, 33 Am. Rep. 671..... 794
 Dietrich v. Baltimore & H. S. R. Co. 58 Md. 347..... 642
 Di Sora v. Phillips, 10 H. L. Cas. 624, 638, 639..... 805
 Divan v. Loomis, 68 Wis. 150, 31 N. W. 700..... 461
 Dixon v. Bell, 5 Maule & S. 198.... 430
 Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537..... 140
 Dodd v. Bond, 88 Ga. 355, 14 S. E. 581.... 750
 Dodge v. Boston & B. S. Co. 148 Mass. 207, 2 L. R. A. 83, 19 N. E. 373 892
 Donahoe, Ex parte, 24 Neb. 69, 38 N. W. 28..... 924, 927
 Donovan v. Laing, W. & D. Constr. Syndicate (1893) 1 Q. B. 629..... 717
 Doran v. Cohen, 147 Mass. 342, 17 N. E. 647..... 171
 v. Smith, 49 Vt. 353..... 502
 Doremus v. Hennessy, 176 Ill. 608, 43 L. R. A. 797, 52 N. E. 924, 54 N. E. 524..... 552
 Dover v. Portsmouth Bridge, 17 N. H. 209 950
 Dow v. Beldelman, 125 U. S. 680, 31 L. ed. 841, 2 Intern. Com. Rep. 56, 8 Sup. Ct. Rep. 1028.... 349, 350, 351
 Dowd v. Chicopee, 116 Mass. 93..... 574
 Drake v. Drake, 3 Hare, 523..... 951, 853
 v. Mount, 83 N. J. L. 442..... 628
 v. Vorse, 52 Iowa, 417, 3 N. W. 465 699
 Drudge v. Leiter, 18 Ind. App. 694, 49 N. E. 34..... 269
 Dryburg v. Mercur Gold Min. & Mill Co. 18 Utah, 410, 55 Pac. 367.... 710
 Dryden v. Swinburne, 20 W. Va. 89.... 422
 Ducat v. Chicago, 10 Wall. 410, 19 L. ed. 972..... 488
 Dundas's Appeal, 64 Pa. 325..... 578, 579
 Dunham v. Cincinnati, C. & C. R. Co. 1 Wall. 254, 17 L. ed. 584.... 871
 v. Dunham, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841..... 587
 Dunlap v. Northeastern R. Co. 130 U. S. 652, 32 L. ed. 1059, 9 Sup. Ct. Rep. 647..... 843
 v. Steele, 80 Ala. 424..... 724
 Dunn v. Grand Trunk R. Co. 58 Me. 187, 4 Am. Rep. 267..... 705

Dunne v. Kansas City Cable R. Co. 131 Mo. loc. cit. 5, 32 S. W. 641..	663	Falls v. United States Sav. Loan & Bldg. Co. 97 Ala. 417, 24 L. R. A. 174, 13 So. 25.....	802, 805
Durkee v. People ex rel. Askren, 155 Ill. 354, 40 N. E. 626.....	409	Farmer v. Russell, 1 Bos. & P. 296..	425
Dyke v. Erie R. Co. 45 N. Y. 113, 118, 6 Am. Rep. 43.....	805	Farmers' & M. Bank v. Joslyn, 37 N. Y. 353.....	913
E			
Eager v. Brown, 14 La. Ann. 695.....	369	Farmers' & M. Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215.....	880
Earle v. San Francisco Bd. of Edu. 55 Cal. 489.....	663	Farmers' & T. Bank v. Kimball Milling Co. 1 S. D. 388, 47 N. W. 402.....	889
Early v. Mahon, 19 Johns. 150, 10 Am. Dec. 204.....	914	Farmers' Loan & T. Co. v. Baltimore & O. S. W. R. Co. 102 Fed. 17.....	705
East India Co. v. Evans, 1 Vern. 307.....	953	Farmlington v. Downing, 67 N. H. 441, 30 Atl. 845.....	489
East St. Louis Connecting R. Co. v. Allen, 54 Ill. App. 27.....	190	Farrington v. Tennessee, 95 U. S. 687, 24 L. ed. 560.....	489
East Texas F. Ins. Co. v. Harris, 7 Tex. Civ. App. 647, 25 S. W. 720.....	753	Farris v. Cass Avenue & F. G. R. Co. 80 Mo. 325.....	189
Eaton v. Delaware, L. & W. R. Co. 57 N. Y. 382, 15 Am. Rep. 513.....	707	Farwell v. Boston & W. R. Corp. 4 Met. 49 38 Am. Dec. 339.....	835, 843
Eby's Appeal, 84 Pa. 241.....	540	Favre v. Louisville & N. R. Co. 91 Ky. 541, 18 S. W. 370.....	641
Eccliff v. Wabash, St. L. & P. R. Co. 64 Mich. 196, 31 N. W. 180.....	705	Fearing v. Irwin, 55 N. Y. 486.....	286
Edgar v. Walker, 106 Ga. 454, 32 S. E. 582.....	751	Felix v. Wallace County, 62 Kan. 832, 62 Pac. 667.....	767, 760
Edgerton v. Wolf, 6 Gray, 453.....	507	Felton v. Newport, 34 C. C. A. 470, 92 Fed. 470.....	113
Edison Electric Light Co. v. United States Electric Lighting Co. 35 Fed. 134.....	148	v. Newport, 44 C. C. A. 530, 105 Fed. 532.....	192
Edmonds v. Herbrandson, 2 N. D. 270, 14 L. R. A. loc. cit. 729, 50 N. W. 970.....	662	Fenton v. Fidelity & C. Co. 36 Or. 283, 48 L. R. A. 770, 56 Pac. 1096.....	792
Edwards v. Roepke, 74 Wis. 571, 43 N. W. 554.....	382	Ferguson v. Columbus & R. R. Co. 75 Ga. 637, 77 Ga. 102.....	570
Edwardson v. Garnhart, 56 Mo. 85.....	855, 860	v. Hillman, 55 Wis. 181, 12 N. W. 389.....	757
Ehrisman v. Sener, 162 Pa. 577, 29 Atl. 719.....	388	Ferris v. Adams, 23 Vt. 136.....	420, 421
Elkins v. Boston & M. R. Co. 23 N. H. 275 619	619	Fidelity & C. Co. v. Fordyce, 64 Ark. 174, 41 S. W. 420.....	792
v. McKean, 79 Pa. 493.....	431	Field v. Western Springs, 181 Ill. 186, 54 N. E. 929.....	129
Ellerbe v. National Exch. Bank, 109 Mo. 445, 19 S. W. 241.....	117	Fields v. Williams, 91 Ala. 502, 8 So. 808..	724
Ellicott v. Kuhl, 60 N. J. Eq. 333, 46 Atl. 945.....	888	Fletsam v. Hay, 122 Ill. 293, 13 N. E. 501 44	
Embler v. Hartford Steam Boiler Inspection & Ins. Co. 158 N. Y. 431, 44 L. R. A. 512, 53 N. E. 212.....	792	Files v. Boston & A. R. Co. 149 Mass. 204, 21 N. E. 311.....	707
Embree v. Hanna, 5 Johns. 101.....	124	Fillingham v. Nichols, 108 Wis. 49, 84 N. W. 15.....	460
Embrey v. Jemison, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 775.....	409	Filson v. Himes, 5 Pa. 452, 47 Am. Dec. 422.....	424
Emery's Case, 107 Mass. 172, 9 Am. Rep. 22.....	656, 657	Finley v. Bogan, 20 La. Ann. 444.....	359
Emmert v. Thompson, 49 Minn. 386, 52 N. W. 31.....	904	Fire Asso. of Philadelphia v. Williamson, 26 Pa. 106.....	381
Endsley v. Johns, 120 Ill. 479, 60 Am. Rep. 572, 12 N. E. 247.....	119	First Nat. Bank v. Allen, 100 Ala. 478, 27 L. R. A. 426, 14 So. 335, 538, 584	
English v. Danville, 150 Ill. 92, 36 N. E. 994.....	129	v. Hummel, 14 Colo. 259, 8 L. R. A. 788, 23 Pac. 986.....	887
Esberg Cigar Co. v. Portland, 34 Or. 282, 48 L. R. A. 435, 55 Pac. 961.....	622	v. Kentucky, 9 Wall. 353, 19 L. ed. 701.....	489
Estes v. State, 2 Humph. 496.....	428	v. Marshall & I. Bank, 28 C. C. A. 42, 54 U. S. App. 516, 83 Fed. 725.....	117
Etheridge v. Sperry, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565.....	871, 872	v. National Pahquolque Bank, 14 Wall. 383, 20 L. ed. 840.....	815
Eureka Dist. Twp. v. Farmers' Bank, 88 Iowa, 194, 55 N. W. 342, 887.....	889	Fitts v. Hall, 9 N. H. 441.....	678
Evangelical Synod v. Schoenich, 143 Mo. 652, 45 S. W. 647.....	887	Fitzgerald v. Boston & A. R. Co. 156, Mass. 293, 31 N. E. 7.....	709
Evans v. Collins, 5 Q. B. 804.....	119	Fitzhugh v. Maxwell, 34 Mich. 138.....	647
v. Pearce, 15 Gratt. 515, 78 Am. Dec. 635.....	741	Fitzpatrick v. Welch, 174 Mass. 486, 48 L. R. A. 278, 55 N. E. 178.....	134
v. Salt, 6 Beav. 266.....	540	Flannery v. Coleman, 112 Ga. 648, 37 S. E. 878.....	759
Evansville v. State ex rel. Blend, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267.....	778	Flath v. Casselman, 10 N. D. 419, 87 N. W. 988.....	346
Evarts v. St. Paul, M. & M. R. Co. 56 Minn. 141, 22 L. R. A. 663, 57 N. W. 459.....	267	Fleet v. Hollenkemp, 13 B. Mon. 219, 56 Am. Dec. 563.....	430
Ewan v. Lippincott, 47 N. J. L. 192, 54 Am. Rep. 148.....	719	Fleming, Ex parte, 60 Miss. 910.....	317
Ewell v. Daggs, 108 U. S. 148, 27 L. ed. 684, 2 Sup. Ct. Rep. 408.....	580	Fletcher v. New York L. Ins. Co. 4 McCrary, 440, 13 Fed. 528.....	803
Ewing v. Pittsburgh, C. C. & St. L. R. Co. (Pa.) 14 L. R. A. 666.....	561	v. Rylands, L. R. 1 Exch. 265.....	411
F			
Fagan v. Chicago, 84 Ill. 227.....	129	v. Smith, L. R. 2 App. Cas. 781.....	135
Falkney v. Reynolds, 4 Burr. 2069.....	425	Flinn v. Philadelphia, W. & B. R. Co. 1 Houst. (Del.) 469.....	619
Fairchild v. Hedges, 14 Wash. 117, 31 L. R. A. 851, 44 Pac. 125.....	638	Flower v. Pennsylvania R. Co. 69 Pa. 210, 8 Am. Rep. 251.....	267, 705
Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 155, 41 L. ed. 387, 17 Sup. Ct. Rep. 56.....	850	v. Shaw, 2 Car. & K. 703.....	748
57 L. R. A.		Flynn v. Equitable L. Ins. Co. 78 N. Y. 568, 34 Am. Rep. 561 323, 324, 328	
		Foot v. Bronson, 4 Lans. 51.....	547
		Ford v. North Des Moines, 80 Iowa, 626, 45 N. W. 1031.....	248, 252
		Forepaugh v. Delaware, L. & W. R. Co. 128 Pa. 217, 5 L. R. A. 508, 13 Atl. 503.....	618
		Ft. Worth & D. C. R. Co. v. Wrenn, 20 Tex. Civ. App. 628, 50 S. W. 210.....	710

- Foss v. Marr**, 40 Neb. 559, 59 N. W. 122. 921
Fossion v. Landry, 123 Ind. 138, 24 N. E. 509
Foster v. Johnson, 44 Minn. 290, 46 N. W. 350. 154
Fowler v. Bell, 90 Tex. 150, 39 L. R. A. 254, 37 S. W. 1058. 802
v. Wood, 78 Hun, 304, 28 N. Y. Supp. 976. 400
Fox v. Ohio, 5 How. 410, 12 L. ed. 213. 415
Fox's Appeal, 112 Pa. 337, 4 Atl. 149. 349
Frank v. Chemical Nat. Bank, 84 N. Y. 209, 38 Am. Rep. 501 532, 534, 536
Frank's Appeal, 59 Pa. 190. 889
Fraser v. Bigelow Carpet Co. 141 Mass. 126, 4 N. E. 620. 136
Frasier v. Thompson, 2 Watts & S. 235. 424
Freedman's Sav. & T. Co. v. Earle, 110 U. S. 710, 28 L. ed. 301, 4 Sup. Ct. Rep. 226. 389
Freeman v. Boland, 14 E. I. 39, 51 Am. Rep. 340. 502
v. Knight, 37 N. C. (2 Ired. Eq.) 72. 540
Free Press Assn. v. Nichols, 45 Vt. 7. 380
Freeth v. Burr, L. R. 9 C. P. 208. 223
Freidenburg v. Jones, 68 Ga. 612, 66 Ga. 505, 42 Am. Rep. 86. 751
Frelinghuysen v. Nugent, 36 Fed. 229. 889
Fritchle v. Miller's Pennsylvania Extract Co. 197 Pa. 401, 47 Atl. 351. 792
Frith v. Cartland, 2 Hem. & M. 417. 888
Frost v. Eastern R. Co. 64 N. H. 220, 9 Atl. 790. 569-571
Fuchs v. St. Louis, 133 Mo. 168, 34 L. R. A. 118, 31 S. W. 115, 34 S. W. 508. 146
Fuller v. Dane, 18 Pick. 472. 409
Funk v. St. Paul City R. Co. 61 Minn. 435, 29 L. R. A. 208, 63 N. W. 1099. 74
Furey v. New York C. & H. R. Co. 51 Atl. 505. 309
- G.
- Gage v. Gage**, 66 N. H. 282, 28 L. R. A. 829, 29 Atl. 543. 955
Galesburg v. Hawkinston, 75 Ill. 156. 249
Galveston. H. & H. R. Co. v. Cowdrey, 11 Wall. 459, 20 L. ed. 189. 871
Gard v. Stevens, 12 Mich. 292, 86 Am. Dec. 52. 473
Gardner v. Emerson, 40 Ill. 296. 401
v. Johnston, 9 W. Va. 403. 872
v. New Haven & N. Co. 51 Conn. 143, 50 Am. Rep. 12. 707
Garforth v. Fearon, 1 H. Bl. 327. 419
Garitte v. Baltimore, 53 Md. 422. 281
Garland v. Garland, 87 Va. 758, 13 L. R. A. 212, 13 S. E. 478. 387
Garver v. Hawkeye Ins. Co. 69 Iowa, 202, 28 N. W. 555. 331
Gaskell v. King, 11 East, 165. 423
Gaskin v. Meek, 42 N. Y. 186. 663
Gates v. Galtner, 46 La. Ann. 292, 15 So. 50. 869
Gatzow v. Buening, 106 Wis. 1, 49 L. R. A. 475, 81 N. W. 1003. 553
Gavin v. Chicago, 97 Ill. 66, 37 Am. Rep. 99. 189
Gelss v. Franklin Ins. Co. 123 Ind. 172, 24 N. E. 99. 331
Geoghegan v. Atlas SS. Co. 146 N. Y. 369, 40 N. E. 507. 495
George v. People, 167 Ill. 447, 47 N. E. 741. 850, 852, 853
v. Skivington, L. R. 5 Exch. 1. 431
Georgetown v. Alexandria Canal Co. 12 Pet. 98, 9 L. ed. 1015. 281
Georgia P. R. Co. v. Underwood, 90 Ala. 49, 8 So. 116. 641
Gerhard v. Seekonk River Bridge, 15 R. I. 334, 5 Atl. 199. 286
German Nat. Bank v. Meadowcroft, 95 Ill. 124, 35 Am. Rep. 137. 269
Germania L. Ins. Co. v. Com. 85 Pa. 519. 350
Germania Sav. Bank v. Suspension Bridge, 159 N. Y. 362, 54 N. E. 33. 542
Gerrish v. New Haven Ice Co. 63 Conn. 9, 27 Atl. 235. 495
Gibbs v. Lyon, 95 N. C. 146. 840
v. Morgan, 39 N. J. Eq. 126. 663
v. Tally, 133 Cal. 373, 65 Pac. 970. 728
Gilchrist v. Foxen, 95 Wis. 428, 70 N. W. 585. 462
Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250. 401
Gill v. Sullivan, 62 Iowa, 529, 17 N. W. 758. 472
Gillespie v. Lincoln, 35 Neb. 34, 16 L. R. A. 349, 52 N. W. 811. 153
v. McGowan, 100 Pa. 144, 45 Am. Rep. 865. 725
Gilson v. Spear, 38 Vt. 311, 88 Am. Dec. 859. 502
Glasgow v. St. Louis, 107 Mo. 198, 17 S. W. 743. 286
Glasier v. Rolla, L. R. 42 Ch. Div. 436. 119
Glynn v. Houston, 1 Keen, 329. 954, 955
Godfrey v. Macomber, 128 Mass. 188. 382
Godolphin v. Tudor, 2 Saik. 468. 410
Godwin v. Neustadt, 42 La. Ann. 735, 7 So. 744. 359
Goetz v. Bank of Kansas City, 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318. 691
Goodloe v. Dudley, Jeff. (Va.) 59. 422
Gore v. Brubaker, 56 Md. 87. 281
Gorham v. Gross, 125 Mass. 282, 28 Am. Rep. 234. 135
Goshen v. Stonington, 4 Conn. 209, 10 Am. Dec. 118. 493
Gould v. Adams, 108 Cal. 365, 41 Pac. 408. 214
v. McKenna, 86 Pa. 297, 27 Am. Rep. 705. 547
Gowen v. Harley, 6 C. C. A. 190, 12 U. S. App. 574, 56 Fed. 973. 716
Gradin v. St. Paul & D. R. Co. 30 Minn. 217, 14 N. W. 881. 705
Graham v. Toronto, G. & B. R. Co. 23 U. C. P. 541. 707
Gramlich v. Wurst, 86 Pa. 74, 27 Am. Rep. 684. 567
Grand v. Livingston, 4 App. Div. 589, 38 N. Y. Supp. 480, Aff'd 158 N. Y. 688, 53 N. E. 1125. 521
Grand Island Bkg. Co. v. Wright, 53 Neb. 574, 74 N. W. 82. 915
Grand Rapids v. De Vries, 123 Mich. 570, 82 N. W. 269. 901
Grand Trunk R. Co. v. Ives, 144 U. S. 427, 36 L. ed. 492, 12 Sup. Ct. Rep. 688. 842
Graney v. St. Louis, I. M. & S. R. Co. 157 Mo. 666, 50 L. R. A. 153, 57 S. W. 276. 144
Granholm v. Swelgie, 3 N. D. 476, 479, 57 N. W. 509, 510. 928
Grant v. Bartholomew, 57 Neb. 673, 78 N. W. 314. 152
v. McLester, 8 Ga. 553. 420
Grattan v. Metropolitan L. Ins. Co. 92 N. Y. 274, 44 Am. Rep. 372, 80 N. Y. 281, 86 Am. Rep. 617. 323, 328
Gratton & K. Mfg. Co. v. Troll, 77 Mo. App. 344. 146
Graves v. Dolphin, 1 Stm. 66. 388
Gray v. Boston Gaslight Co. 114 Mass. 149, 19 Am. Rep. 324. 134
v. Harris, 107 Mass. 492, 9 Am. Rep. 61. 135
v. Pullen, 5 Best & S. 970. 135
Greene v. EQUITABLE F. & M. Ins. Co. 11 E. I. 434. 500
Greenland v. Chaplin, 5 Exch. 248. 144
Greenlee v. Southern R. Co. 122 N. C. 977, 41 L. R. A. 399, 30 S. E. 115. 824, 827, 843
Greensboro v. Mullins, 13 Ala. 341. 415
Gregg v. Sanford, 76 Am. Dec. 723, note (24 Ill. 17). 871, 872
Greville v. Atkins, 9 Barn. & C. 462. 419
Griffith v. Bird, 22 Gratt. 73. 737, 741
Griffiths, Ex parte, 118 Ind. 83, 3 L. R. A. 398, 20 N. E. 513. 252
Griggs v. Fleckenstein, 14 Minn. 81, Gil. 62, 100 Am. Dec. 199. 628
Grill v. General Iron Screw Collier Co. (1866) L. R. 1 C. P. 600. 705
Griswold v. Hepburn, 2 Duv. 24. 776
v. New York & N. E. R. Co. 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261. 495
v. Sawyer, 125 N. Y. 411, 26 N. E. 464. 540
Gulford v. Chenango County, 13 N. Y. 143. 294
- 57 L. R. A.

Gulf, C. & S. F. R. Co. v. Calvert , 11 Tex. Civ. App. 297, 32 S. W. 246.....	710	Harrold v. Watney , 78 L. T. N. S. 788....	565
v. Campbell , 76 Tex. 175, 13 S. W. 19.....	703	Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151.....	529
v. Dorsey , 66 Tex. 148, 18 S. W. 444.....	719	Hartfield v. Roper , 21 Wend. 615, 34 Am. Dec. 273.....	571
v. Dwyer , 75 Tex. 572, 7 L. R. A. 478, 12 S. W. 1001.....	768	Harvey v. Com. 23 Gratt. 941.....	856
v. Eilla , 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.....	610	v. Great Northern R. Co. 50 Minn. 405, 17 L. R. A. 84, 52 N. W. 905.....	124
v. McWhirter , 77 Tex. 358, 14 S. W. 26.....	570	Hathaway v. Hinton , 46 N. C. (1 Jones, L.) 243.....	840
v. Morgan (Tex. Civ. App.) 64 S. W. 688.....	895	Haugen v. Albina Light & Water Co. 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244.....	762
Gunderson v. Northwestern Elevator Co. 47 Minn. 161, 49 N. W. 694.....	566	Hausmann v. Madison , 85 Wis. 187, 21 L. R. A. 263, 55 N. W. 167.....	468
Gundling v. Chicago , 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633.....	185	Havens v. Lathene , 75 N. C. 503.....	638
Gunn v. Geary , 44 Mich. 615, 7 N. W. 235.....	472	Hawes v. Chicago , 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373.....	129
v. Ohio River R. Co. 42 W. Va. 676, 36 L. R. A. 575, 26 S. E. 546.....	192	Hawker v. Baltimore & O. R. Co. 15 W. Va. 628, 36 Am. Rep. 825.....	191
Gunter v. Lecky , 30 Ala. 591.....	409	Hayburn's Case , 2 Dall. 408, 1 L. ed. 436.....	252
Gustin v. Union School Dist. 94 Mich. 502, 54 N. W. 156.....	649	Hayman v. Hewitt, Peake, N. P. Cas. pt. 2, p. 170.....	628
Guthrie Nat. Bank v. Guthrie , 173 U. S. 528, 43 L. ed. 796, 19 Sup. Ct. Rep. 513.....	294	Haynes v. Aldrich , 133 N. Y. 287, 31 N. E. 94.....	224
Guy v. Manuel , 89 N. C. 83.....	211	v. Raleigh Gas Co. 114 N. C. 203, 26 L. R. A. 810, 19 S. E. 344.....	625
H.		v. Thomas , 7 Ind. 38.....	509
		Hazeltine v. Edgmand , 35 Kan. 202, 57 Am. Rep. 157, 10 Pac. 544.....	547
Hacheny v. Leary , 12 Or. 40, 7 Pac. 329.....	794	Healey v. New Haven , 47 Conn. 805.....	221
Hackett v. Louisville R. Co. 95 Ky. 236, 24 S. W. 871.....	450	Heathcote v. Fleete , 2 Vern. 442.....	958
Hadley v. Baxendale , 9 Exch. 353.....	959	Hedin v. Bingham , 56 Ala. 575, 28 Am. Rep. 776.....	723
Hadow v. Hadow , 9 Sim. 438.....	740	Hefner v. Yount , 8 Blackf. 455.....	464
Hadtner v. Williamsport , 15 W. N. C. 138.....	351	Heizer v. Kingsland & D. Mfg. Co. 110 Mo. 605, 15 L. R. A. 821, 19 S. W. 630.....	431
Haft v. First Nat. Bank , 19 App. Div. 423, 46 N. Y. Supp. 481.....	476	Helena Consol. Water Co. v. Steele , 20 Mont. 1, 37 L. R. A. 412, 49 Pac. 382.....	251
Hahn v. Hutchinson , 159 Pa. 138, 28 Atl. 167.....	388	Heller v. Atchison, T. & S. F. R. Co. 28 Kan. 625.....	288
Hale v. Bonner , 82 Tex. 33, 14 L. R. A. 336, 17 S. W. 605.....	773	Hendershot v. Western U. Tele. Co. 106 Iowa, 529, 76 N. W. 828.....	908
Hamilton v. Fidelity Mut. L. Asso. 27 App. Div. 480, 50 N. Y. Supp. 526.....	327	Henderson v. Trousdale , 10 La. Ann. 548.....	369
v. St. Louis Co. Ct. 15 Mo. 13.....	776	Henderson Bridge Co. v. Com. 99 Ky. 623, 29 L. R. A. 78, 31 S. W. 486.....	80, 60, 71
Hammond v. Winchester , 82 Ala. 470, 24 So. 892.....	723	v. Kentucky , 166 U. S. 154, 41 L. ed. 954, 17 Sup. Ct. Rep. 534.....	36
v. Worcester County , 154 Mass. 509, 28 N. E. 902.....	286	Hendricks v. State , 26 Tex. App. 176, 9 S. W. 555.....	747
Hancock v. Hazard , 12 Cush. 112, 59 Am. Dec. 171.....	638	Hendryx v. Kansas City, Ft. S. & G. R. Co. 45 Kan. 377, 25 Pac. 893.....	703
v. Norfolk & W. R. Co. 124 N. C. 222, 32 S. E. 679.....	836	Henneberger, Re , 155 N. Y. 420, 42 L. R. A. 132, 50 N. E. 61.....	545
Hancock Mut. L. Ins. Co. v. Schlink , 175 Ill. 284, 51 N. E. 795.....	456	Hennepin County v. Jones , 18 Minn. 199, Gil. 182.....	636
Hanington v. DuChatel , 1 Bro. Ch. 124.....	420	Henningson v. Stillwater , 81 Minn. 215, 83 N. W. 983.....	302
Hanks v. Naglee , 54 Cal. 51, 35 Am. Rep. 67.....	217	Henric v. Buck , 39 Kan. 381, 18 Pac. 228.....	472
Hanna v. Hanna , 3 Tex. Civ. App. 51, 21 S. W. 720.....	190	Henry v. Allen , 151 N. Y. 1, 36 L. R. A. 658, 45 N. E. 355.....	535
Hanover F. Ins. Co. v. Bohn , 48 Neb. 743, 67 N. W. 774.....	695	v. State , 35 Ohio St. 128.....	746
v. Crawford , 121 Ala. 258, 25 So. 912.....	331	Herriman v. Menzies , 115 Cal. 16, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730.....	557
Hanover R. Co. v. Coyle , 55 Pa. 402, 191, 192	192	Hewison v. New Haven , 37 Conn. 475, 9 Am. Rep. 342.....	221
Hansford v. Payne , 11 Bush, 385.....	450	Heyrock v. McKenzie , 8 N. D. 601, 80 N. W. 762.....	346
Haralson v. Dickens , 4 N. C. (2 Car. Law Rep.) 163.....	420	Hibbard v. New York & E. R. Co. 15 N. Y. 455.....	278
Harding v. American Glucose Co. 182 Ill. 551, 55 N. E. 577.....	552	Hickey v. State , 23 Ind. 21.....	858
v. American Glucose Co. (Ill.) 74 Am. St. Rep. 244, note.....	553	Hicks v. Roanoke Brick Co. 94 Va. 741, 27 S. E. 596.....	383
v. Boston , 163 Mass. 14, 89 N. E. 411.....	135	Hickson v. State , 61 Neb. 763, 54 L. R. A. 327, 86 N. W. 509.....	747
v. Railway Transfer Co. 80 Minn. 504, 83 N. W. 395.....	716	Higbee v. Camden & A. R. Co. 19 N. J. Eq. 278.....	281
Bardy v. Brooklyn , 90 N. Y. 435, 43 Am. Rep. 182.....	141	Hill v. Boston , 122 Mass. 844, 23 Am. Rep. 332.....	221
Hartford County v. Wise , 71 Md. 52, 18 Atl. 31.....	282	v. Kimball , 76 Tex. 210, 7 L. R. A. 618, 13 S. W. 59.....	561
Harmon v. Chicago , 140 Ill. 374, 29 N. E. 782.....	129	v. Proctor , 10 W. Va. 59.....	648
v. Hart (Tenn. Ch. App.) 53 S. W. 310.....	804	v. State , 112 Ga. 32, 37 S. E. 441.....	753
Harriman v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11, 12 N. E. 451.....	566	Hilladord v. St. Louis , 45 Mo. 94, 100 Am. Dec. 352.....	715
Harris v. Pratt , 17 N. Y. 249.....	529	Hills v. Missouri F. R. Co. 101 Mo. 36, 13 S. W. 946.....	139
Harrison v. Adamson , 86 Iowa, 693, 53 N. W. 334.....	811		
v. Com. 83 Ky. 162.....	40		
57 L. R. A.	2		

John S. Brittain Dry Goods Co. v. Year- out, 59 Kan. 684, 54 Pac. 1062.....	473	Kenyon v. Knights Templar & M. Mut. Ald. Asso. 122 N. Y. 247, 25 N. E. 299.....	322
Johnson v. Boston, 118 Mass. 114.....	719	v. See, 94 N. Y. 563.....	543
v. Coleman, 23 Wis. 452, 99 Am. Dec. 193.....	585	Kerr v. Kingsbury, 39 Mich. 150, 33 Am. Rep. 362.....	633
v. Garber, 19 C. C. A. 556, 48 U. S. App. 107, 73 Fed. 523.....	113	Kerrains v. People, 60 N. Y. 221, 19 Am. Rep. 158.....	318
v. Hulings, 103 Pa. 498, 49 Am. Rep. 131.....	400	Kerrigan v. Force, 68 N. Y. 381.....	663
v. Jackson, 99 Ga. 369, 27 S. E. 734.....	235	Kerwhacker v. Cleveland, C. & C. R. Co. 3 Ohio St. 172, 62 Am. Dec. 246	573
v. Philadelphia, W. & B. R. Co. 68 Md. 106.....	278	Kerwood v. Ayres, 59 Kan. 343, 53 Pac. 134.....	125
v. Richmond & D. R. Co. 81 N. C. 454.....	824	Ketchum v. Stevens, 19 N. Y. 499.....	691
v. Williard, 83 Wis. 420, 53 N. W. 776.....	345	Keyes v. Konkell, 119 Mich. 550, 44 L. R. A. 242, 78 N. W. 649.....	773
Jolly v. Hawesville, 89 Ky. 280, 12 S. W. 313.....	131	Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.....	252
Jonasohn v. Young, 4 Best & S. 269.....	229	Kinchlow v. Midland Elevator Co. 57 Kan. 274, 46 Pac. 703.....	566
Jones v. Davenport, 44 N. J. Eq. 33, 13 Atl. 632.....	757	King v. Chicago, M. & St. P. R. Co. 80 Minn. 83, 50 L. R. A. 161, 82 N. W. 1113.....	177
v. Earl, 37 Cal. 630, 99 Am. Dec. 338.....	528	v. Iyves, 2 Show. 468.....	426
v. East Tennessee, V. & G. R. Co. 128 U. S. 443, 445, 32 L. ed. 478, 479, 9 Sup. Ct. Rep. 118.....	842	v. Patterson, 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705.....	477
v. New Haven, 34 Conn. 1.....	221	v. Severn & W. R. Co. 2 Barn. & Ald. 646.....	185
v. Portland, 35 Or. 612, 58 Pac. 657.....	622	v. Seward, 1 Ad. & El. 706.....	550
Jones's Case, 4 Barn. & Ad. 345.....	550	Kings County F. Ins. Co. v. Stevens, 101 N. Y. 411, 5 N. E. 853.....	286
Jordan v. Dayton, 4 Ohio, 295.....	185	Kinney v. North Carolina R. Co. 122 N. C. 961, 30 S. E. 813.....	836
Judd v. Hartford, 72 Conn. 350, 44 Atl. 510.....	221	Kirby's Case, 77 Va. 681, 46 Am. Rep. 747	190
Judge v. Meriden, 38 Conn. 90.....	221	Kirkpatrick v. Clark, 132 Ill. 342, 8 L. R. A. 511, 24 N. E. 71.....	346
Junction R. Co. v. Bank of Ashland, 12 Wall. 226, 20 L. ed. 885.....	805	Kiling v. Sejour, 4 La. Ann. 130.....	369
Jutte v. Hughes, 67 N. Y. 267.....	547	Knatchbull v. Hallett, L. R. 13 Ch. Div. 696.....	887
Juxon v. Morris, 2 Ch. Cas. 42.....	419	Knight's Case, 156 U. S. 35, 39 L. ed. 837, 15 Sup. Ct. Rep. 249.....	555
K.		Knowles v. Williams, 58 Kan. 221, 48 Pac. 856.....	577
Kahler v. Iowa State Ins. Co. 106 Iowa, 380, 76 N. W. 734.....	331	Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, 485.....	486
Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203.....	345	Knutson v. Bostrak, 99 Wis. 469, 75 N. W. 156.....	462
Kaiser v. Seaton, 62 Iowa, 463, 17 N. W. 664.....	764	Koehler v. Ball, 2 Kan. 161, 83 Am. Dec. 451.....	579
Kalleck v. Deering, 161 Mass. 469, 37 N. E. 450.....	495	Koisti v. Minneapolis & St. L. R. Co. 32 Minn. 134, 19 N. W. 655, 570.....	574
Kane v. Northern C. R. Co. 128 U. S. 91, 94, 32 L. ed. 339, 841, 9 Sup. Ct. Rep. 17.....	842	Koons v. St. Louis & I. M. R. Co. 65 Mo. 592.....	570
v. Roberts, 40 Md. 590.....	874	Koontz v. Hannibal Sav. & Ins. Co. 42 Mo. 126, 97 Am. Dec. 325.....	331
Kansas City v. Marsh Oil Co. 140 Mo. 472, 41 S. W. 943.....	251	Kopplekom v. Colorado Cement Pipe Co. (Colo. App.) 64 Pac. 1047.....	566
Kansas C. R. Co. v. Fitzsimmons, 22 Kan. 691, 31 Am. Rep. 203.....	569	Koster v. Merritt, 32 Conn. 246.....	805
Kansas P. R. Co. v. Whipple, 39 Kan. 531, 18 Pac. 730.....	703	Kountze v. Kennedy, 147 N. Y. 124, 29 L. R. A. 360, 41 N. E. 414.....	119
Kastl v. Wabash R. Co. 114 Mich. 53, 72 N. W. 28.....	719	Kreamer v. Earl, 91 Cal. 112, 27 Pac. 735	409
Kay v. Pennsylvania R. Co. 65 Pa. 269, 3 Am. Rep. 628.....	574	Kreth v. Rogers, 101 N. C. 263, 7 S. E. 652.....	874
Kearney v. Vaughan, 50 Mo. 287.....	580	Kropp v. Kropp, 97 Wis. 137, 72 N. W. 361	460
Kearnsley v. Woodcock, 3 Hare. 185.....	389	Kuhl v. Jersey City, 23 N. J. Eq. 84.....	154
Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393.....	569	Kynaston v. East India Co. 3 Swanst. 249	952
Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494.....	793	L.	
Kelley v. Fond du Lac, 31 Wis. 179.....	467	Laclede Fire-Brick Mfg. Co. v. Hartford Steam Boiler Inspection & Ins. Co. 9 C. C. A. 1, 19 U. S. App. 510, 60 Fed. 351.....	716
Kellogg v. Adams, 39 N. Y. 28.....	913	La Farge v. Herter, 9 N. Y. 241.....	914
v. Hayes, 81 Cal. 175, 6 L. R. A. 588, 22 Pac. 511.....	727	Lafayette v. James, 92 Ind. 240, 47 Am. Rep. 140.....	472
v. Oshkosh, 14 Wis. 624.....	851	Lafever v. Billmeyer, 5 W. Va. 33.....	423
Kelly v. Barber Asphalt Co. 93 Ky. 363, 20 S. W. 271.....	267	Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261.....	117
v. People, 115 Ill. 563, 56 Am. Rep. 184, 4 N. E. 644.....	852	Lakin v. Willamette Valley & Coast R. Co. 13 Or. 436, 57 Am. Rep. 23, 11 Pac. 68.....	394
v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658.....	249	Lamb v. Old Colony R. Co. 140 Mass. 79, 54 Am. Rep. 449, 2 N. E. 932.....	793
v. Southern Minnesota R. Co. 28 Minn. 98, 9 N. W. 688.....	574	Lambert v. Penn Mut. L. Ins. Co. 50 La. Ann. 1031, 24 So. 16.....	369
v. Thuey, 143 Mo. 437, 45 S. W. 300.....	658	Lancaster v. Clayton, 86 Ky. 373, 5 S. W. 864.....	41
Kelly's Case, 24 N. Y. 74.....	658	Landeman v. Wilson, 29 W. Va. 702, 2 S. E. 203.....	871
Kennedy v. Nichols, 33 Misc. 726, 68 N. Y. Supp. 1053.....	952	Landis v. Vineland, 54 N. J. L. 75, 23 Atl. 367.....	861
Kentucky C. R. Co. v. Gastineau, 83 Ky. 119.....	566	Lane v. Bryant, 9 Gray, 245, 69 Am. Dec. 282.....	191
Kentucky Railroad Tax Cases, 115 U. S. 322, 20 L. ed. 414, 6 Sup. Ct. Rep. 57.....	849		
Kenworthy v. Ironton, 41 Wis. 647.....	467		
57 L. R. A.			

Lang v. Lee, 8 Rand. (Va.) 411.....	871, 872	Louisville & J. Ferry Co. v. Com. 104 Ky.	84
v. Pike, 27 Ohio St. 498.....	472	726, 47 S. W. 877.....	
Langridge v. Levy, 2 Mees. & W. 519, 4	431	Louisville & N. R. Co. v. Boykin, 76 Ala.	728
Mees & W. 337.....		564.....	
Lansing Iron & Engine Works v. Walker,	633	v. Cummins, 28 Ky. L. Rep. 681, 63	783
91 Mich. 409, 51 N. W. 1061.....	633	S. W. 594.....	
v. Wilbur, 111 Mich. 413, 69 N. W.	633	v. McElwain, 98 Ky. 700, 84 L. E.	450
687.....		A. 788, 34 S. W. 236.....	
Lanusse v. Barker, 3 Wheat. 101, 4 L. ed.	474	v. Smith, 21 Ky. L. Rep. 857, 53 S.	782, 783
343.....		W. 269.....	
Larson v. Chase, 47 Minn. 307, 14 L. R. A.	561	Louisville, C. & L. R. Co. v. Goetz, 79 Ky.	783
85, 50 N. W. 238.....		449, 42 Am. Rep. 227.....	
Lascelles v. Georgia, 148 U. S. 537, 37 L.	297	Louisville, N. A. & C. R. Co. v. Keefer, 146	617
ed. 549, 13 Sup. Ct. Rep. 687	649	Ind. 21, 38 L. R. A. 93, 44 N.	783
Lavender v. Abbott, 30 Ark. 172.....		E. 796.....	
Lawless v. Anglo-Egyptian Cotton & Oil	476	v. Schmidt, 134 Ind. 16, 33 N. E.	783
Co. (1869) L. R. 4 Q. B. 262.....		774.....	
Lawrence v. Springer (L. R. 4 Q. B.) 31 Am.	722	Louisville, N. & G. S. R. Co. v. Harris, 9	279
St. Rep. 713.....		Lea, 180, 42 Am. Rep. 668.....	
Leach v. Leach, 4 Ind. 628, 58 Am. Dec.	464	Love v. Buckner, 4 Bibb. 506.....	421
642.....		Lovejoy v. Murray, 3 Wall. 1, 18 L. ed.	125
Learned v. Castle, 78 Cal. 454, 18 Pac.	311	129.....	955
872, 21 Pac. 11.....		Lovell v. Galloway, 17 Beav. 1.....	
Leather Mfrs. Nat. Bank v. Morgan, 117	534	v. St. Louis Mut. L. Ins. Co. 111 U.	507
U. S. 96, 29 L. ed. 811, 6 Sup.		S. 264, 28 L. ed. 423, 4 Sup.	399
Ct. Rep. 657.....		Ct. Rep. 390.....	
Lee v. Burlington, 113 Iowa, 356, 85 N. W.	561	Low v. Allen, 26 Cal. 141.....	
618.....		Lowe, Ba. 54 Kan. 757, 27 L. R. A. 545,	901
v. Howard F. Ins. Co. 3 Gray, 583.....	331	39 Pac. 710.....	
Leeper v. Lyon, 68 Mo. 216.....	648	v. Salt Lake City, 13 Utah, 91, 44	566
Leimon v. People, 20 N. Y. 562.....	488	Pac. 1050.....	
Lent v. Morrill, 25 Cal. 500.....	399	Lowry v. Polk County, 51 Iowa, 50, 33	806
v. Shear, 26 Cal. 361.....	399	Am. Rep. 114, 49 N. W. 1049.....	
Leonard v. New York, A. & B. Electro		Luby v. Hudson River R. Co. 17 N. Y. 131	191
Magnetic Telegr. Co. 41 N. Y.	909	Lucas v. Milwaukee & St. P. R. Co. 33	705
544, 1 Am. Rep. 446.....		Wis. 41, 14 Am. Rep. 735.....	
Lesser Cotton Co. v. St. Louis, I. M. & S.	711	v. Waul, 12 Smedes & M. 157.....	344
R. Co. 114 Fed. 133.....		Luce v. Dunham, 69 N. Y. 36.....	537, 538,
Levi v. Louisville, 97 Ky. 304, 28 L. R. A.	61	Lucke v. Clothing Cutters' & Trimmers'	539
480, 30 S. W. 973.....		Assembly, No. 7507, K. of L.	
Lery v. State, 6 Ind. 281.....	415	77 Md. 397, 19 L. R. A. 408,	554
Lewis v. Childers, 13 W. Va. 1.....	429	26 Atl. 505.....	
v. Knox, 2 Bibb. 453.....	420	Ludwig v. Pillsbury, 35 Minn. 256, 28 N.	642
v. Marsh, 8 Hare, 97.....	952	W. 505.....	
v. Monson, 151 U. S. 549, 38 L. ed.		Lutterloh v. Cedar Keys, 15 Fla. 306.....	286
266, 14 Sup. Ct. Rep. 424.....	350	Lycoming F. Ins. Co. v. Ward, 90 Ill. 545.	457
v. Smith, 9 N. Y. 502, 61 Am. Dec.		Lyell v. Kennedy, L. R. 8 App. Cas. 222	951, 954
706.....			
Lleuallen v. Mosgrove, 33 Or. 282, 54 Pac.	649	Lynch v. Nurdin, 1 Q. B. 29.....	
200.....	430, 565, 566, 571,	574
Litt v. Cowley, 7 Taunt. 169, 23 English	622	v. Nurdin, 1 Q. B. 422.....	628
Ruling Cases, 411.....	528,	Lynd v. Pickett, 7 Minn. 184, Gil. 128, 82	
Littlejohn v. Fitchburg R. Co. 148 Mass.	529	Am. Dec. 79.....	724
478, 2 L. R. A. 502, 20 N. E.	630	Lyon v. Lenon, 106 Ind. 567, 7 N. E. 311.	269
103.....			
Little Rock & Ft. S. R. Co. v. Payne, 33	769	M.	
Ark. 816, 34 Am. Rep. 55 767.....			
Liverpool & L. & G. Ins. Co. v. Kearney, 2	753	M'Allister v. Jerman, 32 Miss. 142.....	802
Ind. Terr. 67, 46 S. W. 414.....		M'Allen v. Churchill, 11 J. B. Moore, 483	424
Livesay v. Beard, 22 W. Va. 585.....	872	Macaulay v. Shackell, 1 Bligh N. E. 96	954,
Livingstone's Case, 14 Gratt. 592.....	190354,	955
Lloyd v. Hanes, 126 N. C. 361, 35 S. E.	824	McAuley v. Mardis, Walk. (Miss.) 307.....	344
611.....		McBlair v. Gibbs, 17 How. 232, 15 L. ed.	425
v. Smith, 176 Pa. 218, 35 Atl. 199.....	351	132.....	
Locke v. Bradstreet Co. 22 Fed. 771, 476,	479	McCall v. White, 10 La. Ann. 577.....	369
v. Homer, 131 Mass. 93, 41 Am.	793	McCarthy v. White, 21 Cal. 495, 82 Am.	399
Rep. 199.....		Dec. 754.....	
Lockhart v. Little Rock & M. R. Co. 40	715	McCarty v. Woodstock Iron Co. 92 Ala.	508
Fed. 631.....		463, 12 L. R. A. 136, 8 So.	924
Lockner v. Strode, 2 Ch. Cas. 48.....	419	417.....	
Loehner v. Home Mut. Ins. Co. 17 Mo. 247	331	McCaskell v. State, 53 Ala. 511.....	
Lombard v. Lennox, 155 Mass. 70, 28 N.	561	McCauley Bros. v. Tierney, 19 R. I. 255,	557
E. 1125.....		37 L. R. A. 455, 33 Atl. 1, 554,	
London & N. W. American Mortg. Co. v.	302	McCleary v. Ellis, 54 Iowa, 311, 37 Am.	388
Gibson, 77 Minn. 394, 80 N. W.	270	Rep. 205, 6 N. W. 571.....	
205, 777.....		Macclesfield v. Davis, 3 Ves. & B. 16. 951,	953
Lonergan v. Stewart, 55 Ill. 44.....		McClure v. Alexander, 15 Ky. L. Rep. 732,	
Longshore Printing & Pub. Co. v. Howell,	557	24 S. W. 619.....	451
26 Or. 527, 28 L. R. A. 464,	952	v. Philadelphia, W. & B. R. Co. 34	278
38 Pac. 547.....		Md. 532, 6 Am. Rep. 345.....	
Lonsdale v. Curwen, 3 Bligh. 168.....		McClymond v. Noble, 84 Minn. 329, 87 N.	302
Loomis v. Rockford Ins. Co. 77 Wis. 87, 8	381	W. 838.....	
L. R. A. 834, 45 N. W. 813.....		McCrea v. Roberts, 89 Md. 238, 44 L. R.	252
Loop v. Litchfield, 42 N. Y. 351, 1 Am.	430	A. 485, 43 Atl. 39.....	453
Rep. 543.....		McCulloch v. McKee, 16 Pa. 289.....	
Lord v. Morris, 18 Cal. 482.....	399	McDonald v. Beer, 42 Neb. 437, 60 N. W.	913, 914
v. State, 17 Neb. 526, 23 N. W.	158	868.....	
507.....		v. Louisville, 24 Ky. L. Rep. 271,	781
Losee v. Buchanan, 51 N. Y. 476, 10 Am.	412	68 S. W. 413.....	
Rep. 623.....		v. Provident Sav. Life Assur. Soc.	456
Louisville v. Com. 1 Duv. 297, 85 Am. Dec.	777	108 Wis. 213, 84 N. W. 154.....	
624.....		McEligott v. Randolph, 61 Conn. 157, 22	495
v. University of Louisville, 15 B.	251	Atl. 1094.....	
Mon. 642.....		McElroy v. Nashua & L. R. Corp. 4 Cush.	715
57 L. R. A.		400, 50 Am. Dec. 794.....	

- McGill's Appeal, 61 Pa. 46.
McIlhenney v. Wilmington, 127 N. C. 146,
50 L. R. A. 470, 37 S. E. 187.
McIver v. Estabrook, 134 Mass. 550.
Mack v. South Bound R. Co. 52 S. C. 328,
40 L. R. A. 879, 29 S. E. 905.
McKay v. Williams, 67 Mich. 547, 35 N.
W. 159.
Mackey v. Vicksburg, 64 Miss. 778, 2 So.
178.
McLamb v. Wilmington & W. R. Co. 122
N. C. 862, 29 S. E. 894.
McLaughlin v. Camden Iron Works, 60 N.
J. L. 557, 38 Atl. 677.
McLeod v. Evans, 66 Wis. 401, 57 Am.
Rep. 287, 28 N. W. 178, 214.
McLeod County v. Gilbert, 19 Minn. 214,
Gil. 176.
McMarshall v. Chicago, R. I. & P. R. Co.
80 Iowa, 757, 45 N. W. 1065.
McNichol v. United States Mercantile Re-
porting Agency, 74 Mo. 457.
Macon v. Hughes, 110 Ga. 795, 36 S. E.
247.
McRae v. Grand Rapids, L. & D. R. Co.
93 Mich. 399, 17 L. R. A. 750,
53 N. W. 561.
McVesty v. St. Paul, M. & M. R. Co. 54
Minn. 269, 11 L. R. A. 174, 47
N. W. 806.
Madigan v. McCarthy, 108 Mass. 376, 11
Am. Rep. 371.
Maginnis v. Knickerbocker Ice Co. 112
Wis. 385, 88 N. W. 300.
Magneau v. Fremont, 30 Neb. 844, 9 L. R.
A. 786, 47 N. W. 280.
Magnin v. Dinmore, 62 N. Y. 35, 20 Am.
Rep. 442.
Magoun v. Illinois Trust & Sav. Bank, 170
U. S. 283, 42 L. ed. 1037, 18
Sup. Ct. Rep. 596.
Mahon, Re, 84 Fed. 525.
Mahoney v. Dankwart, 108 Iowa, 321, 79
N. W. 134.
v. Libbey, 123 Mass. 20, 25 Am.
Rep. 6.
v. Metropolitan R. Co. 104 Mass.
73.
Maler v. Fidelity Mut. Life Assn. 24 C. C.
A. 239, 47 U. S. App. 822, 78
Fed. 566.
Manchester F. Assur. Co. v. Glenn, 13 Ind.
App. 365, 40 N. E. 928, 41 N.
E. 847.
Mandell v. Fidelity & C. Co. 170 Mass.
173, 49 N. E. 110.
Mangan v. Atterton, L. R. 1 Exch. 239.
Manufacturers' Bank v. Scofield, 39 Vt.
590.
Manufacturers' Gas & Oil Co. v. Indiana
Natural Gas & Oil Co. 155 Ind.
506, 58 N. E. 851.
Manwaring v. Jennison, 61 Mich. 119, 27
N. W. 903.
Mapes v. Second Nat. Bank, 80 Pa. 163.
Marble v. Rosa, 124 Mass. 44.
Marbury v. Madison, 1 Cranch, 137, 2 L.
ed. 60.
March v. Com. 12 B. Mon. 25.
v. Davison, 9 Paige, 580, 584, 586.
Marden v. Dorothy, 160 N. Y. 39, 46 L. R.
A. 694, 54 N. E. 726.
Mares v. Territory (N. M.) 65 Pac. 165.
Marion County v. Clark, 94 U. S. 278, 24
L. ed. 59.
Mark v. Hudson River Bridge Co. 103 N.
Y. 28, 8 N. E. 243.
Markham v. Guerrant, 4 Leigh, 279.
Markland Min. & Mfg. Co. v. Kimmel, 37
Ind. 560.
Marsden v. Panahall, 1 Vern. 407.
Marsh v. McPherson, 105 U. S. 709, 26 L.
ed. 1139.
Marshall v. Welwood, 38 N. J. L. 339, 20
Am. Rep. 894.
Martel v. East St. Louis, 94 Ill. 67.
Martin v. Johnson, 84 Ga. 481, 8 L. R. A.
170, 10 S. E. 1092.
v. Marks, 154 Ind. 549, 57 N. E.
249.
v. Terrell, 12 Smedes & M. 571.
Mason v. Erie County Directors of Poor,
123 Pa. 445, 17 Atl. 616.
Mason v. Pierron, 69 Wis. 585, 34 N. W.
921.
Masser v. Chicago, R. I. & P. R. Co. 63
Iowa, 602, 27 N. W. 776.
Mathews v. Lightner (Minn.) 88 N. W.
992.
Maxwell v. Dow, 176 U. S. 531, 44 L. ed.
597, 20 Sup. Ct. Rep. 448, 487.
May v. Crawford, 150 Mo. 525, 51 S. W.
698.
Mayall v. Mayall, 63 Minn. 511, 65 N. W.
942.
Maynard v. Cleaves, 149 Mass. 307, 21 N.
E. 376.
v. Hill, 125 U. S. 190, 31 L. ed.
654, 8 Sup. Ct. Rep. 723.
Mayton v. Texas & P. R. Co. 63 Tex. 77,
51 Am. Rep. 637.
Meagher v. Driscoll, 99 Mass. 281, 96
Am. Dec. 759.
Melswinkel v. St. Paul F. & M. Ins. Co. 75
Wis. 147, 6 L. R. A. 200, 43
N. W. 689.
Mellick v. Williamsport, 162 Pa. 408, 29
Atl. 917.
Melon Street, Re, 182 Pa. 397, 38 L. R. A.
275, 38 Atl. 482.
Memphis Gaslight Co. v. Shelby County
Taxing Dist. 109 U. S. 400,
27 L. ed. 976, 3 Sup. Ct. Rep.
205.
Menken v. Atlanta, 78 Ga. 668, 2 S. E.
559.
Mentzer v. Western U. Teleg. Co. 93 Iowa,
752, 28 L. R. A. 72, 62 N. W. 1.
Meredith v. Ladd, 2 N. H. 517.
Meriwether v. Garrett, 102 U. S. 472, 26
L. ed. 197.
Meroney v. Atlanta Bldg. & L. Assn. 116
N. C. 882, 21 S. E. 924.
Merrill v. Agricultural Ins. Co. 73 N. Y.
452, 29 Am. Rep. 184.
Merryman v. Chicago, R. I. & P. R. Co.
85 Iowa, 684, 52 N. W. 545.
Mersey Steel & I. Co. v. Naylor, L. R. 9
App. Cas. 434.
Messenger v. Lockwood, 9 West. L. J. 521
Metropolitan L. Ins. Co. v. Rutherford, 95
Va. 773, 30 S. E. 383.
Metropolitan Nat. Bank v. Campbell Com-
mission Co. 77 Fed. 705.
Mets v. Buffalo, C. & P. R. Co. 58 N. Y. 61,
17 Am. Rep. 201.
Meyer v. Berlandi, 39 Minn. 438, 1 L. R.
A. 777, 40 N. W. 513.
Meyers v. Hudson County Electric Co. 63
N. J. L. 573, 44 Atl. 713.
Michoud v. Girod, 4 How. 503, 11 L. ed.
1076.
Miller v. Cornwall R. Co. 154 Pa. 474, 26
Atl. 779.
v. Lampson, 66 Conn. 432, 34 Atl.
79.
v. Law, 10 Rich. Eq. 320, 73 Am.
Dec. 92.
v. Marchle, 21 Ill. 152.
v. Miller, 25 N. J. Eq. 354.
v. Minnesota & N. W. R. Co. 76
Iowa, 655, 39 N. W. 188.
v. State, 149 Ind. 607, 40 L. R. A.
109, 49 N. E. 894.
v. Stewart, 9 Wheat. 680, 6 L. ed.
189.
v. Tiffany, 1 Wall. 298, 17 L. ed.
540.
Milliken v. Pratt, 125 Mass. 374, 23 Am.
Rep. 241.
Million v. Ohnsorg, 10 Mo. App. 432.
Mills v. Orange, A. & M. R. Co. 2 Mac-
Arth. 814.
Milton v. Haden, 32 Ala. 30, 70 Am. Dec.
523.
Milwaukee v. Milwaukee, 12 Wis. 94.
Milwaukee & St. P. R. Co. v. Arms, 91 U.
S. 489, 23 L. ed. 374.
Minneapolis v. Lundin, 7 C. C. A. 844, 19
U. S. App. 245, 58 Fed. 525.
Minneapolis & St. L. R. Co. v. Baugh, 149
U. S. 368, 37 L. ed. 772, 13
Sup. Ct. Rep. 914.
v. Herrick, 127 U. S. 211, 32 L. ed.
110, 8 Sup. Ct. Rep. 1176.

Minnesota Lumber Co. v. Whitebreast Coal Co. 160 Ill. 85, 31 L. R. A. 529, 43 N. E. 774.....	699	Moses v. Cromwell, 78 Va. 671.....	748
Minot v. Philadelphia, W. & B. R. Co. 18 Wall. 208, 21 L. ed. 888.....	489	v. Newburgh Electric R. Co. 91 Hun. 278, 36 N. Y. Supp. 149.	850
Missouri v. Lewis, 101 U. S. 22, 25 L. ed. 999.....	487	v. Travellers' Ins. Co. (N. J. Eq.) 49 Atl. 720.....	793
Missouri, K. & T. R. Co. v. Bagley, 60 Kan. 424, 56 Pac. 759.....	699	Motes v. Bates, 74 Ala. 378.....	723
v. Vance (Tex. Civ. App.) 41 S. W. 167.....	190	Motey v. Pickle Marble & Granite Co. 20 C. C. A. 368, 36 U. S. App. 882, 74 Fed. 155.....	716
Missouri P. R. Co. v. Baier, 37 Neb. 235, 35 N. W. 913.....	190	Mott v. Robins, 1 Hill, 21, 37 Am. Dec. 286.....	420
v. Foreman, 73 Tex. 311, 11 S. W. 326.....	892	Moundsville v. Fountain, 27 W. Va. 182.....	416
v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 111.....	610	Mount Hope Cemetery v. Boston, 158 Mass. 509, 33 N. E. 695.....	777
v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.....	836	Mount Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699.....	249
v. Sharitt, 43 Kan. 375, 8 L. R. A. 385, 23 Pac. 430.....	124	Mt. Washington Road Co., Re, 35 N. H. 134.....	284
Mitchell v. Charleston Light & P. Co. 45 S. C. 146, 31 L. R. A. 577, 22 S. E. 767.....	624	Mowry v. Rosendale, 74 N. Y. 360.....	324
v. Lasseter, 114 Ga. 275, 40 S. E. 287.....	237	Moyer v. Koontz, 103 Wis. 22, 79 N. W. 50.....	586
v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673.....	871	Muhlenburg County v. Morehead, 20 Ky. L. Rep. 376, 46 S. W. 484.....	252
Moakler v. Willamette Valley R. Co. 18 Or. 189, 6 L. R. A. 656, 22 Pac. 948.....	641	Mulhall v. Fallon, 176 Mass. 268, 54 L. R. A. 934, 57 N. E. 386.....	630
Mobile v. Allaire, 14 Ala. 400.....	415	Mulligan v. Knickerbocker Ice Co. 109 N. Y. 657, 16 N. E. 684.....	177
v. Rouse, 8 Ala. 515.....	416	Mundy v. Howe, 4 Bro. Ch. 226.....	739
Mobile & M. R. Co. v. Jurey, 111 U. S. 596, 28 L. ed. 531, 4 Sup. Ct. Rep. 566.....	113	Munger v. Shannon, 61 N. Y. 251.....	691
Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 608.....	555	Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.....	770
Moncure v. Dermott, 13 Pet. 345, 10 L. ed. 193.....	558	Murch v. Concord R. Corp. 29 N. H. 9, 61 Am. Dec. 631.....	619
Monday v. O'Neill, 44 Neb. 724, 63 N. W. 32.....	921	Murdock v. Ward, 67 N. Y. 387, 537, 538, 539	539
Monroe v. State (Miss.) 13 So. 884.....	868	Murphy v. Independent Order of S. & D. of J. of A. 77 Miss. 830, 50 L. R. A. 111, 27 So. 624.....	805
Monroe County Sav. Bank v. Rochester, 37 N. Y. 367.....	91	Murray v. Lehigh Valley R. Co. 66 Conn. 512, 32 L. R. A. 539, 34 Atl. 508.....	719
Monroe Mercantile Co. v. Arnold, 108 Ga. 449, 34 S. E. 176.....	756	v. Ramsey County, 31 Minn. 359, 51 L. R. A. 828, 84 N. W. 103.....	300
Montgomery & E. R. Co. v. Thompson, 77 Ala. 448, 54 Am. Rep. 72.....	395	v. South Carolina R. Co. 1 McMull. L. 385, 36 Am. Dec. 268.....	834
Montpeller v. East Montpeller, 29 Vt. 12, 67 Am. Dec. 748.....	251	Musbach v. Wisconsin Chair Co. 108 Wis. 57, 84 N. W. 36.....	466
Moodalay v. Morton, 1 Bro. Ch. 469.....	951	Musser v. Steward, 21 Ohio St. 353.....	928
Moody v. Wright, 46 Am. Dec. 712, note (13 Met. 17).....	871	Myers v. Clay Center Bd. of Edu. 51 Kan. 87, 32 Pac. 658.....	887
Moog v. Strang, 69 Ala. 98.....	213	v. Southwestern Nat. Bank, 193 Pa. 1, 44 Atl. 280.....	533
Mooney v. Buford & G. Mfg. Co. 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32.....	124	N.	
Moore v. Charlotte Electric Street R. Co. 128 N. C. 455, 39 S. E. 57.....	841	Nagel v. Missouri P. R. Co. 75 Mo. 653, 42 Am. Rep. 418.....	570
v. Illinois, 14 How. 13, 14 L. ed. 306.....	415	Nagle v. Allegheny Valley R. Co. 88 Pa. 35, 32 Am. Rep. 413.....	642
v. Littel, 41 N. Y. 66.....	543	Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490	41
v. State, 5 Sneed, 510.....	661	Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168.....	763
Mootry v. Danbury, 45 Conn. 550, 29 Am. Rep. 703.....	221	Natchez Bldg. & L. Asso. v. Shields, 71 Miss. 630, 15 So. 793.....	806
Moran v. Hollings, 125 Mass. 93.....	630	Nathans v. Hope, 77 N. Y. 420.....	177
More v. Bennett, 140 Ill. 69, 15 L. R. A. 361, 29 N. E. 888.....	550	National Bldg. & L. Asso. v. Bedford, 88 Fed. 7.....	795
Morford v. Unger, 8 Iowa, 82.....	243	v. Pinkston 79 Miss. 468.....	795
Morgan v. Boyer, 39 Ohio St. 324, 48 Am. Rep. 454.....	473	v. Pinkston (Miss.) 31 So. 834.....	795
v. Long, 29 Iowa, 434.....	638	v. Wilson, 78 Miss. 993, 30 So. 56.....	794
v. Louisiana, 93 U. S. 223, 23 L. ed. 861.....	88	National Loan & Invest. Co. v. Stone (Tex. Civ. App.) 46 S. W. 67.....	804
v. Seaward, 1 Webster Patent Cases, 167.....	952	National Mut. Bldg. & L. Asso. v. Burch, 124 Mich. 63, 82 N. W. 839.....	794
v. Skiddy, 62 N. Y. 319.....	119	National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621.....	429
Morningstar v. Cunningham, 110 Ind. 328, 59 Am. Rep. 211, 11 N. E. 593	269	Neal v. Carolina C. R. Co. 126 N. C. 634, 49 L. R. A. 684, 36 S. E. 117.....	831
Morrill v. Aden, 19 Vt. 505.....	503	v. New Orleans Loan, Bldg. & Sav. Asso. 100 Tenn. 607, 46 S. W. 755.....	804
v. Nightingale, 93 Cal. 452, 28 Pac. 1068.....	409	Nebraska Loan & Bldg. Asso. v. Perkins, 61 Neb. 254, 85 N. W. 67.....	924
v. State, 38 Wis. 428, 20 Am. Rep. 12.....	931	Nebraska Teleph. Co. v. State ex rel. Yeiser, 55 Neb. 627, 45 L. R. A. 113, 76 N. W. 171.....	252
Morrison v. Lincoln Sav. Bank & S. D. Co. 57 Neb. 225, 77 N. W. 655.....	889	Nelson v. Brown, 53 Iowa, 555, 5 N. W. 719.....	269
v. Stone, 103 Cal. 94, 37 Pac. 142.....	214	Nester v. Continental Brewing Co. 161 Pa. 473, 24 L. R. A. 247, 29 Atl. 102.....	555
Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 173, 8 Am. Rep. 159.....	554	Neumeyer v. Krakel, 23 Ky. L. Rep. 190, 62 S. W. 518.....	780
Morrow v. Sweeney, 10 Ind. App. 626, 38 N. E. 187.....	566		
Morse v. Buckworth, 2 Vern. 443.....	953		
57 L. R. A.			

- New England R. Co. v. Conroy, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85. 708
- New Hampshire Mut. F. Ins. Co. v. Noyes, 32 N. H. 345. 502
- New Haven v. Whitney, 36 Conn. 373. 221
- Newland v. Bally, 85 Mich. 151, 48 N. W. 544. 124
- New London v. Miller, 60 Conn. 112, 22 Atl. 499. 221
- New Omaha Thomson-Houston Electric Light Co. v. Baldwin (Neb.) 57 N. W. 27. 148
- New Orleans v. Clark, 95 U. S. 644, 24 L. ed. 521. 294
- v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142. 777
- New Orleans & O. R. Co. v. Mellen, 20 L. ed. 434. 872
- New Orleans, J. & G. N. R. Co. v. Harrison, 48 Miss. 112, 12 Am. Rep. 356. 267
- Newport v. Horton, 22 K. I. 196, 50 L. R. A. 330, 47 Atl. 312. 251
- Newport News & M. Valley Co. v. Howard, 14 Ky. L. Rep. 476. 783
- New South Bldg. & L. Asso. v. Reed, 96 Va. 345, 31 S. E. 514. 735
- Newton's Trusts, Re, L. R. 4 Eq. 171. 540
- New York v. Bailey, 2 Denio, 433. 135
- New York & O. Midland R. Co. v. Van Horn, 57 N. Y. 473. 542
- New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627. 618
- New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444. 127
- New York Land Improv. Co. v. Chapman, 118 N. Y. 288, 23 N. E. 187. 119
- New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837. 327
- Nichols v. Richmond, 162 Mass. 170, 38 N. E. 501. 286
- Nickell v. Handly, 10 Gratt. 336. 387
- Niles Waterworks v. Niles, 59 Mich. 311, 28 N. W. 525. 251
- Noble v. State, 22 Ohio St. 541. 857
- Noel v. Fisher, 3 Call (Va.) 216. 420
- Nolan v. New York, N. H. & H. R. Co. 70 Conn. 159, 43 L. R. A. 305, 39 Atl. 115. 495
- Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383. 887
- Norfolk & P. R. Co. v. Ormsby, 27 Gratt. 455. 192
- Norfolk & W. R. Co. v. Wyse, 82 Va. 250. 279
- Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12. 227
- Norris v. Jones, 93 Va. 176, 24 S. E. 911. 744
- Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133. 328
- Northern P. R. Co. v. Craft, 16 C. C. A. 175, 29 U. S. App. 687, 69 Fed. 124. 719
- v. Egeland, 163 U. S. 93, 98, 41 L. ed. 82, 86, 16 Sup. Ct. Rep. 977. 842
- v. Hogan, 11 C. C. A. 51, 27 U. S. App. 184, 63 Fed. 102. 709
- v. Mase, 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 114. 715
- North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. Rep. 266. 716
- Northville v. Westfall, 75 Mich. 603, 42 N. W. 1068. 808
- Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 208. 430
- Norwalk Gaslight Co. v. Norwalk, 68 Conn. 405, 28 Atl. 32. 221
- Norwalk Street R. Co.'s Appeal, 69 Conn. 576, 39 L. R. A. 794, 37 Atl. 1080, 38 Atl. 708. 483
- Norwich Gaslight Co. v. Norwich City Gas Co. 25 Conn. 19. 493
- Nugent v. Breunhard, 91 Hun, 12, 36 N. Y. Supp. 102. 190
- O.
- O'Brien v. Lloyd, 43 N. Y. 248. 177
- O'Brien v. Evans, 107 Mich. 623, 65 N. W. 571. 648
- 57 L. R. A.
- O'Brien v. Home Benefit Society, 117 N. Y. 310, 22 N. E. 954. 322, 323, 328
- Ocean S. S. Co. v. Hamilton, 112 Ga. 901, 38 S. E. 204. 750
- O'Farrell v. Metropolitan L. Ins. Co. 22 App. Div. 495, 48 N. Y. Supp. 189, 44 App. Div. 554, 60 N. Y. Supp. 945, 168 N. Y. 592, 60 N. E. 1117. 323, 324
- O'Flaherty v. Nassau Electric R. Co. 34 App. Div. 74, 54 N. Y. Supp. 96. 623
- Ogden v. Lucas, 48 Ill. 492. 311
- Oil City v. Oil City Trust Co. 151 Pa. 459, 25 Atl. 124. 349
- Old Colony R. Co. v. Miller, 125 Mass. 1, 28 Am. Rep. 194. 136
- Olive v. Van Patten, 7 Tex. Civ. App. 630, 25 S. W. 428. 554
- Oliver v. Washington Mills, 11 Allen, 268 490
- v. Worcester, 102 Mass. 489, 3 Am. Rep. 485. 251
- O'Malley v. St. Paul, M. & M. R. Co. 43 Minn. 289, 45 N. W. 440. 574
- Omro v. Kalme, 39 Wis. 468. 306
- Opinion of the Judges, 30 Conn. 593. 483
- Opinion of the Justices, 175 Mass. 599, 49 L. R. A. 564, 57 N. E. 675. 294
- O'Rear v. Kiger, 10 Leigh, 622. 420
- Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281. 770
- Ormsby v. Douglass, 37 N. Y. 477. 476
- Orr v. Bracken County, 81 Ky. 593. 251
- Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539. 409
- Ouray v. Corson, 14 Colo. App. 345, 59 Pac. 876. 898
- Outon v. Rodes, 3 A. K. Marsh. 433, 13 Am. Dec. 193. 420
- Owens v. State, 32 Neb. 174, 49 N. W. 226. 158
- v. State, 35 Tex. 361. 868
- Owenaboro & N. R. Co. v. Barclay, 102 Ky. 16, 43 S. W. 177. 450
- P.
- Pacific Exp. Co. v. Selbert, 142 U. S. 851, 35 L. ed. 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250. 349
- Paducah Lumber Co. v. Paducah Water Supply Co. 89 Ky. 340, 7 L. R. A. 77, 12 S. W. 554, 13 S. W. 249. 431
- Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272. 250
- v. Monks, 5 Gray. 495. 424
- v. Way, 3 Beav. 20. 389
- Paine v. Meller, 6 Ves. Jr. 353. 647
- Palmer v. Dunham, 125 N. Y. 68, 25 N. E. 1081. 538
- v. Dunham, 52 Hun, 468, 6 N. Y. Supp. 46, Aff'd in 121 N. Y. 68, 25 N. E. 1081. 539
- v. Horn, 84 N. Y. 516. 538
- v. McMahon, 133 U. S. 669, 33 L. ed. 776, 10 Sup. Ct. Rep. 324. 350
- v. Morrison, 104 N. Y. 132, 10 N. E. 144. 649
- Palmour v. Johnson, 84 Ga. 91, 10 S. E. 500. 756
- Parker v. Pettit, 43 N. J. L. 512. 699
- Parry v. Smith, L. R. 4 C. P. Div. 325. 431
- Parsons v. New York C. & H. R. R. Co. 113 N. Y. 355, 3 L. R. A. 683, 21 N. E. 145. 892
- v. Thompson, 1 H. Bl. 322. 419
- Pasley v. Freeman, 3 T. R. 51, 2 Smith Lead. Cas. 74. 119
- Passamanek v. Louisville R. Co. 98 Ky. 205, 32 S. W. 620. 566
- Patent Type Founding Co. v. Lloyd, 5 Hurlst. & N. 192. 952
- v. Walter, Johns. V. C. (Eng.) 727, 730. 951, 952
- Paterson v. Society for Establishing Useful Manufactures, 24 N. J. L. 885. 251
- Pawlet v. Rutland & W. R. Co. 28 Vt. 297. 717
- Payne v. Cave, 3 T. R. 149. 789
- v. Western & A. R. Co. 18 Lea, 507, 40 Am. Rep. 666. 557

- Payne's Will, Re, 4 T. B. Mon. 423..... 257
 Peabody v. Landon, 61 Vt. 318, 17 Atl. 781 874
 Peak v. Ellicott, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499..... 887
 Pearsall v. Eaton County, 74 Mich. 568, 4 L. R. A. 193, 42 N. W. 77..... 286
 Pearsoll v. Chapin, 44 Pa. 9..... 580
 Peck v. Ashley, 12 Met. 478..... 951
 Peck v. Powell, 62 Vt. 296, 19 Atl. 227..... 380
 Peek v. Derry, L. R. 37 Ch. Div. 541..... 114
 Peirce v. Gurney, L. R. 6 H. L. 377..... 118
 Peirce v. Van Dusen, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693..... 192
 Pekin v. McMahon, 154 Ill. 141, 27 L. E. A. 206, 39 N. E. 484, 566, 567, 570
 Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737..... 488
 Peninsular & O. Steam Nav. Co. v. Shand, 8 Moore, P. C. N. S. 272..... 804
 Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co. 35 W. Va. 666, 14 S. E. 237..... 418
 Pennock v. Coe, 23 How. 117, 16 L. ed. 436..... 871
 Pennoyer v. Neff, 95 U. S. 734, 24 L. ed. 572..... 610
 Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559..... 395
 v. Roy, 102 U. S. 451, 26 L. ed. 141 395
 v. Stanley, 10 Ind. App. 421, 87 N. E. 258, 38 N. E. 421..... 509
 Pennsylvania R. Co. v. American Oil Works, 126 Pa. 485, 17 Atl. 671..... 528
 v. Langdon, 92 Pa. 21, 37 Am. Rep. 651..... 705
 v. Lyons, 120 Pa. 113, 18 Atl. 759..... 190
 Penso v. McCormick, 125 Ind. 116, 9 L. R. A. 313, 25 N. E. 156..... 568
 People v. Arensburg, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277..... 180
 v. Brown, 67 Ill. 435..... 153
 v. Clipperly, 101 N. Y. 634, 4 N. E. 107, 37 Hun. 319..... 180
 v. Gardner, 62 Mich. 312, 29 N. W. 19..... 809
 v. Gasberle, 9 Johns. 71, 6 Am. Dec. 268..... 307
 v. Girard, 145 N. Y. 105, 39 N. E. 823..... 180
 v. Gordon, 81 Mich. 306, 45 N. W. 658..... 898
 v. Harding, 53 Mich. 485, 19 N. W. 155, 53 Mich. 48, 51 Am. Rep. 95, 18 N. W. 555..... 808
 v. Harriden, 1 Park. Crim. Rep. 344..... 857
 v. Hulise, 3 Hill. 309..... 868
 v. Jones, 48 Mich. 554, 12 N. W. 848..... 809
 v. Kilber, 106 N. Y. 321, 12 N. E. 795..... 180
 v. McGowan, 17 Wend. 386..... 858
 v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29..... 180
 v. Munroe, 100 Cal. 664, 24 L. R. A. 33, 35 Pac. 326..... 747
 v. O'Sullivan, 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880..... 868
 v. Rathbun, 21 Wend. 509..... 746
 v. Sheldon, 139 N. Y. 251, 23 L. R. A. 221, 34 N. E. 785..... 551
 v. State Auditors, 42 Mich. 422, 4 N. W. 274..... 185
 v. Taylor, 117 Mich. 585, 76 N. W. 158..... 808
 v. Toomey, 122 Ill. 308, 13 N. E. 521..... 472
 v. White, 68 Mich. 648, 37 N. W. 34..... 809
 People ex rel. Bolton v. Albertson, 55 N. Y. 50..... 250
 Blanding v. Burr, 13 Cal. 343..... 294
 Lee v. Chautauqua County, 43 N. Y. 10..... 663
 McCagg v. Chicago, 51 Ill. 17, 2 Am. Rep. 278..... 250
 McIlhenny v. Chicago Live Stock Exchange, 170 Ill. 556, 39 L. R. A. 378, 48 N. E. 1062..... 553
 Park Comrs. v. Detroit, 28 Mich. 228, 15 Am. Rep. 202, 250, 778, 779
 People ex rel. Watson v. Detroit Super Ct. Judge, 40 Mich. 729..... 297
 Wood v. Draper, 15 N. Y. 544..... 250, 662, 861
 Nash v. Faulkner, 107 N. Y. 477, 14 N. E. 415..... 638
 Ford v. Gillette, 159 N. Y. 125, 53 N. E. 755..... 250
 LeRoy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103..... 250, 778, 779
 Bradley v. Illinois State Reformatory, 148 Ill. loc. cit. 422, 23 L. R. A. 139, 36 N. E. 76..... 850, 852, 853
 Hackley v. Kelly, 24 N. Y. 74, 655, 658
 Barton v. Londoner, 13 Colo. 303, 6 L. R. A. 444, 22 Pac. 764..... 248
 Nichols v. McKee, 68 N. C. 429..... 232
 Drake v. Mahaney, 13 Mich. 481..... 249
 Van Valkenburg v. Myers, 25 Abb. N. C. 368, 11 N. Y. Supp. 217..... 661
 Clauson v. Newburg & S. Pl. Road Co. 86 N. Y. 1..... 663
 Deneen v. Simon, 176 Ill. 185, 44 L. R. A. 801, 52 N. E. 910..... 252, 302
 People's Bldg. Loan & Sav. Assn. v. Kilder, 9 Kan. App. 390, 58 Pac. 798..... 794
 Pepper v. Western U. Tele. Co. 37 Tenn. 554, 4 L. R. A. 660, 11 S. W. 733..... 909
 Perkins v. New York C. R. Co. 24 N. Y. 106, 82 Am. Dec. 281..... 705
 Perry v. Roberts, 23 Mo. 221..... 648
 Peters v. Bain, 133 U. S. 670, 33 L. ed. 696, 10 Sup. Ct. Rep. 354..... 880
 Peterson v. Chicago, M. & St. P. R. Co. 38 Minn. 511, 39 N. W. 486..... 908
 v. Oleson, 47 Wis. 122, 2 N. W. 94..... 462, 463, 464
 v. Wilmington, 130 N. C. 76, 56 L. R. A. 959, 40 S. E. 853..... 208, 209
 Pettis v. Johnson, 56 Ind. 189..... 509
 Phelps v. Smith, 116 Ind. 887, 17 N. E. 602, 19 N. E. 156..... 758
 Phenix Ins. Co. v. Hart, 112 Ga. 765, 38 S. E. 67..... 758
 v. Pickel, 119 Ind. 155, 21 N. E. 546..... 880
 Philadelphia & R. R. Co. v. Derby, 14 How. 468, 14 L. ed. 502..... 705
 v. Pennsylvania, 15 Wall. 284, 21 L. ed. 164..... 88
 Philadelphia, W. & B. R. Co. v. Hoeflich, 62 Md. 304, 50 Am. Rep. 223..... 278
 v. Rice, 62 Md. xv., 64 Md. 68, 21 Atl. 97..... 278
 v. State use of Bitzer, 58 Md. 372..... 719
 Phillips v. Burlington Library Co. 55 N. J. L. 307, 27 Atl. 478..... 309
 v. Chicago, M. & St. P. R. Co. 64 Wis. 475, 25 N. W. 544..... 719
 v. Missouri P. R. Co. 86 Mo. 543..... 856
 v. Phillips, 34 N. J. L. 208..... 311
 Phinizy v. Clark, 62 Ga. 626..... 756
 v. Eve, 108 Ga. 360, 33 S. E. 1007..... 235, 252
 Phipps v. Sedgwick, 95 U. S. 3, 24 L. ed. 591..... 757, 758, 759
 Phoenix Ins. Co. v. Com. 5 Bush, 68, 96 Am. Dec. 231..... 803
 v. Lawrence, 4 Met. (Ky.) 9, 81 Am. Dec. 521..... 331
 Pickel v. Phenix Ins. Co. 119 Ind. 291, 21 N. E. 898..... 830
 Pickett v. Wilmington & W. R. Co. 117 N. C. 616, 30 L. R. A. 257, 23 S. E. 264..... 830
 Pigot's Case, 11 Coke, 26b..... 423
 Pine Island Bd. of Edu. v. Jewell, 44 Minn. 427, 46 N. W. 914..... 638, 638, 639
 Pioneer Mfg. Co. v. Phenix Assur. Co. 110 N. C. 176, 14 S. E. 731..... 331
 Pioneer Sav. & L. Co. v. Cannon, 96 Tenn. 603, 33 L. R. A. 112, 36 S. W. 386..... 796, 797, 798
 Pittsburgh & C. R. Co. v. McClurg, 56 Pa. 294..... 641
 Pittsburgh v. Coyle, 165 Pa. 64, 30 Atl. 452..... 349, 350
 Pittsburgh, C. C. & St. L. R. Co. v. Mahoney, 148 Ind. 196, 40 L. E. A. 101, 46 N. E. 917, 47 N. E. 464..... 617, 618

Pittsburgh, C. C. & St. L. R. Co. v. Notfeger, 148 Ind. 101, 47 N. E. 832.	500	Rahilly v. Wilson, 8 Dill. 420, Fed. Cas. No. 11,582.	270
Planters' Bank v. Union Bank, 16 Wall. 483, 21 L. ed. 473.	425	Railway Officials & Employees' Accl. Assn. v. Wilson, 40 C. C. A. 411, 100 Fed. 368.	716
Platt v. Mickie, 137 N. Y. 106, 32 N. E. 1070.	537, 538	Raleigh & G. R. Co. v. Reid, 13 Wall. 268, 20 L. ed. 570.	88
Pleasants v. Raleigh & A. Air-Line R. Co. 95 N. C. 195.	824	Rand v. Mather, 11 Cush. 1, 59 Am. Dec. 131.	424
Pleuler v. State, 11 Neb. 566, 10 N. W. 486.	930	Rankin v. Barcroft, 114 Ill. 441, 3 N. E. 97.	649
Plumley v. Birge, 124 Mass. 57, 26 Am. Rep. 645.	574	Ransome v. Burgess (1866-67) L. R. 3 Eq. 773.	739
Polack v. San Francisco Orphan Asylum, 48 Cal. 490.	286	Rathbone v. New York C. & H. R. R. Co. 140 N. Y. 48, 35 N. E. 418.	322
Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 678.	544, 926	v. Wirth, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15.	234, 778
Pontifex v. Midland R. Co. L. R. 3 Q. B. Div. 23.	528, 529	Rawlins v. Rawlins, 18 Fla. 845.	585
Poole v. People, 24 Colo. 510, 52 Pac. 1025.	919	Redwood County v. Tower, 28 Minn. 45, 8 N. W. 907.	306, 639
Pope v. Porter, 102 N. Y. 866, 7 N. E. 804.	227	Reed v. Bond, 96 Mich. 134, 55 N. W. 619.	345
Porter v. Charleston & S. R. Co. 41 S. E. 108.	610	v. Equitable F. & M. Ins. Co. 17 E. 1, 785, 18 L. R. A. 496, 24 Atl. 833.	499, 500
Portland Natural Gas & Oil Co. v. State ex rel. Keen, 135 Ind. 54, 21 L. R. A. 639, 34 N. E. 818.	762, 757	Reem v. St. Paul City R. Co. 77 Minn. 503, 80 N. W. 638, 778.	642
Post v. Stiger, 29 N. J. Eq. 558.	757	Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72.	252
Postal Tele. Cable Co. v. Lathrop, 131 Ill. 575, 7 L. R. A. 474, 23 N. E. 583.	909	Reg. v. Drufft, 10 Cox C. C. 598.	553
Potter v. Detroit, G. H. & M. R. Co. 81 N. W. 80.	908	v. Wilson, 2 Car. & K. 527.	748
v. Ellice, 48 N. Y. 323.	648, 649	Reid v. Burns, 18 Ohio St. 49.	463
Potts v. Hart, 99 N. Y. 168, 1 N. E. 605.	874	Reimers v. Seacote Mfg. Co. 30 L. R. A. 364, 17 C. C. A. 228, 87 U. S. App. 428, 70 Fed. 578.	124
Powers v. Boston & M. R. Co. 153 Mass. 188, 26 N. E. 446.	705, 707	Rex v. Elliott, 2 East, P. C. 951, 1 Leach, C. L. 176.	747
v. Chicago, M. & St. P. R. Co. 57 Minn. 332, 59 N. W. 307.	642	v. Harris, 1 Ld. Raym. 482.	316
v. Harlow, 38 Mich. 514, 51 Am. Rep. 154, 19 N. W. 257, 57 Mich. 107, 23 N. W. 606.	566, 568	v. Martin, 7 Car. & P. 549.	746
Prats v. His Creditors, 2 Rob. (La.) 501.	370	Reynolds v. Boston & M. R. Co. 43 N. H. 580.	528
Pratt v. Adams, 7 Paige, 615.	805	Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439.	723
Prentiss v. Savage, 13 Mass. 20, 23.	805	Rice v. Nixon, 97 Ind. 97, 49 Am. Rep. 430.	269
Presbyterian Bd. of Church Erection Fund v. First Presby. Church, 19 Wash. 455, 53 Pac. 671.	399	v. Wellings, 5 Wend. 595.	913, 914
Prescott v. Norris, 32 N. H. 101.	502	v. Winters, 45 Neb. 517, 63 N. W. 830.	904, 914
Prewitt v. Trimble, 92 Ky. 176, 17 S. W. 356.	119	Richards v. Kountze, 4 Neb. 200.	914
Price v. Atchison Water Co. 58 Kan. 551, 50 Pac. 450.	568, 567	v. Oshkosh, 81 Wis. 226, 51 N. W. 256.	468
v. State, 36 Tex. Crim. Rep. 143, 35 S. W. 988.	867	Richardson v. Buhl, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 102.	409
Priest v. Nichols, 116 Mass. 401.	811	v. Olmstead, 74 Ill. 213.	270
Priestley v. Fowler, 3 Mees. & W. 1.	825, 834	Richmond & D. R. Co. v. Scott, 88 Va. 958, 16 L. R. A. 91, 14 S. E. 763.	641
Primghar State Bank v. Berick, 96 Iowa, 238, 64 N. W. 801.	243	Richter v. Richter, 111 Ind. 456, 12 N. E. 698.	464
Prince v. International & G. N. R. Co. 64 Tex. 146.	703	Ricketts v. Markdale, 31 Ont. Rep. 610.	566
Pritz, Ex parte, 9 Iowa, 80.	251	v. Western U. Tele. Co. 10 Tex. Civ. App. 226, 30 S. W. 1105.	614
Pryse v. People's Bldg. L. & Sav. Assn. 19 Ky. L. Rep. 752, 41 S. W. 574.	804	Riddle v. Brown, 20 Ala. 412, 56 Am. Dec. 202.	723
Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 188, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.	409	v. Roll, 24 Ohio St. 572.	579, 582
Purcell v. St. Paul City R. Co. 48 Minn. 134, 16 L. R. A. 203, 50 N. W. 1034.	561	Riedle v. Mulhausen, 20 Ill. App. 68.	346
Purdy v. Wallace Muller & Co. 81 Fed. 513.	124	Riggs v. Pursell, 68 N. Y. 193.	318
Purnell v. Raleigh & G. R. Co. 122 N. C. 832, 29 S. E. 958.	841	Righter v. Riley, 42 W. Va. 633, 26 S. E. 357.	870
Puth v. Zimbleman, 99 Iowa, 641, 68 N. W. 895.	908	Rigney v. Chicago, 102 Ill. 64.	241, 242
Pye v. Butterfield, 5 Best & S. 329, 836.	954	Ripka v. Pope, 5 La. Ann. 63, 52 Am. Dec. 579.	369
v. Faxon, 156 Mass. 471, 31 N. E. 640.	135	Rippon v. Norton, 2 Beav. 63.	389
Q.			
Queen v. Peck, 9 Ad. & El. 686.	550	River Rendering Co. v. Behr, 7 Mo. App. 345.	899
Quigly v. Muse, 15 La. Ann. 197.	369	Robbins v. Atkins, 168 Mass. 45, 46 N. E. 425.	135
Quincy Canal v. Newcomb, 7 Met. 276, 39 Am. Dec. 778.	287	Roberts v. Roberts, 2 Bust. 130.	538
Quincy Horse R. & Carrying Co. v. Gnuse, 137 Ill. 264, 27 N. E. 190.	190	Robertson v. Corsett, 89 Mich. 777.	638, 634
Quinn v. Crimmings, 171 Mass. 255, 42 L. R. A. 101, 50 N. E. 624, 184.	185	v. New York & E. R. Co. 22 Barb. 91.	703, 705
R.			
Rafolovits v. American Tobacco Co. 73 Hun, 87, 25 N. Y. Supp. 1036.	699	v. Old Colony E. Co. 156 Mass. 525, 31 N. E. 650.	618
75 L. R. A.		Robinson v. Chapline, 9 Iowa, 91.	649
		v. Craig, 16 Ala. 50.	955
		v. Dun, 24 Ont. App. Rep. 287.	476
		v. Ryan, 25 N. Y. 320.	154
		v. Superior Rapid Transit R. Co. 64 Wis. 345, 34 L. R. A. 205, 68 N. W. 961.	190
		v. Woodward, 20 Ky. L. Rep. 1142, 48 S. W. 1082.	888
		Roehford v. Hackman, 9 Hare, 475.	888
		Roehl v. Porteous, 47 La. Ann. 1582, 18 So. 645.	369
		Rogers v. Jones, 1 Wend. 237, 19 Am. Dec. 493.	415, 416

Rogers v. Rathbun, 1 Johns. Ch. 367....	914	Sargent v. Metcalf, 5 Gray, 306, 66 Am. Dec. 368....	291
v. Warren, 8 Johns. 119.....	473	Savannah v. Hussey, 21 Ga. 86, 68 Am. Dec. 452....	416
Bohrbach v. Germania F. Ins. Co. 62 N. Y. 47, 20 Am. Rep. 451.....	323, 326, 328	Saville v. Roberts, 1 Ld. Raym. 378.....	550
Roll v. Raguet, 4 Ohio, 400, 22 Am. Dec. 759.....	345	Sawyer v. Dooley, 21 Nev. 390, 32 Pac. 437....	252
Rollins v. State, 22 Tex. App. 548, 58 Am. Rep. 659, 3 S. W. 759.....	747	v. Metropolitan Water Board, 178 Mass. 267, 59 N. E. 658.....	204
Roman v. Strauss, 10 Md. 89.....	281	v. Rutland & B. R. Co. 27 Vt. 370.....	719
Rome Land Co. v. Eastman, 80 Ga. 683, 6 S. E. 586.....	579	Sayre v. Wisner, 8 Wend. 661.....	542
Roosevelt v. Hopkins, 33 N. Y. 81.....	318	Scales v. Chambers, 113 Ga. 920, 39 S. E. 396....	790
Roosevelt's Estate, Re, 143 N. Y. 120, 25 L. R. A. 695, 38 N. E. 281.....	543	Schaferman v. O'Brien, 28 Md. 565, 92 Am. Dec. 708....	736
Rose v. Douglass Twp. 52 Kan. 451, 34 Pac. 1046.....	306	Schelber v. Chicago, St. P. M. & O. R. Co. 61 Minn. 499, 63 N. W. 1034....	641
Rosenbaum v. Hayes, 10 N. D. 311, 86 N. W. 973.....	345	Schilsby v. Westenholz, L. R. 6 Q. B. 155, 159....	805
Ross v. Thompson, 78 Ind. 90.....	509	Schilling v. Abernethy, 112 Pa. 437, 56 Am. Rep. 320, 3 Atl. 792....	566
Rountree v. Brinson, 98 N. C. 107, 3 S. E. 747....	913	Schmidt v. Barker, 17 La. Ann. 261, 87 Am. Dec. 527....	409
Rourke v. White Moss Colliery Co. L. R. 2 C. P. Div. 205.....	717, 719	v. Kansas City Distilling Co. 90 Mo. 284, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417.....	568
Royal Ins. Co. v. Stinson, 103 U. S. 25, 26 L. ed. 473.....	694, 695	Schubert v. J. R. Clark Co. 49 Minn. 331, 15 L. R. A. 818, 51 N. W. 1103....	431
Rudisill v. Cross, 54 Ark. 519, 16 S. W. 575.....	723	Schulze v. Jalonic, 18 Tex. Civ. App. 296, 44 S. W. 580.....	907
Rumsey v. Nelson, 58 Vt. 590, 3 Atl. 484....	628	Schuyler v. Hoyle, 5 Johns. Ch. 206....	540
Rush v. Rush, 46 Iowa, 648, 26 Am. Rep. 179.....	587	Scott v. Davis, 141 Mo. 213, 42 S. W. 717....	648
Russel v. People's Sav. Bank, 39 Mich. 671, 33 Am. Rep. 444.....	916	v. Dixon, 29 L. J. Exch. N. S. 62....	118
Russell v. Cowley, 1 Webster Patent Cases, 457.....	951, 953	v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108....	763
v. Dickeschied, 24 W. Va. 61, 68.....	955	v. St. Louis, K. & N. W. R. Co. 112 Iowa, 54, 83 N. W. 818.....	572
v. H. C. Akeley Lumber Co. 45 Minn. 376, 48 N. W. 3.....	302	v. Scott, 3 B. Mon. 2.....	464
v. Nelson, 99 N. Y. 119, 1 N. E. 314.....	913	Scudder v. Anderson, 54 Mich. 122, 19 N. W. 775....	633
Ryan v. Towar (Mich.) 8 Det. L. N. 727, 87 N. W. 644.....	570, 571, 572	v. Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245.....	519
v. Williams, 29 Kan. 487.....	472	Seabolt v. Northumberland County, 187 Pa. 318, 41 Atl. 22.....	925
Rylands v. Fletcher, L. R. 3 H. L. 330, L. R. 1 Exch. 267.....	134, 135	Seaman, Re, 147 N. Y. 69, 41 N. E. 401....	542
B.			
Sabine v. Rounds, 50 Vt. 74.....	380	Secor v. Sturgis, 16 N. Y. 548.....	177
Sackville West v. Holmesdale, L. R. 4 H. L. 543.....	630	Seeley v. Bishop, 19 Conn. 128.....	286
Saffron v. Ericson, 3 Coldw. 1.....	661	Semere v. Semere, 10 La. Ann. 704....	359
St. George's Dist. Bd. of Edu. v. Parsons, 22 W. Va. 314, 580.....	426	Sessengut v. Posey, 67 Ind. 408, 33 Am. Rep. 98....	135
St. Joseph & G. I. R. Co. v. Hedge, 44 Neb. 448, 62 N. W. 887.....	900	Seton v. Slade, 7 Ves. Jr. 265.....	647
St. Joseph & W. R. Co. v. Wheeler, 35 Kan. 185, 10 Pac. 461.....	705	Sexton v. Graham, 53 Iowa, 181, 4 N. W. 1090....	269
St. Louis v. Bentz, 11 Mo. 61.....	415, 416	Shadewald v. Phillips, 72 Minn. 520, 75 N. W. 717....	765
v. Dorr, 145 Mo. 479, 42 L. R. A. 686, 41 S. W. 1094, 48 S. W. 976....	250	Shafer v. Lacock, 168 Pa. 497, 29 L. R. A. 254, 32 Atl. 44....	190
v. Shields, 52 Mo. 351.....	249	Shaffers v. General Steam Nav. Co. L. R. 10 Q. B. Div. 356, 357....	709
v. Sternberg, 69 Mo. 289.....	924	Shannon v. Georgia State Bldg. & L. Asso. 78 Miss. 955, 57 L. R. A. 800, 30 So. 61....	794-798
St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243....	610, 837	Shattock v. Knight, 25 W. Va. 590.....	872, 873
St. Louis, I. M. & S. R. Co. v. Needham, 25 L. R. A. 838, 11 C. C. A. 56, 27 U. S. App. 227, 63 Fed. 107....	709, 711	Shaw v. Boston & A. R. Co. 159 Mass. 597, 35 N. E. 92....	287
St. Louis, V. & T. H. R. Co. v. Bell, 81 Ill. 76, 25 Am. Rep. 269.....	570	v. Halsey, 48 Iowa, 468.....	154
v. Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. Rep. 953....	345	Shawmut Nat. Bank v. Boston, 118 Mass. 125....	134
Salem Turnp. & C. Bridge Corp. v. Essex County, 100 Mass. 282.....	252	Sheldon v. Connecticut Mut. L. Ins. Co. 25 Conn. 207, 65 Am. Dec. 565....	457
Salling v. McKinney, 1 Leigh, 42, 19 Am. Dec. 722.....	420, 421, 422	v. Pruessner, 52 Kan. 579, 22 L. R. A. 709, 35 Pac. 201.....	409
Salt Lake City v. Hollister, 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055....	117	Shepard v. Bank of State, 15 Mo. 144....	855
Salzer v. Milwaukee, 97 Wis. 471, 73 N. W. 20.....	468	v. Milwaukee Gaslight Co. 6 Wis. 539, 70 Am. Dec. 479....	762
San Antonio & A. P. R. Co. v. McDonald (Tex. Civ. App.) 31 S. W. 72....	710	Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773....	302
San Antonio Street R. Co. v. Mechler, 87 Tex. 623, 30 S. W. 899.....	188	Sheppard v. Turpin, 3 Gratt. 404.....	872, 873
Sanders v. St. Louis & N. O. Anchor Line, 97 Mo. 26, 3 L. R. A. 390, 10 S. W. 595....	855	Sheriden v. Foley, 58 N. J. L. 230, 33 Atl. 484....	628
v. State, 60 Ga. 126.....	132	Sherman v. Toronto, G. & B. R. Co. 34 U. C. Q. B. 451....	707
Sandy River Cannel Coal Co. v. Caudill, 22 Ky. L. Rep. 1175, 60 S. W. 180.....	880	Sherwood v. Central Michigan Sav. Bank, 103 Mich. 109, 61 N. W. 352....	888
57 L. R. A.		Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318....	547
		Shipman v. Bank of the State, 126 N. Y. 318, 12 L. R. A. 791, 27 N. E. 371....	533
		Shipper v. Pennsylvania R. Co. 47 Pa. 338	488
		Shirley v. Long, 6 Rand. (Va.) 735.....	737
		Shotwell v. Smith, 20 N. J. Eq. 81.....	955

Shrewsbury v. Smith , 12 Cush. 177.....	135	Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L. R. A. 512, 47 N. E. 88	561
Shurcliff v. Millard , 12 R. I. 272, 34 Am. Rep. 640.....	502, 503	Spargur v. Romine , 38 Neb. 736, 57 N. W. 523.....	152, 155
Shute v. Hinman , 34 Or. 578, 47 L. R. A. 285, 56 Pac. 412, 58 Pac. 882.....	888	Spencer v. Hamilton , 113 N. C. 50, 18 S. E. 167.....	960
Sic, Re , 73 Cal. 142, 14 Pac. 405.....	415	v. Merchant , 125 U. S. 355, 31 L. ed. 767, 8 Sup. Ct. Rep. 921.....	350
Sichel v. Carrillo , 42 Cal. 493.....	399	Spencer Dist. Bd. of Edu. v. Cain , 28 W. Va. 758.....	426
Siddall v. Jansen , 168 Ill. 43, 39 L. R. A. 112, 49 N. E. 191.....	568	Spokane County v. First Nat. Bank , 16 C. C. A. 81, 29 U. S. App. 707, 68 Fed. 978.....	888
Sievers v. San Francisco , 115 Cal. 648, 47 Pac. 687.....	154	Sprague v. Fletcher , 69 Vt. 69, 37 L. R. A. 840, 37 Atl. 239.....	489
Sigafus v. Porter , 28 C. C. A. 443, 51 U. S. App. 693, 84 Fed. 430.....	119	v. Holland Purchase Ins. Co. 69 N. Y. 128.....	327
Simmons v. Biggs , 99 N. C. 236, 5 S. E. 235.....	507	v. New York & N. E. R. Co. 68 Conn. 346, 37 L. R. A. 638, 36 Atl. 791.....	495
v. United States , 142 U. S. 148, 35 L. ed. 968, 12 Sup. Ct. Rep. 171.....	810	Springer v. Westcott , 166 N. Y. 117, 59 N. E. 693.....	529
Sioux City & P. R. Co. v. Smith , 22 Neb. 775, 36 N. W. 285.....	148	Springfield Consol. R. Co. v. Welsch , 155 Ill. 511, 40 N. E. 1034.....	190
Sir Walter Rawley's Case , Hutton, 21.....	316	Springs v. Schenck , 99 N. C. 551, 6 S. E. 405.....	841
Skelton v. State , 149 Ind. 641, 49 N. E. 901.....	850, 853	Spring Valley Waterworks v. Schottler , 62 Cal. 110.....	89
Skinner v. Newberry , 51 Ill. 203.....	649	Spurgin v. Traub , 65 Ill. 170.....	816
Slaters, Ex parte , 72 Mo. 102.....	851	Staats v. Bergen , 17 N. J. Eq. 554.....	577
Slaughter v. People , 2 Dougl. (Mich.) 834, note.....	415	Stanton v. Allen , 5 Denio, 434, 49 Am. Dec. 282.....	554
Slaughter-House Cases , 16 Wall. 36, 21 L. ed. 394.....	487, 488, 555	Stanwood v. Malden , 157 Mass. 17, 16 L. R. A. 591, 31 N. E. 702.....	286
Sloane v. Heatfield, Bunbury , 18.....	953	Starr v. Pease , 8 Conn. 548.....	493
Small v. Danville , 51 Me. 359.....	251	Staton v. Pittman , 11 Gratt. 102.....	737
Smiley v. MacDonald , 42 Neb. 5, 27 L. R. A. 540, 60 N. W. 355.....	898, 899	State v. Allen , 48 N. C. (3 Jones, L.) 257 840	857
Smith v. Baker (1891) A. C. 325.....	827, 828	v. Baker , 136 Mo. 74, 37 S. W. 810	857
v. Beaufort , 1 Hare, 507.....	951	v. Bangor , 41 Me. 533.....	850
v. Bergengren , 153 Mass. 236, 10 L. R. A. 768, 26 N. E. 690.....	294	v. Bank of Commerce , 54 Neb. 725, 75 N. W. 28.....	888, 887
v. Bolles , 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39.....	114	v. Barge , 82 Minn. 256, 53 L. R. A. 428, 84 N. W. 912, 1116.....	243
v. Boston , 7 Cush. 254.....	283, 284, 285, 287, 288	v. Baskett , 111 Mo. 272, 19 S. W. 1097.....	857
v. Combs , 49 N. J. Eq. 420, 24 Atl. 9.....	889	v. Bennett , 31 Iowa, 24.....	158
v. Duffy , 57 N. J. L. 679, 32 Atl. 371.....	114	v. Bobleter , 83 Minn. 479, 86 N. W. 401.....	636
v. Gage , 41 Barb. 60.....	649	v. Bockstruck , 136 Mo., loc. cit. 358, 38 S. W. 317.....	859, 860, 861
v. Gower , 2 Duv. 19.....	44	v. Brown , 69 Ind. 95, 35 Am. Rep. 210.....	132
v. Horton , 19 Tex. Civ. App. 28, 46 S. W. 401.....	765	v. Burries , 126 Mo. 565, 29 S. W. 842.....	857
v. Nashua Street R. Co. 69 N. H. 504, 44 Atl. 133.....	467	v. Central R. Co. 109 Ga. 722, 48 L. R. A. 351, 35 S. E. 37.....	557
v. Postal Teleg. Cable Co. 174 Mass. 578, 47 L. R. A. 323, 55 N. E. 380.....	292	v. Chapman , 58 Iowa, 254, 55 N. W. 489.....	867
v. St. Paul City R. Co. 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827	640	v. Conlon , 65 Conn. 478, 31 L. R. A. 55, 33 Atl. 519.....	483
v. Sands , 17 Neb. 498, 23 N. W. 356	757	v. Connelly , 57 Minn. 482, 59 N. W. 479.....	867
v. Strother , 68 Cal. 194, 8 Pac. 832	252	v. Cowan , 29 Mo. 330.....	415
v. Vertue , 30 L. J. C. P. N. S. 59.....	690	v. Crummev , 17 Minn. 72, Gil. 50.....	415
v. Whitney , 118 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570.....	417	v. Dickson , 124 N. C. 871, 32 S. E. 961.....	209
Smither v. Keys , 30 Miss. 179.....	344	v. Dourden , 13 N. C. (2 Dev. L.) 445.....	747
Snell v. State , 2 Humph. 347.....	746, 748	v. Duffey , 128 Mo. 537, 31 S. W. 98.....	857
Snyder v. Com 21 Ky. L. Rep. 1538, 55 S. W. 679.....	436	v. Eleventh Judicial Dist. Ct. 54 Minn. 34, 55 N. W. 816.....	74
v. Wheeling Electrical Co. 43 W. Va. 661, 39 L. R. A. 499, 28 S. E. 733.....	412, 622	v. Ellis , 74 Mo. 385, 41 Am. Rep. 321.....	857, 858, 864
Société Générale v. Metropolitan Bank , 27 L. T. N. S. 849.....	532	v. Foster , 115 Mo. 451, 22 S. W. 468.....	855, 856
Society for Savings v. Colte , 6 Wall. 607, 18 L. ed. 902.....	88, 89	v. Gates , 130 Mo., loc. cit. 357, 32 S. W. 971.....	864
Sodfeld v. Sommers , 9 Ben. 526, Fed. Cas. No. 13,157.....	145	v. Gidden , 55 Conn. 46, 8 Atl. 890.....	555
v. Guggenheim Smelting Co. 64 N. J. L. 605, 50 L. R. A. 417, 46 Atl. 711.....	496	v. Gordon , 60 Mo. 383.....	415
Soon Hing v. Crowley , 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730	610	v. Gould , 26 W. Va. 258.....	427, 428
Southern Bldg. & L. Asso. v. Atkinson , 20 Tex. Civ. App. 516, 50 S. W. 170.....	794, 795, 804	v. Grand Trunk R. Co. 58 Me. 176, 4 Am. Rep. 258.....	892
Southern Exp. Co. v. Duffey , 48 Ga. 358.....	346	v. Granneman , 132 Mo., loc. cit. 331, 33 S. W. 784.....	664
Southern F. Ins. Co. v. Knight , 111 Ga. 622, 52 L. R. A. 70, 36 S. E. 821.....	331	v. Green , 27 Neb. 64, 42 N. W. 913.....	924, 926
Southern L. Ins. Co. v. Booker , 9 Helsk. 606, 24 Am. Rep. 344.....	457	v. Gritzner , 134 Mo., loc. cit. 529, 36 S. W. 39.....	664
Southern Mut. Ins. Co. v. Hudson , 113 Ga. 438, 38 S. E. 964.....	759	v. Hall , 164 Mo. 528, 65 S. W. 248	856
South Platte Land Co. v. Crete , 11 Neb. 344, 7 N. W. 859.....	152	v. Hatch , 116 N. C. 1003, 21 S. E. 430.....	209
Spade v. Lynn & B. R. Co. 172 Mass. 488, 43 L. R. A. 832, 52 N. E. 747.....	292	v. Hawkins , 77 N. C. 494.....	209
57 L. R. A.			

State v. Hays, 80 W. Va. 107, 3 S. E. 177.....	426	State ex rel. Jameson v. Denny, 118 Ind. 382, 4 L. R. A. 79, 21 N. E. 252.....	778
v. Hazen, 89 Iowa, 648.....	158	Howe v. Des Moines, 103 Iowa, 76, 39 L. R. A. 285, 72 N. W. 639.....	250
v. Higgs, 126 N. C. 1014, 48 L. R. A. 446, 35 S. E. 473.....	900	West v. Des Moines, 98 Iowa, 521, 31 L. R. A. 186, 65 N. W. 818.....	249
v. Hill, 147 Mo. 63, 47 S. W. 798.....	664	Holmes v. Dillon, 90 Mo. 229, 2 S. W. 417.....	661
v. Hill, 126 N. C. 1189, 50 L. R. A. 473, 36 S. E. 828.....	900	Walsh v. Douman, 28 Wis. 541.....	664
v. Houx, 109 Mo. 654, 19 S. W. 35.....	857	Drake v. Doyle, 40 Wis. 175, 23 Am. Rep. 162.....	279
v. Howard, 88 N. C. 850.....	507	Dawson County v. Farmers & M. Irrig. Co. 59 Neb. 4, 80 N. W. 53.....	921
v. Hoyt, 71 Vt. 59, 42 Atl. 973.....	669	Phillips v. Fidelity & C. Co. 77 Iowa, 648, 42 N. W. 509.....	248
v. Hughes, 58 Iowa, 165, 11 N. W. 706.....	158, 160	Atty. Gen. v. First Judicial Dist. C. P. Ct. Judges, 21 Ohio St. 11.....	663
v. Independent School Dist. 29 Iowa, 264.....	248	Atty. Gen. v. First Judicial Dist. Judges, 21 Ohio St. 1.....	252
v. Julow, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781.....	663	Witter v. Forkner, 94 Iowa, 1, 28 L. R. A. 206, 62 N. W. 772.....	250
v. Keith, 94 N. C. 933.....	415	Monett v. Guilbert, 56 Ohio St. 575, 38 L. R. A. 519, 47 N. E. 551.....	302
v. Kendle, 52 Ohio St. 346, 39 N. E. 947.....	252	Harris v. Herrmann, 75 Mo. 340.....	663
v. Kimball, 50 Me. 409.....	748	Atwood v. Hunter, 38 Kan. 578, 17 Pac. 177.....	250
v. Knock, 142 Mo. 515, 44 S. W. 235.....	864	Godard v. Johnson, 61 Kan. 803, 49 L. R. A. 662, 60 Pac. 1068.....	252
v. Laverack, 34 N. J. L. 207.....	957	Cummings v. Kings County Super. Ct. 5 Wash. 518, 32 Pac. 457, 771.....	417
v. Layton, 160 Mo. 474, 61 S. W. 171.....	856	Terre Haute v. Kolsen, 130 Ind. 434, 14 L. R. A. 566, 29 N. E. 595.....	250
v. Lingle, 128 Mo. 528, 31 S. W. 20.....	864	Waterbury v. Martin, 46 Conn. 479.....	248
v. Mace, 5 Md. 387.....	928	Hawes v. Mason, 153 Mo. 23, 54 S. W. 524.....	249
v. Marks, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095.....	849	Keenan v. Milwaukee County, 25 Wis. 339.....	664
v. Meinhart, 73 Mo. 563.....	857	Atty. Gen. v. Moores, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175.....	778
v. Messenger, 27 Minn. 119, 6 N. W. 457.....	302	Peck v. Riordan, 24 Wis. 484.....	664
v. Midland State Bank, 52 Neb. 1, 71 N. W. 1011.....	886, 887	Douglas v. Ritt, 76 Minn. 531, 79 N. W. 535.....	299
v. Montgomery, 92 Me. 433, 43 Atl. 18.....	925	Duluth v. St. Louis County Dist. Ct. 61 Minn. 548, 64 N. W. 190.....	299
v. Nevin, 19 Nev. 162, 7 Pac. 650.....	306	Board of Transportation v. Sioux City, O. & W. R. Co. 46 Neb. 682, 31 L. R. A. 47, 65 N. W. 766.....	252
v. New York, N. H. & H. R. Co. 71 Conn. 43, 40 Atl. 925.....	252	Bender v. Spencer, 91 Mo. 206, 3 S. W. 410.....	661
v. Nowell, 58 N. H. 814.....	657	Ladenburger v. State Bank, 42 Neb. 896, 61 N. W. 252.....	887
v. Parkhurst, 9 N. J. L. 446, Appx. 313.....	813	Marr v. Stearns, 72 Minn. 200, 75 N. W. 210.....	300
v. Patrick, 107 Mo. 147, 17 S. W. 666.....	869	Anderson v. Sullivan, 72 Minn. 127, 75 N. W. 8.....	299
v. Robb, 90 Mo. 30, 2 S. W. 1.....	855	Luria v. Wagoner, 69 Minn. 206, 38 L. R. A. 677, 72 N. W. 67.....	926
v. Ruedy, 57 Ohio St. 224, 48 N. E. 944.....	185	Monahan v. Walton, 69 Mo., loc. cit. 559.....	659
v. Sloan, 55 Iowa, 219, 7 N. W. 516.....	158	St. Louis, K. & N. W. R. Co. v. Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43.....	851
v. Stevenson, 109 N. C. 730, 14 S. E. 385.....	925	Hahn v. Young, 29 Minn. 474, 9 N. W. 737.....	252
v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559.....	553	State use of Judge v. Gatzweiler, 49 Mo. 17, 8 Am. Rep. 119.....	638
v. Stratman, 100 Mo. 540, 13 S. W. 814.....	864	State, Kean, Prosecutrix, v. Elizabeth, 54 N. J. L. 462, 24 Atl. 495.....	286
v. Thomas, 53 Iowa, 214, 4 N. W. 908.....	858	State, Haines, Prosecutor, v. Mullica Twp. 51 N. J. L. 412, 17 Atl. 941.....	663
v. Walsh, 136 Mo. loc. cit. 407, 35 L. R. A. 231, 37 S. W. 1112.....	664	State Bank v. Abbott, 20 Wis. 570.....	154
v. Wheeler, 25 Conn. 297.....	493	State Bd. of Assessors v. Central R. Co. 48 N. J. L. 283, 4 Atl. 578.....	88
v. Wilson, 91 Mo. 410, 3 S. W. 870.....	869	State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146.....	88
v. Woolaver, 77 Mo. 103.....	857	State Railroad Tax Cases, 92 U. S. 603, 23 L. ed. 669.....	88
v. Wray, 109 Mo. 509, 19 S. W. 86.....	857	State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. ed. 164.....	88
v. Yopp, 97 N. C. 477, 2 S. E. 458.....	243	Staver & Walker v. Locke, 22 Or. 519, 1 L. R. A. 632, 30 Pac. 497.....	472
v. Zischfeld, 23 Nev. 304, 34 L. R. A. 784, 46 Pac. 802.....	919	Steele v. Price, 5 B. Mon. 58.....	211
State ex rel. Crow v. Astoria Ins. Co. 150 Mo. 113, 51 S. W. 413.....	856	Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 718.....	252
Milwaukee Street R. Co. v. Anderson, 90 Wis. 550, 63 N. W. 746.....	87, 90	Steffens v. Earl, 40 N. J. L. 137, 29 Am. Rep. 214.....	223
Wyatt v. Ashbrook, 154 Mo. 375, 48 L. R. A. 269, 55 S. W. 629.....	930	Steinhauser v. Spraul, 114 Mo. 551, 21 S. W. 515.....	146
Byers v. Bailey, 7 Iowa, 390.....	248		
Coogan v. Barbour, 53 Conn. 85, 55 Am. Rep. 65, 22 Atl. 686.....	252		
Sage v. Bennett, 19 Neb. 191, 26 N. W. 714.....	929		
Auburn School Dist. v. Boyd (Neb.) 89 N. W. 417.....	930		
Atty. Gen. v. Columbia Gaslight & Coke Co. 84 Ohio St. 572, 32 Am. Rep. 390.....	762		
Wood v. Consumers' Gas Trust Co. 157 Ind. 345, 55 L. R. A. 245, 61 N. E. 874.....	762		
Courthouse & City Hall Comrs. v. Cooley, 56 Minn. 540, 58 N. W. 150.....	300		
Atty. Gen. v. Covington, 29 Ohio St. 102.....	234		
Holt v. Denny, 118 Ind. 449, 4 L. R. A. 65, 21 N. E. 274.....	780		

Stendal v. Boyd, 67 Minn. 279, 69 N. W. 899.	570
Stensgaard v. Smith, 43 Minn. 11, 44 N. W. 669.	699
Stephenson v. Cady, 117 Mass. 6.	228
Stephoe v. Flood, 31 Gratt. 323.	748
Sterling v. Drake, 29 Ohio St. 457, 23 Am. Rep. 762.	317
Sterling Gas Co. v. Higby, 134 Ill. 557, 25 N. E. 680.	89
Stetler v. Chicago & N. W. R. Co. 46 Wis. 497, 1 N. W. 112.	716
Stevens v. Truman, 127 Cal. 155, 59 Pac. 397.	252
Stevens' Trusts, Re, L. R. 15 Eq. 110.	540
Stewart v. His Creditors, 12 La. Ann. 89.	370
v. Petree, 65 N. Y. 623, 14 Am. Rep. 352.	914
v. State, 15 Ohio St. 155.	809
v. Woodward, 50 Vt. 78, 28 Am. Rep. 488.	458
Stockwell v. Hunter, 11 Met. 448, 45 Am. Dec. 220.	184
Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L. R. A. 794, 51 N. E. 1.	145
v. Wilson, 19 Ky. L. Rep. 126, 39 S. W. 49.	252
Stoppelkamp v. Mangelot, 42 Cal. 316.	223
Storey v. Lennox, 1 Myl. & C. 525.	951
Stout v. Sioux City & P. R. Co. 2 Dill. 294, Fed. Cas. No. 18,504.	571
563, 564, 565, 568, 569, 570, 571.	571
Stubblefield v. McAuliff, 20 Wash. 442, 55 Pac. 637.	400
Sugar Trust Case, 22 Abb. N. C. 164, 2 L. R. A. 33, 3 N. Y. Supp. 401.	554
Sullivan v. Jefferson Ave. R. Co. 133 Mo. 1, 32 L. R. A. 167, 34 S. W. 566.	144
v. New York, N. H. & H. R. Co. 62 Conn. 209, 25 Atl. 711.	495
Supreme Lodge K. of P. v. Withers, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611.	800
Sutter v. Ling, 25 Pa. 466.	649
Swart v. Kimball, 43 Mich. 443, 5 N. W. 635.	863
Swartwout v. Payne, 19 Johns. 294, 10 Am. Dec. 228.	914
Sweeney v. Metropolitan L. Ins. Co. 19 R. I. 171, 38 L. R. A. 297, 36 Atl. 9.	499
Sweet v. Dutton, 109 Mass. 589, 12 Am. Rep. 744.	540
Swift, Re, 137 N. Y. 88, 18 L. R. A. 709, 32 N. E. 1096.	542
Swinney v. Edwards, 8 Wyo. 54, 55 Pac. 306.	345
T.	
Taggart ex rel. Jackson v. James, 73 Mich. 234, 41 N. W. 262.	248
Tanner v. Valentine, 75 Ill. 624.	547
Tappan v. Brown, 9 Wend. 175.	420
v. Merchant's Nat. Bank, 19 Wall. 490, 22 L. ed. 189.	489
Tarbox v. Gotzian, 20 Minn. 139, Gil. 122.	699
Tarry v. Ashton, L. R. 1 Q. B. Div. 314.	135
Taylor v. Com. 3 J. J. Marsh. 401.	252
v. Crampton, Bunbury, 95.	953
v. Jones, 3 N. D. 235, 55 N. W. 593.	346
v. Union Traction Co. (Pa.) 47 L. R. A. 289, note.	243
v. Western P. R. Co. 45 Cal. 323.	719
Templeton v. Tekamah, 32 Neb. 542, 49 N. W. 373.	924
Tennessee v. Whitworth, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 647.	489
Terre Haute v. Evansville & T. H. R. Co. 149 Ind. 174, 37 L. R. A. 189, 46 N. E. 77.	252
Territory v. Webb, 2 N. M. 147, 156.	867
Terry v. Com. 87 Va. 673, 13 S. E. 104.	746
Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707.	413
v. Reich (Tex. Civ. App.) 32 S. W. 817.	396
Texas P. R. Co. v. James, 82 Tex. 306, 15 L. R. A. 347, 18 S. W. 589.	278
Texas Standard Oil Co. v. Adoue, 83 Tex. 650, 15 L. R. A. 598, 19 S. W. 274.	551
Thatcher v. Adams County, 19 Neb. 485, 27 N. W. 729.	152
Thayer v. Burchard, 99 Mass. 508.	699
The New World v. King, 16 How. 474, 14 L. ed. 1021.	705
Theomke v. Fiedler, 91 Wis. 386, 64 N. W. 1030.	722
Third Nat. Bank v. Stillwater Gas Co. 36 Minn. 75, 30 N. W. 440.	889
Thomas v. Chicago & G. T. R. Co. 72 Mich. 355, 40 N. W. 463.	619
v. Chicago, M. & St. P. R. Co. 103 Iowa, 649, 39 L. R. A. 399, 72 N. W. 783.	572
v. Frost, 29 Mich. 336.	224
v. Quartermaine, L. R. 18 Q. B. Div. 685.	827
v. Western U. Tele. Co. 100 Mass. 156.	467
v. Winchester, 6 N. Y. 897, 57 Am. Dec. 455.	430
Thompson v. Edwards, 85 Md. 414.	804
v. Herring, 45 La. Ann. 991, 13 So. 398.	370
v. Lowell, L. & H. R. Co. 170 Mass. 577, 40 L. R. A. 345, 49 N. E. 913.	135
v. United States, 155 U. S. 271, 39 L. ed. 146, 15 Sup. Ct. Rep. 73.	811
v. Whittaker Iron Co. 41 W. Va. 580, 23 S. E. 795.	425
Thomson v. Tracy, 60 N. Y. 31.	417
Thornton, Ex parte, 12 Fed. 538.	925
Thorpe v. Macauley, 5 Madd. 218.	954
Thruston v. Clark, 107 Cal. 285, 40 Pac. 435.	306
Tierman v. Security Bldg. & L. Asso. No. 2, 152 Mo. 135, 53 S. W. 1072.	887
Tillis v. Treadwell, 117 Ala. 448, 22 So. 983.	722
Tobin v. McNab, 53 S. C. 76, 30 S. E. 829.	805
Todd v. Minneapolis & St. L. R. Co. 37 Minn. 358, 35 N. W. 5.	148
v. Old Colony & F. River R. Co. 3 Allen, 18, 80 Am. Dec. 49, 7 Allen, 207, 83 Am. Dec. 679.	641
Toledo, W. & W. R. Co. v. Beggs, 85 Ill. 84, 28 Am. Rep. 613.	708
v. Brooks, 81 Ill. 250.	703
Tompson v. Dashwood, L. R. 11 Q. B. Div. 43.	477
Topolanck v. State, 40 Tex. 160.	866
Touzalín v. Omaha, 25 Neb. 817, 41 N. W. 796.	154
Townsend v. Wathen, 9 East. 277.	569
Townslay v. Barber, 27 Vt. 417.	649
Tracey v. Sacket, 1 Ohio St. 54, 59 Am. Dec. 610.	463
Traders' Bank v. Alsop, 64 Iowa, 97, 19 N. W. 863.	345
Trenton Mut. Life & F. Ins. Co. v. Perrine (N. J. L.) 57 Am. Dec. 401, note.	430
Trenton Pass. R. Co. v. Bennett, 60 N. J. L. 219, 38 L. R. A. 637, 37 Atl. 730.	626
v. Cooper, 60 N. J. L. 219, 38 L. R. A. 637, 37 Atl. 730.	622
Trimble v. Reid, 97 Ky. 713, 31 S. W. 861.	119
Troxler v. Southern R. Co. 122 N. C. 903, 30 S. E. 117, 124 N. C. 189, 44 L. R. A. 313, 32 S. E. 550.	843
v. Southern R. Co. 124 N. C. 189, 44 L. R. A. 313, 32 S. E. 550.	843
824, 827, 843.	843
Trudo v. Anderson, 10 Mich. 357, 81 Am. Dec. 795.	458
Trumbull v. Erickson, 38 C. C. A. 536, 97 Fed. 891.	711
Trussell v. Scarlett, 18 Fed. 214.	476, 479
Tucker v. New York C. & H. R. Co. 124 N. Y. 308, 26 N. E. 916.	642
Tullett v. Armstrong, 4 Myl. & C. 377.	388
Tully v. Philadelphia, W. & B. R. Co. 2 Penn. (Del.) 537, 47 Atl. 1019.	566
Tuolumne County v. Stanislaus County, 6 Cal. 440.	252
Turner v. Boger, 126 N. C. 300, 49 L. R. A. 590, 35 S. E. 592.	198
v. Great Northern R. Co. 15 Wash. 213, 46 Pac. 243.	393
v. Norfolk & W. R. Co. 40 W. Va. 675, 22 S. E. 83.	188
57 L. R. A.	

Twist v. Winona & St. P. R. Co. 39 Minn. 184, 39 N. W. 402.....	570, 642	Vanderwelle v. Taylor, 65 N. Y. 341.....	546
Twohy v. McMurrin, 57 Minn. 242, 59 N. W. 301.....	474	Vandine, Petitioner 6 Pick. 187, 17 Am. Dec. 351.....	893, 900
Twohy Mercantile Co. v. Melbye, 78 Minn. 357, 81 N. W. 20.....	888	Vane v. Evanston, 150 Ill. 616, 37 N. E. 901.....	129
Tyler v. Coulthard, 95 Iowa, 705, 64 N. W. 851.....	765	Van Schoick v. Niagara F. Ins. Co. 68 N. Y. 434.....	322
v. Harring (Miss.) 19 Am. St. Rep. 263.....	577	Van Witsen v. Gutman, 79 Md. 408, 24 L. R. A. 403, 29 Atl. 608.....	280
v. Registration Ct. Judges, 176 Mass. 71, 51 L. R. A. 433, 55 N. E. 812.....	303	Vary v. Burlington. C. R. & M. R. Co. 42 Iowa, 246.....	719
v. Sanborn, 128 Ill. 136, 4 L. R. A. 218, 21 N. E. 193, 577, 578, 581,	582	Vason v. Augusta, 38 Ga. 542.....	751
U.		Vaughn v. Miller, 76 Ga. 712.....	758
Uggle v. West End Street R. Co. 160 Mass. 351, 35 N. E. 1126.....	623	v. Scade, 30 Mo. 604.....	854
Underwood v. Bailey, 56 N. H. 187, 59 N. H. 480.....	283	Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482.....	487
v. People, 32 Mich. 1, 20 Am. Rep. 633.....	859	Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 30 L. ed. 299, 7 Sup. Ct. Rep. 118.....	191
Union Associated Press v. Heath, 49 App. Div. 247, 63 N. Y. Supp. 96.....	481	Virginia, Ex parte, 100 U. S. 339, 346, 25 L. ed. 676, 679.....	762
Union Mut. L. Ins. Co. v. Wilkinson, 18 L. Wall. 222, 20 L. ed. 617.....	323	Virginia Midland R. Co. v. Roach, 83 Va. 375, 5 S. E. 175.....	705
Union P. R. Co. v. Dunden, 37 Kan. 1, 44 Pac. 501.....	570	Vogel v. Pekoc, 157 Ill. 339, 30 L. R. A. 375, 5 S. E. 175.....	699
v. Elliott, 54 Neb. 305, 74 N. W. 627	149	Volght v. Brown, 42 Hun. 394.....	519
v. Jarvi, 7 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65.....	711	Von Fragstein v. Windler, 2 Mo. App. 598	177
v. McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619	574	W.	
v. Nichols, 8 Kan. 506, 12 Am. Rep. 475.....	703	Wabash, St. L. & P. R. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705.....	719
Union Pass. R. Co. v. Baltimore, 71 Md. 238, 17 Atl. 935.....	955	Wagner v. Rock Island, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545.....	250
Union Stock-Yards Co. v. Goodwin, 57 Neb. 138, 77 N. W. 357.....	149	Wahoo v. Dickinson, 23 Neb. 426, 36 N. W. 813.....	252
United Co. v. Kynaston, 3 Bligh. 153.....	952	Walte v. Northeastern R. Co. El. Bl. & El. 719.....	571
United States v. Addystone Pipe & Steel Co. 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271.....	558	Walker v. Casgrain, 101 Mich. 608, 60 N. W. 292.....	647
v. Baltimore & O. R. Co. 17 Wall. 329, 21 L. ed. 600.....	776	v. Chicago, R. I. & P. R. Co. 71 Iowa, 658, 33 N. W. 224.....	144
v. Coolidge, 2 Gall. 364, Fed. Cas. No. 14,858.....	810	v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24.....	252
v. Cruikshank, 92 U. S. 542, 23 L. ed. 588.....	487	v. Fletcher, 3 Bligh. 172.....	952
v. Dashlell, 4 Wall. 182, 18 L. ed. 319.....	638	v. Morgan Park, 175 Ill. 570, 51 N. E. 638.....	129
v. Ferreira, 13 How. 40, 14 L. ed. 42.....	252	v. Walker, 63 N. H. 321, 56 Am. Rep. 841.....	955
v. Gilbert, 2 Sumn. 19, Fed. Cas. No. 15,204.....	810	Wallace v. Anderson, 16 Beav. 533.....	389
v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.....	554	v. Detroit City R. Co. 58 Mich. 231, 24 N. W. 870.....	467
v. King, 34 Fed. 314.....	190	Walsh v. Fitchburg R. Co. 145 N. Y. 301, 27 L. R. A. 724, 39 N. E. 1068	570
v. Morris, 1 Curt. C. C. 23, 37 Fed. Cas. No. 15,815.....	809	v. Mead, 8 Hun. 387.....	546
v. Mundel, 6 Call (Va.) 245, Fed. Cas. No. 15,834.....	850	Walter v. Whitlock, 9 Fla. 86, 76 Am. Dec. 607.....	803
v. New Orleans, 98 U. S. 392, 25 L. ed. 225.....	350	Walton v. Booth, 34 La. Ann. 913.....	430
v. New Orleans & O. R. Co. 12 Wall. 362, 20 L. ed. 434.....	871	v. Stafford, 162 N. Y. 558, 57 N. E. 92.....	175
v. Perez, 9 Wheat. 579, 6 L. ed. 165	810	Wantlan v. White, 19 Ind. 470.....	767
v. Prescott, 3 How. 578, 11 L. ed. 734.....	638	Ward v. Maryland, 12 Wall. 418, 20 L. ed. 448.....	489
v. Realty Co. 163 U. S. 427, 41 L. ed. 215, 16 Sup. Ct. Rep. 1120	294	v. Sugg, 113 N. C. 489, 24 L. R. A. 280, 18 S. E. 717.....	803
v. Shoemaker, 2 McLean, 114, Fed. Cas. No. 16,279.....	810	Warren v. Boston & M. R. Co. 163 Mass. 484, 40 N. E. 895.....	292
v. Todd, 13 How. 52, note, 17 L. ed. 47, note.....	252	v. Charlestown, 2 Gray, 84.....	249
v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.....	554	v. Williams, 52 Me. 349.....	736
United States Sav. & L. Co. v. Miller (Tenn. Ch. App.) 47 S. W. 17	798, 797	Washburn v. Gilman, 64 Me. 163, 18 Am. Rep. 246.....	311
v. Scott, 98 Ky. 695, 34 S. W. 235	804	Washington, A. & G. R. Co. v. Brown, 17 Wall. 445, 21 L. ed. 675.....	395
United States Teleg. Co. v. Wenger, 55 Pa. 262, 93 Am. Dec. 751.....	909	Washington Gaslight Co. v. Lansden, 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296.....	117
United States Trust Co. v. Sedgwick, 97 U. S. 804, 24 L. ed. 954.....	757	Washington Nat. Bldg. L. & Invest. Asso. v. Stanley, 38 Or. 340, 58 L. R. A. 63, 63 Pac. 489.....	795
V.		Wasmer v. Delaware, L. & W. R. Co. 80 N. Y. 212, 36 Am. Rep. 608.....	628
Valparaiso v. Bozarth, 153 Ind. 536, 47 L. R. A. 487, 55 N. E. 439.....	509	Watkins v. Watkins, 125 Ind. 163, 25 N. E. 175.....	587
57 L. R. A.		Watriss v. First Nat. Bank, 124 Mass. 571, 26 Am. Rep. 694.....	184
		Watson v. Chicago, 115 Ill. 78, 3 N. E. 430	129
		Way v. Chicago, R. I. & P. R. Co. 64 Iowa, 48, 52 Am. Rep. 431, 19 N. W. 828, 73 Iowa, 463, 35 N. W. 525.....	703
		Weaver v. Bell, 87 Ala. 385, 6 So. 298.....	723
		Webb v. Bishop, 101 N. C. 99, 7 S. E. 698.....	913
		v. Branner, 59 Kan. 190, 52 Pac. 429.....	577

Weber v. Kansas City Cable R. Co. 100 Mo. 194, 7 L. R. A. 819, 12 S. W. 804, 13 S. W. 587.....	139	Whitsett v. Union Depot & R. Co. 10 Colo. 243, 15 Pac. 339.....	286
Webster v. Webster, 54 Iowa, 155, 6 N. W. 170.....	585	v. Wamack, 159 Mo. 14, 59 S. W. 961.....	336
Weed v. Greenwich, 45 Conn. 170.....	221	Whittacre v. Fuller, 5 Minn. 508, Gll. 401	401
Weisand v. Malatesta, 6 Coldw. 367.....	676	Wiggett v. Fox, 11 Exch. 832.....	719
Welman v. Wilkinsburg & E. L. Pass. R. Co. 118 Pa. 202, 12 Atl. 288.....	350	Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257.....	930
Weinstein v. National Bank, 69 Tex. 38, 6 S. W. 171.....	538	Wight v. Rindskopf, 43 Wls. 344.....	409
Weisel v. Cobb, 122 N. C. 67, 80 S. E. 312	834	Wild v. Paterson, 47 N. J. L. 406, 1 Atl. 490.....	221
Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731.....	535	Wilke v. Wilde, 37 Neb. 891, 56 N. W. 724	409
Welborne v. State, 114 Ga. 793, 40 S. E. 837.....	283	Wilkins v. Elliott, 9 Wall. 740, 19 L. ed. 586, 108 U. S. 256, 27 L. ed. 718, 2 Sup. Ct. Rep. 641.....	124
Welch v. Wadsworth, 30 Conn. 155, 79 Am. Dec. 236.....	493	Wilkinson v. Leland, 2 Pet. 657, 7 L. ed. 627.....	493
Wellington v. Downer Kerosene Oil Co. 104 Mass. 64.....	431	v. Searcy, 76 Ala. 181.....	724
v. Janvria, 60 N. H. 174.....	388	Willcuts v. Northwestern Mut. L. Ins. Co. 81 Ind. 300.....	457
Wells v. Alexandre, 130 N. Y. 942, 15 L. K. A. 218, 29 N. E. 142.....	699	Williams v. Banks, 11 Md. 250.....	873
v. Cook, 16 Ohio St. 67, 88 Am. Dec. 436.....	118	v. Com. 20 Ky. L. Rep. 1850, 56 S. W. 240.....	435
v. Steam Nav. Co. 2 N. Y. 204.....	618	v. Fullerton, 20 Vt. 346.....	649
Wells, F. & Co.'s Express v. Fuller, 13 Tex. Civ. App. 610, 35 S. W. 824.....	778	v. Morris, 8 Mees. & W. 488.....	721
Welsh v. Crater, 32 N. J. Eq. 177.....	540	v. Mutual Gas Co. 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236.....	762
v. German Nat. Bank, 73 N. Y. 424, 29 Am. Rep. 175.....	538	v. State, 61 Ala. 33.....	746
West v. Camden, 135 U. S. 507, 34 L. ed. 234, 10 Sup. Ct. Rep. 838.....	409	Williamson v. Cambridge R. Co. 144 Mass. 148, 10 N. E. 790.....	191
v. Moore, 14 Vt. 447, 39 Am. Dec. 235.....	502	Williamsport v. Wenner, 172 Pa. 173, 38 Atl. 544.....	851
Westerveld v. Levia, 43 La. Ann. 63, 9 So. 52.....	566	Willis v. Scott, 33 La. Ann. 1026.....	370
Western Assur. Co. v. Phelps, 77 Miss. 625, 27 So. 745.....	804	Willis v. Noyes, 12 Pick. 324.....	724
Western College of Homeopathic Medicine v. Cleveland, 12 Ohio St. 375.....	251	Willmot v. Macabee, 4 Sim. 263.....	954
Western Maryland R. Co. v. Stocksedale, 83 Md. 253, 34 Atl. 880.....	277	Wilson v. Auburn, 27 Neb. 485, 43 N. W. 257.....	152
Western Sav. Fund Soc. v. Philadelphia, 31 Pa. 183, 72 Am. Dec. 730.....	778	v. Brett, 11 Mees. & W. 113.....	705
Western U. Teleg. Co. v. Adams, 75 Tex. 531, 6 L. R. A. 844, 12 S. W. 857.....	909	v. Brookshire, 126 Ind. 497, 9 L. R. A. 792, 25 N. E. 181.....	577
v. American U. Teleg. Co. 65 Ga. 160, 38 Am. Rep. 781.....	557	v. Conway F. Ins. Co. 4 R. I. 141.....	499
v. Cooper, 1 L. R. A. 728.....	909	v. People's Union of Pueblo & A. Valley R. Co. 19 Colo. 199, 22 L. R. A. 449, 34 Pac. 944.....	638
v. Indiana, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345.....	349	v. Southern P. Co. 13 Utah, 352, 44 Pac. 1042.....	190
v. Morris, 44 C. C. A. 350, 105 Fed. 49.....	711	v. State, 69 Ga. 224.....	235
v. Norman, 77 Fed. 27.....	39	v. Wichita County, 67 Tex. 647, 4 S. W. 87.....	306
v. Sheffield, 71 Tex. 570, 10 S. W. 752.....	909	v. Williamite Linen Co. 50 Conn. 433, 47 Am. Rep. 653.....	495
v. State, 62 Tex. 630.....	862	Winfield v. Linn, 60 Kan. 859, 57 Pac. 549.....	252
v. State use of Nelson, 82 Md. 293, 31 L. R. A. 572, 33 Atl. 763.....	622	Wing v. McDowell, Walk. Ch. (Mich.) 181	647
v. Vancleave, 22 Ky. L. Rep. 63, 54 S. W. 827.....	778	Wingfield v. Dingfield, L. R. 9 Ch. Div. 658.....	540
Westervelt v. Gregg, 12 N. Y. 202, 62 Am. Dec. 160.....	542	Winsor v. Queen, L. R. 1 Q. B. 289, 399, 6 Beat & S. 143, 7 Beat & S. 490.....	810
Westfield Gas & Mill Co. v. Mendenhall, 142 Ind. 538, 41 N. E. 1033.....	762	Winter v. Truax, 87 Mich. 324, 49 N. W. 604.....	580
Westholts v. Betaud, 18 La. Ann. 287.....	359	Winterbottom v. Wright, 10 Mees. & W. 109.....	431
What Cheer Coal Co. v. Johnson, 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. 810.....	708	Wischam v. Richards, 136 Pa. 109, 10 L. R. A. 97, 20 Atl. 532.....	267
Wheeler Re. 34 Kan. 96, 8 Pac. 276.....	929	Witham v. Cohen, 100 Ga. 670, 28 S. E. 505.....	564
v. Boone, 108 Iowa, 235, 44 L. R. A. 821, 73 N. W. 909.....	244	Withers v. Reynolds, 2 Barn. & Ad. 882	230
v. Wadleigh, 37 N. H. 55.....	955	Withy v. Mangies, 10 Clark & F. 215.....	540
v. Winn, 38 Vt. 122.....	346	Witters v. Sowles, 32 Fed. 764.....	815
Wheeler & Wilson Mfg. Co. v. Givan, 65 Mo. 89.....	453	Wood v. Buxton, 108 Mass. 102.....	382
Whirley v. Whiteman, 1 Head. 614.....	568	v. Goodfellow, 43 Cal. 185.....	399
Whitaker v. Whitaker, 6 Johns. 112.....	540	v. Oakley, 11 Paige, 400.....	542
Whitcomb v. Benton, 50 N. H. 25.....	284	Woodman v. Metropolitan R. Co. 149 Mass. 335, 4 L. R. A. 213, 21 N. E. 482.....	185
Whitcomb v. Whitcomb, 46 Iowa, 437.....	587	v. Northwood, 67 N. H. 307, 36 Atl. 255.....	284
White v. Montgomery, 58 Ga. 204.....	751	Woods v. Trinity Parish, 21 D. C. 540.....	568
White County v. Gwin, 136 Ind. 562, 22 L. R. A. 402, 36 N. E. 237.....	252	Woodstock Iron Co. v. Richmond & D. Extension Co. 129 U. S. 643, 32 L. ed. 819, 9 Sup. Ct. Rep. 402.....	409
Whited v. Germania F. Ins. Co. 76 N. Y. 415, 32 Am. Rep. 330.....	328	Woodward v. Semans, 125 Ind. 330, 25 N. E. 444.....	269
Whitehead v. St. Louis, I. M. & S. R. Co. 99 Mo. 263, 6 L. R. A. 409, 11 S. W. 751.....	705	Woolsey v. Ryan, 59 Kan. 601, 54 Pac. 664.....	699
Whitley v. Southern R. Co. 122 N. C. 987, 29 S. E. 783.....	841	Workingmen's Bkg. Co. v. Rautenberg, 103 Ill. 460, 42 Am. Rep. 26.....	815
Whitman v. Steiger, 46 Cal. 256.....	217	Worth v. Patton, 5 Ind. App. 272, 31 N. E. 1130.....	865
57 L. R. A.		Wright v. Carter, 27 N. J. L. 76.....	957
		v. Harris, 31 Iowa, 272.....	638

Penal Code.

- § 483, 484. Sale of adulterated drugs... 558
 § 662. Forestalling, engrossing, and re-grating... 557
 § 846. Special charges to grand jury... 557

Illinois.**Constitution.**

- Art. 2, § 13, cl. 1. Compensation for property taken... 241

Statutes.

- 1895, June 15, p. 153. Sentence of persons; parole... 852
 1897, June 14. Local improvement... 127

Revised Statutes.

- P. 413, §§ 446, 447. Penalties fixed by court... 853

Revised Statutes, 1845.

- P. 182, § 168. Term fixed by jury... 852

Hurd's Revised Statutes, 1899.

- Chap. 24, p. 362. Local improvement... 127

Starr & Curtis's Annotated Statutes.

- Vol. 1, p. 1409, § 629. Term fixed by jury... 852

Indiana.**Bill of Rights.**

- § 18. Rights of accused... 853
 § 19. Jury to determine law and facts... 853

Statutes.

- 1901, March 12, p. 569. Appeals... 508

Revised Statutes, 1881.

- § 2482-83, 2491, 2499, 2508-09. Descent 362

Iowa.**Constitution.**

- Art. 1, § 6. Equal privileges and immunities... 243
 Art. 1, § 25. Bill of rights... 250
 Art. 3, § 1. Division of powers... 251
 Art. 3, § 30. Local and special laws... 251
 Art. 8, § 1. Corporations... 251
 Art. 8, § 12. Corporations... 251

Statutes.

- 27th Gen. Assem. chap. 23. Appointment of waterworks trustees... 248

- 28th Gen. Assem. chap. 25. Appointment of waterworks trustees... 248

Code, 1873.

- § 482. Ordinances for safety of inhabitants... 244

Code, 1897.

- § 742-750. Waterworks... 248
 § 754. Regulation of conveyances... 244
 § 3172. Divorce; petition... 586
 § 3173. Hearing in divorce action... 586
 § 4008. Property exempt from execution... 764
 § 4316. Quo warranto proceedings... 248

Kansas.**Bill of Rights.**

- § 16. Imprisonment for debt... 929

Constitution.

- Art. 9, § 1. Change of county seat... 769

Statutes.

- 1893, chap. 100. Railroad to provide track scales... 766

General Statutes, 1897.

- Chap. 95, §§ 48, 72. Service by publication... 123

- Chap. 95, §§ 89-91. Demurrer to petition... 126

- Chap. 95, p. 122, § 108. Demurrer to reply... 125

57 L. R. A.

- Chap. 95, § 108. Truth of verified account... 700

- Chap. 95, §§ 227, 228. Garnishment proceedings... 123

General Statutes, 1899.

- Chap. 37, § 132. Sales by executors and administrators... 579

- Chap. 46, § 18. Guardians and wards... 579

General Statutes, 1901.

- § 2938. Executors and administrators... 582

Civil Code.

- § 458. Confirmation of sales... 579

Kentucky.**Constitution.**

- § 174. Manner of taxation... 60
 § 181. Taxation... 55
 § 241. Damages for death... 450

Statutes.

- 1894, March 22. Franchise tax... 55

- 1898, March 18, p. 96. Assessment and valuation of corporate franchises... 48

- 1900, March 15, p. 15. Government of cities of second class... 775

General Statutes, 1888.

- Chap. 56. Incorporated companies... 49

- Chap. 113, § 16. Wills... 256

- P. 66, § 7. Examination by state insurance commissioner... 116

Statutes.

- § 6. Damages for loss of life... 450
 § 8. Liability of city for acts of mob... 181

- § 10. Actions that survive... 450

- § 171. Uniform taxation... 40

- § 460. Liberal construction of statutes... 181

- § 1346. Penalty for failure to transmit message... 615

- Chap. 108, art. 3, subd. 1. Assessment of franchises... 57

- § 4019. Tax rate... 48

- § 4050. Personalty to be valued separately... 48

- § 4077. Franchise tax... 34, 55

- § 4079. Taxation of capital stock of corporation... 35

- § 4082. Franchise of persons... 46

- § 4085. Property assessed in name of corporation... 47

- § 4086. Corporations to pay taxes... 46

- § 4092. Statement of corporation... 35

- § 4227. Taxation of foreign life insurance companies... 40

- § 4228. Taxation of foreign building and loan associations... 40

- § 4231. Taxation of foreign insurance companies... 40

- § 4232. Taxation of foreign assessment companies... 40

Louisiana.**Statutes.**

- 1886, No. 156. Tender of charges on stored property... 274

Code of Practice.

- Art. 347. Propounding interrogatories... 358

- Art. 354. Answers to interrogatories... 358

Civil Code.

- Art. 2209. Compensation for storage... 272

- Art. 2400. Community property... 367

- Art. 2446. Sale between husband and wife... 368

- Art. 2956. Holding goods for storage... 272

Maryland.**Constitution.**

- Art. 3, § 44. Imprisonment for debt... 928

Statutes.

- 1854, chap. 188. Prohibiting insuring of lottery tickets... 928

Code of Public Local Laws.

- Art. 4, § 806. Closing street in Baltimore... 281

Massachusetts.*Constitution.*

Pt. 1, art. 12. Prosecutions.	655
------------------------------------	-----

Statutes.

1842, chap. 89. Actions which survive.	630
1871, chap. 91. Testimony of witness.	656
1879, chap. 297. Civil damage act.	680
1886, chap. 140. Damages for death.	630
1887, chap. 270, § 1, subsec. 2. Employers' liability act 630, 710	
1892, chap. 260, § 1. Employers' liability act.	632
1895, chap. 488, § 14. Metropolitan water supply act.	293
1898, chap. 565. Damages for death.	630

General Statutes.

Chap. 163, § 7. Punishment for bribery.	656
--	-----

Public Statutes.

Chap. 52, §§ 17, 18. Damages for defect of ways.	630
Chap. 112, § 212. Damages for death.	630
Chap. 165, § 1. Actions which survive.	630

Michigan.*Constitution.*

Art. 6, § 27. Trial by jury.	859
Art. 6, § 29. Trial after acquittal.	808

Minnesota.*Constitution.*

Art. 3. Division of powers.	302
Art. 4, §§ 33, 34. Special legislation.	299
Art. 11, § 4. Election of county officers.	303

Statutes.

1887, chap. 11, § 1. Railroad tax.	73
1895, chap. 329. Payment of money to clerk of court.	637
1901, chap. 237. Torrens system of registration.	299

Special Laws.

1881 (ex. sess.), chap. 200. Rights of Duluth Street Railway Company.	75
--	----

General Statutes, 1878.

Chap. 36, § 107. Bond and duties of school treasurer.	636
--	-----

General Statutes, 1894.

§ 301. Capacity to commit crime.	642
§ 344, subd. 2. State depositaries.	637
§ 356. Clerks of district courts.	637
§ 1524. Valuation of personal property.	68
§ 1530. Method of listing stock.	68
§ 1530, subd. 4. Market value.	76
§ 1530, subd. 5. Total indebtedness.	76
§ 1669. Taxation of railroad companies.	73
Chap. 34, title 1. Corporations.	75
§§ 2649, 2650. Condemnation proceedings.	637
§ 2701. Fellow servant act.	717
§ 4535. Selection of guardian.	642
§ 5809. Partitions of real estate.	637
§ 7149. Money paid to clerk of court.	637
§ 7156. Money paid to clerk of court.	637
§ 7158. Payment by surety.	637

Mississippi.*Statutes.*

1890, p. 10. Building and loan associations.	796, 804
---	----------

Code, 1892.

§ 849. Foreign corporations.	796, 804
§ 2348. Building and loan associations.	796, 804

Missouri.*Constitution, 1875.*

Art. 2, § 22. Right of accused.	849
Art. 2, § 23. Self incrimination.	655
Art. 2, § 28. Trial by jury.	849
Art. 2, § 30. Due process of law.	849
Art. 4, § 53. Local or special laws.	662
Art. 6. Judicial department.	840

57 L. R. A.

Art. 8, § 33. Judges' salaries.	660
Art. 8, § 34. Probate courts.	659
Art. 6, § 35. Uniform organization.	659
Art. 9, § 12. Fees of county officers.	660
Art. 14, § 8. Forbidding increase of fees.	660

Amendment, 1890.

§ 1. Cognizance of criminal cases.	849
§ 4. Transfer of cause for decision.	849

Territorial Laws.

P. 436, chap. 154. Common law.	854
-------------------------------------	-----

Revised Laws, 1825.

Vol. 1, p. 282, § 3. Punishment for murder.	860
--	-----

Statutes.

1877, April 9, p. 229. Probate courts.	659
1895, p. 149. Carnal knowledge of unmarried female.	848

1897, March 20, p. 82. Compensation to probate judge.	659
--	-----

Revised Statutes, 1855.

P. 168, § 3. Punishment for murder.	860
P. 170, § 23. Punishment for rape.	859
P. 493, §§ 4-7. Assessing punishment.	850

Revised Statutes, 1845.

P. 344, § 3. Punishment for murder.	860
Chap. 138, art. 7, §§ 4-7. Assessing punishment.	850

Revised Statutes, 1855.

Vol. 1, p. 559, § 3. Punishment for murder.	860
--	-----

Vol. 1, p. 639, § 10. Imprisonment in penitentiary.	859
--	-----

Vol. 2, pp. 1196-97, §§ 5-8. Assessing punishment.	850
---	-----

General Statutes, 1865.

P. 778, § 3. Punishment for murder.	860
P. 780, § 23. Punishment.	859
P. 826, § 16. Imprisonment in penitentiary.	859
P. 852, §§ 5-8. Assessing punishment.	850

Revised Statutes, 1879.

§ 1186. Fees of probate judge.	659
§ 1253. Punishment for rape.	859
§ 1160. Imprisonment in penitentiary.	859
§§ 1930-33, p. 323. Assessing punishment.	850
§§ 5595 et seq. Fees of county officers.	661

Revised Statutes, 1889.

§ 3407. Fees of probate judge.	659
§ 3480. Punishment for rape.	857
§ 3955. Imprisonment in penitentiary.	859
§§ 4230-33, p. 981. Assessing punishment.	850
§§ 4980 et seq. Fees of county officers.	661
§ 5897. Insurance contracts.	770

Revised Statutes, 1899.

Vol. 1, §§ 41, 60. Administration.	659
§ 1764. Compensation to probate judge.	680
§ 1837. Punishment for rape.	857
§ 1838. Carnal knowledge of unmarried female.	848

§ 1844. Seduction under promise of marriage.	864
---	-----

§ 1845. Guardian deſiling ward.	864
§ 2172. Incest.	864
§ 2206. Testifying against gaming.	655
§ 2375. Imprisonment in penitentiary.	859
§ 2524. Counts in indictment.	803
§ 2648. Jury to assess punishment.	862
§ 2649. Assessing punishment.	862
§ 2650. Punishment below legal limit.	862
§ 2651. Punishment exceeding legal limit.	862
§ 2652. Reduction of punishment.	862
§ 2718. Discharge of defendant on reversal.	869
§§ 3236 et seq. Fees of county officers.	661

Nebraska.*Bill of Rights.*

§ 20. Imprisonment for debt.	924
-----------------------------------	-----

Constitution.

Art. 8, § 5. Disposition of license money.	929
Art. 9, § 1. Occupation tax.	925

Compiled Statutes, 1901.

P. 148. Cities of the metropolitan class.	897
Chap. 10, § 21. Liability for funds.	806
Chap. 18, art. 1, §§ 89, 91. Counties and county officers.	806
Chap. 18, art. 1, § 94. Counties and county officers.	805
Chap. 18, art. 2, § 1. Counties and county officers.	805
Chap. 18, art. 3, §§ 21, 23. Counties and county officers.	806
Chap. 44, § 4. Computing interest.	807
Chap. 52, § 1. Defining "marriage."	920
Chap. 72, art. 1, § 3. Damages to passengers.	892
Chap. 77, art. 1, § 108. Entry of payment of tax.	151
Chap. 77, art. 1, § 144. Injunction to restrain collection of tax.	152
Chap. 77, art. 1, §§ 152-154. License tax on peddlers.	928
<i>Code of Civil Procedure.</i>	
§ 331. Incompetent witness.	158
§ 333. Confidential communication.	160

New Hampshire.*Statutes.*

1832, chap. 89, § 9. Chancery powers of court.	950
--	-----

General Laws.

Chap. 209, § 1. Equity powers of supreme court.	950
---	-----

Revised Statutes.

Chap. 171, § 6. Chancery powers of court.	950
---	-----

General Statutes.

Chap. 99, § 20. Witnessing against principal.	657
Chap. 190, § 1. Equity powers of supreme court.	950

Public Statutes.

Chap. 72, § 4. Damages for discontinuance of highway.	283
Chap. 205, § 1. Equity powers of supreme court.	950
Chap. 224, § 18. Removing disability of parties as witnesses.	953
Chap. 225. Depositions before trial.	955
Chap. 227, § 19. Authority to order view at trial.	955

New Jersey.*Constitution, 1844.*

Art. 3. Division of powers.	314
Art. 5, cl. 9, 10. Granting reprieves and pardons.	314
Art. 5, cl. 12. Vacancy in office of governor.	314
Art. 5, cl. 18. Impeachment of governor.	315
Art. 6, § 3. Impeachments.	315
Art. 8, cl. 2, 3. General provisions.	314

Statutes.

1820, Nov. 16. Power of governor to reprieve.	316
1846, April 16. Reprieve by governor.	316
1894, May 22 (P. L. p. 477). Use of streets for public lighting.	958
1899, March 24 (P. L. pp. 372, 476). Townships.	958

Revision.

P. 290, § 123. Reprieve by governor.	316
<i>Elmer's Digest.</i>	

P. 118. Execution of sentence.	316
--------------------------------	-----

New York.*Constitution.*

Art. 1, § 2. Trial by jury.	853
Art. 1, § 6. Self-incriminating testimony.	655

Statutes.

1853, chap. 539, § 14. Bribery act.	655
57 L. R. A.	

1857, chap. 446, § 52. Punishment for bribery.	655
1887, chap. 289. Public holidays.	175
1892, chap. 690, § 55. Insurance.	792
1893, chap. 338. Agricultural law.	179
1896, chap. 908, pp. 795, 868. Taxation.	542
1897, chap. 284. Taxable transfers.	543
1897, chap. 614, § 1. Public holidays.	175
1899, March 14, chap. 76. Taxable transfers.	542
1900, chap. 534. Agricultural law.	179

Revised Statutes.

Pt. 2, chap. 6, tit. 5, §§ 9, 10. Recovery of distributive share.	538
---	-----

General Laws.

Chap. 24, art. 10. Taxation.	542
------------------------------	-----

Code of Procedure.

§ 167. Causes of action.	178
--------------------------	-----

Code of Civil Procedure.

§ 381. Limitations.	400
§ 401. Limitations.	400
§ 484. Joinder of separate causes of action.	177

Penal Code.

§ 407. Sale of adulterated food.	180
----------------------------------	-----

North Carolina.*Private Laws.*

1897, chap. 56. Railroads; assumption of risk.	824
--	-----

North Dakota.*Constitution.*

§ 15. Imprisonment for debt.	928
------------------------------	-----

Revised Codes.

§ 5118. Constructive notice of fact.	347
--------------------------------------	-----

Civil Code.

Chap. 100, §§ 52, 55, 59. Negotiable instruments.	346
---	-----

Penal Code.

Chap. 37. Prohibiting gaming.	345
-------------------------------	-----

Ohio.*Constitution.*

Art. 1, § 15. Imprisonment for debt.	928
--------------------------------------	-----

Statutes.

1884, March 20. Adulteration of food and drugs.	184
1886, May 17. Regulating sale of dairy products.	184
1887, March 21. Regulating sale of dairy products.	184
1890, March 7. Regulating sale of dairy products.	183
1894, May 16. Regulating sale of dairy products.	184

Bates' Annotated Statutes.

§ 4200-7. Adulteration of food and drugs.	184
§§ 4200-13, 4200-14. Regulating sale of dairy products.	183
§ 4200-16, 30. Regulating sale of dairy products.	184

Oregon.*Civil Code Procedure.*

§ 16. Limitations.	400
--------------------	-----

Pennsylvania.*Constitution.*

Art. 1, § 6. Trial by jury.	853
Art. 9, §§ 1, 2. Taxation.	349

Statutes.

1887, May 24. Municipal license tax.	348
1889, May 13. Ratification of municipal action.	348
1889, May 23. Municipal license tax.	348
1899, May 5 (P. L. 103). Construction and inspection of buildings.	511

South Carolina.*Constitution.*

- Art. 1, § 5. Due process. 609
 Art. 10, § 4. Property exempt from taxation. 607

Statutes.

- 1791, Dec. 20. Incorporation of church. . . 607
 1897, Feb. 25 (22 Stat. at L. p. 443). Common carriers' liability. 610
 1898 (22 Stat. at L. p. 747). Law governing contracts. . . 805
 1901, Feb. 20 (23 Stat. at L. p. 748). "Mental anguish" act. 609

Tennessee.*Statutes.*

- 1891, March 26, chap. 2. Foreign building and loan associations. 795
 1891, March 26, chap. 122. Conditions of doing business. . . 795

Utah.*Revised Statutes, 1898.*

- § 1342. Defining "vice principal". 708
 § 1343. Defining "fellow servant". 708

Vermont.*Bill of Rights.*

- Art. 1. Equal rights of men. 669
 Art. 4. Remedy at law. 669
 Art. 7. Government for the people. 669

Statutes.

- Chap. 175. Loan and investment companies. 667
 § 4132. Under supervision of inspector. . . 667
 § 4133. To file bond with inspector. . . . 667
 § 4134. Penalty for violation of chapter 175. 667
 § 4135. Issuance of license. 667
 § 4136. Appointment of inspector as attorney. 667
 § 4138. To file semi-annual reports. . . . 667
 § 4139. Conduct of business. 667
 § 4140. Revocation of license. 667
 § 4142. Payment of expenses. 667
 § 4178. Joint-stock company. 374
 § 4181. License from insurance commissioner. 374
 § 4182. License to insurance company. . . 374
 § 4204. Amount of "re-insurance reserve". . 379
 § 4218. Discrimination between insurers. 380

Virginia.*Bill of Rights, 1870.*

- Art. 1, § 10. Self-criminating evidence. . 657

Statutes.

- 1787, Jan. 1. Conveyances. 888
 57 L. R. A.

- 1869-70, chap. 355. Witness of duel. . . . 657
 1889-90, p. 36. Verdict contrary to evidence as ground for new trial. 748

Hening's Statute.

- Vol. 12, chap. 62, p. 157. Estates liable to debts. 388

Revised Code, 1819.

- Vol. 1, chap. 99, § 30. Estates liable to debts. 388
 Vol. 1, chap. 145, p. 559. Sale of office. . . 420
Code, 1860.
 Chap. 12, §§ 5, 6. Sale of office. 422
Code, 1887.

- § 2428. Estates subject to debts. 388
 § 3577. Judgment liens. 382
 § 3601. Lien of fieri facias. 382
 § 3602. When lien ceases. 382
 § 3737. Forgery. 745

Washington.*Constitution.*

- Art. 7, § 1. Taxation. 85

Statutes.

- 1897, p. 136. Revenue law. 85
Ballinger's Annotated Codes & Statutes.

- Vol. 1, § 4535. Recording mortgage. . . . 401
 Vol. 2, § 4796. Limitations. 401
 Vol. 2, § 4798, subd. 2. Limitations. . . . 401
 Vol. 2, § 4808. Limitation statute. 399
 § 5202. Franchises subject to sale. 86

West Virginia.*Statutes.*

- 1895, chap. 4. Payment of purchase money not a fraud on creditors. 873

Code, 1891.

- Chap. 7, § 5. Sale of office. 417
 Chap. 7, § 15. Officers *de facto*. 423
 Chap. 32, §§ 1, 3. Licenses. 428
 Chap. 36, § 11. Offenses and their punishments. 414
 Chap. 47, § 28. Powers and duties of council. 415
 Chap. 47, § 29. Powers and duties of council. 415
 Chap. 47, § 39. Powers and duties of mayor. 414
 Chap. 74, § 2. Payment of purchase money not a fraud on creditors. 873
 Chap. 103, § 6. Damages for death. 189
 Chaps. 148, 153. Offenses against peace. 415, 427
 Chap. 152, § 3. Common-law offense. . . . 427
Code, 1899.
 Chap. 150, § 9. Sale of drugs. 431

LAWYERS' REPORTS

ANNOTATED.

KENTUCKY COURT OF APPEALS.

LOUISVILLE TOBACCO WAREHOUSE
COMPANY, Appt.,
v.
COMMONWEALTH of Kentucky.

(.....Ky.....)

1. An ordinary business corporation created under the general law, under which no special or exclusive privilege not allowed by law to natural persons can be obtained is not subject to the franchise tax imposed by Stat. § 4077, on railway, gas, ferry, bridge, express, and every other like company, and every other corporation having "any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service."
2. An exclusive privilege not enjoyed by natural persons, within the meaning

of Stat. § 4077, relating to a franchise tax, is not created by a proviso in articles of incorporation, that the private property of stockholders shall not be subject to corporate debts.

3. The exemption of corporations which do not have any special privileges and franchises from the operation of a statute imposing a franchise tax on corporations which do have such franchises or privileges does not make the statute unconstitutional for lack of uniformity.
4. A public service which will render a corporation subject to the franchise tax imposed by Stat. § 4077, is not performed by a corporation engaged in the business of a tobacco warehouseman.

(Guffy, Paynter, and White, JJ., dissent.)

(March 14, 1899.)

NOTE.—Taxation of corporate franchises in the United States.

- I. Proem.
 - a. Scope of note, 34.
 - b. Definitions of terms employed, 34.
- II. Power and jurisdiction of a state to tax, 34.
- III. Some general principles, 35.
- IV. What are franchises?
 - a. In general, 35.
 - b. Within tax laws, 36.
 - c. Nature as subjects of taxation, 37.
- V. Taxability of franchises.
 - a. When taxable, 38.
 - b. When not taxable.
 1. Generally, 39.
 2. By the state, 40.
 3. Locally, 40.
 - c. Exemptions, 42.
 - d. Property exempt as part of franchise, 45.
- VI. Franchise taxes.
 - a. What taxes are such, 48.
 - b. What taxes that seem to be such are not, 51.
 - c. Taxes on capital stock, 53.
 - d. Interference with Federal agencies and burdens on Federal grants.
 1. Franchises.
 - (a) Railroads, 55.
 - (b) Telegraphs, 56.
 - (c) Bridges, 56.
 - (d) Banks, 56.
 2. United States bonds, 57.
 3. Patents and copyrights, 57.
 - e. Taxes on passenger traffic, 59.
 - f. Taxes on receipts, income, etc.
 1. Corporations engaged in interstate or foreign commerce, 59.

VI. f.—continued.

2. Railroad, steamship, navigation, express, and telegraph companies, generally, 64.
3. Miscellaneous corporations, 68.
4. Local taxes on receipts of local corporations, 68.
- g. Taxes on insurance premiums.
 1. In general, 69.
 2. Domestic companies, 70.
 3. Foreign companies, 71.
- h. Taxes on bank deposits, 72.
- VII. Organizations subject to franchise taxes:
 - a. Generally, 73.
 - b. Domestic corporations.
 1. In general, 75.
 2. Engaged in interstate commerce, 79.
 3. Possessed of other franchises, 80.
 - c. Foreign corporations.
 1. In general, 80.
 2. Conditions upon the privilege of exercising corporate franchises, 83.
 3. What is doing business or employing capital within the state and the meaning of tax laws, 88.
 4. Engaged in interstate commerce, 92.
- VIII. Limitations on franchise taxation.
 - a. Constitutional, 93.
 - b. Double taxation, 97.
- IX. Valuation of franchises for the purposes of taxation, 98.
- X. Administration and relief, 104.
- XI. Conclusion, 108.

A PPEAL by defendant from a judgment of the Circuit Court for Franklin County convicting it of wilfully failing to file with the auditor a statement for purposes of taxation, as required by the Kentucky statutes. *Reversed.*

Defendant contended that it was a private corporation, and that it was not included within the meaning of the statute requiring the filing of such statements. The court of appeals on the first hearing of the case handed down an opinion December 13, 1898, in which it was held that defendant was within the terms of the statute. A petition for rehearing was subsequently granted, after which the opinion printed herewith was handed down.

Further facts appear in the opinion.

Messrs. D. W. Lindsey and Humphrey & Davis for appellant.

I. *Proem.*

a. *Scope of note.*

This note is a commentary, within bounds referred to in the body, upon five classes of taxes upon corporations in the United States, namely: (1) Organization taxes, or taxes exacted of domestic corporations for the grant of corporate powers; (2) franchise taxes, or taxes in the nature of royalties annexed to the grant and levied periodically, usually annually, upon domestic corporations; (3) license taxes,—not licenses under the police power,—or taxes charged by a state to foreign corporations for leave to enter and do business in its territory; (4) privilege taxes, or taxes imposed upon foreign corporations on account of exercising their corporate franchises within the limits of the taxing state; and (5) taxes upon franchisees, *eo nomine*.

Of these, the first four classes are essentially, howsoever designated in the statutes and decisions, capitation taxes upon artificial entities, and the fifth class, true franchise taxes. The classes, however, are seldom carefully discriminated.

Religious, benevolent, charitable, fraternal, educational, and scientific associations, whether incorporated or not, have not been included. Neither have building and loan associations, cemetery companies, and like organizations for profit. And national banks are so plainly separated from corporations generally that they, too, have been omitted.

b. *Definitions of terms employed.*

Throughout this note corporations are called domestic in the state of their origin and foreign in all other jurisdictions. Thus, a corporation organized under the laws of New York is called a domestic one in that state alone; if it does business in any other state of the Union it is there deemed a foreign corporation; and, conversely, in New York a corporation organized under the laws of any other state or of the United States is a foreign corporation.

II. *Power and jurisdiction of a state to tax.*

The right of taxation is an incident of sovereignty and coextensive with sovereignty. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Jones v. Page*, 44 Ala. 657.

And where there is no constitutional restriction upon it, the power to tax is absolute. *Citizens' Mut. Ins. Co. v. Lott*, 45 Ala. 185.

The right to tax being necessary to the very
57 L. R. A.

Mr. Robert B. Franklin for the Commonwealth.

De Belle, J., delivered the opinion of the court:

Most of the questions presented by the briefs in this case have been settled by the opinion recently delivered at this term in the case of *Louisville & J. Ferry Co. v. Com.* 104 Ky. 726, 47 S. W. 877. The sole question remaining for decision is whether a private trading corporation is required to make a report to the auditor, as a basis for the ascertainment of a tax upon its franchise.

The statute (Ky. Stat. § 4077) provides: "Every railway company or corporation and every incorporated bank, trust company, guaranty or security company, gas company, water company, ferry company,

existence of a state, the power, save when restrained by constitutions or the fundamental principles of natural justice, is supreme. *Colts v. Society for Savings*, 32 Conn. 173.

All subjects over which the sovereign power of the state extends are objects of taxation. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579.

Resting as it does in necessity, the right to tax is inherent in every government, and in the United States is vested in the state legislatures, which possess, when unrestrained by national or state constitutions, plenary power over the subject; hence, he who denies the constitutionality of a taxing statute assumes the burden of showing clearly wherein it violates the fundamental law. *Porter v. Rockford*, R. I. & St. L. R. Co. 78 Ill. 561.

The power of the state, unless constitutionally restricted, as to the mode, form, and extent of taxation, is without limit where the subject to which it applies is within her jurisdiction. *State Tax on Foreign-held Bonds*, 15 Wall. 300, *sub nom.* *Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. ed. 179; *State, Central R. Co. Prosecutor, v. State Bd. of Assessors*, 48 N. J. L. 1, 57 Am. Rep. 516, 2 Atl. 789.

But those subjects over which sovereignty does not extend are upon the plainest principles exempt from taxation. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579.

Except as constitutionally limited, the power of the legislature over the subject of taxation is unbounded. *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685.

When justice requires the exercise of the unlimited (except by the Constitution) power of the legislature to levy taxes, neither the statute of limitations, nor laches, will bar its exercise. *State v. Kings County*, 125 N. Y. 312, 26 N. E. 272, *per Ruger*, Ch. J.

The power to tax is a sovereign right belonging alone to the state, and which is and only can be exercised pursuant to laws enacted for the purpose. *State ex rel. Clinton County v. Hannibal & St. J. R. Co.* 87 Mo. 236.

The power of taxation possessed by the state is a very broad and comprehensive one, and may, with some exceptions imposed by the Federal Constitution and laws passed in pursuance thereof, be exercised upon all objects within its jurisdiction. Persons and property within the state, and trades, avocations, and other business carried on therein under the protection of its laws, whether by citizens or non-residents, may be taxed. But nonresidents, property having no legal situs there, and business not carried on there, are beyond the juris-

bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press despatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation, or association, also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised," etc. By the next section it is provided: "In order to determine the value of the franchises

mentioned in the next preceding section, the corporations, companies, and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by § 4092 of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the auditor of public accounts of this state a statement verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts," etc. By § 4079, it is provided that the auditor, secretary of state, and treasurer, constituting the board of valuation, shall, "from said statement [of the corporation], and from such other evidence as it may have, . . . fix the value of the capital stock of the corporation;

diction of a state, and are not the subjects of taxation there. *People v. Equitable Trust Co.* 96 N. Y. 387, 393, per Earl, J.

The taxing power passes to a territory under a general grant of legislative power in the organizing act without other limitations than those contained in the act itself, or in the United States Constitution. *Northern P. E. Co. v. Barnes*, 2 N. D. 810, 51 N. W. 886.

Whether a state statute is an exercise of the taxing power, or the police power, or any other state power, it must still be subordinate to the Federal Constitution, and, if plainly in conflict with any provision thereof, cannot stand. *Henderson v. New York*, 92 U. S. 259, *sub nom.* *Henderson v. Wickham*, 23 L. ed. 543.

But, as McLean, J., well says: In a system of government so complex as ours it may be difficult, perhaps impracticable, to prescribe the exact limit in particular cases to Federal and state powers. *License Cases*, 5 How. 504, 588, 12 L. ed. 256, 294.

If, says Marshall, Ch. J., we measure the power of taxation residing in a sovereignty which the people of a single state possess and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property unimpaired, which leaves to a state the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. *McCulloch v. Maryland*, 4 Wheat. 316, 429, 4 L. ed. 579, 607.

III. Some general principles.

Private corporations may be taxed by the state for the support of the state government. Their privileges and franchises, unless exempted in terms which amount to a contract, are legitimate subjects of taxation,—as much so, as any other property of the citizen which enjoys the protection and is within the control of the sovereign power of the state. The state power to tax such franchisees and privileges is independent of the Federal government. And the taxation of corporate franchisees and privileges rests in the discretion of the legislature of the taxing state, which may decide whether the sum to be levied be a fixed one, and, if not, in what manner and by what means the amount shall be determined. *Society for* 57 L. R. A.

Savings v. Colte, 6 Wall. 594, 18 L. ed. 897; *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904.

The right of corporate existence being by nature indivisible, a license tax therefor is of necessity entire regardless of the manner of employing the corporate capital or the location of the corporate property. *Lumberville Delaware Bridge Co. v. State Bd. of Assessors*, 55 N. J. L. 529, *sub nom.* *State, Lumberville Delaware Bridge Co., Prosecutors v. State Bd. of Assessors*, 25 L. R. A. 134, 26 Atl. 711.

A legislature having a legal right to impose a privilege tax has a discretion to fix its amount. *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 53 L. R. A. 921, 43 S. W. 115.

The extent of the tax is entirely within the discretion of the taxing power. *Southern Car & Foundry Co. v. State (Ala.)* 32 So. 233.

Beside a franchise tax upon a domestic corporation for a right of life and continued existence and the powers that go therewith, or upon a foreign corporation for the privilege of doing business in the state, an excise tax may also be laid upon corporations for the additional burden sustained by the state and the people by reason of property being held by artificial bodies, the persons composing such bodies being exempt, to a great extent, from liability for the debts thereof. *Southern Gum Co. v. Laylin (Ohio)* 64 N. E. 564.

IV. What are franchisees?

a. In general.

The lexicographers agree in defining franchises as privileges granted by the sovereign power in a state to individuals, and in them vesting. *Blackstone* (4 Com. 159) defines a franchise as a royal privilege or branch of the Crown's prerogative subsisting in the hands of a subject. *Bouvier (Law Dict. 545)* as a certain privilege conferred by grant from the government and vested in individuals, adding that corporations or bodies politic are the most usual franchisees known to our law.

Clifford, J., says that it was, *inter alia*, decided in the case of *Society for Savings v. Colte*, 6 Wall. 594, 18 L. ed. 897, that corporate franchisees are legal estates, and not mere naked powers, but powers coupled with an interest, which vest in the corporation by virtue of its charter. *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907.

Taney, Ch. J., speaks of franchisees as special privileges conferred by government upon individuals, and which do not belong to the

. . . and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this state, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid." From these provisions it is manifest that the so-called franchise tax is in reality a property tax upon all the intangible property of the corporations named in the act. And so, in *Henderson Bridge Co. v. Kentucky*, 166 U. S. 154, 41 L. ed. 954, 17 Sup. Ct. Rep. 534, the Supreme Court, in considering this statute, said: "The tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky, and was sustained as such by the court of appeals." And in *Adams Exp. Co. v. Kentucky*, 166 U. S. 180, 41 L. ed. 963, 17 Sup. Ct. Rep. 530, the Supreme

Court said: "We agree with the circuit court that it is evident that the word 'franchise' was not employed in a technical sense; and that the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies, possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under these provisions." And so this court in *Henderson Bridge Co. v. Com.* 99 Ky. 639, 29 L. R. A. 73, 31 S. W. 486, held that the term "intangible property" was used as synonymous with "franchises." The sections we have referred to show conclusively that their object was to obtain a valuation of property for the purpose of taxation. The corporate property sought by

citizens of a country generally of common right. And he declares it essential to the character of a franchise that it should be a grant from the sovereign authority, and that in this country no franchise can be held which is not derived from a law of the state. *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274.

This definition is accepted in his own state. *State v. Philadelphia, W. & B. R. Co.* 45 Md. 361, 24 Am. Rep. 511.

It is, says Strong, J., writing for the court, in *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 385, 25 L. ed. 185, 187, quite too narrow a definition of the word "franchise" to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the legislature.

The term "corporate franchise or business," as used in the New York tax laws, means the right or privilege given by the state to two or more persons of being a corporation,—that is, of doing business in a corporate capacity; and not the privilege or franchise which, when incorporated, the company may exercise. *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593.

A domestic corporation is given life and continued existence by the state, and this life and existence, with their accompanying powers, constitute the franchise. *Southern Gum Co. v. Laylin (Ohio)* 64 N. E. 564.

b. Within tax laws.

Section 1.

The word "franchise" in its appropriate and legal sense is confined to such rights and privileges as are conferred upon corporate bodies by legislative grant. *Fletsam v. Hay*, 122 Ill. 293, 13 N. E. 501.

The privilege or right to be a corporation is a franchise. *People v. O'Hair*, 128 Ill. 22, 21 N. E. 211; *Bushnell v. Consolidated Ice Mach. Co.* 37 Ill. App. 133.

And an excise tax upon the right of a corporation to be is entirely distinct from, and not in lieu of, a tax upon the franchise to do. *Chehalis Boom Co. v. Chehalis County*, 24 Wash. 135, 63 Pac. 1123.

The franchise of a railroad is the privilege of running it and taking fare and freight. *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568.

A consent of the public authorities to the carrying on of business by a gas company, and to the laying of its mains for conducting and supplying illuminating gas, is a grant of a franchise. *People ex rel. Woodhaven Gaslight* 57 L. R. A.

Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787; *San José Gas Co. v. January*, 57 Cal. 614.

The power to consolidate is the grant of a corporate franchise. *Adams v. Yazoo & M. Valley R. Co.* 77 Miss. 194, 24 So. 200, 317, 28 So. 956.

The right granted by public authority to a domestic corporation formed for the purpose of establishing and maintaining booms in navigable streams made public highways, and of collecting tolls for logs and timber boomed, is a privilege or franchise, and is taxable as such, although it is not exclusive, and is open and common to every person and corporation to acquire under the same authority. *Chehalis Boom Co. v. Chehalis County*, 24 Wash. 135, 63 Pac. 1123. *Following Commercial Electric Light & P. Co. v. Judson*, 21 Wash. 49, 56 Pac. 829; and *Edison Electric Illum. Co. v. Spokane County*, 22 Wash. 168, 60 Pac. 132.

A right granted by a municipality to an individual to erect on the water front a bulkhead or wharf, and to receive fees or dues from vessels mooring thereat, to receive and discharge cargoes, without title to the soil, constitutes an incorporated hereditament. *Boreel v. New York*, 2 Sandf. 552.

The right given in a general railroad act to railroads to cross public highways is a franchise or privilege taxable under a law defining special railroad franchises subject to taxation as all franchises, rights, or permission to construct, maintain, or operate a railway in, under, above, on, or through streets, highways, or public places. *New York, L. & W. R. Co. v. Roll*, 32 Misc. 321, 66 N. Y. Supp. 748.

There are two classes of corporate franchises, viz.: Those in their nature purely incorporeal and inalienable, dependent upon the continued existence of the donee, such as the right of corporate life, the exercise of banking, trading, and insurance powers, and similar privileges which die with the corporation, and those requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge, and similar companies, which, with the consent of the state, of course, are transferable to the corporate successors and assigns. *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692.

Section 2.

But a right common to every citizen, such as the right to acquire and own property,—in this case a billiard table,—cannot be converted into a taxable privilege by first prohibiting its exercise and then permitting its enjoyment by such only as will pay a tax prescribed by the

this statute to be subjected to taxation may be said to be the added value which the exercise by the corporation of any special or exclusive privilege or franchise not allowed by law to natural persons gives to the tangible property. For example, a railroad track, without the right of operating a railroad, would be of small value; with that right, it might be worth millions of dollars. So, in ascertaining what corporations come within the purview of this statute, and are by it required to make report to the auditor, we should keep in mind the ultimate purpose of the statute, which is the taxation of this intangible property, and consider whether all corporations can, in law, possess such intangible property; for surely we are not to stretch the language of the statute beyond its letter, and assume that the legislature intended to require a vain thing,

by imposing severe penalties for failure to report intangible property upon corporations which do not, and in law cannot, possess it. The appellant is an ordinary business corporation, created under the general law, under which no special or exclusive privilege not allowed by law to natural persons can be obtained. It conducts its business with the same rights and privileges, and subject to the same restrictions, as natural persons engaged in the same business.

It is insisted—and appears to have been so decided by the trial court—that the insertion in the articles of incorporation of a proviso that the private property of stockholders should not be subject to the corporate debts gave to the corporation an exclusive privilege not enjoyed by natural persons, and therefore brought this corpo-

statute. *Stevens v. State*, 2 Ark. 291, 35 Am. Dec. 72.

And a privilege given by a general county ordinance to any person, firm, association, or corporation engaged in supplying fresh water to any city, town, or county in the state to lay down and maintain pipes as conduits in or through any of the roads and highways of the county, without any right to take tolls or collect water rates therein, or to enjoy any special advantage or prerogative not open to all, confers a mere right of way, and not a franchise taxable as such. *Spring Valley Waterworks v. Barber*, 99 Cal. 36, 21 L. R. A. 416, 83 Pac. 735.

So, too, a private railroad built upon private lands belonging to a corporation not a railroad company and not used or operated under any franchise, but a mere means of transportation to the owner's grounds of the patrons thereof, is not within a general statute for the taxation of railroads and canals operated or owned under a franchise by individuals or unincorporated associations or companies. *State, Monmouth Park Assn., Prosecutor, v. State Bd. of Assessors*, 60 N. J. L. 372, 37 Atl. 729.

A permission given by private individual owners of the fee is not a franchise, and is not taxable within the New York tax law (§ 2, subd. 3, as amended by chap. 712, Laws 1899), defining as taxable property a franchise, right, authority, or permission to lay pipes or mains in or under a public street. *People ex rel. Retsof Min. Co. v. Priest*, 77 N. Y. Supp. 382. See, also, *The Park Tax Case*, 84 Md. 1, *sub nom.* *Baltimore v. Baltimore & E. M. Pass. R. Co.* 33 L. R. A. 503, 35 Atl. 17.

c. Nature as subjects of taxation.

There is almost a consensus of opinion that corporate franchises are property. *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. ed. 529; *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568; *New Orleans City & L. R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; *San José Gas Co. v. January*, 57 Cal. 614; *Spring Valley Waterworks v. Schottler*, 62 Cal. 69; *Stein v. Mobile*, 17 Ala. 234; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40, 41 Am. Dec. 141; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561; *Belleville Nail Co. v. People*, 98 Ill. 399; *Flitsam v. Hay*, 122 Ill. 293, 13 N. E. 501; *Baltimore v. Baltimore & O. R. Co.* 6 Gill, 288, 48 Am. Dec. 531; *Portland Bank v. Apthorp*, 12 Mass. 252; *Connecticut Mut. L. Ins. Co. v. Com.* 133 Mass. 161; *State Bd. of Assessors v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 578; 57 L. R. A.

Monroe County Sav. Bank v. Rochester, 37 N. Y. 367; *People ex rel. Panama R. Co. v. New York Tax Comr.* 104 N. Y. 240, 10 N. E. 437; *Coney Island, Ft. H. & B. R. Co. v. Kennedy*, 15 App. Div. 588, 44 N. Y. Supp. 825; *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692; *People ex rel. Woodhaven Gaslight Co. v. Deehan*, 153 N. Y. 528, 47 N. E. 787; *South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 2 L. R. A. 853, 11 S. W. 348; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 53 L. R. A. 921, 48 S. W. 115.

But it is not wholly unanimous. In *Exchange Bank v. Hines*, 3 Ohio St. 1, Bartley, Ch. J., denies that a corporate franchise is property, although admitting that high authority has declared otherwise. His argument in brief is that while a franchise may be a thing of value, value is not the distinguishing attribute of property. The right of suffrage, a public office and its emoluments, are valuable, but neither is property. The things which constitute property are such as the owner may exercise exclusive dominion over,—may use, enjoy, and dispose of without any control or diminution save by the law of the land. The right of alienation, of disposal by sale, gift, or abandonment, is an essential incident to property. (Citing 1 Wendell's Blackstone, 138; *Rutherford's Inst.* 20; *Puffendorf*, chap. 9, b. 7; and 2 Kent, Com. 317.) A corporate franchise lacks this essential element. And thereupon in the case *coram* he concludes that a bank franchise, not being property of any description, is not taxable within a constitutional provision for the taxation of property, effects, or dues of every description without any exception of banks or bankers.

(It may not be amiss to remark here that, whatever may be thought of the conclusion in the particular case, this reasoning, although contrary to the weight of authority, is at least logically consistent with the conclusions so generally adopted and reached in a less direct way, in the very numerous line of cases that have held statutes imposing taxes upon franchises to be outside of constitutional provisions requiring uniformity and equality of property taxation, *ad valorem*.)

While there is a general agreement that a corporate franchise is property for the purposes of taxation, there is much less concord as to the kind of property that it is.

In Massachusetts it is a "commodity," because the Constitution of that commonwealth empowers the legislature to impose reasonable duties and excises upon commodities within the state, and unless franchises are brought

ration within the purview of the statute. This construction would bring every business corporation in the commonwealth within the letter of the statute, and that is the contention made on behalf of appellee. But this privilege is a privilege, not of the corporation, but to the stockholder, and a privilege which every natural person may avail himself of by becoming a stockholder in a corporation. The corporation itself is a distinct entity, making its own contracts, and responsible for its debts, to the uttermost farthing of its assets. It is conceded that a trading corporation has a franchise; but its franchise is merely a franchise to exist, to have a name, to contract and be contracted with, to sue and be sued, in the same manner as a natural person, and this franchise is not a "special or exclusive privilege or franchise not allowed by law

to natural persons." Nor can the appellant corporation be said to have any intangible property subject to taxation under this statute. Its tangible property—its warehouse, drays, and personal property—is of no greater value in the hands of the corporation than it would bear if owned and managed by the natural persons who are its stockholders. This is also true of its choses in action, etc. The value of its capital stock must necessarily be the value of its tangible property, choses in action, etc. It had no intangible property subject to taxation under the statute, and, as matter of law, could have none.

This brings us to consider the question whether private business corporations were intended by the legislature to make the report provided for in the statute. The statute enumerates by name twenty different

within that provision they may escape taxation. *Portland Bank v. Apthorp*, 12 Mass. 232; *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904; *Connecticut Mut. L. Ins. Co. v. Com.* 133 Mass. 161.

In Connecticut a franchise is declared to be an incorporeal hereditament, known as a species of property as well as an estate in lands. It may be bought and sold, will descend to heirs, and may be devised. *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40, 41 Am. Dec. 141.

But in Illinois it does not pass to a general assignee for creditors, although this is said to be because the rights, privileges, powers, and immunities granted to a bank belong, not to it in its corporate capacity, but to the incorporators upon whom they were conferred. *Fietsam v. Hay*, 122 Ill. 293, 13 N. E. 501.

In New York it was early decided that the powers and privileges constituting the franchises of a corporation were something quite distinct from property which might be acquired by means of them, and that the legislature might classify and tax them as personal property. *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 367.

Later it was said that these were not for taxing purposes to be reckoned a part of the realty as they were incorporeal rights. *People ex rel. Panama R. Co. v. New York Tax Comrs.* 104 N. Y. 240, 10 N. E. 437.

Again: That to regard the franchise of a street railway company to use the street in operating its road as a mere license or privilege enjoyable during the life of the corporation and revocable at the will of the state is not only repugnant to justice and reason, but contrary to the uniform course of authority in the United States. *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692.

In Tennessee the right possessed by a street railway in the city streets is properly regarded as an easement and, for the purposes of taxation, real estate. *South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 2 L. R. A. 853, 11 S. W. 348.

In Illinois and Michigan a franchise is taxable as personal property. *Belleville Nail Co. v. People*, 98 Ill. 399; *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809.

Under a Texas general law (Laws 1874, p. 214) wharf privileges are taxable separately as a distinct property from the real and personal property with which the wharfers' 67 L. R. A.

business is carried on. *Galveston Co. v. Galveston Wharf Co.* 72 Tex. 557, 10 S. W. 587.

A franchise once granted cannot be destroyed, taken from the grantee, or impaired by the arbitrary act of the public authorities in refusing a necessary means to its exercise. *People ex rel. Woodhaven Gaslight Co. v. Deehan*, 153 N. Y. 528, 47 N. E. 787.

It cannot be taken away or abridged by statute without compensation. *Coney Island, Ft. H. & B. R. Co. v. Kennedy*, 15 App. Div. 588, 48 N. Y. Supp. 525.

Even for public use. *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568, *Reversing* 64 N. C. 226.

And, equally with rolling stock and real estate, is it within the protection of a charter exemption of the corporate property. *Ibid.*

But it is not liable to seizure and sale. *Stein v. Mobile*, 17 Ala. 234.

This is otherwise in New York as to certain franchises, such, for instance, as the right of a street railway company to use a street. That is a property right which survives the dissolution of the company and passes to its lawful grantees. The laws of that state have made such franchises taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the right of eminent domain, and invested them with the attributes of property generally. *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692.

V. Taxability of franchises.

a. When taxable.

In general corporate franchises are taxable. *Edison Electric Illum. Co. v. Spokane County*, 22 Wash. 168, 60 Pac. 132.

As much so as any other property. *New Orleans v. New Orleans City & L. R. Co.* 40 La. Ann. 587, 4 So. 512; *Affirmed* in 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406, *Followed* in *New Orleans v. Orleans R. Co.* 42 La. Ann. 4, 7 So. 59.

The franchise to be and continue, with the accompanying powers given by a state to a domestic corporation, being valuable, are taxable according to the amount of the value thus conferred and continued. *Southern Gum Co. v. Laylin (Ohio)* 64 N. E. 564.

Corporate franchises are taxable under a statute requiring all property in the state not exempt to be taxed. *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis. 322, 16 L. R. A. 581, 52 N. W. 439.

And notwithstanding no method of ascertaining their value or levying the tax thereon

varieties of corporation and company, followed by the words, "and every other like company, corporation, or association." It then provides, "also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service." It seems obvious that some varieties of corporations were intended to be excluded from the operation of this act; for why should this painstaking particularity of enumeration have been used, if the object was to include all incorporated companies, which would be the effect of the law if appellee's contention be sustained,—that the exemption of private property from corporate debts is a privilege to the corporation? The latter clause, "also every other corporation, company, or association having or exercis-

ing any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service," seems to us to have been added for the purpose of including such corporations as were not strictly *ejusdem generis* with the companies previously enumerated, but which might possess exclusive privileges, and, as a provision for the future, to impose the intangible property tax upon corporations to be hereafter created, which might have exclusive privileges or perform public services. The only authority relied on in support of the contention that this language includes all corporations is the case of *Western U. Teleg. Co. v. Norman*, 77 Fed. 27. But the case was in relation to a company specifically named in the statute under consideration. The question here presented did not arise in that case, and was,

has been prescribed by the legislature. State ex rel. Milwaukee Street R. Co. v. Anderson, 90 Wis. 550, 63 N. W. 746.

A statute providing that personal property, for the purposes of taxation, shall include various designated kinds, none of such intangible character as franchises and "all other personal property not here enumerated" and not exempt, is sufficient warrant for taxing the franchises of a street railway corporation. They do not escape under the rule of *ejusdem generis*. *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809.

The franchises of a water company to exist as a corporation and do business in a corporate capacity, to condemn by right of eminent domain lands and waters, to use and occupy city streets with mains and conduits and sell water to public and private consumers, are taxable as property in a state whose constitution provides that all property therein not exempt by United States laws shall be taxed ad valorem as provided by law, and that the term "property" includes, *inter alia*, franchises, notwithstanding the corporate possessor is organized under a general law the privileges of which are open to all citizens upon the same terms, and its chartered powers are subject to alteration, restriction, or repeal at the will of the legislature. *Spring Valley Waterworks v. Schottler*, 62 Cal. 69.

The temporary suspension, though continued for six months, of a savings bank because of insolvency, followed by a resumption of business after compromising with its depositors, does not relieve the bank from its liability to pay a state franchise tax accruing just before it resumed business and measured by the average amount of its deposits as scaled for the prior six months of suspension. The franchise remained alive and the bank was not prevented by injunction from using it. *State v. Waterville Sav. Bank*, 68 Me. 515.

And although a savings bank is to some extent temporarily enjoined from doing business, and afterwards the temporary injunction is made permanent so that business is never resumed, a franchise tax measured by the average deposits of the preceding half year, assessed before the permanent injunction issued, must still be paid. *Com. v. Barnstable Sav. Bank*, 126 Mass. 526. But see *infra*, V. b. 2.

The fact that a statute for the taxation of special franchises was amended in its progress through the legislature by striking out the word "across" from the definition of railroad franchises intended to be taxed thereunder, which originally read all franchises, rights, or 57 L. R. A.

permission to construct, maintain, or operate the same in, under, above, on, across or through streets, highways, or public places, does not show that the legislature intended highway crossings to be free from taxation under the act. *New York, L. & W. R. Co. v. Roll*, 32 Misc. 321, 66 N. Y. Supp. 748.

The power to tax persons and corporations using franchises is not confined to the legislature, but, regarding franchises as property, authority may lawfully be conferred upon a municipality to tax them to the extent that they have an existence within the municipal limits in the light of a constitutional mandate to the legislature to require that all taxable property within the limits of municipal corporations be taxed. *Huck v. Chicago & A. R. Co.* 86 Ill. 352.

And a municipality authorized by statute to raise money by taxes for its own use has a right to lay a franchise tax on a bank located and doing a banking business within its limits, chartered by act of Congress, provided it is not a national bank or one for collecting, safe keeping, and transmitting the national revenues. *Farmers' Bank v. Fox*, 4 Cranch, C. C. 330, Fed. Cas. No. 4,658.

b. When not taxable.

1. Generally.

It is not the rule everywhere, as in Michigan, Wisconsin, and some other states (*vide supra*, V. a), that a general law requiring all real and personal property to be taxed requires or authorizes the taxation of corporate franchises. It is exactly the reverse in New Jersey. *State, Passaic Water Co., Prosecutor, v. Paterson*, 56 N. J. L. 471, 29 Atl. 185. The statute *sub judice* in that case (Act 1866, § 2, Rev. 1150) provided that all real and personal estate, whether owned by individuals or corporations, should be liable to taxation. And the court held that it was designed to reach only those species of property usually owned by both corporations and individuals, and thus included, neither mere franchisees, on the one hand, which individuals cannot own, nor offices, upon the other, which corporations cannot hold.

In harmony with the New Jersey case just cited, are *Borel v. New York*, 2 Sandf. 552, and notably the late case of *State v. Austin & N. W. R. Co.* 94 Tex. 530, 62 S. W. 1050.

When the taxing statutes do not include corporate franchisees among the subjects of taxation a tax thereon is void. *Alexandria Canal, R. & Bridge Co. v. District of Columbia*, 5 Mackey, 378.

presumably, not argued; and the suggestion made by the learned judge who delivered that opinion was made in argument, in reaching a conclusion to reach which the *dictum* cited was not necessary. While we attach little importance to legislative debate or legislative action, in the amendment or alteration of bills while on their passage, as a means of ascertaining the proper construction of the act adopted, it is interesting to note that this bill, as originally introduced, provided for the taxation of "every corporation organized under the laws of this state, or any other state, for the purpose of profit or doing business," with the exception of certain enumerated foreign corporations. It further appears, from an examination of §§ 4227, 4228, 4231, and 4232, that § 4077 could not have been intended to apply to all corporations; for

these sections provide for the taxation of foreign life insurance companies, foreign building and loan associations, foreign insurance companies other than life, and foreign assessment companies. The conclusion reached is strengthened when we consider the contemporaneous practical construction of the statute by the officers required by law to enforce it. *Barbour v. Louisville*, 83 Ky. 102; *Harrison v. Com.* 83 Ky. 162.

It has been suggested that to hold that this statute does not apply to all corporations would render the act unconstitutional, as in violation of § 171, which requires the taxes to be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax. But we cannot concur in this contention. The revenue law of the state is not unconstitutional because it does not require natural persons, possess-

And when in such case the assessment is upon the property and franchise of a corporation as a unit, and it is impossible to determine how much of it is laid on the property and how much upon the franchise, the whole tax is void. *Ibid.*

In Tennessee corporate franchisees are property subject to taxation in connection with tangible property, but not separately. *South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 2 L. R. A. 853, 11 S. W. 348.

To warrant the imposition of a tax upon a corporate franchise there must be a statute evincing the legislative intent to make it subject to taxation. *Covington Gaslight Co. v. Covington*, 92 Ky. 312, 17 S. W. 808.

Under an act for the taxation of the privileges and franchisees granted by the legislature to savings banks as personal property to an amount not exceeding the gross sum of their surplus earned (after deducting the amount of such surplus invested in United States securities), a savings bank having uninvested cash on deposit is not taxable when its investments in United States bonds exceed its entire surplus. *People ex rel. Ithaca Sav. Bank v. Beers*, 67 How. Pr. 219.

2. By the state.

When by a decree of sequestration the charter of a savings bank expires, its franchise is dead, and a state franchise tax thereafter accruing, though measured by the average deposits during the prior six months, during part of which period such franchise existed, fails. *Jones v. Winthrop Sav. Bank*, 66 Me. 242.

(N. B.:—Observe the distinction between this case and those of *State v. Waterville Sav. Bank*, 68 Me. 515; and *Com. v. Barnstable Sav. Bank*, 126 Mass. 526, *supra*, V. a.)

Prior to the act of March, 1890, corporate franchisees were not subject to taxation for state purposes in Kentucky. *Bourbon Stock Yard Co. v. Clark*, 13 Ky. L. Rep. 926.

When the statutes do not authorize the taxation of corporate franchisees, as in Illinois they do not when these belong to a foreign corporation, it is not permissible to tax them as a penalty for failure to make return, as required by statute, of the capital stock and franchisees of a domestic corporation whose entire plant the foreign one has leased and operates. *Postal Tele. Cable Co. v. Barnard*, 87 Ill. App. 105.

While it is true that all corporate franchisees are the subject of legislative, and not of municipal, grant, the limitation contained in the 57 L. R. A.

New Jersey statute of 1900 (P. L. 1900, chap. 195, p. 502), imposing a franchise tax upon sundry corporations, forbidding its application to any corporation which before it was enacted did not, or which thereafter shall not, exercise any municipal franchise, does not render the whole act nugatory if given effect, since the purpose of the limitation, and its effect, are merely to exclude from the scope of the act such corporations as do not hold franchises dependent for their exercise and enjoyment upon municipal consent, and to tax all others that do so depend. *State ex rel. State Bd. of Assessors v. Plainfield Water Supply Co.* (N. J. L.) 52 Atl. 230.

The declaration in such act that it shall not be construed to apply to any corporation which has not theretofore, or may not thereafter, exercise any municipal franchise, is not void as a legislative attempt to control the judicial function of interpreting statutes, since it is only a limitation on the scope of the act itself, and equivalent to a mere declaration that the law shall not apply to such corporations. *Ibid.*

In Texas, under statutes requiring railroads to list for taxation all their real and personal property, giving the number of miles of roadbed in the counties where situated at the full and true value thereof; to deliver annually to each local assessor, wherever the road runs, a sworn classified statement or list of all real estate and the value thereof owned or possessed exclusive of right of way and depot grounds, the length of the road and its value per mile, including roadbed, right of way, superstructure, depots, and station grounds, and all shops and fixtures used in operating, and all personal property except rolling stock, describing it in the same manner as citizens are required to describe theirs; and providing that real property includes land and the structures thereon and all rights and privileges appertaining thereto with mines, minerals, quarries, and fossils in and under it; and in the absence of any statute taxing intangible railroad property or providing any method for valuing it, while individuals are required to list their franchisees,—an assessment on the intangible personal property of a railroad, consisting of its rights, privileges, immunities, contracts, goodwill, and franchise to do and carry on business as a common carrier of passengers and freight for hire, as a separate taxable entity, *en bloc*, is invalid. *State v. Austin & N. W. R. Co.* 94 Tex. 530, 62 S. W. 1050.

8. Locally.

One must keep in mind the fundamental dif-

ing no special franchise or privilege, to make report of special privileges and franchises for taxation; nor is it unconstitutional in failing to require a report for the purpose of a franchise or intangible property tax from those corporations which have no special or exclusive franchise, and cannot, as matter of law, possess intangible property. The law requires a report from all classes of corporations which can possess the intangible property sought to be taxed by this statute. The tax upon tangible property of all corporations is elsewhere provided for.

There remains but one question for consideration, and that is whether this company comes within the section, under the words "or performing any public service." It has been repeatedly held by this court, in passing upon exemptions from taxation, that the test to determine whether an insti-

tution performs a public service is whether there exists the right to levy a tax upon the public in aid of the institution. *Barbour v. Louisville Bd. of Trade*, 82 Ky. 653; *Lancaster v. Clayton*, 86 Ky. 373, 5 S. W. 864; *Clark v. Louisville Water Co.* 90 Ky. 515, 14 S. W. 502; *Com. v. Makibben*, 90 Ky. 384, 14 S. W. 372. Nor do we think, under the case of *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490, following the case of *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, that property becomes clothed with a public interest when used in a manner to make it of public consequence, and to affect the community at large. "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he

ference between state and local power to tax. The sovereign state may tax *ad libitum* except when restrained by written constitution. A subordinate governmental body is a creature of delegated powers and can tax only when expressly authorized so to do.

The case last cited (*State v. Austin & N. W. R. Co.* 94 Tex. 530, 62 S. W. 1050) was followed in *Dallas Consol. Electric Street R. Co. v. Dallas* (Tex. Civ. App.) 65 S. W. 201, where a city tax, assessed separately on a "franchise to operate and maintain lines of street railway" on certain streets, was held invalid because such franchise was part of the real estate.

A municipal ordinance forbidding any one to engage in the telephone business, or to place in or to occupy with poles and wires any of the streets without paying an annual fee of \$100 for a license to do so, is a revenue measure and not a regulation, because the sum charged is not limited to the expense of issuing the license and policing. And when the act of the legislature incorporating the city thus ordaining merely empowers it to license, regulate, or prohibit telegraph and telephone companies using the roads, streets, or alleys, and fix the compensation to be paid annually for the privilege or license, an ordinance for revenue is invalid. *Sunset Teleph. & Teleg. Co. v. Medford*, 115 Fed. 202.

While the above case held, in terms, the foregoing proposition, it also decided that a municipal franchise granted on terms to a telephone company to set up poles and string wires in the streets could not be burdened with new conditions such as the ordinance in question imposed, after the company had accepted and complied with the terms, and established its plant, a proposition less debatable. *Ibid.*

A street railroad company having a franchise to lay rails and run cars in a borough street is not subject to an assessment for paving such street on the ground that the value of its franchise has been enhanced thereby, when the only power the borough has to lay such an assessment is limited to imposing it upon lands and buildings benefited by the improvement; and this is so, notwithstanding such railroad was bound by its charter to keep such street in repair, and had neglected to do so, and repaving was necessary in consequence. *Farmers' Loan & T. Co. v. Ansonia*, 61 Conn. 76, 23 Atl. 705.

While corporate franchises are taxable property, they cannot be subjected to municipal taxation for local purposes without express statutory authority; and general acts providing that all real and personal estate, whether owned by individuals or corporations, shall be

liable for taxes; and that the real and personal estate of every corporation shall be taxed the same as that of individuals,—are insufficient for the purpose. *State, Passaic Water Co., Prosecutor, v. Paterson*, 56 N. J. L. 471, 29 Atl. 185.

Inasmuch as the acts of Congress empowering the municipal authorities of Washington, District of Columbia, to impose taxes, do not authorize the taxation of a corporate franchise, an assessment on the piers, trunk, bridge, and structures to low-water mark, Virginia shore, with the franchise, laid upon a corporation owning a combined bridge, aqueduct, and canal across the Potomac river under franchises from Virginia, Maryland, and Congress, is invalid. *Alexandria Canal, R. & Bridge Co. v. District of Columbia*, 5 Mackey, 376.

A provision in a city charter authorizing the assessing and collecting of taxes on real estate in the city, and on such personal estate, shares in associations, and moneys within the city, or belonging to the inhabitants thereof, as the city council may designate, and such as are, and from time to time may be, taxable by the laws of the state, does not authorize a municipal tax upon the franchise of a corporation when the state has not made it taxable. *Covington Gaslight Co. v. Covington*, 92 Ky. 312, 17 S. W. 808.

A right granted by a municipality to an individual to erect on the water front a wharf and collect fees from vessels mooring thereat to take on or discharge cargoes, without title to the soil, although a valuable franchise, is not subject to separate assessment for taxation and sale for nonpayment thereof, because it is not within the statutory definitions of either real or personal property as defined by the tax laws. *Boreel v. New York*, 2 Sandf. 552.

In the statutory scheme, long in vogue in New York, for the local taxation of corporations generally the subject of the tax has been the capital stock, surplus profits, or reserve funds, exceeding 10 per cent of the capital, less the assessed value of the real estate and shares of stock in other corporations subject to like taxation. It was long the uniform practice of the local assessors throughout the state to fix the valuation of the capital stock by the aggregate market value of the shares. But the court of appeals finally held this erroneous, and declared the capital stock taxable under this system to be the capital existing in money or property or both, and not to embrace surplus, franchise, dividend,—earning power, nor goodwill, and hence not ascertainable from the value of the share stock, which

has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control." This is very far from holding that a tobacco warehouseman performs a public service. It was there held that an analogy existed between the business of a warehouseman and that of a common carrier, in this: that as the owner of a stage cannot, without excuse, decline to take a passenger, so a warehouseman is bound to allow all tobacco buyers to bid for tobacco on reasonable terms at his warehouse, and cannot evade this responsibility by calling himself a commission merchant while continuing the business of warehouseman. And it is manifest that the business of warehouseman is as much affected by the public interest when conducted by a natural person as by a corporation, and it is not

contended that the law was intended to apply to tobacco warehouses operated by natural persons.

For the reasons indicated, a rehearing is granted, the former opinion is withdrawn, the judgment reversed, and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent with this opinion.

Guffy, Paynter, and White, JJ., dissent.

Hobson, J., concurring:

In this case the whole court is agreed that the indictment against appellant should be dismissed, but it has become necessary for the guidance of the executive officers of the state that the court should construe § 4077 of the Kentucky Statutes, re-

includes all these things and is a wholly different, not an identical or equivalent, thing. *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818.

That case worked a revolution in the assessment of corporations for local taxation. Since that decision it has been uniformly held that franchises in general are not subject to local taxation in New York. *People ex rel. Manhattan R. Co. v. Barker*, 146 N. Y. 304, 40 N. E. 998, Reversing 48 App. Div. 248, 63 N. Y. Supp. 167, and Affirming 28 Misc. 13, 59 N. Y. Supp. 926, 152 N. Y. 417, 46 N. E. 875; *People ex rel. Keystone Gas Co. v. Martin*, 48 Hun, 193; *People ex rel. Coney Island & B. R. Co. v. Neff*, 15 App. Div. 585, 44 N. Y. Supp. 810; *People ex rel. Brooklyn City R. Co. v. Neff*, 19 App. Div. 590, 46 N. Y. Supp. 385, Affirmed in 154 N. Y. 763, 49 N. E. 1102; *People ex rel. Edison Electric Illum. Co. v. Neff*, 19 App. Div. 599, 46 N. Y. Supp. 388; *People ex rel. Consolidated Gas Co. v. Feltner*, 38 Misc. 178, 77 N. Y. Supp. 745.

So that it could be, and was, said that the law of New York is well settled as to what is the subject of assessment and how the value is to be ascertained for the purpose of taxing a corporation by local taxing officers. 1. The capital stock of every corporation liable to taxation must be assessed at its actual value. 2. It is the value, not of the capital stock, 4. *e.*, the aggregate shares, but of the capital, *i. e.*, the money and property, that is to be ascertained. 3. To ascertain this requires the valuing of the whole property of the corporation, real or personal or both; and from the aggregate is to be deducted the assessed value of the real estate, and the balance, less debts and exemptions allowed by law, is the capital subject to assessment and taxation. 4. The corporate franchises are no part of the assessable capital. *People ex rel. Consolidated Teleg. & E. Subway Co. v. Barker*, 7 App. Div. 27, 39 N. Y. Supp. 776.

This particular branch of the subject is treated in full in the complementary note to the taxation of the capital stock of corporations in the United States.

c. Exemptions.

Whenever an exemption of a corporation from a franchise tax depends upon, or is laid claim to by virtue of, a provision in its charter or in the charter of its predecessor, or a statute of the state amounting to a contract, the case falls without the purview of this note, and is considered where the topic is comprehensively treated in a separate note on corporate taxation 57 L. R. A.

tion as affected by the contract clause in the United States Constitution. The exemptions here considered are of a different character.

A domestic corporation liable in its home state to pay a tax upon its franchise according to the amount of its capital stock found to be employed within such state, which, notwithstanding it designated in its certificate of incorporation a place within the state where its principal place of business was to be and its operations carried on, actually removes its office to another state, and thereafter makes no sales, manufactures nothing, occupies no premises, pays no rent, employs no help, and does no business in the state of its origin, is exempt from such tax, because it employs no capital stock within the state. *People Davis-Colby Ore Roaster Co. v. Campbell*, 66 Hun, 146, 21 N. Y. Supp. 7.

A domestic corporation owning vessels plying between different ports upon the great lakes, engaged wholly in interstate commerce and making no trips between any two ports in New York, which receive or ship at one port in that state about three fourths of all their cargoes, but make less than 2 per cent of their mileage therein, does not employ its capital stock in that state so as to be liable for the annual tax imposed upon corporations of one fourth of a mill upon each dollar of capital stock for each 1 per cent of dividends made or declared during the year, within § 182 of the New York tax law making the basis of computation the capital stock employed within the state. *People ex rel. Lackawanna Transp. Co. v. Knight*, 77 N. Y. Supp. 398.

So much of the capital stock of a domestic railroad corporation as is invested in freight cars permanently engaged without the state is not employed therein, and so not a basis for a franchise tax measured by the capital stock employed in the state. *People v. Campbell*, 88 Hun, 544, 34 N. Y. Supp. 801.

And coal and supplies owned by a domestic railroad corporation, which remain without the state, are likewise no part of the capital stock employed by it within the state as a basis for computing such franchise tax. *People ex rel. New York C. & H. R. R. Co. v. Knight*, 77 N. Y. Supp. 401.

Neither are dividends which it expects to receive from stocks which it owns in other corporations. *Ibid.*

So, too, of capital stock invested by a domestic corporation in idle swamp lands not in any way used by it. *People ex rel. Niagara River Hydraulic Co. v. Roberts*, 30 App. Div. 180, 51 N. Y. Supp. 771.

But stocks held in other corporations by a

lating to tax on franchises. The proper construction of this statute presents a question of great difficulty, on which the members of the court have been unable to agree; and it must be determined, in order that persons interested may know how to conduct their business. The statute reads as follows: "Every railway company or corporation and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press despatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation, or association, also every other corporation, company,

or association, having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town, and taxing district, where its franchise may be exercised." It is insisted that this statute applies to all corporations. It is said that the right of corporate existence is a franchise, and that the exemption of the stockholders from liability for corporate debts is also a franchise, and so that all corporations are included in the section. There would be more force in this argument if the statute read, "any franchise," but it reads, "any special or exclusive privilege or franchise not allowed by law to natural per-

sonal railroad must be regarded as a part of its capital stock employed within the state, and a factor in computing such tax. *People ex rel. New York C. & H. E. R. Co. v. Knight*, 77 N. Y. Supp. 401.

A railroad cannot avoid a tax upon its right to cross a highway, taxable as a special franchise, upon the ground that it is an easement in land derived from the owner of the fee, and not a privilege granted by the public. *New York, L. & W. R. Co. v. Roll*, 32 Misc. 321, 66 N. Y. Supp. 748.

Nevertheless it is also held that the New York tax law, as amended by chap. 712, Laws 1899, in defining as taxable property "a franchise, right, authority, or permission" to lay pipes or mains in or under a public street, means only some special privilege granted by a governmental body having authority to confer it; that such a permission granted by private individuals owning the fee is no franchise, and hence is not taxable. *People ex rel. Betsol M'n. Co. v. Priest*, 77 N. Y. Supp. 382. To the like effect is the *Park Tax Case*, 84 Md. 1, sub nom. *Baltimore v. Baltimore, C. & E. M. Pass. R. Co.* 33 L. R. A. 503, 35 Atl. 17.

A statute requiring every domestic trust company to pay annually, for the privilege of exercising its corporate franchises or carrying on its business in an organized capacity, a yearly tax equal to 1 per cent on the amount of its capital stock, surplus, and undivided profits, and providing that such trust companies shall be exempt from assessment and taxation for all other purposes, is not a statute of exemption purely, but one that substitutes one method of taxation for another. Hence, the rule requiring exemption statutes to be strictly construed does not apply. *Binghamton Trust Co. v. Binghamton*, 72 App. Div. 341, 76 N. Y. Supp. 517.

Under a general statute declaring that taxes shall be levied upon all the property in the state except such as is exempted; and, in the absence of any law exempting corporate franchises, beyond those of railroads, and in the existence of several acts providing that railroad exemptions should not apply to lines operated by horse, cable, or electric power,—the franchisees of an electric street-railway corporation, whether to exist or to operate, are liable to assessment and taxation as property. *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746.

Many states have statutes exempting manufacturing corporations from taxation. The cases generally arising under such laws lie outside the scope of this note. Those alone wherein the direct question of liability for a

franchise tax has been passed upon are included.

A manufacturing corporation which, though regularly organized, and preserving its organization by observance of the legal requirements, has not yet begun actual operations anywhere because under injunction against using patents upon which its proposed productions depend, is not subject to a tax upon its franchise when a statute exempts therefrom manufacturing companies carrying on business in the state. *Re Faure Electric Light & Force Co.* 43 N. J. Eq. 411, 5 Atl. 817.

An Illinois corporation formed according to the terms of its charter for the purpose of furnishing light, heat, and power for public and private uses is not organized for purely manufacturing purposes within the statute of that state (*Rev. Stat.*, chap. 120, § 3, cl. 4), so as to be exempt from assessment by the state board of equalization upon its capital stock and franchises, and liable alone to assessment upon its property by the local assessors the same as individual owners notwithstanding it actually generates the electricity it uses. *Evanston Electric Illuminating Co. v. Kochersperger*, 175 Ill. 26, 51 N. E. 719. The court based its decision upon the ground that the phrasing of the charter was conclusive. The case hardly goes so far as to decide that electric light and power companies are not manufacturing corporations. And it is probably not a precedent when that point shall arise under a charter couched in terms more happily chosen.

The New York cases in point hold otherwise.

A domestic corporation organized under a general act for the formation of corporations for manufacturing and other purposes, and engaged in the business of producing electricity and supplying it to customers for the purpose of private and public illumination, is a manufacturing corporation, and as such was not subject to taxation upon its corporate franchise or business under a statute providing for such a tax upon corporations generally, with certain exceptions, among which were manufacturing corporations, and did not become so subject until, by an amendment to the tax law, electric light companies were by name taken out of the exception, although in the meantime the state officials had uniformly insisted that they were never included. *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 543, 14 L. R. A. 708, 29 N. E. 808.

And to the like effect is *People ex rel. Edison Electric Illum. Co. v. Wemple*, 129 N. Y. 684, 29 N. E. 812, where the relator was engaged in the same business, but organized under an act for the formation of gas companies.

sons;" and this special or exclusive franchise may be taxed in any county, city, town, or taxing district where it may be exercised. The same legislature that passed this act passed a statute allowing everybody to form corporations for certain business purposes, and the right of corporate existence enjoyed by these corporations is in no sense a special or exclusive franchise not allowed by law to natural persons. In *Morawetz on Private Corporations* (§ 923) the accurate author says: "All persons have now the right of forming corporate associations upon complying with the simple formalities prescribed by statute. The right of forming a corporation and of acting in a corporate capacity under the general incorporation laws can be called a 'franchise' only in the sense in which the right of forming a limited partnership, or

of executing a conveyance of land by deed, is a franchise." The same rule is laid down in *Thomp. Corp.* § 5335. In § 5336 this author also says: "The franchise of being a corporation vests in the individuals who compose the corporation, while those secondary franchises, which we shall hereafter see are vendible by the corporation, necessarily, and for the same reason alone, must be deemed to vest in the corporation." The right of corporate existence, not vesting in the corporation, does not pass under a sale by it of all its property and franchises. *Smith v. Gover*, 2 Duv. 19; *Thomp. Corp.* § 5354; *Coe v. Columbus, P. & I. R. Co.* 10 Ohio St. 372, 75 Am. Dec. 518; *Metz v. Buffalo, C. & P. R. Co.* 58 N. Y. 61, 17 Am. Rep. 201; *Fietsam v. Hay*, 122 Ill. 293, 13 N. E. 501. That which does not pass under a grant of all the corporate property and

A foreign corporation, however, organized under the laws of its home state to manufacture, buy, sell, lease, or otherwise procure, own, and dispose of electric and electric telegraph and telephone instruments and apparatus of all kinds, and all parts of the same, and to acquire by purchase, patent, and other rights and franchises, and acquire and dispose of, capital stock of other corporations, which, although it has its main office and factory in the state of its domicile, yet conducts an extensive manufacturing and general business according to its chartered powers in the state of New York, is neither wholly engaged in manufacturing, because of its broader charter powers, nor is it wholly engaged in manufacture within the state of New York, so as to be exempt under a statute thereof from taxation upon the corporate franchise or business of domestic and foreign corporations doing business in such state, except those wholly engaged in carrying on manufacture therein. *People ex rel. Western Electric Co. v. Campbell*, 145 N. Y. 587, 40 N. E. 239, Affirming 80 Hun, 466, 30 N. Y. Supp. 472.

There are some Pennsylvania cases arising under a statute of that state for the taxation of capital stock including franchises from which manufacturing companies are exempt holding that electric light and power companies are not within the exemption. But these decisions go upon the theory, not that such concerns are not manufacturers, but that, their art and product being wholly unknown when the statute was enacted; and there being in existence manufacturing companies to which the statute could and did apply,—the exemption must be held to cover no other manufacturing than what was then within the known and understood popular sense of the word. *Com. v. Northern Electric Light & P. Co.* 145 Pa. 105, 14 L. R. A. 107, 22 Atl. 839; *Com. v. Edison Electric Light Co.* 145 Pa. 131, 22 Atl. 841; *Com. v. Brush Electric Light Co.* 145 Pa. 147, 22 Atl. 844.

A corporation organized under a special law (a general manufacturing act being extant) for the purpose of building, using, and providing one or more dry or wet docks or other conveniences and structures for building, raising, repairing, and coppering vessels of every description is not a manufacturing corporation within the statutory exemption of such from taxes upon franchises or business. *People v. New York Floating Dry Dock Co.* 92 N. Y. 487.

Neither is a corporation engaged in harvesting, collecting, storing, preserving, and preparing ice for sale, and transporting it to market, and there vending it to purchasers, 57 L. R. A.

notwithstanding it is organized under a supplemental statute to the general manufacturing act passed for the very purpose of extending the same to such corporations. *People v. Knickerbocker Ice Co.* 99 N. Y. 181, 1 N. E. 669.

A foreign corporation engaged in and organized for mining, reducing, smelting, and refining ores and incidental operations, and others more or less remotely connected therewith in the state of its origin and other states, which merely receives in New York silver bullion, and there has it refined by the United States assay office into standard silver bars, paying the usual percentage compensation for the work and certification and then selling the bars and certificates and using the proceeds in its business as needed both within and without the state, is not a manufacturing corporation carrying on manufacture within New York state, so as to be exempt from the franchise or business tax imposed by the laws thereof upon corporations, not manufacturing ones, so engaged. *People v. Horn Silver Min. Co.* 105 N. Y. 76, 11 N. E. 155, Affirming 38 Hun, 276, and Affirmed in 143 U. S. 305, 36 L. ed. 104, 4 Intern. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

The mere fact that a domestic manufacturing corporation having only power by its charter to make and sell its own wares does, *ultra vires*, employ part of its capital in buying and selling similar wares of other makers in connection with its own stock, and does so without the state and in foreign countries, does not deprive it of the exemption given to corporations "wholly engaged in manufacture within the state," and no others, in a statute providing for the taxing of corporations upon their corporate franchise or business. *People ex rel. Tiffany & Co. v. Campbell*, 144 N. Y. 166, 38 N. E. 990, Affirming 80 Hun, 95, 30 N. Y. Supp. 70.

While the right of a manufacturing company to sell its wares, and at retail, if it so chooses, is incidental to the power to manufacture, and therefore implied in its charter and the general statutes of the state relating to such companies, and their rights, privileges, and immunities, the right to add thereto and sell the wares of other makers of the same kind of goods to complete lines of stock and meet the demands of customers is not incidental, and hence not embraced; therefore, a corporation is not taxable so far as it makes and sells its own wares, and is taxable so far as it deals in those of others, under a statute for taxing the franchise or business of corporations except when wholly engaged in manufacturing within the state. *Ibid.*

franchise is certainly not a franchise of the corporation for taxing purposes, under our Constitution, providing for the taxation of all property of the citizen not by it exempted. It is equally clear that the exemption of the individual property of the stockholders from corporate debts is not a franchise of the corporation, but vests in the stockholders. It is not a special or exclusive privilege not allowed by law to natural persons, for all persons may be stockholders in corporations. The privilege is open to all who may wish to take advantage of the statute. The concluding words of the sentence providing for the payment of a local tax on the franchise to the county, city, town, and taxing district where it may be exercised cannot refer to the exemption of the individual property of the stockholder from corporate debts; for these words plain-

ly refer to rights exercised by the corporation, such as the collection of tolls, the taking of private property under the right of eminent domain, and the like. If they refer to the exemption of the stockholder's individual property from corporate debts, then it would follow that a local tax under this statute could be imposed in every county or locality where it was exercised; that is, where any stockholder enjoyed the exemption, which might be in any part of the state. The object of the statute is to get at the property of the corporation for the purposes of taxation. It refers by the term "privilege or franchise," to rights possessed by the corporation which are valuable as property, and so should be assessed for taxation. The right of the stockholder to exemption from liability for the debts of the corporation above the amount specified by

But a corporation, although organized under the general manufacturing act, which is chartered to print, publish, and sell books, pictures, newspapers, objects of art and ornament, and to do any and all business connected with or appertaining to a general printing, publishing, and book-selling business, and which, as part of its regular trade, buys, and sells foreign books that it does not make, is not exempt from such franchise tax, even to the extent that its capital is employed in making and vending its own wares. *People ex rel. Frederick A. Stokes Co. v. Roberts*, 90 Hun, 533, 38 N. Y. Supp. 73.

And a domestic manufacturing company which has its factories, and does all its manufacturing, in a foreign state, although all the rest of its business is done in the home state, is not exempt from such franchise tax. *People ex rel. Blackinton Co. v. Roberts*, 4 App. Div. 388, 38 N. Y. Supp. 872.

Neither is a corporation which slaughters cattle and makes the meat ready for market in another state, simply refrigerating and vending it in New York. *People ex rel. Schwarzschild & S. Co. v. Roberts*, 11 App. Div. 449, 42 N. Y. Supp. 317.

In fact the slaughtering, chilling, and preparing for consumption, and keeping fit for food, animals, is not manufacturing, and therefore not exempt. *People ex rel. New England Dressed Meat & Wool Co. v. Roberts*, 155 N. Y. 408, 41 L. R. A. 228, 50 N. E. 53, Reversing 20 App. Div. 521, 47 N. Y. Supp. 123.

But it is otherwise of the business of producing kindling wood by machinery by cutting green slabs, kiln drying and bundling the sticks. A corporation so engaged is a manufacturing one, and its capital therein invested, as well as its office equipment, is exempt from the franchise tax. *People ex rel. Standard Wood Co. v. Roberts*, 20 App. Div. 514, 47 N. Y. Supp. 122.

Granting that the printing and publication of a newspaper is manufacturing, a corporation which publishes one, but lets out by contract the type-setting and printing thereof, is not engaged in manufacturing so as to entitle it to exemption from such franchise tax. *People ex rel. Jewelers' Circular Pub. Co. v. Roberts*, 155 N. Y. 1, 49 N. E. 248.

And if a manufacturing corporation is engaged as well in foreign or interstate commerce it is not wholly engaged in manufacturing within the state, and so is exempt from no part of such franchise tax. *People ex rel. William J. Matheson & Co. v. Roberts*, 158 N. Y. 162, 52 N. E. 1102, Affirming 27 App. Div. 632, 50 N. Y. Supp. 1132; *People ex rel. American Soda-Fountain Co. v. Roberts*, 158 N. Y. 168, 57 L. R. A.

52 N. E. 1104, Reversing 29 App. Div. 585, 51 N. Y. Supp. 487.

d. Property exempt as part of franchise.

This branch of the topic is referred to, rather than treated, here, as it properly appertains to the taxation of corporate property, tangible and intangible, which is the subject of a separate note. In so far as such exemptions, or the claims to them, rest upon charter provisions or other contracts between states and corporations, they are considered in a note upon corporate taxation as affected by the contract clause in the Federal Constitution. In addition, the reader should consult the note to the case of Yellow River Improv. Co. v. Wood County (Wis.) 17 L. R. A. 92, for a view of the law on this point prior to 1892.

It is only when a statute or state policy prevails in a given jurisdiction that property necessary for the construction and operation of the corporate works and the exercise of the franchise is exempt from taxation; hence the immunity prevailing in some states does not exist in others, where the legislature has not granted it. *Orange & A. R. Co. v. Alexandria*, 17 Gratt. 176.

When such a statute or state policy does prevail it is the general rule that only such corporate property as is in actual use in the corporate operations, and is confined to such use, and is actually necessary, not to say indispensable, to the exercise of the corporate franchises, is exempt as a part of those franchises, and not liable to separate assessment and taxation. *McCulloch v. Stone*, 64 Miss. 378, 8 So. 236; *Augusta v. Central R. Co.* 78 Ga. 119; *State, Pennsylvania R. Co., Prosecutor, v. Jersey City*, 49 N. J. L. 540, 60 Am. Rep. 648, 9 Atl. 782; *Northumberland Co. v. Philadelphia & E. R. Co. (Pa.)* 8 Cent. Rep. 531, 9 Atl. 504; *Ford v. Delta & P. Land Co.* 43 Fed. 181; *Fargo & S. W. R. Co. v. Brewer*, 3 N. D. 34, 53 N. W. 177; *State, Delaware, L. & W. R. Co., Prosecutor, v. Fuller*, 40 N. J. L. 329; *Wilmington & W. R. Co. v. Reid*, 13 Wall. 284, 20 L. ed. 568, Reversing 64 N. C. 226; *Pennsylvania & N. Y. Canal & R. Co. v. Vanddyke*, 137 Pa. 249, 20 Atl. 653.

In Pennsylvania it has been said that the rule that measures the extent of the exemption from local taxation of the property of a water company supplying the public is to be construed liberally in favor of the company. *Spring Brook Water Supply Co. v. Schadt*, 3 Lack. L. News, 170.

And it is the actual use to which corporate property is devoted that determines whether

law is not the property of the corporation, and so should not be construed within a statute providing simply for the taxation of its property. The right to do business as a corporation is no more the property of the corporation than the right to do business as a partnership is the property of the firm. Limited partnerships are common, where the partners are not to be liable for the firm debts, and on one would contend that such a partnership falls within this statute.

The same result will be reached if we examine the other words of the section. It will be observed that it applies, not only to corporations, but to other companies or associations. Corporations and incorporated associations are placed by the statute on the same plane. It applies to all, whether incorporated or not, "having or exercising any special or exclusive privilege or fran-

chise not allowed by law to natural persons or performing any public service." This is made very clear by § 4082 in the same subdivision, which is as follows: "Whenever any person or association of persons not being a corporation nor having capital stock, shall, in this state, engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and treated as the capital stock of such person or association of persons for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation." Section 4086 also provides "All corporations and other persons who are re-

It is exempt from local taxation. *Delaware, L. & W. R. Co. v. Newark*, 60 N. J. L. 60, 37 Atl. 629.

In the following cases the property involved fell naturally within the general rule: *Northampton County v. Lehigh Coal & Nav. Co.* 75 Pa. 461; *Richmond v. Richmond & D. R. Co.* 21 Gratt. 004; *Wisconsin R. Co. v. Taylor County*, 52 Wis. 87, 8 N. W. 833; *Petersburg R. Co. v. Northampton*, 81 N. C. 487; *Vicksburg & M. R. Co. v. Bradley*, 66 Miss. 518, 6 So. 321; *State ex rel. Hayes v. Hannibal & St. J. R. Co.* 135 Mo. 618, 37 S. W. 532; *Chicago & A. R. Co. v. People ex rel. Cooley*, 129 Ill. 571, 22 N. E. 864, 25 N. E. 5; *Louisville, N. O. & T. R. Co. v. Taylor*, 68 Miss. 361, 8 So. 675; *Indianapolis, C. & L. R. Co. v. Kilner*, 69 Ind. 71; *New Mexico v. United States Trust Co.* 172 U. S. 171, 43 L. ed. 407, 19 Sup. Ct. Rep. 128; *Chicago, M. & St. P. R. Co. v. Grant*, 167 Ill. 489, 47 N. E. 750; *Mobile & O. R. Co. v. Moseley*, 52 Miss. 127; *Peoria, D. & E. R. Co. v. Goar*, 118 Ill. 134, 8 N. E. 682; *Chicago, M. & St. P. R. Co. v. Cass County*, 8 N. D. 18, 76 N. W. 239; *St. Louis, I. M. & S. R. Co. v. Miller County*, 67 Ark. 498, 55 S. W. 926; *Red Willow Co. v. Chicago, B. & Q. R. Co.* 26 Neb. 660, 42 N. W. 879; *Richmond & D. R. Co. v. Alamance*, 84 N. C. 504; *Schmidt v. Galveston, H. & S. A. R. Co.* (Tex. Civ. App.) 24 S. W. 547; *Quincy, O. & K. C. R. Co. v. People ex rel. Corrigan*, 156 Ill. 437, 41 N. E. 162; *Auditor General v. Flint & P. M. R. Co.* 114 Mich. 682, 72 N. W. 992, 119 Mich. 682, 78 N. W. 889; *Pfaff v. Terre Haute & I. R. Co.* 108 Ind. 144, 9 N. E. 93; *Western N. Y. & P. R. Co. v. Venango County*, 183 Pa. 618, 38 Atl. 1088, *Affirming* 5 Pa. Super. Ct. 304; *Davenport v. Mississippi & M. R. Co.* 16 Iowa, 348; *State v. Western & A. R. Co.* 60 Ga. 563; *State Bd. of Assessors v. Morris & E. R. Co.* 49 N. J. L. 193, 7 Atl. 826; *People's Street R. Co. v. Scranton*, 8 Pa. Co. Ct. 633; *Northampton County v. Easton Pass. R. Co.* 148 Pa. 282, 23 Atl. 895; *Detroit & S. Pl. Road Co. v. Detroit*, 81 Mich. 562, 46 N. W. 12; *Lancaster v. Edison Electric Illum. Co.* 8 Pa. Co. Ct. 631; *Brush Electric Light Co. v. Philadelphia*, 8 Pa. Dist. R. 231; *Rising Sun Street Lighting Co. v. Boston (Mass.)* 63 N. E. 408; *Cotesville Gas Co. v. Chester County*, 97 Pa. 476; *Westchester Gas Co. v. Chester County*, 30 Pa. 232; *West Manayunk Gaslight Co. v. Philadelphia*, 3 Pa. Dist. R. 52; *Schuylkill County v. Citizens' Gas Co.* 148 Pa. 162, 23 Atl. 1055; *Pittsburgh's Appeal*, 123 Pa. 374, 16 Atl. 621; *St. Mary's Gas Co. v. Elk County*, 191 Pa. 458, 43 Atl. 321; *Ridgway Light & Heat Co. v. Elk County*, 191 Pa. 465, 43 Atl. 323; *Mellon Pipe Lines v. Allegheny* 57 L. R. A.

County, 8 Pa. Dist. R. 448; *Monongahela Bridge Co. v. Pittsburgh*, 12 Pa. Co. Ct. 87; *Riverton & P. Water Co. v. Haig*, 58 N. J. L. 295, 35 Atl. 215; *Lehigh County v. Bethlehem South Gas & Water Co.* 4 Pa. Dist. R. 723; *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis. 322, 16 L. R. A. 581, 52 N. W. 439; *Spring Brook Water Supply Co. v. Kelly*, 5 Lack. L. News, 299; *Carondelet Canal Nav. Co. v. New Orleans*, 44 La. Ann. 394, 10 So. 871; *Wayne County v. Delaware & H. Canal Co.* 15 Pa. 351; *Lehigh Coal & Nav. Co. v. Northampton County*, 8 Watts & S. 334; *Yellow River Improv. Co. v. Wood County*, 81 Wis. 554, 17 L. R. A. 92, 51 N. W. 1004; *Hennepin County v. St. Paul, M. & M. R. Co.* 33 Minn. 534, 24 N. W. 196; *Hannibal & St. J. R. Co. v. Shacklett*, 80 Mo. 550.

The general rule has been markedly relaxed in many cases so as to allow exemption to property either partly devoted to other than corporate uses, or as yet unused at all although acquired for corporate purposes. Such cases are the following: *Schuylkill Nav. Co. v. Berks County*, 11 Pa. 202; *People ex rel. Selp v. Chicago & W. I. R. Co.* 116 Ill. 181, 4 N. E. 480; *Chicago, St. P. M. & O. R. Co. v. Bayfield County*, 87 Wis. 188, 58 N. W. 245; *New Jersey Junction R. Co. v. Jersey City*, 63 N. J. L. 120, 43 Atl. 577; *Southern Electric Light & P. Co. v. Philadelphia*, 191 Pa. 170, 43 Atl. 123; *Rural Cemetery v. Worcester County*, 152 Mass. 408, 10 L. R. A. 865, 25 N. E. 618; *Suffolk Sav. Bank, Petitioner*, 149 Mass. 1, 20 N. E. 331; *Vicksburg Bank v. Worrell*, 67 Miss. 47, 7 So. 219; *State, Morris & E. R. Co., Prosecutor, v. Haight*, 35 N. J. L. 40; *State ex rel. Tillery v. Hannibal & St. J. R. Co.* 97 Mo. 348, 10 S. W. 436.

Sometimes, too, the exemption has been extended to cover property not at all requisite to the exercise of the corporate franchise, and often a mere adjunct to the corporate business, even occasionally an independent enterprise. The following are illustrative cases: *State, Pennsylvania R. Co. Prosecutor v. Jersey City*, 49 N. J. L. 540, 60 Am. Rep. 648, 9 Atl. 782; *State v. Nashville, C. & St. L. R. Co.* 86 Tenn. 438, 6 S. W. 880; *Chicago, M. & St. P. R. Co. v. Houston County*, 38 Minn. 531, 38 N. W. 619; *Detroit Union R. Depot & Station Co. v. Detroit*, 88 Mich. 347, 50 N. W. 302; *Chicago, St. P. M. & O. R. Co. v. Bayfield County*, 87 Wis. 188, 58 N. W. 245; *Carondelet Canal Nav. Co. v. New Orleans*, 44 La. Ann. 394, 10 So. 871.

And sometimes the exemption is extended to all the property of the corporation. *Columbia & P. S. R. Co. v. Chilberg*, 6 Wash. 612, 34

quired to make reports to the auditor of public accounts shall pay all the taxes due the state from them into the treasury at the same time and shall be liable for and pay the same rate of interest and penalties as defaulting individuals, except where otherwise specially provided." The three sections must be read together, as they form part of one plan. From the three, taken as a whole, it is evident that the purpose was to reach persons or corporations having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service. With this view, all persons engaged in the business of any of the corporations referred to are placed on exactly the same plane as the corporations, and such persons, as well as the corporations, are required to pay their taxes directly to the auditor. If the

1st section includes all corporations, then it would follow that all individuals engaged in the same business as the corporations must be assessed in the same way. No one has ever so construed the statute. It would not be contended that any individual or association must pay taxes directly to the auditor, unless exercising a special or exclusive privilege or franchise not allowed by law to other natural persons, or performing some public service. But, if the statute does not apply to an individual, it does not apply to a corporation in the same business, for both understand it just alike. No corporation is included within the statute, unless an individual or unincorporated company situated just as it is would be covered by it. Section 4085 provides: "The property of all corporations, except where herein differently provided, shall be assessed in the name

Pac. 163; McHenry v. Alford, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242; Vicksburg Bank v. Worrell, 67 Miss. 47, 7 So. 219.

On the other hand, not a few cases have held that property, although acquired in good faith for corporate purposes, but not as yet so used or occupied, or which has ceased to be so used or occupied, is not exempt. Ramsey County v. Chicago, M. & St. P. R. Co. 33 Minn. 537, 24 N. W. 313; St. Paul v. St. Paul, M. & M. R. Co. 39 Minn. 112, 38 N. W. 925; State v. Northwest Teleph. Exch. Co. 84 Minn. 459, 87 N. W. 1131; Lewis v. Vicksburg & M. R. Co. 67 Miss. 82, 6 So. 773; Republican Valley & W. R. Co. v. Chase County, 33 Neb. 759, 51 N. W. 132; United New Jersey R. & Canal Co. v. Jersey City, 53 N. J. L. 547, 22 Atl. 59; National Docks R. Co. v. State Bd. of Assessors, 64 N. J. L. 486, 45 Atl. 733; Neely v. Buchanan (Tenn. Ch. App.) 54 S. W. 995; Duluth, S. S. & A. R. Co. v. Douglas County, 103 Wis. 75, 79 N. W. 34; Vicksburg & M. R. Co. v. Lewis, 68 Miss. 29, 10 So. 32.

It is the use of the property, not of the income from it, that exempts it from taxation. Richmond County Academy v. Bohler, 80 Ga. 159, 7 S. E. 633.

Therefore, when corporate property is rented out for profit the exemption, if any it has, is lost. Illinois C. R. v. People *ex rel.* Hodges, 119 Ill. 137, 6 N. E. 451; People *ex rel.* Swigert v. Illinois C. R. Co. (Ill.) 6 West. Rep. 725; Farmers' Bank v. Henderson, 7 Ky. L. Rep. 433; St. Louis County v. St. Paul & D. R. Co. 43 Minn. 510, 48 N. W. 334; State *ex rel.* Hayes v. Hannibal & St. J. R. Co. 135 Mo. 618, 37 S. W. 532; State *ex rel.* Ziegenhein v. St. Louis & S. F. R. Co. 117 Mo. 1, 22 S. W. 910; State, Camden & A. R. & Transp. Co., Prosecutors, v. Mansfield, 23 N. J. L. 510, 57 Am. Dec. 400; State, New Jersey R. & Transp. Co. Prosecutor, v. Newark, 27 N. J. L. 185, 26 N. J. L. 519; New York Guaranty & Indem. Co. v. Tacoma R. & Motor Co. 35 C. C. A. 192, 93 Fed. 51.

Even though part of such property is in use by the corporation itself. Grand Lodge, F. & A. M. v. New Orleans, 44 La. Ann. 659, 11 So. 148; Allegheny County v. McKeesport Diamond Market Co. 123 Pa. 164, 16 Atl. 619.

There are several cases holding that such exemption does not extend to property merely convenient or tributary to the corporate business, such as railroad-transfer boats, wharves, bridges, and hotels or restaurants, warehouses, and freight yards used independently, etc. Illinois C. R. Co. v. Irvin, 72 Ill. 452; Pacific Coast R. Co. v. Ramage (Cal.) 37 Pac. 532; St. Joseph & G. I. R. Co. v. Devereux, 41 Fed. 14; Delaware, L. & W. R. Co. v. Newark, 60 N. J. 57 L. R. A.

L. 60, 87 Atl. 629; State v. Baltimore & O. R. Co. 48 Md. 49; Toll Bridge Co. v. Osborn, 35 Conn. 7; Hennepin County v. St. Paul, M. & M. R. Co. 42 Minn. 238, 44 N. W. 63; Milwaukee & St. P. R. Co. v. Crawford County, 29 Wis. 116; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 9 Sup. Ct. Rep. 1073.

Again, this exemption has been denied to railroad lands used to supply gravel and material for keeping up the embankments along the line. LeBlanc v. Illinois C. R. Co. 72 Miss. 669, 18 So. 381; Chicago & P. R. Co. v. Hilbrand, 136 Ill. 467, 27 N. E. 69.

To timber lands to supply railroad ties and other lumber needed for construction and repairs. Todd County v. St. Paul, M. & M. R. Co. 38 Minn. 163, 36 N. W. 109.

Woodlands used to furnish fuel to the corporation. People *ex rel.* Blackburn v. Barton, 63 App. Div. 581, 71 N. Y. Supp. 933.

To houses and lots for residences of workmen and employees of the corporation. State, Camden & A. R. & Transp. Co., Prosecutor, v. Mansfield, 23 N. J. L. 510, 57 Am. Dec. 409; State, New Jersey R. & Transp. Co., Prosecutor, v. Newark, 25 N. J. L. 315, 26 N. J. L. 519; West Chester Gas Co. v. Chester County, 30 Pa. 232.

To a railroad coal and ore terminal. Philadelphia use of McCann v. Philadelphia & R. R. Co. 177 Pa. 292, 34 L. R. A. 564, 35 Atl. 610.

To railroad repair shops. Pennsylvania & N. Y. Canal & R. Co. v. Vandyke, 137 Pa. 249, 20 Atl. 653; Allegheny Valley R. Co. v. School Dist. 29 Pitts. L. J. N. S. 314.

To land contiguous to the source of supply of a water company, held to prevent contamination. Roaring Creek Water Co. v. Gilton, 142 Pa. 92, 21 Atl. 780; Roaring Creek Water Co. v. Northumberland County, 6 Pa. Co. Ct. 473.

To railway personal property, such as rails, ties, and materials on its right of way. Chicago, B. & Q. R. Co. v. Hitchcock County, 40 Neb. 781, 59 N. W. 358.

And to fuel for use in locomotives. Chicago & N. W. R. Co. v. Ellison, 113 Mich. 30, 71 N. W. 324.

Also to the horses and stables of a street passenger railway company. Delaware County v. Chester Street R. Co. 10 Pa. Co. Ct. 326.

There are cases, too, holding that exemptions of roadbed and right of way because of franchise taxation do not take in improvements and structures upon or along them. Atlantic & P. R. Co. v. Yawapal County (Ariz.) 21 Pac. 768; Atlantic & P. R. Co. v. Lesueur (Ariz.) 1 L. R. A. 244, 19 Pac. 157; Nashville & D. R. Co. v. State, 129 Ala. 142, 30 So. 619.

of the corporation in the same manner as that of a natural person." These sections are a part of the general revenue and taxation bill, providing for the payment of a uniform tax on "all property directed to be assessed for taxation," by the owner, person, or corporation assessed. Ky. Stat. § 4019. Personal property of every kind is required to be separately valued, and, if there be no appropriate column in the tax book, it shall be valued in the column headed "Miscellany." Id. § 4050. When the assessor has taken the tax list of corporations like appellant, including their tangible and intangible property, all that they have has been given in for taxation, just as in the case of a firm or any other unincorporated association. Section 4077 was not intended to apply to any of these, but only to such corporations or companies as exercised special or exclusive franchises, or performed some

public service. The value of these intangible franchises could not well be fixed by an assessor, and, when these companies have paid a tax on these franchises, they have only been taxed on all their property as provided by the Constitution. The same result is reached when appellant gives in all its property to the assessor, and so all are put on the same footing.

The statute referred to received a legislative construction by the act approved March 19, 1898, entitled "An Act Concerning the Assessment and Valuation for Taxation of Corporate Franchises and Intangible Property by Cities of the First and Second Class." This act follows nearly literally all the sections of the act before us, but provides (Acts 1898, p. 96): "No assessment for city taxes shall be made by any assessor or board of valuation and assessment of the franchise of any private busi-

ness. These are not assessable as a part of the franchise. Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132.

Sometimes the width of the right of way of a railroad is limited, and all property outside the limits subjected to separate taxation. St. Louis, I. M. & S. R. Co. v. Miller County, 67 Ark. 498, 55 S. W. 926; Red Willow Co. v. Chicago, B. & Q. R. Co. 26 Neb. 660, 42 N. W. 879; Oregon Short Line R. Co. v. Gooding (Idaho) 59 Pac. 821.

And property within the right of way, or otherwise fairly a part of the franchise, is separately liable to taxation if not owned by the corporation. Com. v. Maysville & B. S. R. Co. (Ky.) 21 S. W. 342; Chicago & A. R. Co. v. People ex rel. Windmill, 153 Ill. 409, 29 L. R. A. 69, 38 N. E. 1075; State v. Red River Valley Elevator Co. 69 Minn. 131, 72 N. W. 60; State ex rel. Glenn v. Mississippi River Bridge Co. 134 Mo. 321, 35 S. W. 592; Re Erie R. Co. 64 N. J. L. 123, 44 Atl. 976.

Under statutes imposing taxes in the nature of duties or excises upon corporate franchises according to the excess of market value of the capital stock above the real estate and machinery locally taxed, gas mains and pipes laid in the streets are classified as machinery. Com. v. Lowell Gaslight Co. 12 Allen, 75.

VI. Franchise taxes.

a. What taxes are such.

A franchise tax and a property tax, when the two approach each other, ordinarily may be distinguished by the respective methods adopted of laying them and fixing their amounts. If a tax is imposed directly by the legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer irrespective of the nature or value of the taxpayer's assets, it is regarded as a franchise tax; but if the tax is computed upon a valuation of property, and assessed by assessors either where it is situated or at the owner's domicile, although franchise privileges may be included in the valuation, it is considered a property tax. This, in substance, is the test suggested by Clifford, J., writing for the court, in Society for Savings v. Colte, 6 Wall. 594, 611, 18 L. ed. 897, 904.

And yet, when one is told that a state tax of a definite percentage on the money on deposit in a bank on a named date is necessarily a 57 L. R. A.

franchise and not a property tax, because laid by statute in terms, and made payable directly into the state treasury, without any valuation by the local assessor or intervention of the local collector, one does not see that this follows. One naturally asks how the method of levying or collecting a tax can affect its incidence. And, remembering that money being at once property and the measure of value, and its amount and value being always equal, is moved to inquire again why assessors should be called in to appraise it.

But the suggested test cannot always be applied. So, to determine whether a given tax is in one or the other class one is compelled to take the course recommended by Miller, J., in Davidson v. New Orleans, 98 U. S. 97, 24 L. ed. 616, to get at the meaning of due process of law, viz., resort to the gradual process of judicial inclusion and exclusion, as the cases decided require, with the reasoning on which the decisions are founded.

"The usual and most certain test is whether the tax is upon the capital stock *eo nomine* without regard to its value, or at its assessed valuation in whatever it may be invested; if the former it is a franchise tax; if the latter a tax upon the property." State v. Stonewall Ins. Co. 89 Ala. 335, 338, 7 So. 753, Clopton, J.

A statute requiring all corporations, except banks, both domestic and foreign, doing business in the state, and not otherwise specifically required to pay a license tax, to pay an annual privilege tax graduated by the paid-up capital of the corporation imposes a franchise, and not a property tax. Phoenix Carpet Co. v. State, 118 Ala. 143, 22 So. 627.

A statute requiring domestic insurance companies to make a sworn return to the state treasurer of the total amount of cash capital belonging to them upon a named date annually, and pay that officer a sum equal to 1 per cent thereon, imposes a tax upon the franchise of the corporations, and not upon their capital or property as such. Colte v. Connecticut Mut. L. Ins. Co. 36 Conn. 512, Following Colte v. Society for Savings, 32 Conn. 173, Affirmed on error in 6 Wall. 594, 18 L. ed. 897.

A statute requiring savings banks to pay a state tax of a named percentage on the average amount of the gross deposits as held on designated days of the six months prior to the first Mondays of May and November in each year, on which days a return for the purpose is to be made by every such bank, lays a tax upon the franchise of such bank the value of which is measured by the average deposits,

ness, mercantile or manufacturing corporation whose property is not devoted to a public use." It cannot be presumed that the legislature intended one rule to apply in cities of the first and second classes, and a different one in the state at large and all of its other subdivisions. It had no power, under the Constitution, to exempt from taxation property in cities of the first and second classes that is subject to taxation in other parts of the state. If the act could be so construed, it is unconstitutional. It is a well-settled rule that that construction must be adopted which will uphold both acts, rather than the one which will destroy one of them. Under this rule, the second act must be regarded as a legislative construction of the first, and that act must be construed as not applying to the classes of corporations exempted from the operation of the other act. The statute was given this practical construction by the executive offi-

cers of the state during two administrations. The legislature was well aware of the construction so put upon it, and, having not only acquiesced in it, but expressly adopted it, it should not now be departed from. Appellant is a private business corporation, organized under chapter 56 of the General Statutes, possessing no franchises or privileges not possessed, in effect, by an individual or limited partnerships engaged in the same business. Such corporations are now running stores, farms, mills, and many other enterprises in this state. They are not within the letter or spirit of the statute, and no good can come from requiring them to make the reports in question.

For these reasons, I concur in the opinion of the court delivered by Judge Du Ralle. This separate opinion is filed in addition only to state more in detail some of the reasons sustaining the conclusion reached.

and not a tax on the deposits themselves; and it accrues at the date of each return, and not earlier. *Jones v. Winthrop Sav. Bank*, 66 Me. 242.

A tax of a fraction of 1 per cent on the subscribed or issued and outstanding capital stock of a corporation is not a property, but an excise, tax, the amount of which is measured by the amount of the subscribed or issued and outstanding stock. *Southern Gum Co. v. Laylin* (Ohio) 64 N. E. 564.

A statute directing the appraisal of the railroads in a state with their franchises, rolling stock, and fixtures at their cash value, and upon such valuation the levy of a tax of 1 per cent so as to make the tax equal as near as may be to the taxes of all kinds upon other property in the districts through which such roads extend; and declaring that such appraisal shall embrace only the roadways, rolling stock, and franchises and that the lands, buildings and fixtures outside of the roadways shall be taxable in the towns where situated as other property.—Imposes a franchise tax upon railroad corporations measured in amount by the value of their franchise and property not otherwise taxed. *State v. Maine C. R. Co.* 74 Me. 376.

The court followed *Com. v. Hamilton Mfg. Co.* 12 Allen, 298, 6 Wall. 632, 18 L. ed. 904, saying that an examination of the two statutes would show that the one under consideration in that case, and the Maine act *sub judice*, were identical in principle, though differing in form.

A state tax on the gross receipts of a corporation is a tax on the franchise. *State v. Philadelphia, W. & B. R. Co.* 45 Md. 361, 24 Am. Rep. 511; *United States Electric Power & Light Co. v. State*, 79 Md. 63, 28 Atl. 768.

A majority of the Maryland court of appeals, speaking through Robinson, J., appear to have been of the opinion, in *State v. Central Sav. Bank*, 67 Md. 290, 10 Atl. 290, 11 Atl. 357, that a statute of that state (Act 1874, chap. 483, § 85), which read: The president or other proper officer of any savings bank, institution, or corporation which shall receive deposits and allow interest thereon shall furnish to the comptroller, on or before the 1st day of July in each year, the aggregate amount of deposits in such corporation, and shall pay to the treasurer, on or before the 1st day of January succeeding out of the interest due to depositors the state tax on said deposits.—Imposed a franchise, and not a property tax; but, inasmuch as a previous statute identical in 57 L. R. A.

terms had been construed otherwise in *State v. Sterling*, 20 Md. 502, and the act of 1874 passed subsequent to that decision, they held that the legislature had adopted the earlier construction, and intended no change in the law; so the earlier decision was followed, and the statute held to impose a property, and not a franchise, tax. *Alvey, Ch. J.*, and *Bryan, J.*, concurring in the result, filed separate opinions in which they respectively took the ground that the earlier case was rightly decided and should be followed because soundly reasoned, and that both statutes imposed property taxes, and not franchise taxes.

One of the reasons assigned by *Bigelow, Ch. J.*, for holding a certain tax on the deposits in a savings bank a franchise rather than a property tax, because he conceded that, being specific and not proportional, it was void if a property tax, was that, as the duty of making payment is usually devolved on those from whom a debt or charge is due, it is fair to infer, in the absence of any explicit provisions to the contrary, that the assessment was intended to be laid on the corporation by which it is to be paid and from which it is to be exacted in case payment is not voluntarily made. *Com. v. People's Five Cents Sav. Bank*, 5 Allen, 428.

The tax involved there was upon the average amount of deposits in savings banks in the six months prior to levying it, and it was held to be an excise or duty on a commodity within the Massachusetts Constitution. The case was followed in *Com. v. Provident Inst. for Savings*, 12 Allen, 312, afterwards affirmed in 6 Wall. 611, 18 L. ed. 907; also in *Com. v. Lancaster Sav. Bank*, 123 Mass. 493, holding that, because the tax was an excise or duty,—a franchise tax,—it was not collectible when the bank was in the hands of a receiver, and perpetually enjoined on the day it accrued. It was in effect also followed in *Com. v. Hamilton Mfg. Co.* 12 Allen, 298, affirmed, too, in 6 Wall. 632, 18 L. ed. 904, which held that a tax laid by general law upon domestic corporations specifically on the excess market value of their capital stock over and above the real estate and machinery locally taxed was a franchise tax,—a so-called excise or duty on a commodity,—and therefore it was immaterial that part of the capital was invested in United States bonds; that some of the stockholders were nonresidents, and that it was not proportional *ad valorem*.

To the like effect was the decision in *Bos-*

**SOUTH COVINGTON & CINCINNATI
STREET RAILWAY COMPANY, Appt.,**

v.

Town of BELLEVUE.

(.....Ky.....)

1. An ad valorem tax upon the franchise of a street railway company is required by Const. § 174, which declares that all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value.
2. The valuation by the state board of the franchises of a street railway company is conclusive as to its value for city assessment.

(January 18, 1899.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Campbell County

ton Mfg. Co. v. Com. 144 Mass. 598, 12 N. E. 862, concerning a tax upon the market value of the shares of stock.

A statute imposing upon miscellaneous corporations a yearly tax proportioned to the amount of capital stock issued and outstanding provides for a franchise tax. *State, Singer Mfg. Co., Prosecutor, v. Heppenheimer*, 54 N. J. L. 439, 24 Atl. 446.

In *People v. Home Ins. Co.* 92 N. Y. 328, Affirmed by United States Supreme Court in 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. Rep. 1385, the question was, Did the statute provide for a tax on property, or one upon a franchise? It was conceded, on the one hand, that neither directly nor indirectly in any form can a state tax United States bonds, or the income therefrom or the property they represent, and, upon the other, that the privileges or franchises of a corporation may lawfully be taxed by the state that bestowed them; therefore if the tax involved was a property tax it was void, if a franchise tax it was valid. The statute, so far as the Home Insurance Company was affected, after describing the corporations subject to its provisions, declared that each of them should be subject to, and pay, a tax upon its corporate franchise or business annually into the state treasury, to be computed as follows: If the dividend or dividends made or declared during the taxing year amounted to 6 per cent or over upon the par value of the capital stock, then the tax should be at the rate of one quarter of a mill upon the capital stock for each 1 per cent of dividends so made or declared. The argument against the tax was that, as it was based upon dividends, and these were in part made up of interest from United States bonds, the tax was necessarily invalid to the extent that such interest entered into the dividends. To this it was answered that there was no tax on dividends, but these were merely considered as a standard by which to measure the value of the franchise. This was assumed to be worth what was earned under it,—assumed to be the producer of the dividends,—and taxed accordingly. The New York court of appeals held the tax a franchise tax, and the United States Supreme Court agreed with it.

A statute applying to domestic corporations and foreign ones doing business in the enacting state, which possess the privilege of mining or of purchasing and selling coal in bulk and requiring from each such company a semiannual report of the number of tons it has mined or bought and the payment of a tax upon its corporate franchise at a stated rate upon each 57 L. R. A.

in favor of defendant in an action brought to enjoin defendant from collecting taxes upon plaintiff's property in alleged violation of a contract for exemption. *Affirmed.* The facts are stated in the opinion.

Messrs. Simrall & Galvin for appellant.

Mr. M. Herold, for appellee:

The term "property" in its broad sense includes a franchise.

Frankfort, L. & U. Turnp. Co. v. Com. 82 Ky. 389; *Franklin County Ct. v. Deposit Bank*, 87 Ky. 383, 9 S. W. 212.

What the Constitution intended to be taxed was property,—all property; and, as to corporations, not all tangible property only.

Henderson Bridge Co. v. Com. 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486; *Levi v. Louisville*, 97 Ky. 394, 28 L. R. A. 480, 30 S. W. 973.

long ton so mined or purchased not consumed by the corporation itself, imposes a franchise tax measured by the quantity of coal, and not a property tax upon the coal. *Kittanning Coal Co. v. Com.* 79 Pa. 100.

A statute imposing a tax on the amount of nominal capital of a bank without regard to loss or depreciation is like one annexed to the franchise as a royalty for the grant, and it is immaterial what the character or description of the property is which constitutes the capital, as the tax laid is wholly irrespective of it. *New York ex rel. Bank of Commerce v. New York City & County Tax Comrs.* 2 Black, 620, 17 L. ed. 451.

The United States Supreme Court had occasion, in *Society for Savings v. Colte*, 6 Wall. 504, 18 L. ed. 897, to determine whether a tax imposed by a Connecticut statute was laid upon the corporation franchise or upon property. The law provided that the several savings banks in the state should annually return to the comptroller the total amount of all deposits in them on July 1st in each successive year, and should yearly pay the state treasurer a sum equal to $\frac{1}{4}$ of 1 per cent on the total deposits in the respective banks on the stated day, and that such tax should be in lieu of all other taxes upon savings banks or their deposits. As a large part of the deposits in the particular institution before the court were invested in United States bonds, and so exempt if the tax rested upon the deposits, the tax was invalid if a property tax. The court, affirming that below, held the tax a franchise tax.

The same conclusion was reached at the same time in a cause involving a very similar Massachusetts tax. *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907.

And the same court, at the same time, held, also, that another Massachusetts statute, which required the local assessors annually to report to the state treasurer the names of all corporations having a capital stock divided into shares and the value of their real estate and machinery locally taxed; and the corporations to make returns to the same officer annually of the amounts of their capital stock at par and the market value of the shares on a stated day; and then provided that commissioners should ascertain the excess of such market value over the value of the real estate and machinery, and that a tax upon such excess should thereupon be paid by the corporation,—imposed a franchise tax, and not one upon property. *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904. And it fol-

Franchises are property the same as any other property, and therefore must respond to taxation the same as tangible property.

Henderson Bridge Co. v. Com. 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486; *Frankfort, L. & U. Turnp. Co. v. Com.* 82 Ky. 389; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 365.

As defendant has not levied any kind of tax on plaintiff's franchise except the ad valorem tax, therefore it cannot complain of double taxation.

Cooley, Taxn. 777, note 4.

The power given to the council to assess omitted property is, in the meaning of the term, the power to fix the value of it for taxation.

Owensboro v. Callaghan, 13 Ky. L. Rep. 418, 17 S. W. 278.

lowed, from this conclusion, that it was immaterial in what the deposits in the first cases, and the capital in the last, was invested, although in the latter case the investments in United States bonds exceeded the entire difference between the market value of the capital stock and the value of the real estate and machinery. Chase, Ch. J., and Miller and Grier, JJ., were unable to agree in the decision of these three cases, being of the opinion that the tax in each was a tax upon property, and not upon franchises.

Afterwards came The Delaware Railroad Tax Case, in which it was held of a statute providing that every railroad and canal company incorporated and doing business in the state should, in addition to all other taxes, pay to the state treasurer annually $\frac{1}{4}$ of 1 per cent upon the actual cash value of every share of its capital stock, with a proviso that when the line lay partly in and partly out of the state the corporation should only be required to pay on so many of the shares as would be in proportion to the whole number as the length of the line within the state bore to the total length,—that it was not obnoxious to the objection that it imposed taxes upon property out of the jurisdiction because a greater number of stockholders than the ratio of mileage within the state to the total mileage were non-residents, not yet because the ratio of mileage within the state to the total mileage was not that of the capital invested nor the value of the corporate property within the state, for the reason that the tax was laid neither on the shares nor the corporate property, but was a franchise tax upon the corporation measured by a percentage upon the cash value of a certain proportionate part of the shares of the capital stock, which, though an arbitrary rule was approximately a just one, and within the legislative power to adopt. 18 Wall. 206, *sub nom.* *Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888, Reversing 7 Phila. 555.

b. What taxes that seem to be such are not.

Coming to the cases of judicial exclusion, one finds a respectable array of decisions holding that taxes apparently laid upon corporations as excises are really taxes upon their property.

An Alabama statute (Code, § 453, subd. 9) levied a tax upon the capital stock of all domestic corporations, except such portions of the capital stock as might be invested in property which was otherwise taxed as property the same to be paid by the corporation; but provided that when such corporation paid the

Appellant cannot complain that the value of its franchise was summarily fixed by appellee's board of council.

Cincinnati, N. O. & T. P. R. Co. v. Com. 81 Ky. 511.

The town of Bellevue had no power to make the contract.

Charter, § 12.

If the general assembly intended to grant the power to exempt street railway property it would have mentioned it in the exceptions.

Miller v. Kirkpatrick, 29 Pa. 226; *Sutherland, Stat. Constr.* § 328.

Statutes or charters exempting persons, property, or corporations from the common burden of taxation are to be strictly construed.

25 Am. & Eng. Enc. Law, p. 157; *Louisville v. Louisville Bd. of Trade*, 90 Ky. 414, 9 L. R. A. 629, 14 S. W. 408; Cooley, Taxn.

taxes in that chapter of the statute levied upon the shares into which its capital stock was divided, or the same was paid by the shareholders, such corporation should only be required to pay the taxes levied upon the real and personal estate owned by it, unless its investments were otherwise taxed by the same statute. A controlling question was whether this tax was upon the corporate property or upon the corporate privileges and franchises. It was insisted that it was a franchise tax upon the theory that the statute prescribed, as the rule for determining the value of the capital stock for the purposes of taxation, the aggregate market value of the shares into which it was divided, and the case of *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904, was relied on to support this contention. The court, however, declined to regard this case as one of general authority, deeming it due wholly to the peculiar phraseology of the Massachusetts Constitution and the settled course of decisions of the courts of that state, and held the tax one upon the property of the corporation. *State v. Stonewall Ins. Co.* 89 Ala. 335, 7 So. 753.

A general law requiring all railroads once a year to make a return to a state officer of the number of shares of their stock, the market value thereof, the amount at a stated time of their funded and floating debt, and to pay a sum equal to 1 per cent of the market value of such stock and indebtedness; and which provides that the valuation thus obtained shall be regarded as fixing the value of railroads and of their rights, franchises, and property for the purposes of taxation, and that the tax shall be in lieu of all other taxes on railroad property; and which, in another part, speaks of the "tax hereby imposed upon the property and franchises of any railroad,"—imposes a property, and not a franchise or privilege, tax. *Nichols v. New Haven & N. Co.* 42 Conn. 103.

This case is notable in two respects. It is said in it that *Colte v. Society for Savings*, 32 Conn. 173, Affirmed in 6 Wall. 594, 18 L. ed. 897, went "to the verge of the law;" and it criticizes *The Delaware Railroad Tax Case*, 18 Wall. 206, *sub nom.* *Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888. Park, Ch. J., writing for the court, saying of it (p. 121): It is a singular fact that the court, in giving its opinion in the case, makes no reference to the *Bank Tax Case*, 2 Wall. 200, 17 L. ed. 793, and *New York ex rel. Bank of Commerce v. New York City & County Tax Comrs.* 2 Bl. 620, 17 L. ed. 451, although they had been very recently decided. No reason is given for the opinion which consists merely in a naked declaration

205, and notes; Dill. Mun. Corp. § 776. *People ex rel. Twenty-Third Street R. Co. v. New York Tax Comrs.* 95 N. Y. 554; *Henderson v. Covington*, 14 Bush, 312; *Murphy v. Louisville*, 9 Bush, 189; *Johnston v. Louisville*, 11 Bush, 527; *Bellevue v. Hohn*, 82 Ky. 4.

Street railways are not a public service, because they are not highways.

Louisville & P. R. Co. v. Louisville City R. Co. 2 Duv. 178; *Henderson v. Covington*, 14 Bush, 312; *Barbour v. Louisville Bd. of Trade*, 82 Ky. 645; *Com. v. Makibben*, 90 Ky. 390, 14 S. W. 372.

The railroad company was bound to know the powers of the defendant.

Bellevue v. Hohn, 82 Ky. 1; *Oraycraft v. Selvaage*, 10 Bush, 708.

The town of Bellevue cannot bind the legislature as to what shall be taxed.

that the tax is imposed, neither upon the shares, nor upon the property, of the corporation, but is a tax upon the corporation itself measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock. He declares the two cited cases by far the better authority, and that the third cannot be reconciled with these well considered ones.

A percentage tax laid upon the deposits in a savings bank, and collected out of the property of the depositors, although paid through the medium of the bank under a statute substituting the corporate agent for the depositors themselves, who formerly were taxed on their deposits as money at interest, and where the tax is declared to be in full for all taxes on the deposits or on the depositors on account thereof, is a tax upon property, and not a franchise or privilege tax, and, hence, is unaffected by the insolvency or liquidation of the bank or its ceasing to exercise or being deprived of the franchise or privilege. *Bartlett v. Carter*, 59 N. H. 105.

The difficulty of distinguishing between the capital of a corporation and the property in which it is invested, which renders tests for determining whether a tax is on the property or the franchises generally uncertain and unsatisfactory, according to Clopton, J., in *State v. Stonewall Ins. Co.* 89 Ala. 335, 338, 7 So. 753, is illustrated in the controversies over the Kentucky act of 1874, § 4077. Notwithstanding its explicit language in declaring that certain corporations, companies, and associations shall each, in addition to the other taxes imposed by law, annually pay a tax on its franchise to the state and another tax thereon to the county, city, town, or taxing district where its franchise may be exercised, it is declared plain, upon consideration of the other provisions of the act, that the tax is not imposed upon the corporate franchise in the technical legal sense, since it is equally laid in the same manner upon companies and associations having neither corporate existence nor franchises, and attaches to both domestic and foreign corporations. It was thus, it is said, the purpose of the legislature to tax the capital stock by said act as an entirety to include the whole corporate property, tangible and intangible, and when the owner is a foreign organization, such proportion of that entirety as is within the state, and therefore to impose a property, and not a franchise, tax. *Western U. Teleg. Co. v. Norman*, 77 Fed. 13.

This doctrine was formally adopted by the United States Supreme Court in *Adams Exp. Co. v. Kentucky*, 186 U. S. 171, 41 L. ed. 960, 57 L. R. A.

Sioux City Street R. Co. v. Sioux City, 138 U. S. 108, 34 L. ed. 902, 11 Sup. Ct. Rep. 228.

The legislature may provide for a property tax on franchises.

Const. § 174; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 365.

Franchises may be subjected to taxation if the legislature sees fit so to act.

Rolling stock of railroads was made "real estate" for purposes of taxation.

Railroad Tax Cases v. Com. 5 Ky. L. Rep. 445; *Kentucky Railroad Tax Cases*, 115 U. S. 321, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *State Railroad Tax Cases*, 92 U. S. 576, 23 L. ed. 663.

17 Sup. Ct. Rep. 527, but not without protest from White, Field, Harlan and Brown, JJ., who, dissenting on the same grounds that they did in *Adams Exp. Co. v. Ohio*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, took pains further to point out that while the majority with some plausibility held that the Ohio statute only purported to tax the tangible property within the state, but empowered the assessing board to augment the value of it by the use it was put to, to enhance that value by drawing to it intangible elements, without the state, which the dissenters both then considered and then still regarded as a mere disguise,—a distinction without a difference,—the Kentucky statute threw off even that thin disguise, and plainly in unambiguous language imposed a franchise tax, or laid an impost upon what was beyond the jurisdiction of the state.

In the same state, also, it has been held that a statute requiring corporations to report under oath to the assessor on or before a stated date annually, a complete statement of all their property, tangible and intangible, and the total cash value thereof, imposes no tax upon the corporate franchise. *Covington Gaslight Co. v. Covington*, 92 Ky. 312, 17 S. W. 808.

A statute requiring the president and cashier of any bank in the state, or other joint-stock company, the capital stock of which is taxable, at a designated time yearly, to deliver to the county assessor a sworn statement of the capital stock paid in and its market value, except such as is not liable to be taxed, to the end that it may be assessed for taxation; and providing that on default the tax shall be assessed upon the whole authorized capital,—includes, by the term capital stock at its market value, not only the franchise of the corporation, but also its property of all descriptions; and the taxation intended is taxation of property, and not of a privilege. *State ex rel. Dist. Atty. v. Simmons*, 70 Miss. 485, 12 So. 477.

Statutes in New Jersey for the assessment and taxation of private corporations at the full amount of their capital stock paid in, and accumulated surplus, with provisions that any corporate real estate in another state shall not be estimated in such surplus, and that persons holding the capital stock shall not be assessed therefor, do not impose taxes on the corporations as such, rather than on their property,—do not lay franchise taxes, but property taxes; hence nontaxable securities are to be deducted. *Newark City Bank v. Fourth Ward Assessors*, 80 N. J. L. 13; *State, International & Life Assur. Co., Prosecutor, v.*

Guffy, J., delivered the opinion of the court:

The appellant instituted this action in the Campbell circuit court for the purpose of perpetually enjoining the appellee from collecting from appellant certain taxes, which it is alleged that appellee was illegally and unlawfully attempting to collect. The substance of the averments contained in the petition is that prior to the 26th of May, 1892, the appellant operated a horse railway between the town of Bellevue and the city of Newport, and none of the cars upon said road were operated between the town of Bellevue and the city of Cincinnati, but the passengers going from the town of Bellevue to the city of Cincinnati, or from Cincinnati to the town of Bellevue, were required to change cars in the city of Newport; that prior to May 26, 1892, appellant

had the right to charge, and did charge, for the carriage of a passenger between the town of Bellevue and Fountain Square, in the city of Cincinnati, and between Fountain Square and the town of Bellevue, at the rate of 10 cents cash fare, or three tickets for 25 cents, each of said tickets entitling the passenger holding the same to one ride between said points; that it was deemed important for the interest of the town of Bellevue that a more rapid means of transit should be established between said town and the city of Cincinnati, for the convenience of citizens residing in said town of Bellevue, and that a less rate of fare for carrying passengers between said points should be charged, and that plaintiff's cars should be so operated between Bellevue and Cincinnati as to avoid passengers changing cars in Newport; that on the 26th of May, 1892,

Haight, 35 N. J. L. 279; Merchant's Ins. Co. v. Newark, 54 N. J. L. 138, 23 Atl. 305.

The tax imposed upon the capital stock of corporations by the Pennsylvania act of 1891 (P. L. 229) is a tax upon property and assets, including the franchises, but not a privilege or franchise tax. *Com. v. Delaware*, S. & S. R. Co. 14 Pa. Co. Ct. 440, Affirmed in 185 Pa. 44, 30 Atl. 522; *Com. v. Manor Gas Coal Co.* 8 Pa. Dist. R. 258, Reversed without affecting this point in 188 Pa. 195, 41 Atl. 605; *Com. v. New York, P. & O. R. Co.* 188 Pa. 169, 41 Atl. 594, Followed in *Com. v. Ontario C. & S. R. Co.* 188 Pa. 205, 41 Atl. 607; *Com. v. Beech Creek R. Co.* 188 Pa. 203, 41 Atl. 605; *Com. v. Fall Brook R. Co.* 188 Pa. 199, 41 Atl. 606.

It has been settled by numerous decisions, says the court in one of these cases, that the tax on capital stock imposed by the taxing acts of Pennsylvania is not a franchise or license tax, but is a tax on the property and assets of the corporation. But it by no means follows that capital stock and tangible property are identical, either in substance or value. The capital stock, it is true, represents the property and assets of the corporation, but it represents also the value of its franchises and privileges and facilities for doing business and the success with which the business is carried on, so far as these are denoted and expressed by the pecuniary results, and the tax on capital stock is, by express terms of the act of 1891, intended to reach these elements of value. *Com. v. Delaware*, S. & S. R. Co. 3 Dauph. Co. Rep. 249, Affirmed in 185 Pa. 44, 30 Atl. 522.

Later, although it was urged that the case at bar was a novel and an extreme one and ought not to be extended, the higher court declared that it saw no reason to modify or restrict the decision. *Com. v. Ontario C. & S. R. Co.* 188 Pa. 203, 41 Atl. 607. Which is equivalent to saying that a tax upon a franchise is not a franchise tax.

Again, it has been said that the statute (Pa. Act June 8, 1891, P. L. 229) having in express terms by title and in preamble declared the subject of taxation to be all the property of corporations having capital stock, and the settled interpretation by the supreme court in Pennsylvania of a tax on capital stock being that it is a tax upon all the property of the corporation, it is clear that the learned judge of the court below did not err in his conclusion of law that a tax on the capital stock of the corporation is a tax on its property and assets including its franchises. *Com. v. New York, P. & O. R. Co.* 188 Pa. 169, 41 Atl. 594.

There is a dissent in this and kindred cases known as the capital-stock cases by Mitchell, 57 L. R. A.

Green, and Williams, JJ., on the ground that the statute imposed a tax on the capital stock *eo nomine* at actual value not less than the average selling price during the year, and that this is a tax on the share stock in the aggregate, or the interest of the stockholders after the debts are paid, and not a tax on the corporate property and assets in gross, plus the franchise. They assert that the decision confuses two distinct things.

The court adopted the same view of the act in *Com. v. Ontario C. & S. R. Co.* 188 Pa. 203, 41 Atl. 607.

c. Taxes on capital stock.

For a full discussion of franchise taxes upon corporations, whether measured by capital stock or imposed upon capital stock *eo nomine*, the reader is referred to the separate note in this series on the taxation of capital stock of corporations in the United States. Not only would it extend the limits of this note too far to embrace all the cases in point, but the view necessarily would be a partial one, since these cases are so intimately related to, not to say blended with, those respecting taxes upon capital stock regarded as property that it is a logical necessity to treat of all in a single comprehensive commentary. In Pennsylvania, as has been seen, a tax upon capital stock is held to be one upon the property and assets of the corporation, but these are said to include the franchise. In Illinois taxes are laid upon combined capital stock and franchises *eo nomine*. In New York the statutes imposing state taxes upon capital stock call them taxes upon the franchise or business of the corporation, while the statutes imposing local taxes upon capital stock and surplus are held not to warrant the taxation of corporate franchises.

The cases below, therefore, are those of only general application.

When a corporation returns, for the purposes of taxation, its capital stock as exceeding many times in value its entire tangible property, it is taxable on the excess, notwithstanding a statute providing that, where the tangible property of a corporation is assessed its shares of capital stock shall not be. *Hylland v. Central Iron & Steel Co.* 129 Ind. 68, 13 L. R. A. 515, 28 N. E. 308.

Capital stock, from which the value of tangible property is to be deducted to ascertain the value of a corporate franchise for taxation within the Kentucky statute, § 4079, means all the corporate property, real and personal, tangible and intangible, assets and franchises

for the purpose of inducing the plaintiff to change its horse cars into electric cars, and for the purpose of inducing this plaintiff to reduce its fare, and in consideration of the change by the plaintiff from the horse-car system to the electric-car system, and to obviate the necessity of changing cars at Newport, the town of Bellevue, on the said 26th of May, 1892, duly and regularly passed by its then board of trustees an ordinance entitled "An Ordinance Authorizing the South Covington & Cincinnati Street-Railway Company to Substitute Electrical for Animal Power upon Its Street Railway in the Town of Bellevue." So much of the ordinance as is material is here copied, which is as follows: "In consideration of said reduction of fares between the town of Bellevue and the city of Cincinnati, and the city of Cincinnati and Bellevue, and in consid-

eration of equipping said line with electric power, and so insuring rapid transit over said line, the South Covington & Cincinnati Street-Railway Company is hereby released from any and all obligations to keep any part of the streets occupied by its track in the town of Bellevue in repair, and is released from the payment of car license except as hereinafter provided, and from the payment of taxes of any and every kind, except an ad valorem tax upon its real estate and personal property." It is further alleged in the petition that appellant did change from the horse-car system to the electric-car system, and proceeded to discharge all the duties required by said contract. It is also alleged in the petition that the town of Bellevue has never, by ordinance or otherwise, provided for the levying of, or requiring the payment of, a franchise tax

Henderson Bridge Co. v. Com. 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486.

Although the Constitution and laws require all property to be assessed at its fair cash value, and corporate property to be rated no higher than that of individuals, and the local assessors value individual property at but 66 per cent of its actual value, a corporation taxable upon its franchise is not exonerated because assessed by a state board at the full actual value of its capital stock after deducting the assessed value of all its tangible property. Paducah Street R. Co. v. McCracken County, 20 Ky. L. Rep. 1294, 49 S. W. 178.

References in license tax acts to the declared or nominal capital or surplus of business or banking institutions do not constitute taxes upon the capital and surplus, but merely a method of classifying the banks and graduating the licenses. State v. Citizen's Bank, 52 La. Ann. 1086, 27 So. 709.

Under statutes imposing taxes in the nature of duties or excises upon corporate franchises according to the excess of the market value of the capital stock above the real estate and machinery locally taxed, the purpose of deducting the value of the real estate and machinery from the aggregate of the shares of capital stock to fix the basis of the state franchise tax is to avoid double taxation. This merely leaves elements once taxed out of the assessable value of the franchise; it does not make the tax one upon property rather than upon privilege. Com. v. Hamilton Mfg. Co. 12 Allen, 298.

Under such a statute, which also requires a return from the stock department of every insurance company doing both a stock and a mutual business as a basis for such franchise tax, a mutual insurance company doing a mutual business exclusively is subject to no franchise tax, duty, or excise upon the excess market value of the shares of an original stock subscription made as a guarantee to warrant beginning business and subject to redemption, and until redeemed entitled to 7 per cent annual dividends, as this really constitutes a debt of the company. Com. v. Berkshire L. Ins. Co. 98 Mass. 25.

If a tax can be considered as in the nature of a privilege tax or royalty upon the franchise, it may be held valid regardless of the fact that it is laid upon capital stock rather than on the franchise *eo nomine*.—Holly Springs Sav. & Ins. Co. v. Marshall County, 52 Miss. 281, 24 Am. Rep. 668.

A general tax law requiring all domestic corporations to pay a yearly license fee or percentage tax upon capital stock, with a proviso

that it shall not apply to railways, canals, banks, and certain other named corporations, or to manufacturing companies or mining companies carrying on business in the state, exempts, not all manufacturing companies, but only such as carry on business within the state. State v. Underground Cable Co. (N. J. Eq.) 18 Atl. 581; Standard Underground Cable Co. v. Atty. Gen. 46 N. J. Eq. 270, 19 Atl. 733; American Glucose Co. v. State, 43 N. J. Eq. 280, 5 Atl. 803.

In the absence of any provision in a general corporation tax law fixing a date when a yearly license fee or tax of a percentage on capital stock imposed thereby accrues, the date when the act took effect controls, and the amount of capital stock on each recurring anniversary thereof is the basis of computation. Brewing Improv. Co. v. State Bd. of Assessors (N. J. L.) 47 Atl. 426.

And for the purpose of affording a basis for such tax, capital stock is issued and outstanding within the meaning of the statute, when subscribed for, and the first call of 5 per cent met thereon upon the proceeds of which the corporation has begun business, although no certificates of stock have been delivered. American Pig Iron Storage Co. v. State Bd. of Assessors, 56 N. J. L. 389, 29 Atl. 160.

When the statute does not penalize a corporation for neglect or refusal to make a return of how much of its stock is issued and outstanding as a basis for such tax the assessors are not warranted in assessing a corporation thus in default upon its total authorized capital. State, People's Invest. Co., Prosecutor, v. State Bd. of Assessors, 66 N. J. L. 175, 48 Atl. 579.

A franchise tax laid upon a railroad corporation pursuant to an act exempting the property thereof for a definite time, and providing that afterwards the legislature may levy a tax not exceeding 25 cents a share on each share of the capital stock yearly whenever the annual profits exceed 6 per cent, is to be collected from the corporation, not the stockholders. State ex rel. Bain v. Seaboard & R. R. Co. 52 Fed. 450.

In statutes imposing a new tax upon the franchisees or business of certain corporations, theretofore taxable upon their property, to be computed according to dividends made or declared during the prior year of 6 per cent or more upon the par value of the capital stock, the referred-to dividends are simply made the measure of the annual value of the franchise upon which the yearly tax is to be paid, and the statutes are prospective in operation. The taxes thus imposed are payable, not for past,

on the franchise of corporations doing business in, or exercising the rights and privileges of a franchise within, the corporate limits of said town, and is without right, power, or authority to levy or collect a tax upon the franchise of plaintiff. It is further alleged that the said town of Bellevue is claiming and asserting the right, power, and authority to levy, assess, and collect said franchise tax from this plaintiff, under and by virtue of the terms and conditions of § 4077 of the Kentucky Statutes of the state of Kentucky, and an act of the legislature of said state passed and approved March 22, 1894. The plaintiff says that said act, and especially that portion thereof that provides that corporations, and especially street-railway companies, shall pay tax upon its franchise to each incorporated city, town, or taxing district in which its

franchise is exercised, or in which it does business, is contrary and in direct violation of § 181 of the Constitution of Kentucky, and therefore void. It is also alleged that the same is in violation of its contract aforesaid, and therefore in conflict with the Constitution of the United States, because it impairs the contract aforesaid.

The appellant demurred to the petition, which demurrer was sustained to all the petition, except the allegation that the tax is levied and sought to be collected under § 4077 of the statute. We copy as follows from the opinion of the circuit court upon the demurrer in question:

"The town of Bellevue seeks to collect \$295.95 on a valuation of \$18,674.71, placed upon plaintiff's franchise; and plaintiff seeks to enjoin the collection thereof. Plaintiff relies upon a contract between it

but for the future, enjoyment of the franchise. Hence, a corporation that in a given year paid a regular dividend of 8¼ per cent, and also distributed to its stockholders because its charter was expiring (although a renewal was contemplated) an accumulated fund amounting to 50 per cent of its capital, made up of the profits of several past years before the statute was enacted, is not chargeable on enhanced franchise tax computed on such distributed fund, because that did not constitute a dividend within the meaning of the statute. *People v. Albany Ins. Co.* 92 N. Y. 458.

The words "capital stock" in § 182 of the New York tax law, providing that every corporation organized by or pursuant to law in the state shall pay to the state treasurer annually a franchise tax, to be computed upon the basis of the amount of capital stock employed within the state, refer to the capital or property of the corporation, and not to the share stock. *People ex rel. Lackawanna Transp. Co. v. Knight*, 77 N. Y. Supp. 898.

d. Interference with Federal agencies and burdens on Federal grants.

1. Franchises.

It is conceded that a franchise granted by the United States or an agency employed by the general government in the exercise of its constitutional powers is not, without its consent, liable to state taxation. It will be found, upon examination, that every case in which a franchise tax, really or apparently such, laid by a state upon a corporation holding a Federal franchise or constituting a Federal agency was sustained, that the tax was held, either not to be a franchise tax, or, if such, to rest upon a franchise granted by the taxing government, or to have been laid by the consent, expressed or implied, of Congress.

(a) Railroads.

The right of a state to tax a railroad chartered by Congress came in question early with respect of the transcontinental lines. A railroad incorporated by the territory of Kansas was absorbed in the Union Pacific system, and afterwards subjected to taxation by the state of Kansas. The tax, however, was a property tax. The right and power of the state to thus tax were upheld notwithstanding the argument that the territory of Kansas in incorporating the railroad was the agent or deputy of the United States, rather than an independent sovereign state in embryo, and therefore the road 57 L. R. A.

must be regarded as a creature of Congress and a means or agency for carrying into effect the governmental powers, and so exempt. *Thomson v. Union P. R. Co.* 9 Wall. 579, 19 L. ed. 792.

In a later case the state of Nebraska having taxed the Union Pacific Railroad upon a mileage basis, the validity of the tax was called in question again. In this case the charter came directly from Congress, but the court held that this fact made no difference, and followed the preceding case. *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787.

That, too, was a property tax, and the court was divided upon it. Swayne, J., concurred in the result, but did so upon the ground that, although the road was a national instrumentality of such a character that Congress might interpose and protect it from state taxation, it was not the intention of Congress so to do, and the power might be, and had been, waived. Bradley, J., with the concurrence of Field, J., dissented upon the authority of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, and *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204, asserting that the case was within the principles thereof as summed up by Marshall, Ch. J., in *Weston v. Charleston*, 2 Pet. 466, 7 L. ed. 487, and that the facts distinguished the case from *Thomson v. Union P. R. Co.* 9 Wall. 579, 19 L. ed. 792, while Hunt, J., dissented without expressing any opinion of his own, or concurring in any other dissent.

In that case was formulated the rule, *vis.*: That the exemption of Federal agencies from state taxation depends, not on the nature of the agents or the mode of constituting them, but on the effect and incidence of the tax,—whether it deprives them of power to serve the government as they were intended to serve it, or hinders the efficient exercise of the power. A tax on their property has no such necessary effect; a tax on their operations is a direct obstruction. A state, therefore, may tax their property, but not their franchises or right to be and perform their corporate functions; nor may it lay a tax on any acts they are authorized to do. The case was followed, with respect to a tax on the real estate and personal property, in *State v. Central P. R. Co.* 10 Nev. 47, where the court contented itself by a simple reference to that case, in which it declared, the United States Supreme Court decided that a corporation sustaining substantially, if not identically, the same relations was not exempt.

It necessarily followed that a railroad holding such Federal franchises, or thus consti-

and the city, evidenced by an ordinance approved May 26, 1892, and the acceptance thereof; the material clause being, 'And is [the plaintiff being referred to] released from the payment of car license, except as hereinafter provided, and from the payment of tax of any and every kind, except an ad valorem tax upon its real estate and personal property.' When this contract was made, the city was acting under a charter enacted March 4, 1882 (§ 12), which provided that the board of trustees shall not grant any special privilege to any person, corporation, or company, nor exempt any such person or persons from the payment of an annual tax. Section 45 is that the board of trustees of the town of Bellevue are hereby vested with power, by ordinance, to levy and collect an annual tax upon all real, personal, and mixed property within the

corporate limits of the town of Bellevue, including bank stock, bridge stock, money in possession, notes, bonds of all kinds, except United States bonds, choses in action, improvements, and all real property whatsoever, not to exceed the sum of \$1 on each \$100 valuation on such real, personal, and mixed property in one year.

"Plaintiff contends that § 12, quoted, prohibits exemption of persons, but not corporations, from taxation, and, by construction thereof, exempts all corporations. Without following the argument made, it is sufficient to say that the word 'such,' used to qualify the word 'person or persons,' indisputably refers to, and makes a prohibition including, person, corporation, or company. The words 'annual tax,' used in said section, refer to the tax authorized by § 45, quoted above; and it may be well argued that the

tuted, which was also a corporation by the law of a state, was taxable in the state which incorporated it, certainly upon its property therein (Huntington v. Central P. R. Co. 2 Sawy. 503, Fed. Cas. No. 6,911), and upon the franchise derived from the state. Central P. R. Co. v. State Bd. of Equalization, 60 Cal. 35.

This case was overruled in San Benito County v. Southern P. R. Co. 77 Cal. 518, 19 Pac. 827, the overruling being constrained by virtue of the decisions of the United States Supreme Court in California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073, but this point is not necessarily affected thereby.

But franchises conferred by the United States cannot be included. California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; San Benito County v. Southern P. R. Co. 77 Cal. 518, 19 Pac. 827; People v. Central P. R. Co. 105 Cal. 576, 38 Pac. 905.

That is, a state may tax its own franchise, not that of the United States. Central P. R. Co. v. California, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766. Field, J., dissented in this case on the ground that the record showed there was but one franchise,—the national grant,—and that was not subject to state taxation. Harlan, J., dissented for alleged error in exclusion of testimony, and White, J., contented himself by a mere concurrence in the result.

The same decision was followed in Southern P. R. Co. v. California, 162 U. S. 167, 40 L. ed. 929, 16 Sup. Ct. Rep. 794.

In Arizona the conclusion was reached that an organized territory may lawfully tax a corporate franchise granted by Congress when the taxing statute has received congressional approval, as this is an implied permission. Atlantic & P. R. Co. v. Lesueur (Ariz.) 1 L. R. A. 244, 2 Inters. Com. Rep. 189, 19 Pac. 157.

(b) Telegraphs.

When a telegraph company has accepted the provisions of the act of Congress of July 24, 1866 (U. S. Rev. Stat., §§ 5283-5289), and thus acquired a right or privilege to enter any state and construct, maintain, and operate its lines over the public domain and navigable waters and all military and post roads, it is, of course not liable to taxation by any state in which it operates upon such franchise. Therefore, state statutes which impose so-called franchise taxes upon such telegraph companies have to be construed as laying property taxes, otherwise they would be void. Western 57 L. R. A.

U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Atty. Gen. v. Western U. Teleg. Co. 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889; Western U. Teleg. Co. v. Norman, 77 Fed. 13.

But if default is made in paying the tax the operation of the business cannot be prevented by injunction. Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961.

Such a company may be taxed upon purely local and internal messages, but not those going beyond the state. Western U. Teleg. Co. v. Alabama State Bd. of Assessment, 132 U. S. 472, sub nom. Western U. Teleg. Co. v. Seay, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161, Reversing 80 Ala. 273, 60 Am. Rep. 99.

It may not appropriate city streets for its poles and wires without making compensation to the municipality. St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 360, 13 Sup. Ct. Rep. 455; Philadelphia v. Postal Teleg. Cable Co. 67 Hun, 21, 21 N. Y. Supp. 556.

And it may be subjected to a city license tax on its occupation or business in the city. Western U. Teleg. Co. v. Richmond, 28 Gratt. 1.

But a direct tax upon the franchise is void. San Francisco v. Western U. Teleg. Co. 96 Cal. 140, 17 L. R. A. 301, 31 Pac. 10.

(c) Bridges.

Bridge corporations whose structures span navigable streams dividing two or more states, and which necessarily have been built in conformity to acts of Congress regulating their heights above the surface, dimensions of draws, breadth of spans, etc., and which have been made post roads, have asserted their exemption from state franchise taxes imposed by the states upon whose soil their ends rest, upon the ground that they are Federal agencies, or hold non-taxable Federal franchises. As they hold, too, franchises from the states, and are, like railroads, subject to taxation on these, they have failed to escape. Henderson Bridge Co. v. Com. 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486, Affirmed in 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; Keokuk & H. Bridge Co. v. Illinois, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205.

(d) Banks.

It was settled in McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579, that the franchise of a bank chartered by act of Congress as a

sentence 'and all manner of property whatever' includes franchises. It therefore seems to the court that not only was the town of Bellevue not authorized either expressly or by necessary implication to exempt a person or corporation from taxation, but was expressly prohibited from doing so, and that, therefore, the contract affords no protection against the tax.

"Section 4077 of the Kentucky Statutes provides that 'every . . . street railway company . . . shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town, and taxing district where its franchise may be exercised,' etc. Section 181 of the Constitution provides that the general assembly 'shall not impose taxes for the purposes of any county, city, town

or other municipal corporation, but may by general laws confer on the proper authorities thereof, respectively, the power to assess and collect such taxes.' Plaintiff says that the defendant is claiming the right to assess, levy, and collect tax under said § 4077, and that said section is in conflict with § 181 of the Constitution. If § 4077 imposes a tax for county or city purposes, in so far as it does, it is unquestionably unconstitutional; but it does not impose such tax. That section is but a part of subdivision 1, article 3, of chapter 108 of the Statutes, which provides a scheme for assessment or valuation of franchises, and an apportionment among the taxing districts in which the franchise may be exercised. There cannot be an imposition of a tax without the amount or the rate being fixed, and no attempt is made to fix one.

government agency is beyond the power of a state to tax. The Supreme Court was asked, in *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204, to re-examine this case upon that point, and did so, but adhered to its former holding. As announced at the outset, it is not within the scope of this note to discuss the taxation of national banks, so the topic may be dismissed at this point with the general statement that a state cannot impose taxes upon, nor authorize the taxation of, the franchises of national banks. This may be considered settled. *Sumpter County v. National Bank*, 62 Ala. 464, 34 Am. Rep. 30; *Macon v. First Nat. Bank*, 59 Ga. 648; *Second Nat. Bank v. Caldwell*, 18 Fed. 429; *First Nat. Bank v. Richmond*, 39 Fed. 309; *National Bank v. Richmond*, 42 Fed. 877; *Farmers' & T. Nat. Bank v. Hoffman*, 98 Iowa, 119, 61 N. W. 418; *First Nat. Bank v. Fisher*, 45 Kan. 726, 26 Pac. 482; *Com. v. Morrison*, 2 A. K. Marsh. 96; *Graves County v. First Nat. Bank*, 21 Ky. L. Rep. 1656, 56 S. W. 16; *Owen County Ct. v. Farmers' Nat. Bank*, 22 Ky. L. Rep. 916, 59 S. W. 7; *State v. National Bank*, 38 Md. 75; *Carthage v. First Nat. Bank*, 71 Mo. 508, 36 Am. Rep. 494; *Pittsburg v. First Nat. Bank*, 55 Pa. 45; *National Bank v. Chattanooga*, 8 Heisk. 814; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826; *Davenport Nat. Bank v. Davenport Bd. of Equalization*, 123 U. S. 83, 31 L. ed. 94, 8 Sup. Ct. Rep. 78; *National Bank v. Boston*, 125 U. S. 60, 31 L. ed. 689, 8 Sup. Ct. Rep. 772; *Davis v. Elmira Sav. Bank*, 161 U. S. 283, 40 L. ed. 701, 16 Sup. Ct. Rep. 502; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537; *First Nat. Bank v. Louisville*, 174 U. S. 438, 43 L. ed. 1038, 19 Sup. Ct. Rep. 753; *Louisville v. Third Nat. Bank*, 174 U. S. 436, 43 L. ed. 1037, 19 Sup. Ct. Rep. 874; *Citizens' Nat. Bank v. Stone*, 174 U. S. 436, 43 L. ed. 1037, 19 Sup. Ct. Rep. 874; *Third Nat. Bank v. Stone*, 174 U. S. 432, 43 L. ed. 1035, 19 Sup. Ct. Rep. 759.

2. United States bonds.

When a state imposes a franchise tax upon a corporation measured by the amount of its capital stock, it is immaterial what such stock is invested in. The tax is subject to no abatement because a part of the capital stock is invested in nontaxable United States bonds. This proposition has been firmly established by the cases of *Colte v. Society for Savings*, 32 Conn. 173, on Error, 6 Wall. 594, 18 L. ed. 897; *Com. v. Hamilton Mfg. Co.* 12 Allen, 298, on Error, 6 Wall. 682, 18 L. ed. 904; *Com. v. Provident* 57 L. R. A.

Inst. for Savings, 12 Allen, 312, on Error, 6 Wall. 611, 18 L. ed. 907; *People v. Home Ins. Co.* 92 N. Y. 328, on Error, 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. Rep. 1385, on Rehearing, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 867; *People ex rel. Bank of Commonwealth v. New York Tax & A. Comrs.* 23 N. Y. 193; *Colte v. Connecticut Mut. L. Ins. Co.* 36 Conn. 512; *Manufacturers' Ins. Co. v. Lord*, 99 Mass. 146, 96 Am. Dec. 715; *Philadelphia Contributionship for Ins. v. Com.* 98 Pa. 48; *Holly Springs Sav. & Ins. Co. v. Marshall County*, 52 Miss. 281, 24 Am. Rep. 668.

The difficulty is ever, not with the principle, but in the application of it. The vigorous dissents in the United States Supreme Court in the cited cases are based upon the proposition that the taxes *sub judice* were upon property rather than franchises. When this is the case the assessment must always be lowered to the extent of the investment in United States bonds. *State, International & L. Assur. Co., Prosecutor, v. Haight*, 85 N. J. L. 279; *Newark City Bank v. Fourth Ward Assessor*, 30 N. J. L. 13; *People ex rel. Ithaca Sav. Bank v. Beers*, 67 How. Pr. 219.

A tax on the income from United States bonds is void. *Bank of Kentucky v. Com.* 9 Bush, 46.

A corporation subjected to a tax upon, or one measured by, its net earnings or income is not entitled to deduct from its receipts the difference between United States bonds redeemed during the year at their face value and the amount paid at a premium years before on buying them. *Philadelphia Contributionship for Ins. v. Com.* 98 Pa. 48.

3. Patents and copyrights.

A patent or a patent right is not subject to state taxation, either as a piece of property, or as a franchise or privilege. *People ex rel. Edison Electric Illum. Co. v. Brooklyn Bd. of Assessors*, 156 N. Y. 417, 42 L. R. A. 290, 51 N. E. 289; *People ex rel. Edison Electric Illum. Co. v. Neff*, 19 App. Div. 599, 46 N. Y. Supp. 388; *People ex rel. Edison Electric Illum. Co. v. Harkness*, 44 N. Y. Supp. 51; *People ex rel. New York & N. J. Teleph. Co. v. Neff*, 15 App. Div. 8, 44 N. Y. Supp. 46; *Com. v. Westinghouse Electric & Mfg. Co.* 151 Pa. 265, 24 Atl. 1107, 1111; *Com. v. Westinghouse Air Brake Co.* 151 Pa. 276, 24 Atl. 1111, 1113; *Com. v. Philadelphia Co.* 157 Pa. 527, 27 Atl. 378; *Com. v. Edison Electric Light Co.* 157 Pa. 529, 27 Atl. 379; *Com. v. Davis-Colby Ore Roaster Co.* 1 Dauph. Co. Rep. 118.

"It is argued that § 181 provides for conferring upon the proper authorities of counties, cities, etc., the power to assess, and that, therefore, such officer cannot be empowered to assess franchises for county or city taxes. The fallacy of this argument lies in the meaning given to the word 'assess.' In the place used, it means to levy a tax, and does not mean the valuation of property for taxation. That the Constitution makers did not intend to forbid the valuation of property for local taxation by the state board is apparent from their continuing in force that method of valuation of railroads for taxation, and which is now in force.

"The plaintiff also contends that, under the Constitution, an ad valorem tax cannot be levied upon the franchise; that all the legislature may do is to authorize the im-

position of license fees. This question will not be considered now, because of the conclusion of the court that § 4077 does not impose a tax. The demurrer to paragraphs 1 and 4 of the petition will be sustained, and the demurrer to paragraph 3, which charges that the taxation is levied and sought to be collected under § 4077 of the statute, will be overruled. The motion for an injunction will be retained until final judgment."

Appellee thereafter filed its answer, which may be considered a traverse of all the averments of the petition which tend to show a right to the relief sought. The answer shows that the appellee was entitled to levy and collect, for municipal purposes, an annual ad valorem tax, not exceeding 75 cents on every \$100 on all property taxable by law for such purposes, and, in addition,

The immunity of patents and patent rights does not prevent state taxation of patented articles as pieces of property the same as other chattels (*Webber v. Virginia*, 103 U. S. 344, 28 L. ed. 565, Reversing on other grounds 83 Gratt. 898, and Followed in *Ex parte Thomas*, 71 Cal. 204, 12 Pac. 58); nor free the patentee from any of the pains and penalties imposed by a police regulation conserving the public safety and reasonably adapted to the professed end. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115.

And copyrights, like patents and patent rights, are equally beyond the power of the state to tax. *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 45 L. R. A. 126, 53 N. E. 685, Reversing 85 App. Div. 624, 54 N. Y. Supp. 1112.

But when a tax is laid upon a corporation as a franchise or privilege tax measured by its capital stock, it is no more material that such capital stock is invested in patents or patent rights than as if invested in United States bonds. *State, Marsden Co., Prosecutor, v. State Bd. of Assessors*, 61 N. J. L. 461, 39 Atl. 638.

It is true that a recent New York case has held the contrary, and decided that in assessing a franchise tax upon a domestic corporation measured by its appraised capital patent rights belonging to the company cannot be included. *People ex rel. United States Aluminum Printing Plate Co. v. Knight*, 67 App. Div. 333, 73 N. Y. Supp. 745. But this decision is certainly against the weight of authority, and credit must be given to *Smith, J.*, for dissenting. The majority opinion conceded that there were several New York cases, resting upon the authority of *People v. Home Ins. Co.* 92 N. Y. 328, holding the contrary, viz.: *People ex rel. Edison Electric Illum. Co. v. Wemple*, 61 Hun, 53, 15 N. Y. Supp. 711 (which, by the by, was reversed in 129 N. Y. 664, 29 N. E. 812, on the ground that the relator was exempt as a manufacturing company), and *People ex rel. Edison Electric Light Co. v. Wemple*, 63 Hun, 444, 18 N. Y. Supp. 511 (also reversed in 148 N. Y. 690, 43 N. E. 176, because stock holdings in foreign corporations were held not to be capital employed within the state); and that these rulings were sanctioned by the views expressed in *People ex rel. Edison Electric Light Co. v. Campbell*, 138 N. Y. 543, 20 L. R. A. 453, 34 N. E. 370, in the course of a decision that the tax involved could only be imposed upon so much of the capital stock of the relator as was employed within the state, and that, contrary to the decision below and the contention of the comptroller, some of it

was not so employed, while, as against the contention of the relator that none of it was, that a part was; yet they considered that the later case of *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 45 L. R. A. 126, 53 N. E. 685, was an authority requiring them to now hold the other way.

Now the difficulty here is that the relator in the last-cited case was a foreign corporation, while the relator *sub judice* was a domestic one. The statutes through a long series of enactments imposed the tax of the character involved upon the franchise or business of domestic corporations and foreign ones doing business within the state, measuring it by the amount of capital stock employed within the state. The New York cases involving these statutes are crowded with declarations to the effect that this tax is a tax upon the franchises of domestic corporations and only upon the business which foreign ones are privileged to do in the state, since the franchises of the latter are beyond the jurisdiction. See remarks of *Earl, J.*, at pp. 393, 394, in *People v. Equitable Trust Co.* 96 N. Y. 387; of *O'Brien, J.*, pp. 68, 69, in *People ex rel. Southern Cotton Oil Co. v. Wemple*, 131 N. Y. 64, 29 N. E. 1002; of *Gray, J.*, pp. 74, 75, and *Vann, J.*, p. 85, in *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 45 L. R. A. 126, 53 N. E. 685. of *Putnam, J.*, in *People ex rel. Postal Telegraph Cable Co. v. Campbell*, 70 Hun, 507, 24 N. Y. Supp. 208: in quoting from *People ex rel. Pennsylvania R. Co. v. Wemple*, 138 N. Y. 1, 19 L. R. A. 694, 33 N. E. 720; *Gray, J.*, p. 563, in *People ex rel. American Contracting & Dredging Co. v. Wemple*, 129 N. Y. 558, 29 N. E. 812; and in *People ex rel. Badische Anilin & Soda Fabrik v. Roberts*, 152 N. Y. 59, 36 L. R. A. 756, 46 N. E. 161; and *Bartlett, J.*, p. 591, in *People ex rel. United Verde Copper Co. v. Roberts*, 156 N. Y. 585, 51 N. E. 293.

This discrimination somewhat differentiates the *Johnson Case*, and makes the assumption very dubious that it was intended in effect to overrule the *Home Insurance Company Case*. It does not dispose of the matter to cite, as well, *People ex rel. Edison Electric Illum. Co. v. Brooklyn Bd. of Assessors*, 156 N. Y. 417, 42 L. R. A. 290, 51 N. E. 269, since that involved local taxes upon capital stock which, as is elsewhere pointed out, does not include franchises. And finally, it may be said that the *Johnson Case* goes no further than to hold that copyrights belonging to a foreign corporation form no part of the capital employed within the state, and since that is the basis of the tax they cannot be included in the computation.

50 cents on each \$100 of such property for public schools, and also to impose a penalty not exceeding 25 per centum of the amount of its tax bill for failure to pay same on or before the 1st of November of the year in which they were made out; that, under the provisions of said act, said board of council may list or assess for taxation all property subject to taxation, if such property, for any reason, has not been listed or assessed by this defendant's town assessor; that on the 20th of June, 1894, the clerk of the Campbell county court certified to this defendant's board of council that the state board of valuation and assessment had fixed the value of plaintiff's franchise, within the corporate limits of this defendant's town, at \$18,674.71 for the purpose of taxation, and that said board of valuation and assessment had fixed the value of plaintiff's fran-

chise in this defendant's town at \$18,674.71, for the purposes of taxation by this defendant, and for purposes of taxation by this state; that, after the receipt of said certificate, the board of council listed said franchise for ad valorem taxation at the sum aforesaid, and entered and listed said franchise property upon the books of its town assessor for taxation, and directed the clerk of this defendant town to make out its bill in accordance therewith; that on the 20th of June, 1894, the said board of council duly passed an order providing for the levy and collection of an ad valorem tax for the year 1894 upon all real, personal, and mixed property within the corporate limits of the town as listed or assessed by the assessor. The answer further sets out all the technical steps required by law, as well as alleging the amount of property owned by appel-

e. Taxes on passenger traffic.

Attempts have been made from time to time to impose state taxes upon carriers of passengers, but they have usually proved abortive. These laws commonly infringed the commerce clause of the United States Constitution, and were adjudged void for that reason. A brief reference only to this class of cases is made here for the sake of continuity. They are discussed in a separate note on corporate taxation as affected by the commerce clause in the Federal Constitution.

The supreme court of New Jersey held valid a law of that state which laid upon foreign corporations doing business therein and transporting passengers and merchandise across the state to and from other states a special tax graduated by the number of passengers and the weight of goods carried (*State v. Delaware, L. & W. R. Co.* 30 N. J. L. 478); but other cases, with substantial unanimity, have held the efforts hitherto made by states to tax passenger traffic futile. The Passenger Cases—*Smith v. Turner*, 7 How. 283, 12 L. ed. 702; *Perrine v. Chesapeake & D. Canal Co.* 9 How. 172, 13 L. ed. 92; *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745; *Clarke v. Philadelphia, W. & B. R. Co.* 4 Houst. (Del.) 158; *Henderson v. New York*, 92 U. S. 259, *sub nom.* *Henderson v. Wickham*, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87; *Head Money Cases*, 112 U. S. 580, *sub nom.* *Edye v. Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635.

f. Taxes on receipts, income, etc.

1. Corporations engaged in interstate or foreign commerce.

As the whole subject of corporate taxation as affected by the commerce clause of the United States Constitution is reserved for treatment in a separate note, an exhaustive discussion under this head must not be looked for here. It is generally agreed that the gross receipts of corporations which happen to be engaged in foreign or interstate commerce, in so far as they are exclusively derived from commercial transactions that begin, continue, and end within the territory ruled by the taxing government, are subject to taxation by that

government. There is practically such an agreement that the receipts from commerce which both begins and ends outside of such territory are beyond the reach of such taxation. And the great weight of authority is to the effect that commerce which either commences or terminates outside that territory renders the receipts from it not taxable within it. *Northwestern P. R. Co. v. Raymond*, 5 Dak. 356, 1 L. R. A. 732, 2 Inters. Com. Rep. 321, 40 N. W. 538; *Northern P. R. Co. v. Barnes*, 2 N. D. 310, 51 N. W. 386; *State ex rel. Carr v. Woodruff Sleeping & P. Coach Co.* 114 Ind. 155, 1 Inters. Com. Rep. 798, 15 N. E. 814; *People ex rel. New York C. & H. R. R. Co. v. Roberts*, 32 App. Div. 113, 52 N. Y. Supp. 859; *Com. v. Delaware & H. Canal Co.* 21 W. N. C. 406; *Com. v. New York, L. E. & W. R. Co.* 21 W. N. C. 410; *Com. v. Lehigh Valley R. Co.* 22 W. N. C. 525; *Com. v. Delaware, L. & W. R. Co.* 21 W. N. C. 412; *Com. v. New York, P. & O. R. Co.* 145 Pa. 38, 22 Atl. 212; *Com. v. Buffalo, N. Y. & P. R. Co.* 2 Dauph. Co. Rep. 216; *Southern Exp. Co. v. Hood*, 15 Rich. L. 66, 94 Am. Dec. 141; *State v. Pullman's Palace Car Co.* 64 Wis. 89, 23 N. W. 871; *Indiana v. American Exp. Co.* 7 Biss. 227, Fed. Cas. No. 7,021; *Indiana v. Pullman's Palace Car Co.* 11 Biss. 561; *Southern R. Co. v. Asheville*, 69 Fed. 359; *Delaware Railroad Tax*, 18 Wall. 206, *sub nom.* *Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888, *Reversing* 7 Phila. 555; *Fargo v. Michigan*, 121 U. S. 230, *sub nom.* *Fargo v. Stevens*, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Rutland R. Co. v. Central Vermont R. Co.* 63 Vt. 1, 10 L. R. A. 562, 3 Inters. Com. Rep. 488, 21 Atl. 262, 731; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Pacific Exp. Co. v. Selbert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; *McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242.

These general rules are conspicuously illustrated by the litigation between the state of New York and the Pennsylvania Railroad Company. The first attempt to tax that corporation under the franchise or business tax acts failed because the business it carried on was exclusively interstate commerce. *People ex rel. Pennsylvania R. Co. v. Wemple*, 138 N. Y. 1, 19 L. R. A. 694, 33 N. E. 720.

But when it established a cab service to

lant, and the purpose for which the various taxes were levied. Copies of said ordinances are filed with the answer.

To the foregoing answer, appellant filed its demurrer, which was overruled by the court; and, no further steps being taken by the appellant, its petition was dismissed, and the injunction dissolved, and from that judgment this appeal is prosecuted. We copy as follows from the opinion of the court on the demurrer to the answer:

"The question now presented to the court is whether the town of Bellevue can levy an ad valorem tax on the valuation of plaintiff's franchise. Section 174 of the Constitution provides that all property, whether owned by natural persons or corporation, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of

taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses, or franchises. And § 181 also provides: 'The general assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations, and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities, and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations, and professions.' That the state can collect an ad valorem tax on franchises was decided by the court of appeals in the case of *Henderson Bridge Co. v. Com.* 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486. Section

transport actual or prospective passengers in the city of New York between its terminal at the ferry to New Jersey and their homes, hotels, or other points of arrival and departure, charging an independent separate cab-fare therefor, it was held subject to taxation in respect of its receipts from such cab service under the New York statute (Laws 1896, chap. 908, § 184) providing for the taxation of railroad and other transportation companies for the privilege of exercising corporate franchises or of carrying on business in a corporate or organized capacity by an annual license fee or excise tax equal to $\frac{1}{2}$ of 1 per cent upon their gross earnings from transportation or transmission business originating and terminating within the state, but not including earnings derived from business of an interstate character. *People ex rel. Pennsylvania R. Co. v. Knight*, 171 N. Y. 354, 64 N. E. 152, *Affirming* 67 App. Div. 398, 73 N. Y. Supp. 790.

The case of *Western U. Tele. Co. v. State Bd. of Assessment*, 80 Ala. 273, 60 Am. Rep. 99, affirming the power of a state to tax receipts from not only telegraph messages received and delivered at points within the state, but those received within it for transmission and delivery without its territory, was reversed on error by the United States Supreme Court. *Western U. Tele. Co. v. Alabama State Bd. of Assessment*, 132 U. S. 473, *sub nom.* *Western U. Tele. Co. v. Seay*, 33 L. ed. 409, 1 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161.

The cases of *United States Exp. Co. v. Ellyson*, 28 Iowa, 370, and *Western U. Tele. Co. v. Ellyson*, 28 Iowa, 380, are unique. The Iowa statute therein involved enacted that the property of all express or telegraph companies operating in the state should be included in the valuation of their personal property in the respective political communities where they had business offices, and that they should be assessed at the same rate as other personal property belonging to individuals. It proceeded to make it the duty of the agents of such companies to furnish the local assessors, annually between stated dates, sworn statements of the gross receipts of their respective offices; and thereupon it directed the assessors to deduct from such receipts 60 per cent to represent expenses, and to return the remaining 40 per cent as the value of the personal property of the corporations to be assessed at the same rate as the personal property of individuals. This the court held unaffected by the commerce clause, as the law merely subjected local property to taxation. There was no provision for ascertaining whether or not there was, apart from the receipts any personal

property of the companies, or what it consisted of, or its value; no thought or care of the source of the receipts, nor what the expenses actually were; just a bald allowance of 60 per cent for expenses and a declaration that 40 per cent of the receipts constituted local personal property subject to the tax.

When both terminal points are within a state, the receipts from commerce between them are rightly held subject to state taxation although in the course of the journey the state is departed from and re-entered. *Com. v. New York, L. E. & W. R. Co.* 21 W. N. C. 410; *Lehigh Valley R. Co. v. Com. (Pa.)* 1 L. R. A. 232, *note*; *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806.

If the tax laid upon a corporation engaged in interstate commerce is seen to be clearly and beyond controversy a franchise tax, to levy which the gross receipts are merely resorted to as a standard to measure the value of the franchise, it is, of course, just as valid as if the standard taken was something else.

Thus, a statute imposing a specific tax on express companies according to their gross receipts from current business in the state, even when applied to a foreign carrier engaged in general commerce among the several states, is valid. *Walcott v. People*, 17 Mich. 68.

So is a tax imposed by way of license upon a foreign pipeline company of a percentage of the gross receipts from transporting oil in the state, apportioned according to mileage. *Tide Water Pipe Co. v. State Bd. of Assessors*, 57 N. J. L. 516, 27 L. R. A. 684, 31 Atl. 220.

And a tax upon the corporate franchise or business of transportation companies doing business in the state, of a fraction of 1 per cent upon their gross earnings in the state from tolls, for express, transportation, telegraph, and telephone business, may include as part of the basis of computation, not only receipts from internal commerce, but also those apportioned to the domestic constituent of a consolidated company as its share from interstate and foreign transactions. *People ex rel. Dunkirk, A. Valley & P. R. Co. v. Campbell*, 74 Hun. 210, 26 N. Y. Supp. 832.

And a tax upon the gross receipts from telegraphing during the year preceding its assessment is held to be a franchise tax, and not one on the telegrams sent or received, and therefore to be valid. *Western U. Tele. Co. v. Mayer*, 28 Ohio St. 521.

It is when the tax is laid upon gross receipts *eo nomine*, so that it is not always possible to say with certainty that it is a fran-

174, above quoted, applies alike to the state and every taxing subdivision of it; and § 181 authorizes the same license fees to be collected by counties, towns, cities, etc., as is done by the state, except an excise or income tax. So that, if § 181 is a limitation on § 174 as to cities, as counsel for plaintiff contends, it is also a limitation as to the state for the same reason; but it is not either. A franchise is property, and it must, under the Constitution, pay the same rate of taxation paid by other property. Stock used for breeding purposes is assessed, and an ad valorem tax is paid, and, in addition thereto, a license fee is charged by the state, and is paid, and the right to both has not, and cannot be, successfully ques-

tioned. There is no good reason why, under the provision of the Constitution quoted, a town or city having legislative authority may not both collect an ad valorem tax on the value of the franchise, and a license fee for the use of the franchise. The defendant seeks to collect an ad valorem tax on the assessed value of plaintiff's franchise. These views, the court believes, are in accord with the reason of the chief justice in the case of *Levi v. Louisville*, 97 Ky. 394, 28 L. R. A. 480, 30 S. W. 973."

It seems to us that the charter of the town of Bellevue, in May, 1892, at the time the alleged contract was executed, prohibited the appellee from making the contract claimed by the appellant; and, besides, the

chise tax measured by receipts rather than an impost on the receipts themselves, that confusion arises.

In the famous case of the State Tax on Railway Gross Receipts, 15 Wall. 284, *sub nom.* Philadelphia & R. R. Co. v. Pennsylvania, 21 L. ed. 164, the ruling was that a state statute imposing, in addition to other legal taxes, a percentage tax upon the gross receipts of every domestic railroad, canal, and transportation company, not otherwise liable to an income tax, was not a tax upon freight or passengers carried, but one laid upon the corporation itself measured in amount by the extent of its business or the degree to which the franchise is exercised. That such a law was not open to the objection that it conflicted with the commerce clause because such receipts were partly derived from the carriage of persons and property to and from other states. The decision rested upon two distinct grounds: First, that the receipts from freight carried had passed into the treasury of the company and thereby lost their distinctive character,—that, the commerce from which they were derived having altogether ended, what it had produced had become general property and as such subject to taxation as much as if its source was otherwise; second, that the tax was a franchise tax laid upon the company merely measured by the sum of the receipts. At the outset three of the judges, Miller, Field, and Hunt, went on record in dissent. They took the ground that the case was indistinguishable in principle from the case between the same parties just disposed of the other way (State Freight Tax Case, 15 Wall. 232, *sub nom.* Philadelphia & R. R. Co. v. Pennsylvania, 21 L. ed. 146), which held that a state tax upon the freight or tonnage of a domestic railroad corporation was a regulation of commerce and could not stand. They argued that a tax on freight, being because of the commerce clause without the power of the state to impose a tax on the receipts from freight, was not within it. To hold the contrary was to "keep the word of promise to the ear, and break it to the hope."

"It was at once felt," says a later authority, "that the distinction thus drawn between freight and the money paid for carrying freight was unsound in principle and that the [last] decision must soon be overruled." Delaware & H. Canal Co. v. Com. 1 Monaghan, 26, 1 L. R. A. 232, 2 Inters. Com. Rep. 222, 17 Atl. 175.

The next case to come before the Supreme Court upon the same general question,—Delaware Railroad Tax, 18 Wall. 206, *sub nom.* Minot v. Philadelphia, W. & B. R. Co. 21 L. ed. 888,—did not affect the controversy thus begun, because of the material differences in 57 L. R. A.

the statute there involved. That law required all domestic railroad and canal corporations doing business in the taxing state annually to pay a state tax, in addition to other taxes, of 3 per cent on their net earnings or income from all sources during the year, with a proviso that when the canal or railroad extended into an adjoining state only so much of the net earnings or income as was proportioned to the length of the line within the state should be subject to the tax. The act also imposed a further tax of $\frac{1}{4}$ of 1 per cent on the actual cash value of every share of the capital stock of such corporations, with a similar proviso for an apportionment, in which the factors were the whole number of shares, the total length of the line, and the mileage within the state. And lastly, it laid a specific tax upon each locomotive, passenger coach, truck, and freight car used within the state. This law was sustained.

The Pennsylvania courts, of course, upheld the act of their own state taxing the gross receipts of domestic railroads from freights passing through the state coming from or going to other states. Com. v. Buffalo & E. R. Co. 2 Pearson (Pa.) 376; Buffalo & E. R. Co. v. Com. 3 Brewst. (Pa.) 386.

In the latter case it was said that the law must be considered as settled until reviewed and changed by the Supreme Court of the United States, which the court plainly contemplated, since it added: We concede that there is no difference between the tax charged on the freight as claimed here and on the goods as decided in the previous cases, but the point is negatived without qualification in obedience to those decisions.

Then the supreme court of Michigan was called upon to pass on the validity of a statute of that state whereby every person, association, partnership, or corporation owning, running, or interested in any special, fast, through, or other stock, coal, or refrigerator car freight lines, the cars of which were not the exclusive property of the railroads over which they run, and which did business in, or run cars upon, railroads in Michigan, was required to keep accounts and make reports of all sums received for business in that state, and to pay a state tax annually thereon of a percentage of the gross receipts as computed by the state railroad commissioner. A tax laid pursuant to this statute upon a foreign joint-stock association sending freight into and through the state in its own cars for its own patrons under contracts with the railroad companies was contested for repugnancy to the commerce clause, but held valid by the state court. Fargo v. Auditor General, 57 Mich. 598, 24 N. W. 538.

This case was promptly carried to the Unit-

new Constitution was then in full force, which would also seem to prohibit the making of any such contract; and, for the two reasons, the contract, even if it attempted to exempt the value of appellant's franchise from taxation, would be null and void. But we are further of the opinion that a fair construction of the contract only exempts the appellant from the payment of a license tax or fee proper; that is a specific tax for the privilege, without regard to its value. Section 4077 of the Kentucky Statutes does not levy a tax for such purpose, but merely fixes a basis for determining the value of certain franchises; and it is wholly immaterial, so far as this action is concerned, whether the town authorities of Bellevue

were bound to adopt the state valuation as the value of the franchise for city taxation or not. But, as matter of law, the valuation by the state board of the property was, in law, conclusive as to its value for city assessment. It appears from the answer that the city authorities, under and by virtue of the law, did assess and value the franchise at the sum named therein, and assessed the tax provided by law. We think the reasons of the court below, as shown by the quotations from its opinions copied herein, are sustained by the law.

Judgment affirmed.

Whole court sitting.

ed States Supreme Court on writ of error, where the judgment was reversed. It was there held that a state tax on the gross receipts of a foreign express company derived from transportation of merchandise into, out of, or through the state, and not wholly internal, was void by reason of the commerce clause. *Fargo v. Michigan*, 121 U. S. 230, *sub nom. Fargo v. Stevens*, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857.

It is obvious that it could not be said in such a case that the tax rested upon money that had ceased to be commerce and become property, since it never came within the jurisdiction of Michigan,—never entered that state at all,—so that this contention would not support the tax. If upheld at all, it must be sustained as a franchise tax; but clearly Michigan has no more jurisdiction over the foreign franchise than she has over foreign property. But the decision went beyond this. Miller, J., writing for the court, after discussing the State Tax on Railway Gross Receipts, 15 Wall. 284, *sub nom. Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 164, says: The proposition that the states can, by way of a tax upon business transacted within their limits or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations has often been set up as a defense to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the states or with foreign nations, the constitutional provision cannot thereby be evaded, nor can the states, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation, or in any other way.

About this time the supreme court of Pennsylvania decided that a domestic corporation with its head office in that state, owning seagoing ships employed in coasting and foreign ocean trade between its home port and the ports of other states and countries on voyages over the navigable waters of the United States and upon the high seas, whose vessels were registered under Federal navigation acts, while its entire receipts came from the carriage of freight and passengers between the different ports referred to, was subject to a state tax upon its gross receipts notwithstanding the commerce clause of the United States Constitution. *Philadelphia & S. Mail SS. Co. v. Com.* 104 Pa. 109.

In affirming the validity of this tax the court argued that it was laid upon the money of the 57 L. R. A.

carrier after it reached the corporate treasury, and it was immaterial where it came from, as the state had a right to tax its own corporations upon the fruits of their business brought within its jurisdiction and made a part of the general mass of the commonwealth.

When this case reached the United States Supreme court, as in due course it soon did, Bradley, J., writing in his opening sentence pronounced the question presented by it for decision to be: "Whether a state can constitutionally impose upon a steamship company incorporated under its laws a tax upon the gross receipts of such company derived from the transportation of persons and property by sea between different states and to and from foreign countries." And his final conclusion was "that the imposition of the tax in question in this cause was a regulation of interstate and foreign commerce in conflict with the exclusive powers of Congress under the Constitution." *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 336, 30 L. ed. 1200, 1201, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118. In the course of his opinion the learned justice reasons thus: If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the freights and fares received for carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it nevertheless tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company, we will not tax you for the transportation you perform, but we will tax you for what you get for performing it. Such a position can hardly be said to be based on a sound method of reasoning. Turning to the decision of the Case of State Tax on Railway Gross Receipts, 15 Wall. 284, *sub nom. Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 164, he says that a review of the question has convinced the court that the first ground, to wit: that the receipts from the freight carried had passed into the general property of the company and lost their distinctive character, upon which the decision in that case was placed, is not tenable. The second ground upon which that decision rested, he takes up in relation to the case at bar, and thus disposes of: It certainly could not have been intended as a tax on the corporate franchise, because by the terms of the act it was laid equally on the corporations of other states doing business in Pennsylvania. If intended as a tax on the franchise of doing business,—which in this case is the

MINNESOTA SUPREME COURT.

STATE of Minnesota

v.

DULUTH GAS & WATER COMPANY.

SAME

v.

DULUTH STREET RAILWAY COMPANY.

SAME

v.

HARTMAN GENERAL ELECTRIC COMPANY.

SAME

v.

DULUTH WATER & LIGHT COMPANY.

SAME

v.

WEST DULUTH ELECTRIC COMPANY.

(76 Minn. 96.)

*1. Gen. Stat. 1894, § 1530, was designed to constitute the exclusive method of listing and assessing for taxation the franchises and other intangible property of corporations and associations falling within its purview. The method there provided for reaching such intangible property for taxation is by listing and assessing the entire capital stock at its

*Headnotes by MITCHELL, J.

business of transportation in carrying on interstate and foreign commerce,—it would be clearly unconstitutional.

The two cases of *Fargo v. Michigan*, 121 U. S. 230, *sub nom.* *Fargo v. Stevens*, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857, and *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118, were thereupon generally considered to have overruled *The State Tax on Railway Gross Receipts*, 15 Wall. 284, *sub nom.* *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 164, and to have finally settled the law (see *Rutland R. Co. v. Central Vermont R. Co.* 63 Vt. 1, 10 L. R. A. 562, 3 Inters. Com. Rep. 488, 21 Atl. 262, 731; also *Raney, Ch. J.*, in *Osborne v. State*, 33 Fla. 162, 25 L. R. A. 120, 4 Inters. Com. Rep. 731, 14 So. 588); and the courts of Pennsylvania gracefully acquiesced. *Delaware & H. Canal Co. v. Com.* 1 Monaghan, 36, 1 L. R. A. 232, 2 Inters. Com. Rep. 222, 17 Atl. 175, 21 W. N. C. 406, overruling, in conformity therewith, their former decisions in *Philadelphia & S. Mail SS. Co. v. Com.* 104 Pa. 109; *Pullman's Palace Car Co. v. Com.* 107 Pa. 148; and *Western U. Teleg. Co. v. Com.* 110 Pa. 405, 20 Atl. 720; and holding the contrary in *Com. v. New York, L. E. & W. R. Co.* 21 W. N. C. 410; *Com. v. Delaware, L. & W. R. Co.* 21 W. N. C. 412.

But the controversy was not ended. Maine enacted a statute providing that every corporation, person, or association operating a railroad in that state should pay to the state an annual excise tax for the privilege of exercising railroad franchises in such state, the amount of such tax being ascertained by dividing the gross receipts from transportation during the preceding year by the number of miles of railroad operated to get the average gross

market or actual value, less certain specified deductions.

2. The personal property referred to in item 7 is the tangible property specifically listed and assessed, and does not include "franchises." Item 14 of § 1524, Gen. Stat. 1894, providing for listing "franchises" as a separate and distinct class of personal property, applies only to private persons, or others not falling within the provisions of § 1530. The provision in § 1530 for deducting the total amount of the indebtedness of a corporation or association from the value of its stock is unconstitutional, because resulting in inequality of taxation. But the invalidity of this provision does not render the remainder of the section invalid.

3. Certain irregularities of the county board and county auditor in increasing the assessed value of items 18 and 27 of personal property, and in extending it on the assessment rolls,—*Held* not to have prejudiced the defendants; it not appearing that, as thus increased, either item was overvalued. Gen. Stat. 1894, § 1669, providing for the taxation of railroad companies by requiring them to pay a percentage on their gross earnings, does not apply to street railroads.

4. *Held*, that upon the facts the Duluth Street-Railway Company is not a "railroad company," within the meaning of § 1669, Gen. Stat. 1894.

(April 26, 1899.)

receipts per mile and then taking a percentage of such receipts, larger or smaller according as they fell short of or exceeded certain stated sums. In the case of railroads operating partly within and partly without the state the gross receipts were to be apportioned upon consideration of both totals and averages and mileage within the state and *in toto*. The state court held this statute repugnant to the commerce clause as applied to the Grand Trunk Railway, a foreign corporation carrying on interstate and international commerce, and the attorney general carried the case to the United States Supreme Court. That tribunal, speaking through Field, J., one of the dissentients in the case of *State Tax on Railway Gross Receipts*, 15 Wall. 284, *sub nom.* *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 164, held the tax a valid one as a true franchise tax, which was merely measured by a proportion of the gross receipts, and, being such, it was of no consequence where the receipts used as a standard came from,—they were not taxed. No cases were cited to sustain this conclusion, except the then recent one of *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1023, 10 Sup. Ct. Rep. 593, in which was upheld a franchise tax imposed by New York upon a corporation of its own creation, not engaged in commerce of any kind, measured by its capital stock when a part of such capital stock stood invested in United States bonds. And the prevailing opinion closed with the statement that the case of *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118, in no way conflicted with this decision. "We do not," it was added, "question the correctness of that decision, nor do the views we hold in this case in any way qualify or impair it." *Maine v. Grand Trunk R. Co.* 142 U. S. 217,

QUESTIONS certified by the District Court for St. Louis County which arose in actions brought to enforce collection of personal taxes against the defendant corporations. *Judgment in favor of the State directed with certain exceptions.*

The facts are stated in the opinion.

Messrs. Charles C. Teare, George E. Arbury, and William B. Phelps for the State.

Messrs. Billson, Congdon, & Dickinson, for Duluth Street Railway Company:

The clause authorizing a deduction of the corporate debts was intended by the legislature to authorize a deduction of debts from the value of corporate franchises, just as, in the case of individuals, debts may be deducted from credits.

The statute would remain, after a loss of this clause, as complete, symmetrical, and

harmonious as it could have been with it; nor is there any reason to suppose that the legislature would have changed in other respects its scheme of taxation if it had foreseen the invalidity of this particular clause.

In the cases at bar there could not have been in any event a deduction of debts, because there is no stock value to deduct from; all the corporations being insolvent, and their stock of no value whatever.

Even with the obnoxious clause dropped out, no element of franchise value can be found in the stock of any of these companies.

It was not through caprice that the legislature directed that this residuum of value should be listed as "stocks."

It was as, and in the form of, "stocks" that it was intended to subject this residuary value of taxation.

3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163.

From this decision four judges, Bradley, Harlan, Lamar, and Brown, JJ., the first writing, dissented. Conceding, they said in substance, that a state has the power to exact from a foreign corporation a tax for the privilege of exercising corporate franchises within its borders, yet it cannot adopt an unconstitutional mode of doing so. They insisted that the mode adopted in the case at bar was the laying of a tax on gross receipts the major part of which came from foreign and interstate commerce, and therefore the tax was laid on that commerce, and was for that reason void. They insisted that the decision was a plain departure from the following line of decisions: *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 640, 11 Sup. Ct. Rep. 851; *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118. They express themselves vigorously. They declare that the Supreme Court, and some of the state courts, have gone to a great length in sustaining corporate taxation. That the train of reasoning may be questionable. That, according to this class of decisions, a corporation may be taxed several times over,—for its charter, franchises, for the privilege of carrying on its business, upon its capital, and upon its property; and that each of these taxations may be carried to the full amount of the property of the company. Adverting to the decision that a tax in terms upon the capital stock of the Western Union Telegraph Company in Massachusetts, graduated according to mileage of the lines within that state as compared with the total mileage, was but a taxation of the property of the company within the state although laid upon capital stock; and that it as well might have been laid on gross receipts; and that by this decision a tax may be laid upon gross receipts of a corporation for the privilege of exercising its franchise within the taxing state if graduated according to mileage,—they say: "Then it comes to this: A state may tax a railroad company upon its gross receipts in proportion to the number of miles run within the state as a tax on its property; and may also lay a tax upon these same gross receipts in proportion to the same number of miles for the privilege of exercising its franchise." The 57 L. R. A.

dissent closes thus: "I do not know what else it may not tax the gross receipts for. If the interstate commerce of the country is not, or will not be, handicapped by this course of decision, I do not understand the ordinary principles which govern human conduct."

Notwithstanding, the views expressed by Peckham, J., writing for the court in *McHenry v. Alford*, 168 U. S. 651, 670, 671, 42 L. ed. 614, 621, 18 Sup. Ct. Rep. 242, practically conceding that a state tax on railway gross receipts derived wholly or partly from interstate commerce would be void for conflict with the commerce clause of the United States Constitution, the whole contest is again open.

Thus, the Maryland court of appeals has just decided (February 20, 1901) that a statute of that state imposing a state tax of 1 per cent upon the gross receipts of all domestic steam railroad corporations doing business therein, and upon those whose lines extend beyond the state the same rate per cent upon such proportion of their gross earnings as their mileage within the state bears to the entire length of the line, imposes a franchise tax upon domestic corporations measured merely by the extent of the receipts, and therefore the source of such receipts, as from interstate commerce, is immaterial, and does not affect the validity of the tax. *Cumberland & P. R. Co. v. State*, 92 Md. 668, 52 L. R. A. 764, 48 Atl. 503.

The opinion of the court in that case, by Pearce, J., is an elaborate argument to show that the case of the State Tax on Railway Gross Receipts, 15 Wall. 284, *sub nom.* *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 164, was not overruled by *Fargo v. Michigan*, 121 U. S. 230, *sub nom.* *Fargo v. Stevens*, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857, and *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118, as has so often been asserted; at any rate, if such can justly be claimed, that it was reclothed with authority by the subsequent decision in *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163. Apart from this, he contends that the first of these cases was sound in principle anyway.

Thus the question remains. The series of decisions cannot be wholly reconciled, and those upon one side or the other must in time be positively and finally declared unsound.

2. *Railroad, steamship, navigation, express, and telegraph companies generally.*

Apart from the question of interstate com-

The legislature had its option as to the form in which this residuary element of value should be taxed. It has chosen to tax it as "stocks." It cannot at the same time tax the "stocks," and the underlying franchises or other value of which the stock is another form.

When the legislature elected to pursue the franchise value in the form of stocks, the tax must manifestly stand or fall, according as the stocks have or have not actual value.

A corporation, which is, and for many years last past has been, duly organized and existing under title 1 of chap. 34, Minn. Gen. Stat. 1878, and the acts amendatory thereof and supplemental thereto; and the general nature of whose business was and is to construct, maintain, and operate railways in the streets and highways of the city

of Duluth, and its suburbs, including Lakeside, Lester Park, West Duluth, and New Duluth, and in the roads connecting the same in St. Louis county, Minnesota, upon which the right so to do may be acquired by such corporation, by purchase, condemnation, or otherwise; and which during the years 1894 and 1895 owned and operated a passenger railway line 16 miles in length in the streets of the city of Duluth, and along the rights of way acquired by it by purchase and condemnation; and which has been declared by the legislature of the state of Minnesota to be "a corporation organized and existing under the general railroad law of this state,"—is a railroad corporation within the meaning of § 1, chap. 11, of the General Laws of 1887, so as to be taxable as therein described.

The statute providing for the taxation of

merce, the courts have frequently had occasion to express themselves concerning taxes on corporate receipts.

The various phases in which cases have been presented do not readily admit of systematic grouping.

A tax on gross earnings payable in installments may be discharged by a single payment before all but the first accrues. *Northern P. R. Co. v. Raymond*, 5 Dak. 358, 1 L. R. A. 732, 2 *Intera. Com. Rep.* 321, 40 N. W. 538.

A charter provision that a railroad and its property shall not be subject to a higher tax than a stated percentage on its annual income, permits the taxation of gross earnings from the business of the line, not net income only, nor rental from a lease of the road. *Goldsmith v. Augusta & S. E. Co.* 62 Ga. 468.

Whether or not a statute imposing upon a domestic railroad an obligation to pay the state a fixed proportion of the passenger fares it collects between two cities on its line in consideration of the grant of a franchise to build and operate it and collect fares and tolls therein is void for conflicting with the constitutional right of citizens of the Union to pass through or depart from the state because in effect a capitation tax, it is no defense to a suit by the state for its share after the railroad has actually collected the fares for the use of the state. *State v. Baltimore & O. R. Co.* 34 Md. 374.

When this case reached the Supreme Court the decision was affirmed, but this proposition was not agreed to. It was there said that the doctrine that the part of the fares which the company's charter obliged it to pay the state was state money which the company was agent to collect, and which it held in trust for the state, and was bound to pay over irrespective of the constitutionality of the statute, had no application. The court did say that, inasmuch as a state has the right to build transportation lines and to authorize individuals or bodies corporate so to do and has an unlimited right in its discretion to charge tolls, freights, and fares, and to authorize its delegates or grantees so to do, it can, in either case, constitutionally take any part or any class of the receipts that it and its grantee or creature may agree upon. *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 22 L. ed. 678. *Miller, J.*, however, dissented upon the ground that the case was within the principle of *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745.

One state cannot constitutionally tax the entire gross receipts of a consolidated railroad corporation operating in several states and made up of constituent corporations chartered

by different states. Its power in this respect is limited to the gains within its own territory. *State Treasurer v. Auditor General*, 46 Mich. 224, 9 N. W. 258.

Under a statute laying an annual tax upon the gross receipts per mile of all roads actually and regularly operated by domestic railroad companies in lieu of all other taxes except on real estate capable of alienation and not essential to the exercise of their franchises, and providing that when a railroad lies partly within and partly without the state there shall be paid such a portion of the thereby imposed tax as the length of the road within the state bears to the whole length of the operated portion thereof, a corporation formed by the consolidation of domestic and foreign companies operating lines both within and without the state, some owned and others leased in perpetuity, is taxable upon the gross receipts of the domestic railroads in the consolidation, and not upon the proportionate mileage basis. *Chicago & N. W. R. Co. v. Auditor General*, 58 Mich. 79, 18 N. W. 588.

Advances made by a foreign railroad corporation to domestic roads in its system of lines to pay interest on the latter's debts, and in consideration of a traffic agreement and promise of repayment constitute no part of the taxable earnings of the recipients. *Re Taxation of Grand Trunk R. Co.* 6 Det. L. N. No. 18, *Atty. Gen.'s Op.* 348a.

In computing the miles of railroad operated by a union railroad station company in order to tax the gross income per mile, separate tracks should be treated as main lines, and their aggregate mileage returned; but this does not mean that where a single track is used by two companies the length should be doubled; nor that each of two tracks exclusively used by one company should be measured; nor that switches be regarded as additional track; but that there should be measured a line for each railroad entering the depot, provided there are as many tracks as roads no two of which are used exclusively by any one road. *Fort Smith Union Depot Co. v. Railroad Comrs.* 118 Mich. 340, 76 N. W. 631.

Tracks over which a railroad runs trains, but which it does not exclusively control, are not counted for the purpose of computing a tax upon its gross income per mile of road actually operated within the state. *Detroit, G. R. & W. R. Co. v. Railroad Comrs.* 119 Mich. 132, 77 N. W. 631.

Sums received for switching, rentals of approaches, tracks and terminals, and interest on money deposits are part of the gross income.

gross earnings extends to all railroad companies.

Messrs. Washburn, Lewis, & Bailey, for other defendants:

It may well be questioned whether such a license as this, from a municipality, to allow pipes and mains to be laid in and under the streets and alleys of a town, is a franchise at all, within the meaning and intentment of the statute; and whether it could ever be subject to be taxed as a property item.

People v. Lynoh, 51 Cal. 15, 21 Am. Rep. 677; *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Chicago City R. Co. v. People ex rel. Story*, 73 Ill. 548.

Even if subject to taxation, it is not a thing of value to the corporation separate and apart from its business.

The levy of a tax is a matter solely of statutory creation, and it can only be en-

forced by means and methods provided by statute.

Covington Gaslight Co. v. Covington, 92 Ky. 312, 17 S. W. 808; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561; *Cabin Creek Dist. Bd. of Edu. v. Old Dominion, I. M. & M. Co.* 18 W. Va. 441; *Raynsford v. Phelps*, 43 Mich. 347, 38 Am. Rep. 189, 5 N. W. 403; *Camden v. Allen*, 26 N. J. L. 399; *Carondelet use of Reuter v. Picot*, 38 Mo. 125; *Osborn v. Bank of United States*, 9 Wheat. 859, 6 L. ed. 233; *Brown v. Maryland*, 12 Wheat. 444, 6 L. ed. 687.

It has not been the policy of the law anywhere to subject a taxpayer to the mercy or caprice of assessing officers or boards of equalization in such manner, and such is not the policy of the law of the state of Minnesota.

Beach, Priv. Corp. § 798; 1 Desty, Taxn.

Ibid.; *Chicago & W. M. R. Co. v. Railroad Comrs.* 119 Mich. 135, 77 N. W. 1116.

When a railroad charter provides for the payment of a percentage of the gross earnings in lieu of all taxes and assessment, payments to commence as soon as a certain number of miles of the road shall be completed; and the company has the power to divide its lines and franchises so that several distinct and separate railroads may be created under the exclusive ownership and control, respectively, of independent corporations possessed of like franchises, and exercises such power, a successor acquiring one of such railroads becomes liable to the tax as soon as the requisite number of miles are completed on any one of the original lines, regardless of whether such mileage is completed upon its own particular road or not. *Chicago, M. & St. P. R. Co. v. Pfaender*, 23 Minn. 217.

Compensation paid by one railroad to another for the right to run trains over its tracks should not be counted among the gross earnings taxable under a statute requiring as a basis of taxation a statement of receipts and expenditures on account of the operation of the road. *State v. St. Paul, M. & M. R. Co.* 30 Minn. 311, 15 N. W. 307.

A railroad corporation acquiring by contract a right of perpetual use between designated termini of a line and branches belonging to another company in common with such company to run locomotives, cars, and trains thereon, when there is attached and appurtenant to such railroad an exemption from other taxation and an obligation to pay in lieu thereof a percentage of gross receipts, gets such an interest in and takes the use of such road burdened with a liability to pay such percentage tax. *State v. Northern P. R. Co.* 32 Minn. 294, 20 N. W. 234.

An ordinance of a state constitutional convention adopted as part of the fundamental law providing for the levy upon and collection from certain railroad companies of an annual percentage tax upon their gross receipts from fares and freights (less those from the United States, and deducting Federal taxes) does not contravene the 5th and 6th Amendments to the United States Constitution, since these merely limit the powers of the general government, and have no application to states. *North Missouri R. Co. v. Maguire*, 49 Mo. 490; Affirmed in 20 Wall. 46, 22 L. ed. 287.

When a railroad reduces the salaries of its officers and employees in a given year its reported net income for the previous year may, for the purposes of taxation, be increased by the amount of the reduction, on the theory that so much might have been saved in expenses by

economical administration, in absence of any proof that the prior outlay was necessary. *State v. Virginia & T. R. Co.* 24 Nev. 53, 49 Pac. 945, 50 Pac. 607.

Under a statute requiring every railroad corporation to pay for the privilege of exercising its franchise an annual tax equaling a stated percentage upon its gross earnings within the state, including transportation or transmission business beginning and ending within the state and excluding earnings from interstate business, income from stocks and bonds of other corporations must be counted in. *People ex rel. New York C. & H. R. Co. v. Roberts*, 32 App. Div. 113, 52 N. Y. Supp. 859.

Not so, however, any part of the compensation received for carrying the mails, even where a part thereof is paid for mail matter taken up and set down within the state, when that is so mingled with mails originating and terminating without the state that segregation and apportionment are impossible. *People ex rel. New York C. & H. R. Co. v. Morgan*, 168 N. Y. 1, 60 N. E. 1041, Affirming 57 App. Div. 302, 68 N. Y. Supp. 135.

A corporation organized to make a complete slack-water communication between a designated city and the state line, and authorized to collect tolls upon every ton of freight transported upon its works, but forbidden in express terms to engage directly or indirectly in transporting or storing merchandise, etc., though certainly no transportation company, is none the less within a statute imposing a specified tax upon the gross receipts of every railroad, canal, and transportation company liable to a tonnage tax under another section in the same statute, which does in positive terms include it, when it is plain that the two sections are so intimately blended as to require being construed together, and that the phrase "transportation company" is a mere collective name to designate the companies other than railroads and canals within the tonnage tax section. *Com. v. Monongahela Nav. Co.* 66 Pa. 81.

The court below in a much more logical and direct opinion had held the company not within the statute. It would have been better to leave it to the legislature to bring it in by amendment. It is certainly safer to leave tax legislation to the legislature, which is usually prompt to tax everything in sight, especially corporations.

A foreign railroad corporation cannot escape payment of a state tax upon its gross receipts, otherwise a valid one, by sending them to its home office so that they are without the taxing state. *Delaware & H. Canal Co.*

349; *State Railroad Tax Cases*, 92 U. S. 578, 23 L. ed. 663; *Com. v. Hamilton Mfg. Co.* 12 Allen, 298. *Spring Valley Waterworks v. Schottler*, 62 Cal. 69; *Com. v. Lancaster Sav. Bank*, 123 Mass. 495; *Society for Savings v. Coite*, 6 Wall. 607, 18 L. ed. 902; *Burke v. Badlam*, 57 Cal. 603; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561; *Henderson Bridge Co. v. Com.* 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486.

Where a franchise is to be taxed a just taxable value can only be reached through a consideration and valuation of its tangible property, or through deductions authorized by the statute.

Covington Gaslight Co. v. Covington, 92 Ky. 312, 17 S. W. 808.

Mitchell, J., delivered the opinion of the court:

The facts in all these cases (which were

v. Com. 1 Monaghan, 36, 1 L. R. A. 232, 2 Inters. Com. Rep. 222, 17 Atl. 175.

A state tax upon the gross receipts from business transacted within the taxing state by a foreign telegraph company is valid. *Western U. Teleg. Co. v. Com.* 110 Pa. 405, 20 Atl. 720.

Sumas called rentals are really tolls within a statute imposing a specific tax upon the gross receipts of railroad companies when paid to a foreign railroad for use of a part of its line, a branch road wholly within the state, by its lessee for carrying coal, merchandise, and passengers, both between points within the state, and from them to points beyond its borders. *Com. v. New York, L. E. & W. R. Co.* 145 Pa. 38, 22 Atl. 212.

But payments for trackage when the tracks are used in common by lessor and lessee are no part of the subject-matter of the tax. *Com. v. New York, L. E. & W. R. Co.* 145 Pa. 200, 22 Atl. 807.

These points in the foregoing Pennsylvania cases are, of course, unaffected by the rulings before referred to respecting the same taxes in relation to interstate commerce.

A state is not inhibited from taxing tolls received by a railroad for the use of its line within the state by another road, by the fact of the extension of the line beyond its borders. *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896.

An express company subjected to a state tax upon its gross receipts from express business done wholly within the taxing state, when thereout, during the period they were accruing, it paid to railroad carriers for transporting its express matter, some a fixed yearly sum for all service and facilities, others, a fixed rate per hundred weight carried, and, others still, a sum equal to a stated percentage of its receipts for expressage upon their roads, all of which railroad carriers in turn paid a state tax under the same law upon their gross receipts inclusive of the payments by such express company,—is not thereby within the provisos of the taxing acts, that where the works of one such taxpayer are leased to and run by another, the gross-receipts tax shall be apportioned between them, and the state shall look to the lessee or operator in the first instance, and, upon collecting the tax, the other shall not be liable to any tax upon the proportion of such receipts as rental for the use of such works. *Com. v. United States Exp. Co.* 137 Pa. 579, 27 Atl. 396, Affirming 18 Pa. Co. Ct. Pa. 225. 57 L. R. A.

brought to enforce the collection of personal taxes) being essentially the same, it will be sufficient to state those in the case against the Duluth Gas & Water Company.

This is a domestic corporation organized to manufacture gas for public and private consumption, and to furnish water to the inhabitants of the city of Duluth, which is its principal place of business. It is not, and never has been, the owner of any annuities, royalties, or patent rights; and the only franchise it has ever owned, except the franchise to be a corporation, is the right and privilege, under an ordinance of the city, to lay its pipes under and along the public streets of the city, and to maintain and operate the same for the purpose of furnishing gas and water for public and private consumption. Neither the company nor any of its officers listed its personal property for taxation during the year 1897,

A percentage of value paid by one railroad company to another for the use of its equipment is an operating expense to be deducted from the gross earnings for the purpose of taxing the net earnings, where these are exempt by statute until they realize 6 per cent on the invested capital. *Com. v. Philadelphia & E. R. Co.* 164 Pa. 252, 30 Atl. 145.

A tax on the gross receipts of railroad, steamboat, and other transportation companies, and express, telegraph, palace, and sleeping car companies, that has none of the attributes or characteristics of an income tax, in that it is neither a general tax on all incomes of all inhabitants, nor even upon all sources of income in the selected classes, but plainly a tax on transportation, cannot be sustained as an income tax. *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

Gross receipts of a railroad in the hands of a receiver appointed by a Federal court are still subject to state taxation. *Com. v. Buffalo, N. Y. & P. R. Co.* 2 Dauph. Co. Rep. 216.

Taxes on gross earnings of a railroad are taxes upon the property of the road, so as to be payable by the lessor rather than the lessee, when the rent is a definite proportion of the gross earnings, and the tax law requires the lessee to pay the tax and deduct it from the rent. *Vermont & C. R. Co. v. Vermont C. R. Co.* 63 Vt. 1, 10 L. R. 562, 3 Inters. Com. Rep. 488, 21 Atl. 262, 731.

Under statutes providing that every railroad company and every operator of a railroad within the state shall make yearly a sworn return of the gross earnings of such road and the number of miles operated during the year, and shall apply for and receive a license to operate such road upon paying fees, (1) 4 per cent of the gross earnings when these equal or exceed \$3,000 a year per mile in operation, (2) 2 per cent when they range between \$3,000 and \$1,500, and \$5 per mile in addition, and (3) only the \$5 per mile when less than \$1,500,—a railroad corporation whose annual gross earnings exceed \$3,000 per mile of the aggregate mileage of all the roads it operates, when it operates several distinct and independent lines, is liable to the 4 per cent gross-earnings tax of the first class, although some of these separate lines do not, of themselves, earn as much as \$3,000 per mile a year. *State ex rel. Chicago, M. & St. P. R. Co. v. McFetridge*, 66 Wis. 256, 14 N. W. 185.

and it failed and refused to make any statement or return under either § 1524 or 1530, Gen. Stat. 1894. Thereupon the city assessor made and returned a statement of its personal property for taxation, and of his assessment and appraisal of the value thereof, on June 26, 1897, and filed the same in the office of the county auditor, whereby and wherein he listed and returned as personal property belonging to the company on May 1, 1897, the following (the return being made upon a blank of the form contained in § 1524, and the only items in the blank under which property was assessed being Nos. 1, 5, 10, 14, 18, and 27):

(1) Horses 3 years old and over, assessor's valuation...	\$ 120 00
(5) Wagons and carriages, four	100 00
(10) Household and office furniture of all descriptions...	385 00
(14) Franchises, annuities, royalties, and patent rights.	125,000 00
(18) Mfrs.' tools, implements, machinery, engines, boilers, gas mains, etc.....	175,000 00
(27) The value of all other articles of personal property not included in preceding 26 items, water mains, etc.....	325,000 00
Total value of all the items as determined by the assessor for taxation....	\$625,605 00

The word "gas mains," in item 18, and "water mains," in item 27, were written in after the prior printed words in the blank.

3. Miscellaneous corporations.

A corporation taxable upon its annual net earnings or income is subject to taxation upon the difference between expenses and receipts divided or divisible among its stockholders, whether dividends in form or not. It is not entitled to have such distributions to stockholders regarded as capital returned rather than profits either wholly or in part, merely because the capital is invested in oil wells tending to exhaustion. *Com. v. Ocean Oil Co.* 59 Pa. 61. And, to the same effect, *Com. v. Penn Gas Coal Co.* 62 Pa. 241, 3 Brewst. (Pa.) 107, in which the court expressed its inability to see that the former case did not govern.

Net earnings and profits are synonymous. *Com. v. Sharon Coal Co.* 3 Dauph. Co. Rep. 243.

A percentage tax on the gross receipts within the state of a foreign building and loan association is no interference with commerce. *Southern Bldg. & L. Asso. v. Norman*, 98 Ky. 294, 31 L. E. A. 41, 32 S. W. 952.

4. Local taxes on receipts of local corporations.

The general power conferred upon a municipality to tax real and personal property, auction and other sales, and capital employed in business in the city, and to lay a street tax on the adult male inhabitants, is no authority for taxing the gross receipts of a warehouse company. *Selma v. Selma Press & W. Co.* 67 Ala. 430.

A street railway company subject to a municipal tax of a certain percentage of its receipts within the city that operates three lines 57 L. R. A.

The assessor never attempted to make any return of the property of the company pursuant to the provisions of § 1530 of the statutes; and in making the above return he did not take into consideration, or ascertain, the amount of the paid-up capital stock of the company, or its indebtedness; nor did he reach the amount by deducting the indebtedness of the company, exclusive of current expenses, from the capital stock, nor by deducting the indebtedness of the company, exclusive of current expenses, and the value of its real and personal property, from the actual or the market value of its stock, but put the valuation of said franchises upon his own estimate, as best he could, as though they were an item of tangible personal property. The assessment, return, and valuation as thus made by the assessor were not changed by the board of review of the city of Duluth. The authorized capital stock of the company was \$1,000,000, and the amount of its paid-up capital stock was \$679,050, but this had no value, either market or actual. The total indebtedness, except for current expenses, excluding from such expenses the amount paid for improvements on the property during the current year, was over \$1,800,000. This indebtedness was in excess of the value of its real and personal property, and of its shares of stock. All the personal property which the company owned was included in the return of the assessor. In August, 1897, the county board of equalization raised the valuation of the personal property of the company \$125,000, in a lump sum, determining by resolution that such an increase should be made on items Nos. 18 and

with an aggregate car mileage of 8.63 miles, but, as part of its track is used in common, a track mileage of 7.08 of which half a mile is beyond the city limits, and that charges but one fare and gives a free transfer to each passenger, while not taxable upon so much of its receipts as come for carriage beyond the city, is entitled, when there is no way of classifying passengers or segregating fares, to credit for only so much of its gross receipts as its ultra-urban mileage bears to the total. *Baltimore Union Pass. R. Co. v. Baltimore*, 71 Md. 405, 18 Atl. 917.

Such a percentage tax upon the gross receipts of street railways for intermural fares imposed in consideration of the privilege or franchise to lay tracks and run cars upon the public thoroughfares, cannot be exacted from a railway corporation holding no franchise from the city, and running upon none of the city streets, but exclusively upon private property and a turnpike owned by a private corporation, although by an extension of the city limits a part of the line has been brought within the boundaries. *Park Tax Case*, 84 Md. 1, *sub nom.* *Baltimore v. Baltimore, C. & E. M. Pass. R. Co.* 33 L. E. A. 506, 35 Atl. 17.

Sums devoted to redeeming bonds issued to pay for a street railway franchise are no part of the running expenses which are to be deducted from the gross receipts as the basis for taxing such franchise. *State ex rel. St. Charles Street R. Co. v. Board of Assessors*, 48 La. Ann. 1156, 20 So. 670.

Authority given a city to tax all goods, wares, merchandise, and articles of commerce sold in it, at auction or otherwise; to tax retail liquor

27, but not apportioning the increase between the two; and thereupon the county auditor, without any other or more specific authority from the county board, added \$43,750 to item 18, and \$81,250 to item 27. The board of equalization made this increase without any evidence being introduced upon which to act, and without any examination of the property of the company at that time or for that purpose, and without examination or inquiry as to the amount of the company's indebtedness or the amount of its capital stock.

Upon this state of facts, the trial court has certified up two questions: (1) Were the franchises of the company hereinbefore described, to wit, to be a corporation, and to lay and maintain its pipes in the public streets of the city for the purpose of distributing and supplying water and gas, subject to taxation, as such, as a separate item of personal property, under the provisions of § 1524 of the statutes, or can it be reached for taxation only through assessments on the stock pursuant to the provisions of § 1530? (2) Was the increase on items 18 and 27, made in the manner above described, valid under the laws of this state?

Without stopping to discuss at length the whole scheme of taxation provided in our tax laws, an analysis and comparison of its various provisions satisfy us that the legislature intended § 1530, Gen. Stat. 1894, to be the exclusive method of listing and taxing the property of all corporations and companies falling within the purview of that section. That section nowhere provides for the listing and taxation of corpo-

rate franchises, as such, as a separate and distinct item of personal property. The method there provided for is the very common and most equitable and efficient one,—of reaching the franchises and other intangible property for purposes of taxation through the capital stock. The "capital stock" (using the term in the sense in which it is evidently used in this section) is, as has been said, "a business photograph of all the corporate possessions and possibilities," and represents its business opportunities and capacities as well as its tangible assets. They enter into, and go to make up, the value of the stock. It is well settled that these franchises, although neither visible nor tangible, are property which may be taxed the same as any other property. Hence a very common method of taxing corporations and stock companies is to list and assess all their tangible property, real and personal, the same as the like property of other persons is listed and assessed, and also list and assess the capital stock at its actual or market value, less the value of its tangible real and personal property otherwise specifically listed and assessed. This system reaches every element of property value owned by the corporation, and at the same time avoids double taxation. This is clearly the scheme of taxation contemplated and provided for by § 1530, with one exception, which will be considered hereafter. It is evident, in view of the entire scheme, that the value of the personal property in the seventh item, which is to be specifically listed and assessed, and deducted from the market or actual value of the shares of stock, refers solely to tangible personal

dealers and auctioneers; to assess an annual business tax on the average quarterly business of forwarding and commission merchants, brokers, banks, and banking institutions; and a like tax on the average quarterly receipts of insurance, express, and telegraph companies,—does not warrant the imposition of a municipal tax on the gross receipts of city gas companies. This is so notwithstanding a later statute authorizing the city council, when raising revenue for current expenses and interest payments, to adjust the rate of taxation upon the different subjects then or afterwards made liable to taxation in such a manner as it may deem equitable, regardless of limitations and restrictions in former statutes, since this has not the effect to enlarge the number subject to the gross receipts or business taxes. *Pittsburgh's Appeal*, 1 Monaghan, 290, 18 Atl. 92.

g. Taxes on insurance premiums.

1. In general.

It is settled that insurance is not commerce; so the embarrassments that beset one in the effort to determine whether a tax upon the receipts of corporations engaged in commerce interferes with the exclusive power to regulate foreign, interstate, and Indian trade conferred upon Congress by the Federal Constitution do not arise in the investigation of taxes upon premiums of insurance.

The leading cases of *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972; and *Liverpool & L. Life & F. Ins. Co. v. Massachusetts*, 10 Wall. 566, sub 57 L. R. A.

nom. Liverpool & L. Life & F. Ins. Co. v. Oliver, 19 L. ed. 1029,—are conclusive upon this point.

Premiums received by an insurance company, not being property, but income, are not taxable by a municipality empowered only to tax property, and to license, regulate, and tax certain designated businesses, not including insurance. *Dubuque v. Northwestern L. Ins. Co.* 29 Iowa. 9; *Burlington v. Putnam Ins. Co.* 31 Iowa, 102.

Uncollected insurance premiums are not exempt in Louisiana. *State ex rel. Mechanics' & T. Ins. Co. v. Board of Assessors*, 47 La. Ann. 1498, 18 So. 1462.

When statutes lay a tax of a stated percentage upon all insurance premiums received in cash or otherwise, and all agreed to be paid, an insurance company liable thereto is bound to pay upon the aggregate premiums charged to its policy holders, although a part thereof is paid by crediting an excess of previous collections over the actual cost of insurance for the year of collection. *People ex rel. Connecticut Mut. L. Ins. Co. v. State Treasurer*, 31 Mich. 6.

It is held otherwise in Pennsylvania. It has been decided in that state that discounts from the face amounts of stipulated premiums when only the balance is actually paid by the policy holder to the company are no part of the receipts of the corporation within the meaning of the tax law of that state. And this is so even where the company calls the discounts dividends and credits the policy holder with the full premium, and charges him with

property, and does not include franchises. It would be wholly unreasonable to assume that the legislature would adopt the scheme of reaching the franchises and other intangible property of a corporation through the taxation of its capital stock, and at the same time turn around and specifically tax as a separate item of personal property, and deduct from the value of the stock, the very intangible property which they were endeavoring to reach through the taxation of the stock. Sections 1524 and 1530 must be read and construed together; and, doing so, the 14th subdivision of the former section, providing for listing and assessing franchises as a specific and separate item of personal property, was intended to apply only to franchises owned by private persons or others not falling within the provisions of § 1530. Thus far there can be no con-

stitutional objection to the system of taxation provided for in § 1530, and no question but that the franchises of these corporations were not intended to be made subject to taxation as a separate item of personal property, under § 1524, but only taxable through the assessment of the capital stock, pursuant to the provisions of § 1530. But in the latter section the legislature has gone a step further, and provided for the deduction from the value of the capital stock, not merely of the value of the tangible corporate property otherwise specifically taxed, but also the total amount of all indebtedness of the association, except indebtedness for current expenses. Such a provision is in direct conflict with the constitutional requirement that all taxes shall be as nearly equal as may be, and that all property on which taxes are to be levied shall

the abatement upon its books. *Com. v. Penn Mut. L. Ins. Co.* 1 Dauph. Co. Rep. 233.

A section in a state revenue act taxing all insurance companies doing business in the state (except mutual ones without capital stock) upon the gross amount of premiums received in the state during the previous year, and freeing them from other taxes beyond those on real estate and fees to the insurance department, is fairly within the purview of a general act embracing, amid other subjects of taxation, all personal property and other investments, as well as property *in transitu* from the state controlled by residents, since it reaches premiums in the hands of local agents. *Phoenix Ins. Co. v. Omaha*, 23 Neb. 312, 36 N. W. 522.

In New Jersey an insurance company is not liable to taxation on premiums received by its local superintendent and placed to his credit in a bank where every week he sends his total collections to the company, as this money is merely *in transitu* between policy holders and the insuring corporation. *State, Metropolitan L. Ins. Co., Prosecutor, v. Newark*, 62 N. J. L. 74, 40 Atl. 573.

A statute taxing insurance companies a specified percentage upon premiums received during six months before the first days of July and January in each year, and requiring semi-annual reports to be made after its enactment as the basis of assessing the tax, authorizes the first assessment to be made before the statute has been operative for six months and on account of premiums received prior to its passage. *People v. National F. Ins. Co.* 27 Hun, 188, Reversing 61 How. Pr. 334, 342.

Unearned premiums in the possession of the insurer are liable to taxation notwithstanding the right of the insured to a cancellation of his policy and the return of the part of the premium at any time on demand. *People ex rel. Westchester F. Ins. Co. v. Davenport*, 91 N. Y. 574.

A corporation formed to guarantee the fidelity of persons in public or private place of trust is an insurance company, and as such liable to pay a state percentage tax upon the gross premiums of all insurance companies except life and purely mutual beneficial associations. *People ex rel. American Surety Co. v. Wemple*, 58 Hun, 248, 12 N. Y. Supp. 271, Affirmed in 128 N. Y. 623, 27 N. E. 410.

Such a corporation is not exempted from such tax by a clause in a statute taxing only fire and marine insurance companies declaring that the personal property, franchise, and business of all insurance companies, foreign and domestic, shall thereafter be exempted from all 57 L. R. A.

assessment and taxation except as therein provided, because this broad language is necessarily qualified by the remainder of the law in which it occurs, and so is confined to fire and marine insurance companies alone. *Ibid.*

Receipts of a life insurance company not spent in operation nor added to the legal reserve, but put into a surplus fund, are taxable within a statute taxing corporations upon their net earnings, even where the company is conducted upon a purely mutual plan so that theoretically it has no net income. *Com. v. Penn. Mut. L. Ins. Co.* 1 Dauph. Co. Rep. 233.

And an exemption in the tax act of corporations liable to a tax on capital stock or gross receipts includes those liable to taxation upon gross premiums. *Ibid.*

When an insurance company is dissolved during the half year for which it is taxed in Pennsylvania upon gross premiums, it is liable only for the proportion of the tax accruing prior to dissolution. *Com. v. American L. Ins. Co.* 14 Pa. Co. Ct. 216.

2. Domestic companies.

A statute providing in substance that a state tax, as a franchise tax, of 2 per cent is to be levied annually upon the gross receipts or earnings of sundry corporations of designated characters incorporated under general or special laws of the state and doing business therein, and that all the provisions and requirements thereof shall be in force and apply to all foreign corporations of a like kind doing business in the state, imposes such tax only upon such receipts or earnings of domestic corporations within the statute as they derive from business done within the state and not upon their gross income gained everywhere. Since the legislature plainly could reach only such receipts of foreign corporations as were gained within the state, it is not supposable that it intended to tax home companies higher than foreign ones, and as the practice of the state officers in administering the law has uniformly been not to discriminate, the courts should so construe the act. *State v. United States Fidelity & Guaranty Co.* 93 Md. 314, 48 Atl. 918.

A domestic insurance company chartered originally as a purely mutual one, but since authorized by law, at discretion, to insure for cash premiums, which neither entitled the assured to membership nor subjected him to assessment, and accepting and acting under the new powers, makes itself liable to a tax upon gross premiums upon all domestic insurance companies from which those doing business upon a purely mutual plan without any capi-

have a cash valuation, and be equalized and uniform throughout the state. The indebtedness presumably affects the value of the stock as directly as do the assets of the corporation. The former depreciates, while the latter appreciates, its value. The practical effect of this provision is to allow a double deduction of the amount of the corporate indebtedness. It would necessarily result in inequality of taxation, not only as between the associations themselves falling within the provisions of § 1530 (owing to differences in their financial condition), but also as between all such associations and persons or associations taxed under the general provisions of the tax law, who are not permitted to deduct their indebtedness from the value of franchises owned by them. See *Henderson Bridge Co. v. Com.* 99 Ky. 623; 29 L. R. A. 73, 31 S. W. 486.

tal stock or accumulated reserve are exempt. *Lycoming F. Ins. Co. v. Com.* 10 W. N. C. 228.

3. Foreign companies.

A state may lawfully impose taxes upon foreign insurance companies doing business within it of a percentage of the premium receipts. *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972; *Oliver v. Liverpool & L. Life & F. Ins. Co.* 100 Mass. 531, on Error, 10 Wall. 566, 19 L. ed. 1029.

A municipal ordinance imposing an annual license tax of 2 per cent on the premiums paid or promised to foreign insurance companies for business transacted in the city, such city being empowered by its charter and an amendatory act to license, regulate, and tax insurance brokers and agents, and to regulate agencies of all insurance companies within its jurisdiction, and being possessed of an organized fire department, is, and the penalties ordained for its infraction are enforceable, notwithstanding a general statute providing for an annual report of premium receipts and payment of a property tax thereon at the same rate as other taxes in lieu of all town and municipal licenses, when the general law contains a saving proviso leaving such cities free to levy license taxes to such a percentage for the support of their fire departments. *Walker v. Springfield*, 94 Ill. 364.

Unearned premiums returned to policy holders are not to be counted in computing the state percentage tax on gross premiums received by a foreign insurance company for business done in the taxing state. *German Alliance Ins. Co. v. VanCleave*, 191 Ill. 410, 61 N. E. 94.

A statute relating to foreign insurance companies, providing that the capital shall be deemed the aggregate value of the deposits made in the several states to secure policy holders together with bonds and mortgages on real estate in the United States, and that when said capital has not been taxed, and the taxes thereon paid by the main agency or the company in another state, then the taxation shall be upon the gross receipts less deductions governing domestic companies; but which neither provides nor indicates any method of ascertaining such gross receipts, and neither fixes nor authorizes the fixing of any rate of taxation; and when the general state revenue act, while comprehensively enumerating subjects of taxation, is wholly silent as to gross receipts,—is too indefinite to warrant the imposition of any tax upon foreign insurance companies

This presents the important question whether the invalidity of this provision renders the whole of § 1530 invalid, or whether its remaining provisions are valid notwithstanding the invalidity of this one provision. Without entering into any extended discussion of the rules governing the question when a statute may be held void in part and valid in part, we may refer to a few facts and practical considerations peculiarly applicable to the present case. In the first place, if the whole of § 1530 is held invalid, the only method by which any part of the intangible property of these corporations or associations could be reached for taxation would be under the provisions of the 14th subdivision of § 1524,—a system much less complete and equitable than that provided by § 1530, with the invalid provision omitted, and one which it is evident the legislature never actually intended to

on account of their gross receipts. *British Foreign Marine Ins. Co. v. Board of Assessors*, 42 Fed. 90.

When a statute taxing premiums collected within the state by a foreign insurance company exempts therefrom, and from retaliatory clauses as well, all premiums loaned within the state for two years or more, investments thereof in municipal water bonds for that length of time are not taxable; these are true loans, not purchases. *State v. North America Ins. Co.* 55 Md. 492.

Assessments collected from its members by a foreign insurance company doing business on that plan are not premiums within a taxing statute, and a licensee cannot be refused a foreign organization of that character until it pays a percentage tax thereon. *Northwestern Masonic Aid Assn. v. Waddill*, 138 Mo. 628, 40 S. W. 648.

A statute granting power to a municipality to levy taxes for general purposes on all real and personal property within its limits taxable by the laws of the state, the valuation to be taken from the county assessment roll, is sufficient authority for a city tax upon the gross premiums collected in the city for a foreign insurance company when these are by a state law taxable in the hands of the resident agent. *Phoenix Ins. Co. v. Omaha*, 23 Neb. 312, 36 N. W. 522.

The payment of a tax by an insurance company in accordance with the provisions of a new system of corporate taxation upon franchises and business for state purposes, set forth in a statute which provides that upon such payment the taxpaying corporation shall be exempt from assessment or taxation except as therein prescribed, does not relieve its resident agent from the payment of a specified percentage of its gross premiums from risks taken within a certain city exacted annually for a local incorporated firemen's association, since, although the exaction is in the nature of a license fee for state purposes, it is nevertheless local, and, while within the language of the exemption, is not within its meaning. *Exempt Firemen's Benev. Fund v. Boome*, 93 N. Y. 313, 45 Am. Rep. 217.

A foreign insurance company having an agency and being in receipt of premiums and licensed to do business in the state is liable to a state percentage tax upon such receipts under the licensing statute imposing them, in despite of a later statute for taxing such corporations which does not repeal the former one but does impose a tax upon all foreign and do-

apply to the corporations and associations falling within the purview of § 1530. Again, while it cannot be denied that the legislature intended the provision for deducting the indebtedness from the value of the capital stock to be a part of the system of listing and assessing the property of these corporations and associations, yet this provision is easily separable from the other provisions of the section. What would remain would constitute a complete system of taxation, fully capable of being executed in accordance with what we think was the apparent legislative intent. The fact that this void provision is in the same section with other provisions is not important, for the distribution into sections is purely arbitrary. The test is, rather, whether the provisions are so essentially and inseparably connected and interdependent that the one

may not operate without the other, or that it is impossible to suppose that the legislature would have passed the one without the other. There is no such essential and inseparable connection or interdependency in this case. The other provisions will operate, and can be executed, with this invalid provision stricken out. Neither is there anything to justify a court in holding that the legislature would not have enacted the statute with this obnoxious provision omitted. The evident intention was to reach for taxation the franchises and other intangible property of these corporations and associations as effectually and completely as possible. This the legislature thought could be best accomplished by listing and assessing the value of the stock, which, as already suggested, represents every element of property value, tangible and intangible,

mestic corporations upon their capital stock, and expressly exempts therefrom foreign insurance companies licensed pursuant to general acts in relation thereto. *Com. v. Germania F. Ins. Co.* 11 Phila. 553.

Under legislation requiring foreign fire and inland navigation insurance companies to pay 2 per cent of the gross income of the preceding year on business done in the state; and all foreign life or accident companies to pay \$300 annually for transacting "such" business; and all domestic life or accident companies to pay, in addition to such \$300, 2 per cent upon their cash receipts for premiums on home state business done during the preceding year, as afterwards amended so as to make foreign accident insurance companies subject to the same fees and taxes paid by fire insurance companies doing business in the state,—there is added to the \$300 license fee required of a foreign company doing an accident business in the state the additional requirement of 2 per cent of its gross income during the preceding year from state business; and therefore a combined life and accident foreign insurance company which has done business in the state for several years under a life insurance license, and only paid the \$300 annual fee, is liable for the 2 per cent on gross income from state accident business, and may be deprived of its license if it does not pay such percentage for the past years. *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258, 68 N. W. 958, 99 Wis. 367, 41 L. R. A. 557, 74 N. W. 372.

Under the Ohio statute (Rev. Stat. § 2745) providing, *inter alia*, that certain dividends, cancellations, values, and commissions shall be deducted from the gross receipts, and the net balance shall be the basis of taxation for foreign insurance companies doing business in the state at the rate of 2½ per cent; but also providing that it shall be the insurance superintendent's duty to charge and collect from such companies such a sum as, added to the amount paid to the county treasurers, will produce the equal of 2½ per cent on such receipts of such companies as shown by their annual statements to the insurance department (which statements are required to show the gross receipts),—the basis of computation is the gross, and not the net, receipts. *State ex rel. Penn Mut. L. Ins. Co. v. Hahn*, 50 Ohio St. 714, 35 N. E. 1052.

b. Taxes on bank deposits.

As before mentioned with respect of other franchise taxes, cases involving taxes on bank deposits in which was raised the question of the validity of the imposition because of con-

tract relations, real or supposed, have been reserved for separate treatment; while cases wherein it appeared that the deposits subjected to taxation stood invested in United States bonds are referred to elsewhere herein.

When the United States revenue act of June 30, 1864, was amended (March 3, 1865) by omitting from § 110, reading: "There shall be levied, collected, and paid a duty of 1-24 of 1 per cent each month upon the average amount of deposits of money subject to payment by check or draft, or represented by certificates of deposit or otherwise, whether payable on demand or at some future day with any person, bank, association, company, or corporation engaged in the business of banking, . . . provided, that this section shall not apply to . . . [any savings bank having no capital stock and whose business is confined to receiving deposits and loaning the same on interest for the benefit of the depositors only, and which do no other business of banking],"—the proviso brought such savings banks within the substantive provisions of the act. *Bank for Savings v. The Collector*, 3 Wall. 495, *sub nom.* *Bank for Savings v. Field*, 18 L. ed. 207.

Under the California system for taxation of bank deposits, not only are ordinary deposits subject to the tax, but also interest drawing debts of the bank for borrowed money. *Security Sav. Bank & T. Co. v. Hinton*, 97 Cal. 214, 32 Pac. 3; *Main Street Sav. Bank & T. Co. v. Hinton* (Cal.) 32 Pac. 6.

In Kentucky the banks are not required to pay tax on the money deposited with them by their customers, or on amounts which represent it. *Deposit Bank v. Davless County*, 102 Ky. 174, 44 L. R. A. 825, 39 S. W. 1030, 44 S. W. 1131, *Affirmed* in 178 U. S. 636, 663, 43 L. ed. 840, 850, 19 Sup. Ct. Rep. 530, 875.

Under an act (Md. Laws 1874, chap. 483, § 85), requiring savings banks that receive deposits and allow interest thereon to furnish the comptroller yearly the aggregate amounts of deposits in them and pay a state tax out of the interest due the depositors, such deposits as are invested in ground rents under ninety-nine year leases perpetually renewable on land which is assessed to the leasehold owner and taxed, are not within the scope of the act, since the tax thereby imposed is a property tax, and to construe the statute otherwise would result in a double taxation. *State v. Central Sav. Bank*, 67 Md. 290, 10 Atl. 290, 11 Atl. 357, *Following State v. Sterling*, 20 Md. 502, upon the ground of *stare decisis*.

And for the same reason upon the amendment of the statute (Code, § 86 of art. 81), re-

owned by corporations or associations; but, in enumerating the deductions to be made, they erroneously included their indebtedness, presumably because they failed to perceive that this had already entered into, and gone to fix, the value of the stock, or that such a deduction would necessarily result in inequality of taxation. But, with this deduction omitted, what remains will effect the full and fair taxation of all the intangible property of these corporations and associations;—the very purpose which the legislature apparently had in mind. For these reasons our conclusion is that the remainder of the section should be held valid, notwithstanding the invalidity of the objectionable provision. The result is that the franchisees of the defendants could be taxed only through the taxation of their stock in the manner provided in § 1530.

quiring every savings bank to pay annually what is there designated as a franchisee tax to the amount of $\frac{1}{4}$ of 1 per cent on the total amount of deposits held by such savings bank, but declaring unequivocally that no other tax shall be laid on such bank in respect of such deposits, the securities in which such a bank has invested a part of the deposits are not taxable. *Westminster v. Westminster Sav. Bank*, 92 Md. 62, 48 Atl. 34.

The Massachusetts statute taxing certain insurance companies and depositors in savings banks was construed as providing that every domestic savings corporation should pay a state tax on account of its depositors of a fraction of 1 per cent on the amount of its deposits, to be assessed, one half on the average amount of deposits in the preceding half year, in May and November, and as exempting all property taxed as above for the current year in which such tax was paid. *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907.

The basis of computing such tax was held to be the amount deposited, together with interest and dividends accruing and payable to depositors, but not to include undivided profits or a guaranty fund. *Re Suffolk Sav. Bank*, 151 Mass. 103, 23 N. E. 728.

And when a statute taxes all personal estate in or out of the state to be assessed to the owner at the place he inhabits deposits by a foreign corporation in a Massachusetts bank are not taxable, because such a depositor, being domiciled in its home state, does not become an inhabitant of Massachusetts by merely doing business therein. *Boston Invest. Co. v. Boston*, 158 Mass. 461, 33 N. E. 580.

It affords no claim to a reduction of a tax upon savings bank deposits and accumulations or dividends due depositors in New Hampshire that part of its assets earned no income during the tax year, and will be equally unprofitable during the next; nor that its surplus is relatively less than that of other savings banks, and consequently its exemptions not so large. *Union Five Cents Sav. Bank's Petition*, 68 N. H. 384, 36 Atl. 17.

When savings bank depositors are taxable at their respective places of residence upon their deposits the bank is not taxable upon corporate stocks in which it has invested such deposits for income. *Provident Inst. for Sav. v. Gardiner*, 4 R. I. 484, *Following American Bank v. Mumford*, 4 R. I. 478.

Under a statute providing that every bank and trust company shall pay a state tax of a fraction of 1 per cent upon the average amount of its deposits, including money or securities

2. The method adopted by the county board of equalization in increasing the valuation of items 18 and 27, and by the county auditor in apportioning the increase between the two items, may have been irregular; but the defendants are not in position to successfully object, for the reason that it is neither alleged nor shown that they are at all prejudiced thereby. There is no claim that there has been an overvaluation of either item.

3. The case of the Duluth Street-Railway Company presents a question not involved in the other cases, *viz.*, Is it taxable as a railroad company, under Gen. Laws 1887, chap. 11, § 1 (Gen. Stat. 1894, § 1669); that is, by taxing it a percentage on its gross earnings? Assuming, without deciding, the validity of this act, it applies only to what are usually known as ordinary com-

received as trustee under an order of court or otherwise, deducting therefrom, *inter alia*, the amount of individual deposits in excess of \$1,500 each, and that no other tax shall be assessed upon such deposits except on individual deposits exceeding \$1,500, a trust fund of \$23,000, created by will for the benefit of a minor under guardianship, and deposited by an order of the probate court with a trust company, which keeps it in a separate fund and accounts for its actual earnings, is not exempt, but is within the general laws relating to taxation and subject to a city assessment under chartered power to tax. *Montpellier Sav. Bank & T. Co. v. Montpellier*, 73 Vt. 364, 50 Atl. 1117.

VII. Organizations subject to franchise taxes.

a. Generally.

Taxation is the rule, exemption the exception; therefore, all sorts and conditions of organizations that can be made to bear franchise taxes are subjected thereto.

A water company vested with the right of corporate existence and powers common to all corporations of succession, seal, suing and defending, buying and selling, and of doing business in a corporate capacity; having a right to condemn and take needed lands and waters, and to occupy with its mains the public streets, and distribute and sell water at rates fixed by a prescribed legal method, is possessed of franchises capable of private ownership, and hence taxable under a constitution requiring all property not exempt by Federal laws to be taxed ad valorem, and defining property as inclusive of franchises capable of private ownership. *Spring Valley Waterworks v. Schottler*, 62 Cal. 69.

A statute taxing all packing houses doing a cold-storage business in the state, whether by the principal or an agent, is not inclusive of a concern maintaining a refrigerator plant to preserve its own commodities pending sale, and which does not receive or store for any others whomsoever. *Stewart v. Atlanta Beef Co.* 93 Ga. 12, 18 S. E. 981.

Under a state constitution providing that naught contained in it shall be construed to prevent the legislature from providing for taxation based on income, licenses, or franchises, that body is not restricted to taxing only such privileges as fall within the well-defined legal meaning of the term "franchises," but it may, in a statute taxing banking franchisees, provide for taxing, not only corporations exercising them, but private individuals as well when they carry on the banking business. *Providence*

mercial railways, and not to street railways. This is the practical construction which has always been placed on this statute by both the state and the street-railway companies. The correctness of this construction was assumed without question by this court in *State v. Eleventh Judicial Dist. Ct.* 54 Minn. 34, 55 N. W. 816. All through our statutes the legislature has uniformly, so far as we have discovered, used the word "railroad" or "railway," when unqualified, as referring exclusively to ordinary commercial railroads, while, on the other hand, when they have intended to refer to street railroads they have qualified the word "railroad" by the prefix "street." See *Funk v. St. Paul City R. Co.* 61 Minn. 435, 29 L. R. A. 208, 63 N. W. 1099. Of late, street-railway companies have been gradually extending somewhat the sphere and

character of their operations. This fact may render it rather difficult in some few cases to determine to which class a particular road belongs, but it does not obliterate the inherent difference between the main purposes and functions of the two classes. Speaking generally, a street railway is local, derives its business from the streets along which it is operated, and is in aid of the local travel upon those streets, while a commercial railway usually derives its business, either directly, or indirectly through connecting roads, from a large area of territory, and not from the travel on the streets of those cities, either terminal or way stations, along which they happen to be constructed and operated. In fact, so far from being an aid or advantage, they are a positive impediment, to the travel on such streets. Hence it is held that the one

Bkg. Co. v. Webster County, 21 Ky. L. Rep. 214, 57 S. W. 14.

When a statute of that character requires specified corporations, and "also every other corporation, company, or association having . . . any special or exclusive privilege or franchise, . . . or performing any public service" to pay a tax upon its franchise, it includes all corporations, not merely those like the ones named. *Western U. Teleg. Co. v. Norman*, 77 Fed. 13.

It includes an association authorized to lay out a race course and sell pools on the races run thereon. *Latonia Agricultural & S. Asso. v. Donnelly*, 20 Ky. L. Rep. 1891, 50 S. W. 251.

Even a municipality with a franchise to operate water works. *Newport v. Com.* 21 Ky. L. Rep. 42, 45 L. R. A. 518, 50 S. W. 845, 51 S. W. 483.

When the Constitution commits to the legislature discretionary power, but does not command it to levy a tax upon those who pursue any trade, calling, or business, and the legislature accordingly enacts a license tax law applying but to banks having a stated capital and upwards, a bank with less capital is not within the statute, hence not liable to the license tax. *State ex rel. Huson v. Bank of Mansfield*, 48 La. Ann. 1029, 20 So. 201.

To warrant the exaction of such a tax there must be some express provision of law. *Ibid.*

A statute imposing a specific tax upon all fire insurance companies under a penalty of double the amount for carrying on business without prepaying it applies to a corporation organized upon the mutual co-operative plan of insuring its members and which has no capital nor reserve, and is not intended for profit, but which meets every loss by a special assessment on its members, and pays only what such assessment may yield. *Lee Mut. F. Ins. Co. v. State*, 60 Miss. 395.

A railroad which runs over its own line a car stocked with goods that it furnishes to its own employees only in lieu of wages in cash, and does not sell at all to others, is not within a statute taxing the privilege of running a trading car. *Vicksburg & M. R. Co. v. State*, 62 Miss. 105.

And a railroad operating a telegraph line, not for profit, but solely as a needful adjunct to the safe and expeditious movement of its trains, and which exercises no telegraph franchise, is not a telegraph company operating miles of wire within a statute taxing such companies upon their privileges. *Adams v. Louisville, N. O. & T. R. Co. (Miss.)* 13 So. 932.

A statute concerning money brokers and exchange dealers and the licensing thereof, for-
57 L. R. A.

bidding any person, association, or company of persons to carry on the business of dealing in, buying, selling, or shaving any kind of bills of exchange, checks, drafts, etc., without a license, does not apply to savings banks authorized by their charters to engage in such transactions. *State v. Field*, 49 Mo. 270.

The same is true of savings banks in Tennessee. *State v. Nashville Sav. Bank*, 16 Lea, 111.

The Massachusetts statute laying a state tax upon fire or marine, or both, insurance companies incorporated or associated under the laws of any government or state other than one of the United States, of a percentage upon all premiums charged or received on contracts for the insurance of property made within the commonwealth, applies to a partnership of individuals, citizens of New York and British subjects associated under the laws of Great Britain. *Oliver v. Liverpool & L. Life & F. Ins. Co.* 100 Mass. 531, Affirmed on Error in 10 Wall. 566, 19 L. ed. 1029.

A statute taxing for state purposes every corporation, joint-stock company, and association whatsoever incorporated or organized under any law of the state or by or under the laws of any other state or country and doing business in the state (with certain exceptions), upon its corporate franchise or business, to be computed annually, according to circumstances, upon its capital or a valuation thereof, embraces an association of individuals formed by articles of agreement to carry on a forwarding agency, banking, exchange, and insurance business between divers selected cities and towns of the United States and foreign countries to continue in force for the term of ten years, and afterwards from time to time extended according to adopted by-laws; described in such articles as a joint-stock company, and having a capital divided into shares transferable by the holder to whomsoever he chooses, represented by certificates, managed by a board of directors, and, in the name of its president, litigating, taking, holding, and conveying real estate, and which is not dissolved by the death of any member or number of members less than a majority; and which organization is within the permissive terms of sundry statutes respecting its kind, although the associating articles do not refer to them. *People ex rel. Platt v. Wemple*, 117 N. Y. 136, 6 L. R. A. 303, 2 Inters. Com. Rep. 735, 22 N. E. 1046, Affirming 52 Hun, 434, 5 N. Y. Supp. 581.

But while this is so, the distinction between this kind of an organization and corporations is still preserved in the state of New York, and a joint-stock company, despite of successive leg-

constitutes an additional servitude on the street, while the other does not. *Carli v. Stillwater Street R. & Transfer Co.* 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205. The Duluth Street-Railway Company was organized under Gen. Stat. 1894, chap. 34, title 1, and the acts amendatory thereof. The general nature of its business, as stated in its articles of association, is to construct, maintain, and operate railways in the streets and highways of the city of Duluth and its suburbs, including Lakeside, Lester Park, West Duluth (all or most of which are now parts of the city of Duluth), and in the roads connecting the same in St. Louis county, and over any other lands in St. Louis county upon which the right to do so may be acquired by it by purchase, condemnation, or otherwise. Certain additional powers were granted to it by Sp.

lative enactments clothing such concerns with various corporate attributes, is not taxable under a statutory provision for taxing the capital of all monied or stock corporations deriving an income or profit from their capital or otherwise. *People ex rel. Winchester v. Coleman*, 138 N. Y. 279, 16 L. R. A. 183, 31 N. E. 96.

The latter case was followed in respect of an attempt to tax the Adams Express Company, a similar organization in Pennsylvania, under a statute of that state imposing an annual tax upon the capital stock of all companies incorporated by or under the laws of that state, and upon that of every company doing business therein incorporated by any other state. *Gregg v. Sanford*, 12 C. C. A. 525, 28 U. S. App. 813, 65 Fed. 151.

But limited partnerships formed under the laws of Pennsylvania, having privileges essentially the same as corporate franchises, are taxable thereon the same as like corporations. *Com. v. Sandyllick Gas Coal & C. Co.* 1 Dauph. Co. Rep. 814.

A street railway company operating the plants of electric light companies and supplying light therewith is not subject to taxation upon the franchises of such companies, because these belong in law to them, and not to the railway corporation, and are assessable against the owners only. The electric light companies are incompetent to alienate to the railway corporation their franchises and property necessary to the exercise thereof, so as to disable them from discharging the public duties that are the consideration of the grant of franchises to them. *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746.

In assessing a franchise tax measured by dividends made or declared during the year the comptroller is not justified in treating as a dividend the excess above par value of the capital stock distributed to stockholders from the proceeds of all its lands condemned and taken for public purposes by right of eminent domain, when, during the year, such corporation has done no business, and simply kept up its corporate organization in order to receive and distribute the award. *People ex rel. Jerome Park Villa Site & Improv. Co. v. Roberts*, 41 App. Div. 21, 58 N. Y. Supp. 254.

When a statute imposes a franchise tax upon every trust company or savings bank and trust company incorporated by and doing business in the taxing state on the average amount of its deposits, assessable semi-annually, the right to lay it is measured by the exercise of the franchises; and a corporation otherwise subject thereto, which has been enjoined from trans-

Laws 1881 (Ex. Sess.) chap. 200, entitled "An Act Confirming [Conferring?] Certain Rights upon the Duluth Street Railway Company." By an ordinance of the city of Duluth, it was granted the right to construct and operate an inclined street railway in the city, and by another ordinance of the city it was granted the right to construct and operate street railways in the village of West Duluth, which had become a part of the city of Duluth. While the defendant still owns all the franchises thus granted, the entire extent to which it has exercised them is, as found by the court, to "own and operate a passenger railway line in the streets of the city of Duluth 16 miles in length." This we construe as meaning the aggregate length of all its lines in the streets of the city. So far as it appears, it has constructed and is operating its road

acting business and put in the hands of a receiver, is not liable for the tax while its business is suspended. *State v. Bradford Sav. Bank & T. Co.* 71 Vt. 234, 44 Atl. 349.

b. Domestic corporations.

1. In general.

The power of a state to impose franchise taxes upon its own corporations is practically without limit.

Sald, Strong, J., in the *State Freight Tax Case*, 15 Wall. 232, *sub nom.* *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 146, we concede the right and power of the state to tax the franchises of its corporations.

A state, in granting a franchise to a corporation, may limit the powers to be exercised under it, and annex conditions to its enjoyment, and make it contribute to the revenue. If the grantee accepts the boon it must bear the burden. *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 367.

In the case of *People v. Home Ins. Co.* 92 N. Y. 328, 338, it was undisputed that a state, in the exercise of its legislative power, has the right to impose taxes upon the business, privileges, and franchises of a domestic corporation; and when that case reached the United States Supreme Court, where the decision was affirmed, it was emphatically declared that no constitutional objection prevents the legislature of a state from prescribing any mode of measurement it may choose to determine how much it will charge for the privilege it bestows; and that the validity of a tax can be in no wise dependent on the manner adopted by the state in fixing the amount it exacts for the franchise. *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593.

So that, unless a franchise tax upon a domestic corporation plainly conflicts with some constitutional limitation on the legislative power, its validity is assumed. There are not wanting cases in which such taxes have been challenged upon the ground that the imposition thereof constitutes a denial of the equal protection of the laws or of due process of law required by the Federal Constitution, or infringes against the clauses common in state constitutions requiring uniformity and equality of taxation, but these must be left for discussion in another place.

The laws of Illinois for the assessment and taxation of domestic railroads classify the subjects of the tax as: (1) Capital stock, meaning thereby all the property and rights of the corporation of every kind and nature wherever lo-

in the same manner as street railroads are usually constructed and operated,—in aid of, and deriving its business from, the local travel on the streets of the city. While the defendant may possess some unexercised powers not ordinarily conferred upon street-railway companies, yet it is perfectly apparent that it is in all essential respects a "street," and not a "commercial" railroad. Therefore the "gross earnings" tax law of 1887 does not apply.

These proceedings are each and all remanded, with directions to the court below to disallow in each case that part of the tax assessed upon "item 14" entitled "Franchises, annuities, royalties, and patent rights," and to render judgment in favor of

the state for the remainder of the taxes as assessed.

Canty, J., concurring:

I concur. After striking out subdivision 5 of § 1530 as unconstitutional, the rest of the section may, in my opinion, be allowed to stand. In my opinion, the legislature may provide for deducting the corporate indebtedness from the value of such intangible property as franchises and good will, when listing such intangible property for taxation. That will be the result of rejecting said 5th subdivision as unconstitutional, and permitting the rest of the section to stand, because, in giving a market value to the stock (see 4th subdivision), the public

ated; (2) railroad track, embracing the right of way and the superstructures thereon and declared to be real estate for the purposes of taxation; (3) rolling stock, declared to be personal property and embracing the movable chattels such as cars, locomotives, and their accompaniments, usually in ordinary use moved to and fro along the line; and (4) personal property other than rolling stock, embracing tools, materials for repairs, machinery, and other chattels not ordinarily moved up and down the road. Property of the fourth class with lands not part of the second constitute the local and tangible property of the corporation; while all its other possessions, including the franchise and other things of value inaccessible for local assessment, make up the intangible property, which, combined, is capital stock assessable by the state board. *Ohio & M. R. Co. v. Weber*, 96 Ill. 443.

This system, whereby the state board values the tracks, right of way, improvements thereon, rolling stock, and the capital stock, including the franchise and all invisible, immaterial, and intangible property; and the local assessors in counties, cities, and towns into or through which the roads run value the tangible property in proportion that the mileage in each taxing district bears to the total length of the road,—is just and equitable, and within the constitutional powers of the state. *State Railroad Tax Cases*, 92 U. S. 575, *sub nom.* *Taylor v. Secor*, 23 L. ed. 668.

It is not a valid objection to this system that rolling stock, capital stock, and franchise of a domestic railroad are personal property having a situs for taxation only at the principal office of the company and taxable nowhere else, for the state has the power and right to fix the situs of personal property within its jurisdiction at any place where any part of it may be situated. *Ibid.*

This case was followed and approved in *Chicago, B. & Q. R. Co. v. Siders*, 88 Ill. 322.

The state of New York over two decades ago enacted a statute (chap. 542, Laws 1880) taxing domestic corporations and foreign ones doing business within its limits upon their corporate franchises or business for state purposes. This statute "inaugurated a new system of taxation" in that state of certain classes of corporations. *People v. Spring Valley Hydraulic Gold Co.* 92 N. Y. 383, 386, *Andrews, J.*

So far, said *Earl, J.*, as it imposes a tax upon corporate franchises its operation must be confined to corporations created under New York laws, and as to foreign corporations the tax is imposed solely upon business. *People v. Equitable Trust Co.* 96 N. Y. 387, 393.

And *Burtlett, J.*, declared that this corporation tax is not imposed on property, but in the case of a domestic corporation on its franchises, and of a foreign corporation on its business. *People ex rel. United Verde Copper Co. v. Roberts*, 156 N. Y. 585, 591, 51 N. E. 293, *Reversing* 25 App. Div. 89, 48 N. Y. Supp. 881.

Ever since the enactment of that statute the courts of that state have been kept busy construing and interpreting it and the amendatory laws designed to remedy its defects.

In *Nassau Gaslight Co. v. Brooklyn*, 89 N. Y. 409, the question was whether a city gas company was within the statute or the exceptions it contained.

In *People ex rel. Westchester F. Ins. Co. v. Davenport*, 91 N. Y. 574, it was decided that, in spite of language to the contrary, the act did not relieve corporations taxable under it from local taxation. "The act," said *Ruger, Ch. J.* (p. 590), "is too loosely and inconsistently expressed to induce us to give it the sweeping effect which is claimed for it." He had previously declared (p. 584): "It cannot be disputed but that the language employed in the exemption clause of this section, if considered literally, is broad enough to sustain the claim." The conclusion that the statute did not mean what it said seems to have been reached "by main strength." The legislature promptly amended the act to cover this point the next session (Laws 1881, chap. 361, § 8), and passed a separate act to validate the tax (Laws 1881, chap. 332).

The same court found no difficulty in holding the statute meant what it said when it purported to impose a tax upon the corporate franchise or business, because to hold otherwise the tax would have rested upon nontaxable government bonds. *People v. Home Ins. Co.* 92 N. Y. 328, *Affirmed* in 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; in affirming which decision the United States Supreme Court further declared that a state may lawfully require as a condition of the grant of a franchise to be a corporation or to do business as such, and also for the continued exercise of such right or privilege, payment of a specific sum to the state each year or month, or a specific portion of the gross receipts or of the profits of the corporation, or of a sum to be ascertained in any convenient mode which the state prescribes.

And as late as 1901 a part of § 182 of the New York tax law (chap. 908, Laws 1896), which in substance was the same as § 3, chap. 342, Laws 1880, had to be discarded, the only question between counsel being what part must go. *Cullen, J.*, in the opinion of the court, after construing the section one way because a contrary interpretation would effect unreasonable results, added: We are quite aware that, despite our construction of the statute, there will still remain in it some inconsistencies and apparent unfairness in particular cases.

deducts the corporate indebtedness. In my opinion, the legislature has, under the Constitution, more latitude in providing for the assessment of such intangible property than it has in providing for the assessment of tangible real and personal property, and, as before stated, may provide for assessing only the balance of such intangible property after deducting the corporate indebtedness. But by the scheme proposed by § 1530 the corporate indebtedness is deducted twice,—once by the public, in giving a market value to the stock, and once more by virtue of the 5th subdivision. Therefore the scheme is unconstitutional, because, where there is no corporate indebtedness,

it taxes the franchises and good will to their full value, but where there is corporate indebtedness it deducts double the amount of such indebtedness from the value of such intangible property. If the legislature will tax such intangible property at all, it must, as far as it is reasonably practicable to do so, tax it uniformly. It is this double deduction of the corporate indebtedness, as distinguished from single deduction, which is unconstitutional; and, while I have had some doubt about it, I am of the opinion that the provision for such double deduction may be rejected as unconstitutional, and the rest of the section allowed to stand.

The remedy must be an appeal to the legislature for modification of the law. *People ex rel. New York & E. River Ferry Co. v. Roberts*, 168 N. Y. 14, 18, 60 N. E. 1043, Reversing 85 App. Div. 625, 55 N. Y. Supp. 1146.

A statute requiring every corporation incorporated under any general or special state law, and having capital stock divided into shares, to pay the state treasurer a state tax of a specified fraction of 1 per cent upon its authorized capital at the time of its incorporation, and forbidding every public officer to file its organization certificate and itself to exercise any corporate powers until such payment is made, does not provide for a price to be paid for the franchise the corporation is to exercise after it is formed, but merely the price of the right to be a corporation at all; therefore a body that has lawfully acquired upon foreclosure the franchises of a railroad company, and is organized to operate it by permission of other laws, is bound to pay the organization tax in order to be invested with corporate powers. *People ex rel. Schurz v. Cook*, 47 Hun, 467, Affirmed in 110 N. Y. 443, 18 N. E. 113.

To the like effect is *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865.

A domestic corporation having paid its organization tax and a further tax upon increasing its capital is none the less upon reincorporating under another and later statute for the same purposes bound to pay a new organization tax. *Re New York & S. Invest. Co. 40 N. Y. S. R. 139*, 16 N. Y. Supp. 213.

A corporation formed while a statute requiring payment of a tax as a condition precedent to exercising any corporate powers is in force is without legal existence until it pays the tax, and therefore cannot recover upon its contracts. *Maryland Tube & I. Works v. West End Improv. Co.* 87 Md. 207, 39 L. R. A. 810, 39 Atl. 620.

Under a statute taxing domestic corporations upon their franchises according to the capital employed within the state, a corporation whose capital is invested in patent rights which it parceled out to divers subordinate corporations both foreign and domestic, taking stocks and bonds in exchange, is not to be regarded as employing the whole of its capital in the home state, but only such part of it as is represented by the stocks of domestic companies, the rights not yet conveyed and the bonds of foreign corporations or other choses in action which have been drawn to and have their situs at the domicile. The capital invested in the stocks of foreign corporations is employed without the state. *People ex rel. Edison Electric Light Co. v. Campbell*, 188 N. Y. 543, 20 L. R. A. 453, 34 N. E. 370.

Under such a statute, surplus and what it is invested in are no part of the capital stock, 57 L. R. A.

and therefore a domestic corporation organized to carry on some of its business in the state of its origin, but mining, milling, and other operations in a distant territory, which merely maintains a home office where it keeps certain accounts and occasionally makes contracts to be performed in other states, and where some of its officers, executive and fiscal, attend, and which there holds a large block of stock and bonds got by passing dividends and using the accumulated profits to construct for a foreign corporation 25 miles of railroad in the territory where its mines were operated only to carry supplies to and ores away from its mines, is not taxable on such stocks and bonds as a part of its capital stock. These investments of surplus cannot be regarded as converted into capital stock employed at home for the purposes of such franchise tax on any theory that, the mines being a wasting property ever tending to exhaustion, the longer they are worked the more the capital stock invested in them must be deemed impaired so that there is no surplus. *People ex rel. United Verde Copper Co. v. Roberts*, 156 N. Y. 585, 51 N. E. 293, Reversing 25 App. Div. 89, 48 N. Y. Supp. 881.

Statutes taxing domestic corporations on their corporate franchises measured by the capital stock employed in the home state are not in conflict with any provision of the Federal Constitution, nor of the Constitution of the state of New York, even if in their practical operation they do in a given case result in unequal and double taxation. *People ex rel. Postal Teleg. Cable Co. v. Campbell*, 70 Hun, 507, 24 N. Y. Supp. 208.

Capital of a domestic corporation invested in idle and unproductive land is not employed within the state so as to be the basis of such a franchise tax. *People ex rel. Niagara River Hydraulic Co. v. Roberts*, 30 App. Div. 180, 51 N. Y. Supp. 771, Affirmed on opinion below, 157 N. Y. 676, 51 N. E. 1093.

Under a statute taxing corporations, joint-stock companies, and associations organized by or under the laws of the enacting state, or organized or incorporated under those of any other state or country, and doing business within the taxing state upon their corporate franchises or business, domestic corporations are taxable irrespective of whether they employ any capital or not within the state and when carrying on their entire business outside of it. The qualifying words "doing business within the state," in such statute, relate to foreign corporations only. *People ex rel. American Contracting & Dredging Co. v. Wemple*, 129 N. Y. 558, 29 N. E. 812.

Premiums received by a fire insurance company for insuring property without the state regardless of where the policy is written or the money for it paid do not come under a tax

WASHINGTON SUPREME COURT.

COMMERCIAL ELECTRIC LIGHT & POWER COMPANY

v.

Stephen JUDSON *et al.*

(21 Wash. 49.)

1. A taxpayer who appears before a board of equalization and is heard upon the valuation of his property as fixed by the assessor without objecting to the manner in which the board is constituted cannot recover back the amount paid under the assessment as raised by the board, upon the ground that the board was illegally constituted.

2. The franchise of an electric light and power company which has a right

law imposing a percentage tax upon premiums received by domestic insurance corporations upon business done within the state. *People v. National F. Ins. Co.* 61 How. Pr. 334.

This proposition was affirmed on appeal while the case was reversed on other grounds. 27 Hun, 188.

A corporation which is merely maintaining a perfunctory organization while waiting the payment of an award for its lands condemned for public use that it may go into liquidation is not subject to a franchise tax, since it is neither employing capital nor doing business within the state, when that is the basis thereof. *People ex rel. Jerome Park, Villa Site & Improv. Co. v. Roberts*, 41 App. Div. 21, 58 N. Y. Supp. 254.

The meaning of capital employed within the state, in a statute making that the basis of a franchise tax, is actively employed in the corporate business, when the rule for computing the tax is that laid down in *People ex rel. New York & E. River Ferry Co. v. Roberts*, 168 N. Y. 14, 60 N. E. 1043. Hence, a corporation taxed by such rule is entitled to the exclusion of a piece of real estate it does not use but rents out, and a block of municipal bonds it holds as an investment, from among the bases of the tax. *People ex rel. Union Ferry Co. v. Roberts*, 66 App. Div. 157, 72 N. Y. Supp. 950.

A bank under injunction and in the hands of a receiver is not doing business so as to be taxable under a statute taxing domestic savings banks and trust companies doing business within the state. *State v. Bradford Sav. Bank & T. Co.* 71 Vt. 234, 44 Atl. 349.

A state statute taxing savings banks by an assessment twice a year upon the average amount of their deposits for the preceding six months, imposing as it does a license or franchise tax, and not a property tax on the deposits, does not subject a bank in the hands of a receiver and perpetually enjoined from doing business when the assessment date comes around, to any liability, although it did carry on business and receive deposits for a part of the previous half year. *Com. v. Lancaster Sav. Bank*, 123 Mass. 493.

But a savings institution that has stopped collecting dues from all its members except those indebted on loans, and which makes no new loans, is still doing business within the meaning of a tax act applying to corporations. *Com. v. Pottsville Union Sav. Fund Asso.* 2 Dauph. Co. Rep. 19.

A law taxing corporate franchisees, that requires the charge under it to be based on the authorized capital stock represented by prop-

erty owned and used in the enacting state, requires a domestic corporation whose entire property is in that state to pay a \$5,000 fee on a \$500,000 capitalization. *Etna Standard Iron & S. Co. v. Taylor*, 5 Ohio C. D. 242.

(April 6, 1899.)

CROSS-APPEALS from the Superior Court for Pierce County rendered in an action brought to recover back the amount of taxes alleged to have been unlawfully exacted; the plaintiff appealing from so much of the judgment as held any part of the tax valid, and defendants appealing from so much as authorized the recovery of a tax

erty owned and used in the enacting state, requires a domestic corporation whose entire property is in that state to pay a \$5,000 fee on a \$500,000 capitalization. *Etna Standard Iron & S. Co. v. Taylor*, 5 Ohio C. D. 242.

The repeal of a statute under which a franchise tax has accrued before it has been collected does not discharge a savings bank which was subject thereto from the payment of it. *State v. Waterville Sav. Bank*, 68 Me. 515.

When a state has charged and received a specific sum as the price for a franchise and as the consideration for the enjoyment thereof during the life of the corporate charter, it is precluded from further exactions by way of taxes on such franchise, since this in substance is adding to a price already paid in full. *Gordon v. Appeal Tax Court*, 3 How. 133, 145, 146, 150, 11 L. ed. 529, 535, 537. As Wayne, J., writing for the court, put it, the franchise is corporate property, which, like any other property, would be taxable if a price had not been paid for it which the legislature had accepted as the consideration for allowing the shareholders to use the franchise during the continuance of the charter. The learned justice reasoned: A round sum, or an annual charge with or without reference to capital stock, may be asked by the legislature for such a franchise. It may be more convenient to the banks to have such a consideration or bonus distributed through the years of their corporate existence than to pay its equivalent in advance. This option was given the old banks. Being so given, it is conclusive that the legislature intended the annual tax or charge upon the capital stocks of the banks to be the bonus or price that they were to pay for the prolongation of their franchise of banking. Such a contract is a limitation upon the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax upon the franchise.

This case is considered by Messrs. Angell and Ames (*Corporations*, § 470) opposed to the doctrine of *Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 939, and it is criticised by Dorsey, J., writing for the Maryland court of appeals, in *Baltimore v. Baltimore & O. R. Co.* 6 Gill, 288, 48 Am. Dec. 531.

The reader will find these cases more fully referred to in another note respecting corporate taxation as affected by the contract clause in the United States Constitution.

A domestic corporation operating under telephone patents, and drawing its gross receipts from a business of furnishing instruments, apparatus, wires, and facilities for transmitting speech by electricity between per-

on plaintiff's franchise. *Reversed on defendant's appeal.*

The facts are stated in the opinion.

Mcass, Stiles & Nash, for plaintiff:

The whole of the tax assessed against appellant's property was absolutely void, because there was no lawful board of equalization in the county to which it could appeal for correction of its assessment.

The only resort for redress as to personal property is the board of equalization, except in case of fraud. Such a tribunal acts judicially.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

It must be constituted as the law provides, and must sit at the time and place fixed for its sessions, or its acts are without jurisdiction, and the tax levied is void.

sons at a distance apart, incorporated under an act for the construction and maintenance of a telegraph line and a supplement providing for the incorporation and regulation of certain corporations relative to the powers of telegraph companies for use of individuals and others and for fire-alarm, police, and messenger business,—is within a statute imposing a state tax upon the gross receipts of every domestic telegraph company or foreign one doing business in the state. *Com. v. Pennsylvania Teleph. Co.* 2 Dauph. Co. Rep. 57.

A corporation chartered with all the rights, powers, and privileges of a designated railroad and transportation company, having built and for a time operated a short-line railroad which it sold to another domestic corporation of whose stock it owns nearly the half, and whose principal business is a steamship line across the Atlantic and to a port in another state, is not within the exception in a statute of its home state imposing a specified percentage bonus tax upon the authorized capital stock of domestic corporations, except railroad, canal, turnpike, bridge, cemetery, literary, charitable, and religious companies. *International Nav. Co. v. Com.* 104 Pa. 88.

A taxing statute requiring corporate officers to furnish the assessor a statement of the corporate real estate and the matters and value of its personal property to the end that the same be assessed for taxation as other real and personal property, coupled with provisions making resident stockholders exempt from taxation on their shares when the corporation is taxed, and liable only when it is not assessable, provides for the taxation of all the corporate property, tangible and intangible, including the franchise. *Lewiston Water & P. Co. v. Asotin County*, 24 Wash. 371, 64 Pac. 544.

2. Engaged in interstate commerce.

The general rule is that a state may tax its own corporations upon their franchises without regard to the nature of the business they carry on. This rule does not yield when that business is interstate or foreign commerce, even if the corporation subject to the tax is engaged in nothing else.

The exercise of the authority which every state possesses to tax its corporations and all their property, real and personal, and their franchisees, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other states, and the tax is not on im-

25 Am. & Eng. Enc. Law, 1st ed. p. 246; *Cooley*, Taxn. §§ 265-267; *Blackwell*, Tax Titles, p. 513; *Slaughter v. Louisville*, 89 Ky. 112, 8 S. W. 917; *Ormsby v. Louisville*, 79 Ky. 107; *Aplin v. Reynolds*, 83 Mich. 471, 47 N. W. 442; *Woodman v. Auditor General*, 52 Mich. 28, 17 N. W. 227; *Caledonia Twp. v. Rose*, 94 Mich. 216, 53 N. W. 923; *Power v. Larabee*, 2 N. D. 141, 49 N. W. 724; *Kuntz v. Sumption*, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474.

A tax on a franchise against a corporation is a tax on its privilege to do business, and is not a tax on property at all, but what is known as an "excise tax."

Com. v. Hamilton Mfg. Co. 12 Allen, 298; *Com. v. Lowell Gaslight Co.* 12 Allen, 75.

To arrive at a basis for such a tax there must be some means prescribed for ascer-

ports, exports, or tonnage or transportation to other states, cannot be regarded as conflicting with any constitutional power of Congress. *Delaware Railroad Tax*, 18 Wall. 206, *sub nom.* *Minot v. Philadelphia*, W. & B. R. Co. 21 L. ed. 888.

A line of cases supports this general rule: *State v. New York*, N. H. & H. R. Co. 60 Conn. 326, 22 Atl. 765; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205; *Henderson Bridge Co. v. Com.* 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; *Henderson Bridge Co. v. Henderson*, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. Rep. 114, 173 U. S. 592, 43 L. ed. 823, 19 Sup. Ct. Rep. 553. *Affirming* 18 Ky. L. Rep. 417, 421, 36 S. W. 561, 1132; *Louisville & J. Ferry Co. v. Com.* 104 Ky. 726, 47 S. W. 877, 22 Ky. L. Rep. 446, 57 S. W. 624; *Kittery v. Portsmouth Bridge Co.* 78 Me. 93, 2 Atl. 847; *Standard Underground Cable Co. v. Atty. Gen.* 46 N. J. Eq. 270, 19 Atl. 733; *State v. Underground Cable Co.* (N. J. Eq.) 18 Atl. 581; *Honduras Commercial Co. v. State Bd. of Assessors*, 54 N. J. L. 278, 23 Atl. 668; *Lumberville Delaware Bridge Co. v. State Bd. of Assessors*, 55 N. J. L. 529, *sub nom.* *Lumberville Delaware Bridge Co., Prosecutors, v. State Bd. of Assessors*, 25 L. R. A. 134, 26 Atl. 711.

In the latter case, *Garrison, J.*, writing for the court, divides into three groups the cases wherein the Supreme Court of the United States has adjudged state laws void for repugnancy to the commerce clause, *viz.*:

1. Those where the law discriminated adversely to other states, to wit: *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256.

2. Those where the impost was on the subject of transportation, to wit: *State Freight Tax Case*, 15 Wall. 232, *sub nom.* *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 146; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725.

3. Those where the tax was in effect upon the business of interstate commerce, because imposed upon its (a) Agencies (*Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30

taining its value, which our statute does not do.

Mr. A. B. Titlow, for defendants:

A franchise is subject to taxation.

Wash. Const. art. 7, § 1; Revenue Laws 1897, p. 136; Ballinger's Code, § 5202.

Without any statute making a franchise personal property and subject to execution or foreclosure, and without any statute specially requiring a franchise to be listed as personal property for taxation, a franchise, under the Constitution and the revenue laws of this state would be subject to taxation in any event, as it has always been recognized as a thing of value.

Cooley, Taxn. 2d ed. pp. 222, 223; *Society for Savings v. Coite*, 6 Wall. 604, 18 L. ed. 901; *Philadelphia & W. R. Co. v. Maryland*, 10 How. 393, 13 L. ed. 468; *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 621,

18 L. ed. 910; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 637, 18 L. ed. 906; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 533; *Central P. R. Co. v. California*, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 605; *Com. v. New England Slate & Tile Co.* 13 Allen, 391; *Com. v. Hamilton Mfg. Co.* 12 Allen, 341; *Com. v. Lowell Gaslight Co.* 12 Allen, 76; *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 367; *Hewitt v. Traders' Bank*, 18 Wash. 327, 51 Pac. 468; *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 747; *State Bd. of Assessors v. Central R. Co.* 48 N. J. L. 283, 4 Atl. 578; *State ex rel. Atty. Gen. v. Madison Street R. Co.* 72 Wis. 619, 1 L. R. A. 771, 40 N. W. 487; *South Nashville Street*

L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *McCall v. California*, 136 U. S. 104, 34 L. ed. 392, 10 Sup. Ct. Rep. 881; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 115, 34 L. ed. 395, 8 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; (b) *earnings (Fargo v. Michigan)*, 121 U. S. 230, *sub nom. Fargo v. Stevens*, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; (c) *methods (Moran v. New Orleans)*, 112 U. S. 69, 28 L. ed. 658, 5 Sup. Ct. Rep. 38; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; or else (d) directly upon such business. *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

And, on the other hand, he points out that state legislation, although incidentally it affected interstate commerce was sustained by the same tribunal, when it took the form of license or franchise taxation, upon: (a) *Ferries (Wiggins Ferry Co. v. East St. Louis)*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; (b) *railroads (Delaware Railroad Tax, 18 Wall. 206, sub nom. Minot v. Philadelphia, W. & B. R. Co. 21 L. ed. 888; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163); and (c) other corporations. Horn Silver Min. Co. v. New York*, 143 U. S. 305, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

Other cases illustrative of the general rule at the head of this subdivision are, *People ex rel. Postal Teleg. Cable Co. v. Campbell*, 70 Hun. 507, 24 N. Y. Supp. 208, and three other cases wherein the facts and decisions were the same, viz.: *People ex rel. United Lines Teleg. Co. v. Campbell*, 53 N. Y. S. R. 793, 24 N. Y. Supp. 212.

Others are: *People ex rel. Platt v. Wemple*, 117 N. Y. 136, 6 L. R. A. 303, 2 Inters. Com. Rep. 735, 22 N. E. 1046; *Memphis & L. R. R. Co. v. Nolan*, 14 Fed. 532; *State ex rel. Berney v. Tax Collector*, 2 Ball. L. 654; *State ex rel. Ravenel v. Charleston*, 4 Rich. L. 286; 57 L. R. A.

People ex rel. William J. Matheson & Co. v. Roberts, 158 N. Y. 162, 52 N. E. 1102.

For an exposition of the cases under this head and cognate ones the reader is referred to the separate note on corporate taxation as affected by the commerce clause of the Federal Constitution.

3. Possessed of other franchises.

The mere fact that a domestic corporation holds, in addition to the franchise granted by its home state, other franchises from the United States, or from another state, does not prevent the state that gave it life from taxing it upon the franchise it conferred. In so doing it must, however, carefully avoid taxing any franchise that it did not confer. *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205; *Kittery v. Portsmouth Bridge Co.* 78 Me. 93, 2 Atl. 847; *Louisville & J. Ferry Co. v. Com.* 22 Ky. L. Rep. 446, 57 S. W. 624; *Henderson Bridge Co. v. Com.* 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486, on Error 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; *Henderson Bridge Co. v. Henderson*, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. Rep. 114; also 178 U. S. 592, 43 L. ed. 823, 19 Sup. Ct. Rep. 553, Affirming 18 Ky. L. Rep. 417, 421, 36 S. W. 561, 1132; *Henderson Bridge Co. v. Negley*, 23 Ky. L. Rep. 746, 68 S. W. 989; *Lumberville Delaware Bridge Co. v. State Bd. of Assessors*, 55 N. J. L. 529, *sub nom. State, Lumberville Delaware Bridge Co., Prosecutors, v. State Bd. of Assessors*, 25 L. R. A. 184, 26 Atl. 711; *Com. v. Fall Brook R. Co.* 188 Pa. 199, 41 Atl. 606. And see *supra*, VI. d.

c. Foreign corporations.

1. In general.

No state has the power to tax franchises it has not conferred; hence, a state cannot tax the franchise of a foreign corporation to be or to do business as a corporation. The power of even the national government to tax a franchise granted by a state is not admitted, but is at best an open question.

In *Vezale Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482, the United States Supreme Court avoided deciding the question by holding the act of Congress taxing banks, state and national, 10 per cent on notes of individuals or state banks paid out for circulation, did not impose any tax upon a franchise granted by

R. Co. v. Morrow, 87 Tenn. 406, 2 L. R. A. 553, 11 S. W. 348.

Plaintiff would not be allowed to question the valuation of its personal property after its hearing which it had before the board of equalization.

Olympia Waterworks v. Gelbach, 16 Wash. 482, 43 Pac. 251.

The board had jurisdiction of the subject-matter, and, by the appearance of the plaintiff in response to the notice sent it by the board to appear and show cause why its assessment should not be raised, acquired jurisdiction of the person of plaintiff; and, having acquired jurisdiction of the subject-matter and of the person, without special appearance at the time it submitted itself to the board without protest, it cannot now be heard to complain that the board was illegally constituted.

the state, but laid one upon property created or contracts made and issued under the franchise or power to emit bank bills. Chase, Ch. J., writing for the court, did say that it cannot be admitted that franchises granted by a state are necessarily exempt from Federal taxation, for franchises are property,—often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a state, seem to be as properly objects of taxation as any other property. And again, after emphasis upon the ruling that the tax *sub judice* is not one on the franchise, he proceeds: We do not say that there may not be such a tax. It may be admitted that the reserved rights of the states, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress.

However that may be, it is undisputed that one state cannot tax a corporate franchise granted by another. But practically the same result is accomplished when a state imposes a tax upon a foreign corporation for the privilege of exercising its corporate franchise within the limits of the taxing state. Judge Cooley calls attention to this by saying: The state which grants corporate powers, or consents to their being exercised within its limits when the corporate grant is by some other sovereign, may annex to the grant or consent such terms in respect to taxation as it deems expedient. Cooley, Taxn. 2d ed. 23. And, again: As no state is under obligation to permit a foreign corporation to carry on business or exercise franchises within its territory the permission to do so may be granted under such restrictions, or permitted on such conditions, regarding taxation as the state may think proper or prudent to impose. Id. chap. 3, p. 57.

In New York the courts have ever been at pains to discriminate between the two kinds of franchise taxes.

The court of appeals, in sustaining, as within the constitutional power of the legislature, a tax of this character upon a foreign corporation, which it none the less deemed specific, arbitrary, unequal, unjust, and worthy of condemnation of enlightened statesmanship, said, speaking through Earl, J.: The defendant, being a foreign corporation, could not be taxed in that state on account of its corporate franchise, as that was not given by the laws thereof, but was dependent upon the laws of the state of its creation, and had no existence separate therefrom. Further: The legislature

Godfrey v. Douglas County, 28 Or. 446, 43 Pac. 174.

The attack the plaintiff is attempting to make is a collateral attack, and the acts of the board of equalization in this case cannot be attacked in that way.

United States Trust Co. v. New York, 144 N. Y. 488, 39 N. E. 384; *Burt v. Wadsworth*, 39 Mich. 129.

Reavis, J., delivered the opinion of the court:

Action by plaintiff, a private corporation, against defendants, to recover the sum of \$553.99, claimed to have been illegally exacted for taxes upon the property of plaintiff for the year 1897, which taxes were paid under protest after seizure of property under a tax warrant. Plaintiff alleges two sums were illegally exacted,—one a tax of

was dealing with the subject of taxing foreign corporations doing business in this state, and taxing them only because they did business in this state, and having the right to tax them only on business done in this state. *People v. Equitable Trust Co.* 96 N. Y. 387, 393, 394.

In another case, Gray, J., of the same court, said that, as to corporations which are created under the laws of another state or country, jurisdiction for taxing purposes is gained from the business which they do in this state, and the tax is one upon that business. Foreign corporations coming into the state for the purpose of doing some part of their corporate business are placed under the obligation to bear some portion of the general burden of taxation in return for the privileges and benefits enjoyed. *People ex rel. American Contracting & Dredging Co. v. Wemple*, 129 N. Y. 558, 563, 29 N. E. 812.

And the same judge in a later case, referring to the same law, said: It imposes a tax upon every corporation organized pursuant to law in this state or in any other state or country and doing business in this state. The tax is to be paid on its franchise or business, and is not upon property, but on the corporate franchise of domestic, and on the business done here of foreign, corporations. *People ex rel. Badische Anilin & Soda Fabrik v. Roberts*, 152 N. Y. 59, 36 L. R. A. 756, 46 N. E. 161.

And once more, in a later case still: So far as the franchises themselves of the foreign corporation are concerned, they are beyond the reach of our tax laws. They are derived from the governments to which they owe their creation, and can only be subjected to taxation by the laws of those governments. When it is sought to exercise them within this state the condition of the right to do so is the liability to taxation and control by the legislature so far as the capital can be seen to be employed here. *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 74, 45 L. R. A. 126, 53 N. E. 685.

Similar language is found in *People ex rel. Pennsylvania R. Co. v. Wemple*, 138 N. Y. 1, 19 L. R. A. 694, 33 N. E. 720, and *People ex rel. Postal Teleg. Cable Co. v. Campbell*, 70 Hun, 507, 24 N. Y. Supp. 208.

But the distinction has been rendered very nearly worthless by the declaration of the United States Supreme Court that the validity of an excise tax upon a corporation for the privilege of exercising its franchises within the state is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment; the whole field of inquiry into the extent of revenue from sources

\$132.50 on the franchise of the corporation; and an excessive tax of \$421.49, arising from over assessment of plaintiff's personal property, without any opportunity for a hearing having been given before the board of equalization provided for by law. Plaintiff conceded that it ought to pay a tax on a valuation of \$11,068 of \$293.30, but alleged an excess exacted of \$553.99. The case was tried by the court, and the material facts found are substantially that upon the 1st of March, 1897, plaintiff was the owner of personal property in Tacoma, which it duly listed as of the value of \$11,068, but that the value of the personal property of plaintiff was largely in excess of that sum; that the county assessor assessed and valued the personal property of the plaintiff at the sum of \$30,350, which included the valuation upon the

franchise owned by the plaintiff at the sum of \$5,000: that the plaintiff was the owner of a franchise granted by the city of Tacoma of the right to use the streets, highways, alleys, and avenues of the city over which to transmit and convey power and light to its customers, and the rights appertaining thereto; that about the 7th of August, 1897, plaintiff delivered to and filed with the auditor of Pierce county, as clerk of the board of equalization, its petition in writing, praying the board to reduce the assessments so made by the assessor to the sum of \$11,068, and also praying that the item, "franchise assessed at \$5,000" be stricken off the assessment of plaintiff's property on the ground that the same was illegal and double taxation, and the further reason that the franchisees of other corporations of like character were not assessed in

at the command of the corporation is open to the consideration of the state in deciding what may justly be exacted for the privilege. *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 103.

Turning to the cases, the following illustrative rulings and applications of the principles adverted to are found:

A statute requiring foreign building and loan associations to pay annually into the state treasury 2 per cent of their gross receipts from business done within the state imposes a tax for the privilege of doing business. The tax is not upon the corporate franchise for the conclusive reason that the state did not grant this, but it is a tax on the franchise of doing business in the state, and in this sense a franchise tax. *Southern Bldg. & L. Asso. v. Norman*, 98 Ky. 294, 31 L. R. A. 41, 32 S. W. 952.

The existence and organization of a corporation and its endowed functions and capacities from the law creating it do not alone constitute the franchise or commodity which by the Massachusetts Constitution the legislature may subject to a duty or excise; hence, a statute taxing a foreign corporation, which has an office for directing its affairs and transferring its stock within the state, a percentage upon its entire capital stock at par is a valid exercise of legislative power. *Atty. Gen. v. Bay State Min. Co.* 99 Mass. 148, 96 Am. Dec. 717.

A statute providing that every corporation, joint-stock company, or association, domestic or foreign (with certain exceptions), shall be subject to and pay annually a state tax as a tax upon its corporate franchise or business, to be computed by a method therein set forth according to dividends when these amount to a stated percentage, and when they do not according to the value of the capital stock appraised as therein provided, so far as it taxes corporate franchises operates only upon domestic corporations, and as to foreign corporations the tax is solely upon the business done within the state. *People v. Equitable Trust Co.* 96 N. Y. 387.

A claim that only so much of the capital of a foreign corporation as is employed within the state, rather than its entire capital, should be taken as the basis of computing such tax is unfounded. The proposition is not affected by an amendment to the statute empowering the state comptroller in certain contingencies to determine the amount of capital stock that shall be the basis of the tax when part of it is employed without the state. *People v. Horn Silver Min. Co.* 105 N. Y. 76, 11 N. E. 155, 57 L. R. A.

Affirmed in 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

Such a tax is valid as against a foreign corporation doing any business in the state, without regard to the business it does, the amount of capital it employs therein, the amount of its stock held therein, or the extent of the benefits derived from or the protection afforded by the laws and agencies of the state. *Ibid.*

(The injustice here was ended by the enactment of a subsequent statute [Laws 1885, chap. 501] declaring in terms that the basis of such tax should be the amount of capital stock employed within the state.)

To the same effect, *People ex rel. Southern Cotton Oil Co. v. Wemple*, 131 N. Y. 64, 29 N. E. 1002.

The New York statutes for the taxation of the privileges and franchises of savings banks (Laws 1866, chap. 781, § 7; Laws 1867, chap. 861) do not apply to foreign ones. *People ex rel. Savings Bank v. Coleman*, 135 N. Y. 231, 31 N. E. 1022.

A foreign corporation cannot complain that it is subject to the same license taxes that are laid upon domestic corporations. *Southern Car & Foundry Co. v. State (Ala.)* 32 So. 235.

A foreign railroad corporation having an office or offices within the state which organizes and operates an express business over its road and beyond it is subject to a statute of such state requiring all express companies doing business therein to take out a license and pay both a specific and a percentage of income tax. *Memphis & L. R. R. Co. v. State*, 9 Lea, 218, 42 Am. Rep. 673. The court reasoned out this result by saying that the real question was, Are the legitimate functions of a railroad and the express business identical, or are they distinct occupations when considered as businesses? We do not deem it necessary to go into the cases (which was a great pity). It suffices to say that both in fact and on authority we think it clear the two businesses are separate and distinct having many likenesses, it is true, but differences so well marked as to make them clearly distinguishable the one from the other. We shall not undertake to enumerate the points of likeness or difference in this opinion. All of which is a matter of regret, since, while it is perfectly plain that an express company is not a railroad, it is difficult to see why the carriage of freight at no matter what speed and by special contract with the shipper or otherwise is not legitimate railroading.

That a tax is called one upon the franchise does not affect its validity when laid upon a

the county and state; and in said petition also prayed a hearing, that a time be fixed by the board, and that at the hearing part of the city council of the city of Tacoma, it being a city of the first class, should sit as a part of the board of equalization. The court also found that franchisees of other like corporations and persons were assessed in the county, and equalized by the board of equalization, and that there was no unjust discrimination in this regard against plaintiff, and that the county board of equalization for the year 1897 was composed of the three county commissioners, who duly qualified as members of such board; that the city council of the city of Tacoma appointed three members of the council to sit as a board of equalization during the year, but that the parties so appointed, and each of them, failed to present themselves or

their credentials to the auditor of Pierce county, the clerk of the board of equalization, to offer to qualify and sit as members of the board, or as part thereof; that the petition of the plaintiff for reduction of its assessment as made by the county assessor was duly denied by the board of equalization; that the board thereafter duly notified plaintiff that its assessment would be raised from the amount fixed by the assessor to the sum of \$31,973, unless plaintiff showed cause why it should not be raised in accordance with the notice; that the board at the hearing found that the value of the property was the sum of \$31,973, and equalized its value at that amount; and that the board of equalization at said time was duly organized. The court also found that no members of the city council of Tacoma sat as members of the board of equalization for

foreign corporation if in reality it rests upon property alone and that within the taxing state. *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961.

There was the same ruling in *Western U. Teleg. Co. v. Norman*, 77 Fed. 13.

But the case was distinguished in *San Francisco v. Western U. Teleg. Co.* 96 Cal. 140, 17 L. R. A. 801, 31 Pac. 10, by pointing out that while the Massachusetts tax was held to be one upon the corporate property in that state although misnamed a franchise tax, and was therefore valid, the tax denounced in the California case was both in name and in fact a franchise tax pure and simple, and therefore void.

The assessing for taxation of the capital stock and franchisees of a foreign telegraph company operating both lines of its own and lines leased from a domestic corporation cannot be sustained as a penalty for failure to make a return, as required by law, of the capital stock and franchisees of its lessee. If, indeed, the capital stock and franchisees of a foreign corporation may be taxed in a state in which it does business, but under whose laws it was not created, the Illinois revenue act of March 30, 1872 (Rev. Stat., chap. 120) does not confer the necessary authority so to do. *Postal Teleg. Cable Co. v. Barnard*, 37 Ill. App. 105. Following *Western U. Teleg. Co. v. Lieb*, 76 Ill. 172.

Although Michigan statutes in force have theretofore required foreign corporations, when permitted to do business in that state, to be subject to all the restrictions and liabilities of domestic ones, and have provided that an increase of the capital stock of a domestic corporation shall be operative from the time when the certificate is received by the secretary of state, act No. 79 of 1893 of that state, subjecting foreign corporations theretofore allowed to do business therein to payment of a franchise fee upon every increase of their capital stock, does not apply to such a corporation that had increased its stock before it was enacted, but had not filed its certificate to that effect until after it went into operation. *Warren-Scharf Asphalt Paving Co. v. Secretary of State*, 115 Mich. 234, 73 N. W. 107.

A statute revising and amending prior legislation, and imposing a privilege tax on express companies doing business in the state, and enacting that no company which has paid such tax shall be liable to pay any additional privilege tax or any other tax in the state, and which omits a saving clause found in the earlier acts respecting licenses by cities and towns, is so plainly inconsistent with a provision in a 57 L. R. A.

city charter giving power to license express companies that it operates as a repealer by implication. *Douglas v. Anniston*, 104 Ala. 291, 16 So. 138.

A statute requiring both domestic and foreign corporations annually to pay a specific license tax when their paid-up capital stock exceeds a named sum, bases the tax upon the entire capital stock actually engaged in the corporate business wherever carried on, not merely upon so much of it as may be employed in the state, and makes no distinction between foreign and domestic corporations. *Southern Car & Foundry Co. v. State (Ala.)* 32 So. 235.

2. Conditions upon the privilege of exercising corporate franchises.

The power of a state to exclude altogether from its territory a foreign corporation, or to permit it therein only on such terms and conditions as it may see fit to prescribe, to hamper it with any restrictions it chooses, and to subject it to any amount of taxation, however burdensome, at discretion, is usually asserted in the broadest terms.

To illustrate: The recognition of its existence by a state other than that which has created a corporation, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity never extended where the existence of the corporation, or the exercise of its powers, is prejudicial to their interests, or repugnant to their policy. *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, Field, J.

The right of a corporation to engage in business in a state other than that of its creation depends solely upon the will of such state. *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

The power of taxation is inherent in every sovereignty, and extends, not only to the people and property of a state, but it may be exercised upon every object brought within its jurisdiction. *Stein v. Mobile*, 24 Ala. 591.

All subjects over which the sovereignty of a state extends are subject to taxation, and the state sovereignty extends to everything which exists by its own authority or is introduced by its permission. *Jones v. Page*, 44 Ala. 657.

The legislature has the power to prescribe the terms upon which foreign corporations may be permitted to come into the state and carry on their business, or even to prohibit them altogether from so doing. This is a necessary corollary to the sovereign power to grant or re-

the year 1897 for property within the city of Tacoma, but that three members of the city council appeared on the 4th of August, 1897, before the board, and in response to an interrogation as to their sitting as members of the board the chairman of the board as then organized replied that he thought the board of equalization was then legally organized, and denied the members of the council the right to sit. The complaint alleges no fraud on the part of the assessor or the board of equalization as constituted for the year 1897, and no evidence was introduced in support of any fraud committed by the assessor or the board in fixing the valuation of the property of plaintiff. The court, as legal conclusions, determined that the assessment for the taxation of plaintiff's property for the year 1897 as to the franchise valued at the sum of \$5,000

was void, for the reason that franchises were not subject to taxation under the laws of this state, and that as to the balance of the property it was legally assessed and equalized; that plaintiff, by its appearance before the board of equalization without objection, in response to the notice to show cause why its assessment should not be raised, and failing to object at that time to the legality of the board, if any objection existed, waived its right to object to the board as then constituted, and that the failure of the members of the city council to appear and qualify or offer to qualify in no way affected the legality of the board of equalization as then constituted, and a decree was entered in favor of plaintiff for \$132.50, with interest, on account of the tax collected upon the franchise. Both plaintiff and defendants excepted to the judgment,—

fuse charters of incorporation, since otherwise irresponsible foreign corporations might force themselves upon a state which denied to domestic ones the same rights. *People v. Thurber*, 13 Ill. 554.

There is no doubt of the power of the legislature to impose taxation on foreign corporations to whatever extent it may choose as the condition upon which such corporations shall be allowed to exercise their franchises and privileges in the state. *Western U. Teleg. Co. v. Lieb*, 76 Ill. 172.

Corporations created by the laws of one state have no rights in another except such as the latter may choose to confer upon such terms and conditions as it chooses to impose. *Phoenix Ins. Co. v. Com.* 5 Bush, 68.

A state may lawfully impose upon foreign corporations seeking to do business within it any burdens, terms, and conditions it sees fit in consenting. *State v. Lathrop*, 10 La. Ann. 598.

Not only the manner of doing business, but the kinds of business which foreign corporations may do outside of their home jurisdictions, are entirely and unreservedly under the control of the local legislative authority. *Dryden v. Grand Trunk R. Co.* 60 Me. 512.

That the legislature has the power to tax a foreign corporation to any extent it pleases as a condition upon which such corporation may be permitted to exercise its franchise in the state is well-settled law. *State v. Western U. Teleg. Co.* 73 Me. 518.

The whole matter of admitting foreign corporations to do business in a state rests absolutely in the discretion of the legislature. The terms of admission may be reasonable or unreasonable. Admission once granted may be denied again at any time. *Daggs v. Orient Ins. Co.* 136 Mo. 382, 35 L. R. A. 227, 38 S. W. 85.

The power of a state over foreign corporations is clear. It may exclude them altogether, or admit them on such terms as it may prescribe. *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 521.

Whether or not foreign insurance companies shall do business, or be forbidden to, in the state affects the public welfare, and the state may permit or prohibit them to do so at discretion; and, if it permits, may impose such conditions and restrictions as it sees fit. *Fire Department of Milwaukee v. Heifenstein*, 16 Wis. 136.

A state has a right to exclude a foreign corporation from doing business within it. *Warren Mfg. Co. v. Etna Ins. Co.* 2 Palma, 501, Fed. Cas. No. 17,206.
57 L. R. A.

A foreign corporation coming into a state by its consent with a license to run a year to do business is within the licensing state for any given year only under the license and subject to the conditions prescribed by that state's laws. And as such state has the power to exclude it entirely, it has power to change the conditions of its admission at any time for the future, and to impose as a condition the payment of a new tax or a further tax as a license fee; and if the state imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays it, is not admitted to the state nor within its jurisdiction, but is outside, at the threshold, seeking admission with consent not given. *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108.

But, notwithstanding this sweeping language, one finds when concrete cases come to be examined that it needs some slight qualification, and that the asserted power and right are not wholly unlimited.

There are many suggestions to this effect in the decisions.

A corporation created by one state can transact business in another only with the consent, express or implied, of the latter, which consent may be given upon such conditions as the state may see fit to impose not repugnant to the Constitution or laws of the United States or inconsistent with the rules of public law securing the jurisdiction and authority of each state from encroachment by all others, or contrary to that principle of natural justice which forbids condemnation without opportunity for defense. *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451.

The power of a state to discriminate between her own domestic corporations and those of other states desirous of doing business within her jurisdiction is clearly established and the nature or degree of discrimination belongs to the state to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union. *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972.

No conditions can be imposed by the state which are repugnant to the Constitution of the United States. *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931, Blatchford, J.

The only limitation upon the power of a state to exclude a foreign corporation from doing business within its limits, or from hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices therein, arises where the corporation is in the employ of the Federal govern-

the plaintiff to the allowance of any tax, and the defendants to the judgment for recovery of \$132.50, amount collected as tax on the franchise.

1. The findings of fact made by the superior court seem to be sustained by the evidence. The suggestion of discrimination in the assessment of the franchise of plaintiff, if true, might be answered by a reference to the revenue laws and the provision for the assessment of property which has been omitted from the tax roll. But the court has found that such discrimination did not, in fact, exist. It is not competent for plaintiff to make a collateral attack here upon the composition of the board of equalization. Upon notice duly given from the board, it appeared, and was heard upon the valuation of its property fixed by the assessor, and raised no objection to the

manner in which the board was constituted; and therefore we think the equalization of the assessment was properly made, and, in the absence of any allegation of fraud, such equalization of the value of personal property is conclusive.

2. The important question is brought here by defendants. The superior court concluded that a franchise was not subject to taxation under the laws of this state. The state Constitution (article 7, § 1) declares: "All property in the state not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law." The revenue laws of 1897 (p. 136) provide: "All real and personal property now existing, or that shall be hereafter created or brought into this state, shall be subject to assessment and taxa-

ment, or where its business is strictly commerce, interstate or foreign. *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 81 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

The power of a state to make discriminations in privileges granted to foreign corporations may be exercised where a foreign company desires to do business within the limits of the state not strictly interstate or foreign commerce. Such corporations may be excluded from the state altogether in the legislative discretion. Such restrictions are permissible upon the ground that a state may not be willing, upon grounds of policy of its own, to have a corporation, even if legally created under the laws of its own state, establish a business in its borders, or it may demand a license tax or compliance with any other reasonable condition. But a most vital limitation in this respect upon the power of the state springs up where the business of the foreign corporation is commerce between the corporation, the creature of the legislature of one state and a citizen of another. As against all such foreign corporations engaged in interstate commerce, the state can pass no prohibitory law, constitutional or statutory, without impinging upon the commercial clause of the Constitution of the United States. *McNaughton Co. v. McGlre*, 20 Mont. 124, 38 L. ed. 367, 49 Pac. 651.

And finally, as remarked by Gray, J., of the New York court of appeals in a recent case, the state "cannot prevent the relator from exercising its franchise here as the owner of copyrights, for they are privileged and protected by the Federal Constitution. To concede a right to tax them would be to concede a power to impede or burden the operation of the laws enacted by Congress to carry into execution a power vested in the national government by the Constitution." *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 75, 45 L. R. A. 126, 53 N. E. 685.

If a state does not enact any laws respecting the exclusion of foreign corporations, or put any restrictions upon their doing business within its borders, its consent to their entrance and doing business therein is implied. *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274.

If, however, one looks for consistency, the result is disappointment. The Supreme Court (with a strong dissent it is true), as late as 1891, is found declaring that the privilege of exercising the franchises of a corporation is a valuable one, and as the granting of it rests entirely within the legislative discretion, whether the corporation be of domestic or foreign origin, it may be conferred upon such con-

ditions, pecuniary or otherwise, as to the state may appear most conducive to its interests or policy, among which conditions is the requirement of the payment into the state treasury each year of a specific sum, or of an apportioned amount according to the value of the business permitted as disclosed by its gains or receipts of the present or past years, in a case where the subject of a tax was a railroad engaged exclusively in both foreign and interstate commerce, the privilege of carrying on which the taxing state had neither power to confer nor the right to deny. *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 984, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163.

This is the more bewildering, since the court, in the same breath, affirmed that its decision in no way qualified the former one in *Philadelphia & S. Mall SS. Co. v. Pennsylvania*, 122 U. S. 326, 340, 342, 30 L. ed. 1200, 1203, 1204, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118, in which it had said of a similar tax: "If intended as a tax on the franchise of doing business,—which in this case is the business of transportation in carrying on interstate and foreign commerce,—it would clearly be unconstitutional." And that "it was held by this court in the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826, that interstate commerce carried on by corporations is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals." And, finally: "It is hardly necessary to add that the tax on the capital stock of the New Jersey Company, in that case [*The Gloucester Ferry Co.*] was decided to be unconstitutional because, as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was interstate commerce."

In the light of all this, the investigator must be content with a statement of the decisions in the separate cases as they have arisen, and not attempt to deduce therefrom any masterful principle to control the future cases as they come up.

There have been the following rulings in point:

State statutes forbidding insurance companies incorporated elsewhere from carrying on business within the state without a previous license to do so, obtainable only by depositing with the state treasurer bonds of a specified character to the amount of \$30,000 and upwards according to the capital employed, and forbidding anybody without a license to act as

tion." Section 3 of the same act provides: "Personal property for the purposes of taxation shall be construed to embrace and include, without specifically defining or enumerating it, all goods, chattels, moneys, stocks or estate; all improvements upon lands, the fee of which is still vested in the United States, or in the state of Washington, or in any railroad company or corporation, and all and singular of whatsoever kind, name, nature and description, which the law may define or the courts interpret, declare and hold to be personal property, for the purpose of taxation, and as being subject to the laws, and under the jurisdiction of the courts of this state, whether the same be any marine craft, as ships and vessels, or other property holden under the laws and jurisdiction of the courts of this state, be the same at home or abroad.

Section 8 provides: "Personal property shall be listed in the manner following: First, every person of full age and sound mind, being a resident of this state, shall list all his moneys, notes, accounts, bonds or stock, shares of stock of joint stock or other companies (when the property of such company is not assessed in the state), franchises, royalties, and other personal property." Section 5202, Ballinger's Anno. Codes & Stat., declares that all franchises of every kind and nature are subject to sale upon execution and sale upon foreclosure of mortgage, in the same manner as any other personal property. That a franchise is property cannot be questioned, and that, unless it is exempted from taxation, it is liable to assessment, is equally correct. No argument is made here by counsel for plaintiff that

agent for any foreign insurance company under a penalty of a fine for each offense, are not repugnant to that provision of the United States Constitution declaring the citizens of each state entitled to all the privileges and immunities of citizens in the several states. *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357.

The decision in this case was followed in, and controlled. *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972.

A state statute forbidding all foreign corporations (except insurance companies) which do not invest and use their capital within the state to have an office or offices therein for the use of their officers, stockholders, agents, or employees, without first obtaining a license for which an annual payment of a quarter of a mill on every dollar of the authorized capital stock was required, imposes a tax for the privilege accorded of doing business in the state, and not a tax upon a franchise not granted by, nor one upon property not within the jurisdiction of, the taxing state. *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Intera. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

A charge imposed as a condition by a state upon the taking of corporate being or the exercise of corporate franchises by foreign railroads upon consolidation with a domestic railroad, the right to which depends solely upon the will of the state, is not an attempt to tax property beyond the jurisdiction. *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Intera. Com. Rep. 664, 14 Sup. Ct. Rep. 865.

A license issued to a foreign life insurance company to do business in a state, and the payment of the license taxes or fees required therefor, does not exonerate the licensee when it loans out at interest its premium receipts as its charter authorizes and as an incident to its insurance business, and when it does not do business generally as a money lender, from liability to pay an additional license charge made by the state upon all corporations engaging in banking, loaning money at interest, buying and selling notes and securities, etc. *State v. Union Cent. L. Ins. Co. (Idaho)* 67 Pac. 647.

It is competent for the legislature of a state to require every person acting in one of the cities thereof, as agent for a foreign insurer against fire losses, to pay annually for public use a percentage of the premiums received or promised for insurances effected or agreed upon in such city. *Firemen's Benev. Assn. v. Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115, *Following People v. Thurber*, 13 Ill. 554; *Ducat v. Chicago*, 48 Ill. 172, 95 Am. Dec. 529, *Affirmed on* 57 L. R. A.

error, 10 Wall. 410, 19 L. ed. 972. To the same effect, *Hughes v. Cairo*, 92 Ill. 339.

Inasmuch as the state may exclude altogether from its territory foreign insurance companies, or admit them to do business within its borders upon any terms and conditions it may see fit to impose, such an insurance company cannot contest a municipal license tax upon its agency in the city exacting it under a charter power on the ground that it has sustained all the state burdens. It is within the power of the state, not only to require payments to itself from foreign corporations seeking an entrance, but also to every local political corporation wherein it may establish itself. *Leavenworth v. Booth*, 15 Kan. 627.

States may impose upon foreign corporations any terms or burdens as conditions of entering their territory and doing business therein irrespective of their treatment of domestic corporations and regardless of the provisions of state constitutions requiring uniformity of property taxation, and of the Federal Constitution respecting the rights, privileges, and immunities of citizens in the several states. *Com. v. Milton*, 12 B. Mon. 212, 54 Am. Dec. 522.

Although it is settled law that, so far as the Federal Constitution is concerned, states may impose upon foreign insurance companies seeking to enter their territory and do business within it, such terms as they may see fit as conditions upon which permission so to do is given, it is nevertheless true that provisions in the state constitution protect foreign, equally with domestic, corporations from unconstitutional taxation. *Parker v. North British & M. Ins. Co.* 42 La. Ann. 428, 7 So. 599.

The purchase of the stock, property, and business of a domestic corporation having a paid-for license to do business as such does not give the purchaser—a foreign corporation—authority to continue the business without a license of its own. *Southern Car & Foundry Co. v. State (Ala.)* 32 So. 235.

When a state invests its superintendent of insurance with discretionary power to refuse a license to a foreign insurance company seeking to enter and do business in the state whenever in his judgment such refusal shall best promote the interests of the people of his state, such officer may exercise his power arbitrarily, and exclude a foreign insurance company when it applies for a renewal of its license after having held one and done business under it for a number of years, where the home state thereof has adopted a statute of retaliation and reciprocity, imposing burdensome obliga-

any law of this state exempts franchises from taxation; but it is maintained by counsel that no statute can be found specifically providing a method of ascertaining the value of franchises, and their objection to this tax seems to be founded upon the absence of such provision for ascertainment of the value of franchises. Almost this precise question seems to have been determined by the supreme court of Wisconsin in the case of *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746. There a street-railway company was assessed upon its personal property, specifying cars, motors, snow plows, sweepers, and other vehicles, and all other personal property, and also franchises. The court observed: "It is contended on behalf of the railway company that its franchises are not liable to assessment and taxation, for

the reason that no provision or rule has been enacted for their valuation. . . . It was not denied—indeed, it was rightly conceded—that the franchises of the street-railway company are property. It is believed that there is no authority to the contrary, nor is it seriously questioned but that the franchises of the company, and its property of whatever kind, necessary or essential to their exercise and use to carry out the purposes for which it was created, are in law an entirety, and indivisible, and not subject to severance by sale for taxes under the general operation of the tax laws or other legal process. . . . The method of taxation in this state is upon the valuation of property taxed, and the statute does not provide for a certain, specific tax on franchises, like an excise rate, and known as a franchise tax, under methods of taxation in

tions and restrictions upon, and subjecting to fines and penalties, a like company incorporated in such officer's own state. *Talbot v. Fidelity & C. Co.* 74 Md. 536, 13 L. R. A. 584, 22 Atl. 395.

As a state may rightfully deny to foreign corporations permission to do business, hold property, or exercise any corporate functions whatever within its limits, or may allow them such privileges upon such terms as it sees fit to prescribe, it may lawfully impose a franchise tax—i. e., an excise or duty upon a commodity—upon such as have offices or places of business for directing their affairs and transferring their stocks, and make the exaction a percentage of the par value of the entire capital stock whether employed within the state or not, or owned by residents or nonresidents. *Atty Gen. v. Bay State Min. Co.* 99 Mass. 148, 98 Am. Dec. 717.

When a foreign insurance company enters a state to do business, where there are no domestic companies of the same kind, it is to be presumed that it does so in view of the public law thereof, taxing the gross premiums received within the state and in submission thereto, and that all its transactions with its agents and others will be made with regard to such law. *Phoenix Ins. Co. v. Omaha*, 23 Neb. 312, 36 N. W. 522.

New Jersey subjected, by a statute enacted in 1884 (Supp. Rev. 1016), foreign corporations doing business in that state to an annual license tax, not an imposition in compensation for the grant of a franchise by the state, but for use of its franchises within the state. *State, Tide-Water Pipe Line Co., Prosecutor, v. Berry*, 52 N. J. L. 308, 19 Atl. 665.

A foreign corporation taxed because of doing business in a state other than that of its origin may be subjected to a specific impost which is not harmful when, though arbitrary, it is measured by its ability to pay. It cannot complain that the method of computing it is not based upon an apportionment or appraisal, either of business done, capital employed, or dividends paid within the state. But it must be imposed only on business done within the state; if imposed on all the business of the corporation it is conceded that it cannot be enforced. And such a corporation cannot, outside of its home state, be taxed by another state in reference to property or business not within the limits of the latter, nor on account of its corporate franchises, since these were not given by the latter state, and were dependent only upon the laws of the state that created the corporation, and were without exist-

ence separate therefrom. *People v. Equitable Trust Co.* 96 N. Y. 387.

A corporation employing some or all of its capital in a state other than that which gave it being, and thus having the benefit and protection of the government and laws of such other state to the extent of its investment therein, is justly subject to the same burdens and obligations of taxation in such other state as is a corporation domestic thereto. *People, ex rel. Southern Cotton Oil Co. v. Wemple*, 131 N. Y. 64, 29 N. E. 1002.

When a tax laid upon such a corporation is measured by the amount of capital employed in the state, it is not imposed upon its property, but for the privilege extended to it by the taxing state of doing business therein as a corporation, and in its corporate name. *Ibid.*

The jurisdiction to impose such a tax is gained by reason of the business which the foreign corporation is privileged to do in the taxing state under the protection of its laws. *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 74, 45 L. R. A. 126, 53 N. E. 685, Gray, J.

A tax of that kind is levied upon a foreign corporation for the privilege of exercising its corporate franchises or carrying on its business in the taxing state. *Ibid.*, Vann, J.

The Ohio statute of May 14, 1894 (91 Ohio Laws, 237), imposing an excise tax for the privilege of carrying on the express business in that state, is valid. *Adams Exp. Co. v. State*, 55 Ohio St. 69, 44 N. E. 506.

A foreign corporation can do business in Ohio only upon such terms and conditions as the state may impose; and therefore a franchise tax may be imposed upon a foreign corporation for the privilege of doing business in the state. *Southern Gum Co. v. Laylin* (Ohio) 64 N. E. 564.

A state has a right to require the treasurer of each foreign corporation that does business within its borders, whenever his company pays interest on any scrip, bond, or certificate of indebtedness issued to and held by residents of such state, to assess a state tax thereon upon the face value of each security, and to compel the deduction thereof from the interest payments and the payment thereof into the state treasury. A law so providing is a valid exercise of the power to prescribe conditions upon which a foreign corporation may come into and do business within the state. *Com. v. New York, L. E. & W. R. Co.* 129 Pa. 463, 18 Atl. 412. This case followed *Com. v. Delaware Division Canal Co.* 123 Pa. 594, 2 L. R. A. 798, 16 Atl. 584, and *Com. v. Lehigh Valley R. Co.*

use in many of the states. 'In some states,' says Mr. Cooley in his work on Taxation (p. 383), 'all taxation, as far as possible, is brought to an ad valorem standard. Franchises are property, and in such states may be taxed by valuation, being estimated for the purpose either separately or as a part of the aggregate corporate property.' *State Bd. of Assessors v. Central R. Co.* 48 N. J. L. 283, 288, 347, 4 Atl. 578. They have a value which can be estimated, and this is the proper duty of the assessor or the board of review. In *State Railroad Tax Cases*, 92 U. S. 603, 23 L. ed. 669, it is laid down: "That the franchise, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business, and by the state which creates them, admits of no dispute at this day. "Nothing can be more certain in legal decisions," says

this court in *Society for Savings v. Coite*, 6 Wall. 607, 18 L. ed. 902, "than that the privileges and franchises of a private corporation . . . may be taxed by a state for the support of the state government." *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146; *State Tax on Railway Gross Receipts*, 15 Wall. 284, sub nom. *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 164. In *Raleigh & G. R. Co. v. Reid*, 13 Wall. 268, 20 L. ed. 570, the court says that 'nothing is better settled than that the franchise of a private corporation—which, in its application to a railroad, is the privilege of running it, and taking fare and freight—is property, and of the most valuable kind.' And in *Morgan v. Louisiana*, 93 U. S. 223, 23 L. ed. 861, it is said that they "are rights or privileges which are essential to the operations of the corporation, and without

129 Pa. 429, 18 Atl. 406, 410, upon all the points raised therein, and then held, in addition, that the statute *sub judice* applied to foreign as well as domestic corporations.

The same ruling was made in *Com. v. Delaware & H. Canal Co.* 150 Pa. 245, 24 Atl. 599.

There was a ruling to the same effect, again, in *Com. v. New York, L. E. & W. R. Co.* 139 Pa. 457, 21 Atl. 528; but this case was reversed in the United States Supreme Court. *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952. The point was not affected, however, since the reversal went upon the ground that the state had bargained with the plaintiff in error for a consideration of value for the extension of its road within its territory, and the law in question would impair the obligation of this contract; and upon the further ground that, as the railroad paid its interest in New York, these payments, even when made to Pennsylvanians, were beyond the taxing jurisdiction of Pennsylvania.

3. What is doing business or employing capital within the state and the meaning of tax laws.

It is not easy in any given case to say whether or not a corporation is doing business or employing capital within a state where it did not originate, so as to be subject to a franchise tax imposed thereby upon foreign corporations for the privilege of doing business within its limits. In New York, in particular, where the courts have long and consistently held that the jurisdiction to impose taxes at all upon foreign corporations depends upon the fact that they employ capital or do business, or are privileged so to do, in that state, the controversy over this question has been unceasing, and a final answer to it is still awaited. Illustrative cases will make this clear.

The act of February 27, 1855, provided that all persons and associations doing business in the state of New York as merchants, bankers, or otherwise, either as principals or partners, general or special, and not residents of the state, should be assessed and taxed on all sums invested in any manner in said business the same as if they were residents. A foreign corporation which manufactured nails in Massachusetts and Rhode Island, and had a depot and agent in the city of New York to which it sent nails for sale, and whose only business in New York state was making such sales, and at once remitting the proceeds thereof to the home office, and when these were on credits the securities and accounts therefor for collection, was assessed and taxed by the city tax com- 57 L. R. A.

missioners under that statute because its sales in that city aggregated \$300,000 annually, and its sales agent had on hand for sale \$10,000 worth of its product. It was held that this did not constitute doing business in the state of New York, or rather having any investment in business in such state within the tax law. That merely sending goods into the state to be sold did not subject a foreign corporation to any tax under that law. *People ex rel. Parker Mills v. New York Tax & A. Comrs.* 23 N. Y. 245.

This decision was followed and approved soon afterwards by a court nearly evenly divided (four to three) in holding that a foreign banking corporation having, not a branch, but a mere agency, within the state to which it intrusted funds and securities for temporary employment until they were required elsewhere, they being a part of a general fund reserved to meet shortly maturing and unexpected liabilities at home, and which were at all times subject to draft and under the control of the officers at home, and which had no permanent capital whatever invested in such agency or in any business within the state of New York, and where such agency did not issue bills nor receive deposits nor do any business whatever save loaning on call or short time the funds sent to it,—was not taxable under such statute. *People ex rel. Bank of Montreal v. New York Tax & A. Comrs.* 59 N. Y. 40, *Reversing* 1 Thomp. & C. 680.

The decision in the *Parker Mills Case* was also followed in *People ex rel. Sherwin-Williams Co. v. Barker*, 5 App. Div. 246, 39 N. Y. Supp. 151, *Affirmed* without opinion in 149 N. Y. 623, 44 N. E. 1128, where the facts were much the same.

This last case expressly overruled *People ex rel. Martin Bros. Mfg. Co. v. Barker*, 14 Misc. 382, 36 N. Y. Supp. 76, which had held the contrary.

But a foreign insurance company that has ceased to do aught but collect premiums and pay losses on outstanding policies is still doing business within such statute so as to be subject to taxation thereunder. *Smyth v. International Life Assur. Co.* 35 How. Pr. 126.

A foreign mining corporation whose executive officers have offices in New York, whose directors hold annual meetings, and whose dividends are declared and paid in that state; whose silver bullion is all sent and sold there and the price of it deposited in banks there, in part, and in part loaned there and in part used there for corporate purposes, all continuously throughout an entire year,—is doing business

which its road and works would be of little value. . . . They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them.' *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 186, 29 L. ed. 124, 5 Sup. Ct. Rep. 813; *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660; *Spring Valley Waterworks v. Schottler*, 62 Cal. 110; *Central P. R. Co. v. State Board of Equalization*, 60 Cal. 35; *Veasie Bank v. Fenno*, 8 Wall. 547, 19 L. ed. 487. We have the general and paramount provision making franchises taxable. Legislative direction as to the manner of valuation is a convenience, rather than an absolute necessity, and the lack of such direction does not argue the absence or suspension of the general power to tax. The value of franchises,

especially in connection with the property reasonably necessary for their exercise and use, and which, without them, would be of little or no practical value, can be estimated as well as the value of other subjects of taxation, though perhaps not as readily, or with the same degree of certainty. The cardinal requirement is that, as property, they shall be taxed. All else is matter of method and detail. The assessors, board of review, and other officers would seem to be competent, under their general powers under the law, to fix their value and extend the tax." The Supreme Court of the United States, in *Society for Savings v. Coite*, 6 Wall. 594, 18 L. ed. 897, observes, with reference to the taxation of franchises: "Such a power resides in government as a part of itself, and need not be reserved when property of any description, or the right to

in that state within the meaning of a tax law thereof, imposing a franchise or business tax upon domestic corporations and foreign ones doing business within its limits. *People v. Horn Silver Min. Co.* 105 N. Y. 76, 11 N. E. 155, Affirming 38 Hun, 276, and Affirmed on Error in 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

A foreign corporation chartered to manufacture, own, sell, use, and license others to use electric speaking telephones and other apparatus and appliances pertaining to the transmission of intelligence by electricity, whose entire business practically consists in manufacturing under its patents in its home state and leasing to and licensing others to use telephones elsewhere under elaborate contracts made at its home office providing for royalties and license fees payable at such home office, from which are shipped the telephones required by the licensees, and to which these when done with are returned, but which leaves the entire local business to be carried on by, and the entire local receipts to be collected by, the licensees, except it reserves in its contract certain rights to interfere on default of payment of royalties and rentals, or, when needful, to protect its patent rights,—is not doing business outside of the state where its domicile is and within that of a local corporation it has licensed, and therefore is not taxable under such a statute. *People v. American Bell Teleph. Co.* 117 N. Y. 241, 22 N. E. 1057, Reversing 50 Hun, 114, 3 N. Y. Supp. 733.

A foreign corporation that maintains a sales agency in another state, where it sells the products of its mills, and where it refines crude oil, keeps a warehouse for storage of its stock, and large sums for business purposes on deposit in a local bank, is doing business in such state, and subject to taxation under a statute thereof taxing foreign corporations that do business therein upon the amount of capital they employ therein. *People ex rel. Southern Cotton Oil Co. v. Wemple*, 131 N. Y. 64, 29 N. E. 1002.

This view was the same one taken by the Federal court in that state. *Southern Cotton Oil Co. v. Wemple*, 44 Fed. 24.

It is somewhat noteworthy that after these decisions this corporation changed its methods of doing business in New York, and thereby succeeded (for a time at least) in avoiding this tax. It discontinued its New York office and entered into an arrangement with a firm of commission brokers making them its selling agents for the state, for the eastern and for foreign markets, on a commission of a certain per cent of the sales. The brokers obtained or-

ders and sent them to the company for approval. If these were approved shipments to fill them were in the majority of cases made direct from the mills outside of New York. The company also consigned to the brokers for sale, if a named price could be obtained, an average of 400 to 500 barrels of oil per month, some of which was for consumption in the state of New York, but all of which was sold in original packages. The company also had a New York bank account, but used it wholly without the state except to pay brokers' commissions. It was held that all this did not constitute doing business within the state of New York within said tax law. *People ex rel. Southern Cotton Oil Co. v. Roberts*, 25 App. Div. 13, 48 N. Y. Supp. 1023.

That a foreign railroad corporation keeps buildings and other structures and a force of clerks and laborers and a local bank account at its terminal on the edge of the state for the sole purpose of transacting its business as a carrier of freight and passengers to and from other states does not make it a doer of business within the latter state, or subject it to taxation under such statute. *People ex rel. Pennsylvania R. Co. v. Wemple*, 65 Hun, 232, 20 N. Y. Supp. 287, Affirmed in 138 N. Y. 1, 19 L. R. A. 694, 33 N. E. 720.

But when that same railroad establishes a cab service, and owns and uses cabs to convey actual or potential passengers from or to its terminus in the city of New York upon fares independent of the railroad tickets, it becomes, to the extent of the capital it employs in such cab service, subject to the tax imposed by New York upon foreign corporations for the privilege of exercising corporate franchises or doing business in an organized capacity within its limits, to be computed upon the basis of the capital employed within the state. *People ex rel. Pennsylvania R. Co. v. Knight*, 171 N. Y. 354, 64 N. E. 152, Affirming 67 App. Div. 308, 73 N. Y. Supp. 700.

A foreign manufacturing corporation engaged in building, equipping, and repairing steamships and railway cars in the state of its origin, where all its officers and everyone financially interested in it reside, which makes all its contracts, sells and delivers all its output, keeps all its books and accounts, makes all its deposits in bank at its home office, and which in New York merely hires an office for a salaried agent and as a convenient place to meet patrons and to make preliminary arrangements for contracts that are finally closed at its home office, and which has no property there but office furniture of trifling value, and pays all the expenses thereof, including the agents' sal-

use it in any manner, is granted to individuals or corporate bodies. . . . The privileges and franchises of a private corporation are as much the legitimate subject of taxation as any other property of the citizens which is within the sovereign power of the state. Repeated decisions of this court have held, in respect to such corporations, that the taxing power of the state is never presumed to be relinquished, and, consequently, that it exists unless the intention to relinquish it is declared in clear and unambiguous terms." But it will be observed, upon examination of the authorities mentioned in the case of *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746, that it is a settled

principle that franchises are subject to taxation, and it is a firmly established rule in this state that all property not specifically exempt by law is subject to taxation. We therefore conclude that the objection to the assessment and taxation of corporate franchises is not tenable, and we think the objection to the assessment because the method has not been prescribed by the legislature is sufficiently answered by the supreme court of Wisconsin, *supra*. In the case of *Com. v. New England Slate & Tile Co.* 13 Allen, 391, the supreme court of Massachusetts said: ". . . . And the fact that the defendant corporation held property which was subject to the burden of taxation in other ways does not render this tax up-

ary, by checks drawn at home on a bank there located, neither employs capital, nor does business, in New York, and hence is not taxable therein. *People ex rel. Harlan & H. Co. v. Campbell*, 139 N. Y. 68, 34 N. E. 753.

Merely keeping an office and samples, but no stock, therein, without investing any capital in the state of New York, where orders for goods manufactured without the state are taken and sent to the home office in the state of its origin to be there filled if approved, does not render a foreign corporation taxable as doing business or employing capital in the state of New York. *People ex rel. Washington Mills Co. v. Roberts*, 8 App. Div. 201, 40 N. Y. Supp. 417.

But a foreign corporation organized under the laws of a foreign country, where it carries on all its corporate business, and where everybody interested in it resides, and which has no office, no property, no employee, and no transactions in the United States, and which has contributed a sum of money to a partnership of individuals as a part of the capital of a supposed limited partnership engaged in the importation and sale of the corporation's products and acting as its agents to sell them, the whole partnership business being exclusively managed and controlled by the individual partners, and the title to all its assets being in the firm as such,—is embraced within a statute of the state where such partnership carries on business enacted after said sum was contributed providing for the taxation of domestic corporations upon their corporate franchise and of foreign ones doing business in such state on their business within the state, according, in either case, to the amount of capital employed therein. *People ex rel. Badische-Anilin & Soda Fabrik v. Roberts*, 152 N. Y. 59, 36 L. R. A. 756, 46 N. E. 161, Affirming 11 App. Div. 810, 42 N. Y. Supp. 502. Two judges out of five dissented in the court below, and one, O'Brien, J., on appeal. He based his dissent upon the ground that the relator beyond all dispute was not doing business in the state of New York, and he referred to the earlier case of *People v. American Bell Teleph. Co.* 117 N. Y. 241, 22 N. E. 1057, where the relator therein, though furnishing most of the capital to and holding stock in domestic corporations, was declared not within the same statute for that very reason, stated, in the language of the court, "that for one person to supply the means to another to do business is not the doing of that business by the former," and he was unable to see why that decision did not control the one at bar. And many people will be inclined to agree with him, assuming the cited case to be sound.

A foreign brewing corporation that keeps in New York city and Brooklyn an agent to solicit

orders, which it fills by shipments direct from its brewery in an adjoining state; that has its agent deposit to its credit in a local bank his collections where its average balance is \$500; and that has in Brooklyn a storehouse where its casks from the brewery are temporarily placed over night pending delivery or return, but from which no sales were made,—is not doing business or employing capital in the state of New York, so as to be taxable therein. *People ex rel. Lembeck & B. E. Brewing Co. v. Roberts*, 22 App. Div. 282, 47 N. Y. Supp. 949.

In order that a foreign corporation may be taxed in the state of New York under a statute thereof making every corporation organized under the laws of any other state or foreign country and doing business in New York subject to taxation therein upon its capital stock upon the basis of the amount thereof employed therein, two concurrent conditions must exist: (1) The corporation must be doing business in the state; and (2) its capital, or a part of it, must be employed there. *People ex rel. Chicago Junction R. & U. Stockyards Co. v. Roberts*, 154 N. Y. 1, 47 N. E. 974, Reversing 90 Hun, 474, 35 N. Y. Supp. 968. The court sharply divided, four to three, in this case, not upon the proposition, but whether or not both conditions were fulfilled. The dissentients held they were; the majority that but one of them was. Their view was that the relator employed none of its capital in the state; that at most it employed only surplus, and surplus, as settled in the *Singer Case*, 150 N. Y. 46, 44 N. E. 787, was not capital, nor taxable as such.

The relator in that case was a foreign investment company. Four fifths of its directors were not residents of New York. The office where its annual meetings of stockholders were held was maintained in its home state. It had invested its whole capital in purchasing the stock and bonds of another foreign corporation of a distant state, entirely separate and distinct from itself, which in such distant state transacted all its business and declared and paid all its dividends. The relator derived its whole income from this investment, and had no other business; but it rented and furnished an office in New York, employed there and paid the salaries of a treasurer, secretary, clerk, and stenographer; it mailed from there to its stockholders checks for their dividends drawn upon a New York bank; it kept a bank account in New York with a large balance, and it had constituted such bank its transfer agent. It was held that it was not taxable; that, although it could be said to do business, it employed no capital in New York, and both were essential.

A foreign corporation engaged in loaning money on bonds and mortgages in its home and other western states, and in selling in Eastern markets bonds or debentures based thereon,

on its franchise illegal." See also *Com. v. Lovell Gaslight Co.* 12 Allen, 75. The court of appeals of New York, in *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 367, said: "The powers and privileges which constitute the franchises of a corporation are, in a just sense, property, and quite distinct and separate from the property which, by the use of such franchises, the corporation may acquire. They are so regarded by the law, and so regarded by common acceptance. And, although it has not heretofore been customary, in this state at least, to subject them to taxation, yet it must be conceded that it may be done if the legislature see fit so to enact." We can find no more practical difficulty in the assess-

ment and valuation of a corporate franchise by competent officers under our revenue laws than in some other kinds of personal property which is taxed in this state. Some difficulty or perplexity arises in the valuation of much incorporeal property for taxation.

It is concluded, therefore, that the franchise of plaintiff was properly assessed, and the judgment of the Superior Court is reversed and remanded, with direction to enter judgment for defendants.

Gordon, Ch. J., and Anders and Dunbar, JJ., concur.

Rehearing denied.

which maintains in New York an office, and has from the banking department of that state a license to carry on its business therein, and whose business at such office is the sale of the securities it deals in, and sending the proceeds west for reinvestment, the securities being constantly replenished, and which keeps a bank account in New York,—is doing business in that state, and employing capital to the average amount of the securities it carries there, as much as if such securities were merchandise; and hence, is subject to the New York franchise tax upon its business. *People ex rel. New England Loan & T. Co. v. Roberts*, 25 App. Div. 16, 49 N. Y. Supp. 10. Affirmed on opinion below in 156 N. Y. 688, 50 N. E. 1120.

That a foreign corporation has an office in New York, where it keeps samples of its goods to the amount of \$4,000, and also has there a bank account with about as much of an average balance, all as incidents to the taking of orders for its products to be filed at its factory in another state, although it does have about \$500 worth of odds and ends of materials to make repairs with at such New York office, does not render it taxable under such statute. *People ex rel. H. B. Smith Co. v. Roberts*, 27 App. Div. 455, 50 N. Y. Supp. 355.

A foreign corporation engaged in the state of its origin in making up and printing the insides or outsides of newspapers for local newspapers published in different parts of the Union, the publishers of which pay the corporation at its home office a certain price therefor, and complete the same by printing the blank pages with matter of their own and supplying their local patrons, and which does in New York no business except at an office rented to make contracts with advertisers in its portion of the paper for its own benefit and collect what is due therefor, which it temporarily banks therein, is not taxable under such statute. *People ex rel. A. N. Kellogg Newspaper Co. v. Roberts*, 30 App. Div. 150, 51 N. Y. Supp. 866.

When a foreign corporation, in compliance with a statute to that effect, applies for a license to do business within the state of New York, filing for the purpose a copy of its charter, and designating a principal place of business within the state and a person thereat upon whom legal process against it may be served, and obtains the license applied for, it affords conclusive evidence of an intention to make the designated place a permanent and continuous place of business, and not a mere depot for temporary storage of its property pending sale; and therefore it is taxable as doing business at such place and employing capital there to the amount of its stock of merchandise carried there, although a part of this was manufactured without the state and sent in to it for 57 L. R. A.

sale. *People ex rel. Armstrong Cork Co. v. Barker*, 157 N. Y. 159, 51 N. E. 1043.

The general transactions of the relator in that case were similar to those of the company in *People ex rel. Parker Mills v. New York Tax & A. Comrs.* 23 N. Y. 242, and the relator in *People ex rel. Sherwin-Williams Co. v. Barker*, 5 App. Div. 246, 39 N. Y. Supp. 151, which followed it. These cases were accordingly distinguished.

The Armstrong Cork Company did, however, do a part of its manufacturing within the state of New York, and a portion of its stock was domestic made. Yet this fact made no difference, since the decision was accepted as controlling in the case of a corporation which manufactured its entire stock without the state of New York, and whose actual transactions in it did not differ from those of the Parker Mills Case. As it had applied for and received the license, it was, notwithstanding, held taxable. *People ex rel. Crane Co. v. Feltner*, 49 App. Div. 108, 62 N. Y. Supp. 1107.

The applying for and the issuing of the license is therefore deemed the controlling factor in this class of cases. This is seen by the decision in *People ex rel. Reversible Collar Co. v. Feltner*, 31 Misc. 553, 65 N. Y. Supp. 518, and emphatically so in the second *Sherwin-Williams Company Case*. *People ex rel. Sherwin-Williams Co. v. Feltner*, 60 App. Div. 628, 70 N. Y. Supp. 836.

The weakness of the later decisions appears to consist in assuming that applying for and obtaining a consent to do business is the same thing as doing business after permission is given; that in some way transactions that have for years been adjudicated to be neither doing business nor employing capital within the state are converted into both by asking permission and getting leave to do something else. These questions have not so frequently arisen in states other than New York.

A statute requiring a return, for the purposes of taxation, of the property of railroads operated within the state embraces depots, switchyards, shops, and side tracks used for railroad purposes within the state by means of a leased track, and belonging to a company whose main line is wholly outside of the state. *Quincy, O. & K. C. R. Co. v. People ex rel. Corrigan*, 156 Ill. 437, 41 N. E. 162.

Under a statute requiring every insurance company, firm, individual, or corporation doing and conducting an insurance business of any kind in the state, whether domiciled therein or merely operating through a branch department or agency of any kind, to pay a separate and distinct license tax on said business for every company represented, based upon the gross annual premiums received on risks within the state, and upon risks elsewhere upon which no

licenses elsewhere are paid,—only the insurers and recipients of the premiums in their own right are personally liable; not the agents, who only procure risks and collect premiums for their principals. Such agents do not do or conduct an insurance business. *State v. Woods*, 40 La. Ann. 175, 3 So. 543.

When a foreign insurance company appoints an agent or agents within the state, and authorizes him or them to issue and reissue its policies and collect and receipt for its premiums, and also, in compliance with the state law, names an attorney to accept for it service of legal process, it is conducting an insurance business within the state, and, hence, is liable to taxation, state and local, imposed by statutes and ordinances upon such insurers; and this subject regardless of the fact that such agent or agents also represent a large number of other companies, and also insures or insure on his or their own account. *State v. New England Mut. Ins. Co.* 43 La. Ann. 133, 8 So. 888.

A foreign corporation owning, maintaining, and operating a pipe line across a state, a pumping station at one point, and storage tanks, distributing apparatus, and a business office at another within such state, is doing business therein within the meaning of a taxing law thereof applying to foreign corporations that do business within the state. *Tide Water Pipe Co. v. State Bd. of Assessors*, 57 N. J. L. 516, 27 L. R. A. 684, 31 Atl. 220.

Pennsylvania has been somewhat more prolific of controversy over this point.

Under statutes exacting annual license fees from foreign corporations which maintain offices without investing capital or carrying on business within the state, and imposing, instead, upon other foreign corporations taxes upon their capital stock employed within the state, a foreign corporation in the first class does not transfer itself to the second merely by purchasing a piece of real estate neither used nor necessary for its corporate business. That is not an investment of capital stock within the meaning of such statutes. *Com. v. Conglomerate Min. Co.* 1 Dauph. Co. Rep. 85.

A foreign corporation that owns no property but a United States patent covering a process for desulphuring ores and that actually does no business although authorized to exploit its process, except to grant licenses to others, is not liable to taxation out of its home state because it neither does business nor has a taxable situs in another state. *Com. v. Davis-Colby Ore Roaster Co.* 1 Dauph. Co. Rep. 118.

The purchasing of oil within, to ship to refineries without, a state is sufficiently doing business in such state to subject a foreign corporation to taxation therein. *Com. v. Standard Oil Co.* 101 Pa. 119.

The same conclusion that the New York court of appeals came to in the case of *People v. American Bell Teleph. Co.* 117 N. Y. 241, 22 N. E. 1037, was reached in Pennsylvania by the courts of that state, in the case of the same corporation under a similar tax law, namely, that the company was not doing business or employing capital, and hence was not taxable. *Com. v. American Bell Teleph. Co.* 1 Dauph. Co. Rep. 168; *Com. v. American Bell Teleph. Co.* 129 Pa. 217, 18 Atl. 122.

A railroad receiving gross earnings amounting to \$9,000,000 for transporting passengers and freight, whose line is 455 miles long, of which 42½ miles are within a state other than that to which it owes its origin, is doing business in such foreign state within the terms of a statute thereof imposing a percentage tax upon the gross receipts of every railroad and steamboat company doing business in that 57 L. R. A.

state upon whose works freight may be transported. *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. ed. 595.

4. Engaged in interstate commerce.

An extended discussion of state franchise taxes upon foreign corporations engaged to any extent whatever in foreign or interstate commerce 's not entered upon here. The subject has been relegated to a separate note upon corporate taxation as affected by the commerce clause of the Federal Constitution. It suffices to say, generally, here that whenever a state law taxing foreign corporations for the privilege of carrying on their business within the taxing state casts a burden upon, or amounts to a regulation of, interstate or foreign commerce, it is void, and if in any given case a state tax rests upon such commerce it is invalid. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Intern. Com. Rep. 382, 5 Sup. Ct. Rep. 826, *Reversing Com. v. Gloucester Ferry Co.* 98 Pa. 105; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 8 Sup. Ct. Rep. 1380, *Reversing*, on error, 76 Ala. 401; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Intern. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Intern. Com. Rep. 178, 10 Sup. Ct. Rep. 958, *Reversing* 114 Pa. 256, 6 Atl. 45; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851, *Reversing*, on error, 89 Ky. 6, 12 S. W. 141; *Clyde SS. Co. v. Charleston*, 76 Fed. 46; *San Francisco v. Western U. Tele. Co.* 96 Cal. 140, 17 L. R. A. 301, 31 Pac. 10; *San Bernardino v. Southern P. R. Co.* 107 Cal. 524, 29 L. R. A. 327, 40 Pac. 796; *Osborne v. State*, 38 Fla. 162, 25 L. R. A. 120, 4 Intern. Com. Rep. 731, 14 So. 588; *Coit & Co. v. Sutton*, 102 Mich. 324, 25 L. R. A. 819, 4 Intern. Com. Rep. 768, 60 N. W. 690; *State v. Canda Cattle Car Co. (Minn.)* 89 N. W. 66; *People ex rel. Pennsylvania R. Co. v. Wemple*, 138 N. Y. 1, 19 L. R. A. 694, 33 N. E. 720; *People ex rel. Sherwin-Williams Co. v. Barker*, 5 App. Div. 246, 39 N. Y. Supp. 151, mem. *Affirmed* in 149 N. Y. 623, 44 N. E. 1128; *People ex rel. Washington Mills Co. v. Roberts*, 8 App. Div. 201, 40 N. Y. Supp. 417, *Affirmed* in 151 N. Y. 619, 45 N. E. 1136; *People ex rel. Lembeck & B. E. Brewing Co. v. Roberts*, 22 App. Div. 282, 47 N. Y. Supp. 949; *People ex rel. Southern Cotton Oil Co. v. Roberts*, 25 App. Div. 13, 48 N. Y. Supp. 1028; *People ex rel. H. B. Smith Co. v. Roberts*, 27 App. Div. 455, 50 N. Y. Supp. 355; *Com. v. American Tobacco Co.* 173 Pa. 531, 34 Atl. 223.

The cases in which the taxation has been sustained are all where the law under which it was imposed had not the necessary effect to interfere with, burden, or in any wise regulate commerce, either interstate or foreign, and were such that the tax rested upon internal traffic only, or was a tax in reality, if not in form, upon property within the state, or, if for the privilege of doing business, attached to corporations which either did not do an interstate or foreign business at all, or were not exclusively engaged in such commerce. *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Intern. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Western U. Tele. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Atty. Gen. v. Western U. Tele. Co.* 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889; *Horn Silver Min. Co. v. New*

York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Postal Tele. Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; Adams Exp. Co. v. Kentucky, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527; New York v. Roberts, 171 U. S. 658, *sub nom.* People *ex rel.* Parke, D. & Co. v. Roberts, 43 L. ed. 323, 19 Sup. Ct. Rep. 58; Western U. Tele. Co. v. Norman, 77 Fed. 13; Mitchell v. Meridian, 67 Miss. 644, 7 So. 493; Postal Tele. Cable Co. v. Adams, 71 Miss. 555, 4 Inters. Com. Rep. 416, 14 So. 36, Affirmed in 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; People *ex rel.* American Soda Fountain Co. v. Roberts, 158 N. Y. 168, 52 N. E. 1104, Reversing 29 App. Div. 585, 51 N. Y. Supp. 487; People *ex rel.* Southern Cotton Oil Co. v. Wemple, 131 N. Y. 64, 29 N. E. 1002, Affirming 61 Hun. 53, 15 N. Y. Supp. 711; List v. Com. 118 Pa. 322, 1 Inters. Com. Rep. 784, 12 Atl. 277; Com. v. Western U. Tele. Co. 2 Dauph. Co. Rep. 40.

A state franchise tax once paid by a foreign corporation to obtain a license to do business within the state when the only business it does or intends doing is interstate commerce cannot be recovered back. *Moline Plow Co. v. Wilkinson*, 105 Mich. 57, 62 N. W. 1119.

An apparent exception is the case of *Atlantic & P. R. Co. v. Lesueur (Ariz.)* 1 L. R. A. 244, 2 Inters. Com. Rep. 189, 19 Pac. 157, where a tax laid by the territory of Arizona on the franchise granted by Congress to a transcontinental railroad engaged exclusively in interstate commerce was sustained. This case went on the ground, however, that a territory was not an independent sovereignty, and that its taxing act having been approved by Congress any interference thereby with commerce was by the consent of Congress itself, and therefore in harmony with the commerce clause.

But it must be conceded that the case of *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163, is out of harmony with the above-stated principles. In that case the Supreme Court of the United States sustained the validity of a tax imposed by the state of Maine upon a foreign railway company engaged exclusively in interstate and international commerce for the privilege of carrying on its business in that state.

VIII. Limitations on franchise taxation.

a. Constitutional.

It is manifest that taxing statutes, like other enactments, are sometimes found to transcend the powers of the legislature as restricted by the constitution of its state. It is, of course, outside the present field of view to take note of any infringements of constitutional provisions that have not direct relation to the subject of taxation, and the field is also narrowed to include naught beyond laws subjecting corporations to franchise taxation. Almost every state constitution contains a provision requiring all property to be taxed by uniform laws according to its value, and to share equally in bearing the public burdens. But, although it is everywhere strongly insisted that corporate franchises are property for the purpose of taxation, it is unanimously held that they are not under the protection of such a provision, and that the legislative power of taxation over them is unlimited. Most of

the state constitutions provide, in connection with such provision for ad valorem property taxation, that the legislature may tax franchises and exact license fees from occupations, provided the laws to that end operate uniformly upon all in the same class; but, as it is customarily regarded as competent for the legislature to create classes *ad libitum*, the protective power of such provisions is slight.

The provisions of the Alabama Constitution, requiring all taxes levied upon property to be assessed in exact proportion to the value of such property, and the property of private corporations, associations, and individuals to be forever taxed at the same rate, do not preclude the legislature from laying specific taxes upon franchisees, privileges, or occupations, since such provisions relate only to direct taxes upon property. *Phoenix Carpet Co. v. State*, 118 Ala. 143, 22 So. 627.

The Illinois constitutional requirement of the legislature to provide all needful revenue by levying a tax by valuation so that each taxpayer shall pay in proportion to the value of his property to be ascertained by persons appointed or elected as the legislature should direct, and not otherwise, was coupled with a provision empowering the legislature to tax corporations owning or using franchises or privileges by general law uniform as to the class on which it operates. Under such a constitution taxes imposed in that state upon domestic railroads according to a general system for valuing, first, the real estate and localized chattels, in the several localities where the line runs by the local assessors and taxing these like other local property; second, the railroad track and appurtenances, right of way, and structures thereon with rolling stock and other movables by a state board and the local apportionment according to mileage; and third, the invisible and intangible property, called franchise and capital stock by the same board with a like apportionment, the value of the third class being found by taking the market value of the share stock and funded debt and deducting the assessed value of the other two classes,—are held to be fair and equitable, repugnant neither to such constitutional provisions, nor to any provision of the United States Constitution. *State Railroad Tax Cases*, 92 U. S. 575, *sub nom.* *Taylor v. Secor*, 23 L. ed. 663.

A statute empowering a state board of equalization to fix the fair cash value of corporate capital stock and franchisees of all domestic corporations above the assessed value of their tangible property satisfies all the requirements of such a constitutional provision. Such a statute is a general one and uniform as to the class on which it operates. It is not essential that franchisees be valued and taxed separately, nor that the precise amount that the corporation shall pay be stated and be the same for every corporation regardless of the value of its franchises or privileges. Nor is it requisite that taxation of this character be like that imposed upon occupations. Neither is it needful that the same set of assessors be charged to assess both tangible and intangible property, nor that they do so upon the same basis. *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561.

Other cases of like decisions are: *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602.

And an assessment upon a railroad, made by taking the value of all its possessions, tangible and intangible, including franchisees, and deducting the assessed value of the tangibles, is not violative of the rule of equality and uniformity by the mere fact that such a method

of assessment, when applied to many other corporations, comes out a negative value. The object of deducting the assessed value of the tangibles is to avoid double taxation, and it may well happen that these constitute all the property of value that the corporation owns; or that it has been overvalued to an extent equaling the worth of the franchise and intangibles together; or, upon the other hand, that the tangibles have been undervalued, or to some extent escaped assessment; or that the franchise and intangibles really have additional value,—so that in one case there is more property to value, or else it has already been included in assessing the tangibles and in the other, property not assessed, or insufficiently assessed, is reached and subjected to taxation. *Chicago, B. & Q. R. Co. v. Siders*, 88 Ill. 320; *Huck v. Chicago & A. R. Co.* 86 Ill. 352.

Inasmuch as a foreign insurance company can only do business in a state where it did not originate by that comity that exists between states, and must submit to such terms as may be imposed upon it or cease to do business within it, nothing in such constitutional provision prevents the legislature from imposing terms upon foreign insurance or other corporations as conditions upon which they may do business, which are not put upon domestic organizations of the same character. *Hughes v. Cairo*, 92 Ill. 339.

That provision of the Constitution is not infringed by a revenue act for the valuation for taxation by a state board of equalization of the capital stock, including the franchise of domestic corporations in general, at the fair cash value above the assessed value of the tangible property, but excepting from its operation manufacturing, stock breeding, and newspaper corporations, and expressly leaving these to be assessed on their property like individuals by local assessors. *Coal Run Coal Co. v. Finlen*, 124 Ill. 666, 17 N. E. 11.

While it is true that both capital stock and franchises are property, and as such taxable to a corporation, this does not render such revenue act unconstitutional under such a provision. *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660.

Under the Nebraska constitutional provision couched in very much the same language, except that it provides that the legislature shall have power to tax certain specified classes of persons and occupations (among which, however, litigants are not named) in such manner as it shall direct by general law uniform as to the class upon which it operates, a statute exacting from every party commencing suit in the supreme court a \$10 tax to be paid the clerk and turned over to the county treasurer is not void, as constitutions are limitations on the legislative taxing power, not grants of authority, and therefore, when the taxing power is not restricted by express language, it continues unlimited. *State ex rel. Atchinson & N. R. Co. v. Lancaster County*, 4 Neb. 537, 19 Am. Rep. 641.

Such a constitutional provision does not allow individual or corporate debts to be deducted from the true value of property or franchises in determining the value thereof for taxation, and if the manner of ascertaining such value when strictly followed will result in so doing, and will not result in levying a tax by valuation so that every taxpayer shall pay in proportion to the value of the property and franchises owned, the manner prescribed violates the Constitution, and is, in so far, invalid. Therefore, a law which requires the assessor to deduct corporate indebtedness from the actual value of the shares of stock in fixing what shall be assessed as capital stock is 57 L. R. A.

void. *State ex rel. Shriver v. Karr* (Neb.) 90 N. W. 298.

A constitutional provision requiring all property to be taxed in proportion to its value, whether owned by natural or artificial persons, unless exempt by the Constitution, and all property of corporations to pay the same rate of taxation paid by that of individuals, with a further provision authorizing the legislature to tax incomes, licenses, and franchisees, is not violated by a law for the taxation of corporate franchisees, naming as subject thereunto twenty different kinds, beginning with railroads and closing with a clause generally inclusive of every other like corporation, company, or association, also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons or performing any public service; for it makes no discrimination among corporations. *Paducah Street R. Co. v. McCracken County*, 20 Ky. L. Rep. 1294, 49 S. W. 178.

Such a constitutional provision is not violated by a law subjecting to taxation intangible corporate property which from its very nature is not susceptible of individual ownership. *Western U. Teleg. Co. v. Norman*, 77 Fed. 13.

The constitutionality of the Kentucky statute (§§ 4077-4081), passed upon in the two cases just cited, was again challenged so recently as June, 1902, but the court declared that its constitutionality had been repeatedly affirmed. It was, they said, before the court in *Henderson Bridge Co. v. Com.* 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486, in May, 1895, and affirmed in 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532. That it was also sustained in *Paducah Street R. Co. v. McCracken*, 20 Ky. L. Rep. 1294, 49 S. W. 178; *South Covington & C. Street R. Co. v. Bellevue*, 20 Ky. L. Rep. 1184, 49 S. W. 23; *Louisville R. Co. v. Com.* 20 Ky. L. Rep. 1509, 49 S. W. 486; *Louisville & J. Ferry Co. v. Com.* 22 Ky. L. Rep. 446, 57 S. W. 624; and *Henderson Bridge Co. v. Negley*, 23 Ky. L. Rep. 746, 63 S. W. 989. "We therefore conclude," it was added, "that the validity of the franchise statute has been conclusively settled, and it is therefore unnecessary to enter into a discussion of that question." *Southern R. Co. v. Coulter*, 24 Ky. L. Rep. 203, 68 S. W. 873.

States may impose upon foreign corporations any terms or burdens as conditions of entering their territory irrespective of their treatment of like domestic corporations and regardless of provisions in the state Constitution requiring uniformity and equality of taxation upon property, and of the clause in the United States Constitution respecting the rights, privileges, and immunities of citizens in the several states. *Com. v. Milton*, 12 B. Mon. 212, 54 Am. Dec. 522.

Although it is settled law that, so far as the Federal Constitution is concerned, states may impose upon foreign corporations seeking to enter and do business within them such terms as they see fit as conditions upon which their permission so to do is given irrespective of the commerce clause and guaranty of the privileges and immunities of citizens in the several states to all alike, it is nevertheless true that the provisions of the state Constitution are equally effective to protect foreign as well as domestic corporations from unconstitutional taxation. Hence, when a state tax is levied upon the gross receipts of foreign insurance companies, and not levied upon those of any other class, inasmuch as that is an income tax, and not a tax on capital or capital stock, it violates a constitutional provision re-

quiring all property to be taxed in proportion to its value. *Parker v. North British & M. Ins. Co.* 42 La. Ann. 428, 7 So. 599.

Let the reader contrast this decision and the reasoning that leads to it with cases in other jurisdictions, of which *Hughes v. Calro*, 92 Ill. 339, above cited, is typical.

The requirement of the Massachusetts Constitution that assessments, rates, and taxes imposed and levied upon the inhabitants and residents of, and estates lying within, the commonwealth shall be proportional applies to property taxes, assessments, and rates only, and not at all to franchise and privilege taxes and licenses. These need not be proportional. *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904.

A statute laying a percentage tax upon the paid-in capital of dividend paying banks is a duty or excise upon the banking privilege or franchise, and that is a commodity. Such a tax need not be proportional, as it is not within that requirement of the Constitution, but falls under another part of that instrument,—the part authorizing the imposition and levy of reasonable duties and excises upon any commodities brought into, produced, or made within the commonwealth. *Portland Bank v. Apthorp*, 12 Mass. 262.

The provision in the Mississippi Constitution that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals, and that taxation shall be equal and uniform and all property be taxed in proportion to its value, is not violated by a state revenue act laying a privilege tax upon banks according to their capital stock and assets in lieu of all other taxes, state, county, and municipal thereon, and on the shares of their stock. *Vicksburg Bank v. Worrell*, 67 Miss. 47, 7 So. 219.

A section of a state constitution providing that property shall be assessed for taxes under general laws and by uniform rules according to its true value, when that instrument contains no other restriction upon the power of taxation, does not in anywise inhibit the legislature from imposing license or franchise taxes, or render such taxes invalid for want of equality. *Standard Underground Cable Co. v. Atty. Gen.* 46 N. J. Eq. 270, 19 Atl. 733.

A statute for the taxation of railroad and canal properties under a special system constituted for the purpose is not in conflict with such a constitution, because, in ascertaining the value of corporate property for taxation thereunder, the franchise of its owner is to be taken into account as an element in that value. *State Bd. of Assessors v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 578, per *Parker, J.*

When a new species or class of taxable property is created by an act of the legislature, as, for instance the special franchise of a gas company to lay down its mains in city streets, a constitutional provision requiring all city, town, and village officers to be elected by the electors or appointed by the local authorities where they serve does not restrain the legislature from committing the valuation and assessment thereof to a state board of tax commissioners instead of the local assessors, even when in the same statute it chooses to classify the subject of the tax as land for the purposes of taxation. *Buffalo Gas Co. v. Volz*, 31 Misc. 160, 64 N. Y. Supp. 534; *New York, L. & W. R. Co. v. Roll*, 32 Misc. 321, 66 N. Y. Supp. 748.

When a state constitution, however, requires all the real and personal property in the state to be taxed uniformly according to its true value, and requires township trustees to assess the taxable property in their respective town-

ships; and the legislature enacts general laws to give practical effect to these requirements; and the organic law elsewhere empowers without directing the legislature to tax franchises, and without prescribing any method of so doing,—the legislature cannot constitutionally take from township trustees their power to assess and tax the roadbed and superstructure of a railroad within their jurisdiction; but it is at liberty to provide for the assessment and taxation of the railroad franchise in any way it may deem advisable. *Wilmington, C. & A. R. Co. v. Brunswick County*, 72 N. C. 10; *Richmond & D. R. Co. N. C. Div. v. Brogden*, 74 N. C. 707; *Wilmington R. Bridge Co. v. New Hanover County*, 72 N. C. 15.

Such a constitution is violated by a state revenue act providing for the taxation of three classes of railroads, *viz.*: (1) Those whose property or shares are exempt by their charters, upon their gross receipts at one rate; (2) those in like manner exempt upon their real estate held for right of way, stations, and workshops, but taxable on their franchises and personal property, also upon their gross receipts but at another rate; and (3) those exempt on their property, and not within the other two classes, upon their mileage by an annual privilege tax; and the act is consequently void. *Worth v. Wilmington & W. R. Co.* 89 N. C. 291; *Worth v. Raleigh & G. R. Co.* 89 N. C. 301.

A constitutional provision vesting in the general assembly the legislative power of the state is a grant of the general power of taxation, since the power to raise revenue for public purposes is a legislative power. It follows, therefore, that a subsequent provision in that instrument, that taxation shall be by a uniform rule on all kinds of property according to its true value in money is a limitation upon the legislative power to tax property, and does not circumscribe all revenue measures, but leaves untrammelled the power of the legislature to impose taxes for revenue or regulation upon any business, pursuit, or vocation, or upon the privilege accorded to a foreign corporation to do business as such within the state. A state law to that end therefore is valid. *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 521.

And such a constitution, notwithstanding it also provides that the property of corporations shall be subject to taxation the same as that of individuals, is not violated by a statute laying a percentage tax upon the capital stock subscribed for or issued and outstanding of corporations, although the property in which such capital stock is invested is also taxed as property *ad valorem*, because such a law imposes an excise tax, not a tax upon property. *Southern Gum Co. v. Laylen* (Ohio) 64 N. E. 564.

While the Ohio Constitution contains no express limitation upon the power of the legislature to tax privileges and franchises, there is an implied limitation thereon in the provisions requiring private property ever to be held inviolate but subservient to the public welfare, and declaring government instituted for the equal protection and benefit of the people and the Constitution established to promote the common welfare, so that a tax on privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred or its continued annual value thereafter. And while the determination of such value rests largely with the general assembly, it does so finally with the courts. *Ibid.*

A state tax of 1-10 of 1 per cent upon the amount of capital stock subscribed or issued and outstanding, imposed upon corporations as

a franchise or privilege tax, is not unreasonable,—not above the continuing value of the franchise from year to year, and therefore is clearly within the legislative power. *Ibid.*

A provision in a constitution declaring that the state may continue to collect all specific taxes accruing to the treasury under existing laws, and that the legislature may provide for the collection of specific taxes from banking, railroad, plankroad, and other corporations thereafter created, does not limit the power of the legislature to tax anything and everything within the state, including a business not mentioned in the laws existent when such constitution was adopted, nor afterwards incorporated, but rather it expressly confers power to tax when but for such provision it might by exemption clauses in corporate charters be considered as forever lost by surrender. *Walcott v. People*, 17 Mich. 68.

Under a constitution requiring all taxes to be uniform upon the same class of subjects within the territorial limits of the authority imposing the tax and to be levied and collected under general laws, but giving the legislature power to exempt public property in public use, places of worship, public cemeteries, and charitable institutions, it is competent for that body to impose a franchise tax upon coal mining or dealing corporations, both foreign and domestic, at the same ton rate on their mined or purchased stock not consumed by themselves. *Kittanning Coal Co. v. Com.* 79 Pa. 100.

Such a constitutional provision not only requires laws in conformity to its mandate, but that the assessment of the taxes imposed by unobjectionable laws bring about equality and uniformity. *Com. v. Mammoth Vein Coal & I. Co.* 3 Dauph. Co. Rep. 220.

One state cannot constitutionally tax the entire capital stock, nor impose a tax measured by the entire gross receipts, of a consolidated railroad operating in several states a line extending from one to another through intervening ones, and made up of constituent corporations organized under and authorized to consolidate by laws of each of such states respectively. The power of any one state to tax such a corporation upon its capital stock or receipts is limited to such a part thereof as is employed or gained within its limits. There is a double reason for this, in that a state can only tax that which is within its jurisdiction, and only objects in the same class equally and uniformly and property proportionately. *State Treasurer v. Auditor General*, 46 Mich. 224, 9 N. W. 258.

When a state constitution provides that domestic insurance companies shall not be required to pay a greater tax in the aggregate than is required to be paid by foreign insurance companies, except to the extent of the excess of their ad valorem tax over the privilege tax imposed upon such foreign corporations, a domestic insurance company that has been compelled by law to pay a privilege or franchise tax, and which is not possessed of assets taxable ad valorem to an amount sufficient to yield a larger sum than the privilege tax paid, which privilege tax equals that required of foreign insurance companies doing business in the state, is not subject to any further tax, state, county, or municipal, since the legislature having the power to confer exemptions impliedly gave immunity by imposing such privilege tax; otherwise the constitutional guaranty would be violated. *Brennan v. Mississippi Home Ins. Co.* 70 Miss. 531, 13 So. 228.

The police power of a state is a topic not taken up here for discussion. That power is 57 L. R. A.

declared to be as broad and plenary as is the taxing power, so that whatever in the state is subject to the latter is within the regulating restrictions of the former. *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Intern. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

It has been seen that privilege or franchise taxes are not covered by constitutional provisions respecting the equal and uniform taxation of property ad valorem, and that most of such provisions are coupled with express consents to the taxation of franchises, privileges, occupations, and callings as the legislature may direct by general laws operating uniformly on members of the same class; and it has been remarked that the legislative power to classify was subject to little, if any, restraint.

The following cases upon this point are illuminating:

The right to acquire and keep property cannot constitutionally be forbidden by the state. The function of the legislature in this respect is limited to regulating the use of property in the interest of the general welfare, the public health, or morals. So that while, for instance, the state may tax the occupation of keeping a billiard table for the use of others for hire, and may regulate, perhaps, the method of using it, it cannot make the acquisition and keeping of such a piece of property a privilege, and forbid anyone so to do except upon payment of a license or privilege tax. *Stevens v. State*, 2 Ark. 291, 35 Am. Dec. 72.

A constitutional provision that nothing in that instrument shall be construed to prevent the general assembly from providing taxation based on income, licenses, or franchises, leaves the legislature competent to declare what corporations or companies have taxable franchises. *Providence Banking Co. v. Webster County*, 22 Ky. L. Rep. 214, 57 S. W. 14.

Under the Nebraska Constitution the legislature may determine what purposes are of public concern, so as to render them subject to taxation. *State ex rel. Custer County Agri. Soc. & L. S. Exchange v. Johnson*, 35 Neb. 401, 17 L. R. A. 333, 53 N. W. 213.

Under a constitution giving the legislature power to tax merchants, peddlers, and privileges in such manner as it may from time to time direct, a privilege is whatever the legislature chooses to declare such and so tax. *Kurth v. State*, 86 Tenn. 134, 5 S. W. 593.

Although this proposition was positively asserted in that case, it is rather a *dictum* than a decision. The tax there *sub judice* was one upon the privilege of liquor selling. This is universally admitted to be the subject of license regulation.

In a later case the same court, speaking of this provision in the Tennessee Constitution, declared that in construing it to mean that a privilege was whatever the legislature chose so to declare it meant thereby "that whatever occupation affects the public may be so classed and taxed as such." *Nashville, M. & S. Turnp. Co. v. White*, 92 Tenn. 369, 22 S. W. 75.

Sometimes the state Constitution denies power to the legislature to impose taxes upon counties, cities, town or other public corporations, or upon the inhabitants or property thereof for local purposes, requiring the legislature to vest this authority by general laws in the local officials. When such is the case a state statute taxing foreign insurance companies a percentage of their yearly premiums for a local purpose is void irrespective of whether or not such company can be regarded as an inhabitant of the local district, and whether or not the tax can be regarded as one upon property, since the purpose of such a constitutional provision is to relegate to the local authorities

the whole subject of taxation for local purposes, and it will be construed as effecting such purpose. *San Francisco v. Liverpool & L. & G. Ins. Co.* 74 Cal. 113, 15 Pac. 380.

But such a provision does not invalidate a statute classifying persons, associations, and corporations engaged in banking, loaning money at interest, and dealing in securities, coin, and bullion, and requiring them to pay a license charge of a stated amount, and providing that all revenue from such sources shall be retained by and for the use of the county in which it is collected. *State v. Union Cent. L. Ins. Co. (Idaho)* 67 Pac. 647.

Nor is such a provision violated by a statute for the taxation of corporate franchises, providing for a valuation thereof by a state board and the payment upon such valuation of a state tax, and in the locality where a corporation subject thereto is of such local taxes as the local authorities assess upon such valuation in common with other property of the same value in such places. *Paducah Street R. Co. v. McCracken*, 20 Ky. L. Rep. 1294, 49 S. W. 178.

Such a provision is violated by a statute requiring insurance companies to pay a part of their gross receipts to local fire companies. *State v. Wheeler*, 33 Neb. 563, 50 N. W. 770.

But generally it is in the power of the state to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for constructing canals to drain marshy and malarious districts, levees to prevent inundations, and for the opening of streets in cities and roads in the country. And whenever a local improvement is ordered or authorized it is for the legislature to prescribe the way in which the means to meet its cost shall be obtained, whether by general taxation or by laying the burden upon the district specially benefited by the expenditure, and its selection of method is purely discretionary. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

A constitutional provision that any law which imposes, continues, or revives a tax shall distinctly state the tax and the purpose to which it is to be applied, and that it shall not be sufficient to refer to any other law to fix such tax or object, has no application to a tax imposed as a condition upon foreign insurance companies for the privilege of doing business in the state,—a tax in the nature of a license fee; but it relates solely to a general tax coextensive with the state. Hence a retaliatory statute is not invalid upon that ground. *People v. Fire Asso. of Philadelphia*, 92 N. Y. 312, 44 Am. Rep. 380.

Such a provision does not affect the validity of a statute exacting annually from agents of foreign insurance companies taking fire risks in a given city a specified percentage of the gross premiums from such risks, and directing the payment thereof to an incorporated association of former firemen for benevolences to its members, as the required payment is of the same nature. *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 313, 45 Am. Rep. 217.

Such a provision is sufficiently conformed to in a statute imposing specific taxes upon corporations when such taxes are stated to be applicable to the payment of the ordinary and current expenses of the state. *People v. Home Ins. Co.* 92 N. Y. 328; *People v. Horn Silver Min. Co.* 105 N. Y. 76, 11 N. E. 155.

A constitutional provision prohibiting the legislature from passing any special law for the assessment or collection of taxes is not violated by the enactment of a statute which classifies

railroads running in more than one county for taxation upon their franchises, right of way, rails, roadbed, and rolling stock, since such property is of a kind that the general methods of taxing tangible property with a fixed situs cannot be applied. *People v. Central P. R. Co.* 105 Cal. 576, 38 Pac. 905.

A statute that invests a corporation with the identical franchises, rights, privileges, and immunities formerly possessed by another corporation of the same kind, including the right to be a corporation and a partial exemption from taxation, which the state held in commission in the right of its general sovereignty by virtue of a decree of foreclosure, is not void as an attempt to form a corporation by special act, inhibited by the Constitution. *First Div. of St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297, 6 Ill. 224.

A constitutional limitation as to the rate of taxation upon taxable property within the state does not apply to a tax upon the gross income of a corporation. *Capital City Water Co. v. Montgomery County Bd. of Revenue*, 117 Ala. 303, 23 So. 970.

The provision in the California Constitution (art. 13, § 10) that the franchises, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county shall be assessed at their actual value by the state board of equalization, and shall be apportioned to the counties, cities, etc., in which such railroads are located according to mileage, is self-executing, requiring no further legislation. *San Francisco & N. P. R. Co. v. State Bd. of Equalization*, 60 Cal. 12.

b. Double taxation.

The few cases in which franchise taxes have been complained of as amounting to double taxation of the subjects thereof have been grouped here because it seemed convenient to refer to them under this head. It cannot be said that there is any limitation, short of an express restriction of some kind in a written constitution, to impose double taxation if a state chooses so to do. And, generally speaking, all states do so, more or less, so far as corporations are concerned.

In corporations four elements of taxable value are sometimes found: (1) Franchises; (2) capital stock in the hands of the corporation; (3) corporate property; and (4) shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation, and it is no doubt within the power of the state, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation. Double taxation is, however, never to be presumed. *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645, Waite, Ch. J.

As Herrick, J., of the New York supreme court, well expressed it in sustaining a statute of that state imposing an excise tax upon the gross earnings of railroads, against the objection that, in so far as this included corporate income from stocks and bonds in other corporations subject to like taxes, it was invalid for doubly taxing: The rule against double taxation is a rule of legislation, not of law. It is a question of expediency, not of power. And while a court will not infer an intention to impose a double tax, but rather will construe a statute otherwise where that can be done without forcing, still the power of the legislature is undoubted. *People, New York C. & H. R. R. Co. v. Roberts*, 32 App. Div. 113, 52 N. Y. Supp. 859.

A tax on the franchise or the property of a

corporation is not in law or in fact equivalent to a tax on the shares of stock in the hands of the stockholders. *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537.

It is not double taxation to impose an excise tax upon a corporation equal to a percentage upon its subscribed-for or issued and outstanding capital stock, and at the same time tax ad valorem the property in which such capital stock is invested. *Southern Gum Co. v. Laylin* (Ohio) 64 N. E. 564.

A franchise tax upon the gross receipts of a domestic corporation cannot be considered duplicate taxation because the subject of it has previously paid a tax levied upon its shares of stock. The one tax is upon the property of the stockholders alone; the other is upon the corporation for its franchise. *United States Electric Power & Light Co. v. State*, 79 Md. 63, 28 Atl. 768.

The payment by a corporation of a franchise tax imposed according to the amount of its capital stock does not relieve its lessee from the payment of a privilege or occupation tax on the business it was incorporated to carry on. The first is a tax on the right or privilege of being a corporation and for the right to do business as such; the second is a tax for the privilege of carrying on the particular business, calling, or occupation engaged in. *Cobb v. Durham County*, 122 N. C. 307, 30 S. E. 338.

The payment of a state tax upon the value of its corporate franchise by a private corporation does not *per se* discharge it from ordinary taxes upon its lands. *Carbon Iron Co. v. Carbon County*, 30 Pa. 251.

A statute requiring all corporations, both foreign and domestic, not otherwise specifically required to pay a license tax, to pay annually certain privilege or franchise taxes therein set forth, imposes excises upon all corporations as a class without reference to the particular business they are engaged in and as prerequisites to the doing of any business at all in a corporate capacity. It does not lay imposts upon any particular business. Hence, the payment by a fertilizer company thereunto subject, of a license fee for selling or exchanging fertilizers exacted under another statute, and of the legal charge for official tags to be attached to each package of fertilizer sold, does not exonerate it from the payment of such privilege or franchise taxes. *Troy Fertilizer Co. v. State* (Ala.) 32 So. 618.

On the other hand, it is held in Texas that a separate assessment upon a corporate franchise after the assessed corporation has paid taxes upon all its real and personal property at the full value thereof is void because it is double taxation. *State v. Austin & N. W. R. Co.* 94 Tex. 530, 62 S. W. 1050; *Southwestern Tele. & Teleph. Co. v. Meerscheidt* (Tex. Civ. App.) 65 S. W. 381.

IX. Valuation of franchises for the purposes of taxation.

No general rule that obtains in all the states, or indeed in any considerable number of them, for the valuation of corporate franchises, can be formulated. The standard of measurement and the methods of applying it change almost as often as a state line is crossed. "The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed, . . . however arbitrary or capricious, are mere matters of legislative discretion." *Delaware Railroad Tax*, 18 Wall. 206, *sub nom.* *Minot v.* 57 L. R. A.

Philadelphia & R. R. Co. 21 L. ed. 888, *Field, J.*

The commentator is therefore obliged to group the cases in point, chiefly geographical-ly.

In California it is correct to take the aggregate market value of the shares of stock and deduct therefrom the value of the real and personal property, and treat the difference as representing the value of the franchise. *Spring Valley Water Works v. Schottler*, 62 Cal. 89.

In Massachusetts it is declared that, inasmuch as the market value of the shares is generally a sure indication of the value of all that appertains to or belongs to the corporation, corporeal and incorporeal, the aggregate market value of all the shares or stock affords a reasonable and equitable mode of measuring the value of the franchise. *Com. v. Hamilton Mfg. Co.* 12 Allen, 298, *Bigelow, Ch. J.*

When this case reached the Supreme Court it was said that actual market value of the capital stock of a corporation is determined by factors differing essentially in kind from those which fix the actual value of the property and assets of the corporation which its capital stock represents; hence, a tax measured by the cash market value of the corporate stock is a franchise, and not a property, tax. *Hamilton Mfg. Co. v. Massachusetts*, 73 U. S. 632, 18 L. ed. 904.

And when the assessors, in valuing the corporate stock for the purpose of imposing a franchise tax thereon, follow the correct method of taking the aggregate market value of the shares and deducting therefrom the assessed value of the real estate and machinery subjected to local taxes, the courts cannot interfere with the valuation arrived at on the ground that such market value, although real and actual, is speculative and greatly exceeds the value of all the property owned by the corporation. *Com. v. Cary Improv. Co.* 98 Mass. 19, following and declared to stand upon the same ground as the last cited case.

And as a state rightfully may deny to foreign corporations permission to transact their business, hold property, or exercise any corporate function whatever within its limits, or may permit them to exercise such privilege upon such terms as it sees fit to prescribe, it may impose a franchise or privilege tax—i. e., an excise or duty upon a commodity—upon a foreign corporation having an office or place of business within it, of a percentage on the par value of its entire capital stock, whether employed in or out of the state, and whether owned by residents or nonresidents. *Atty. Gen. v. Bay State Min. Co.* 99 Mass. 148, 96 Am. Dec. 717.

In that state the amount of a franchise tax or excise upon a savings bank under a statute making it a percentage payable semi-annually upon the average amount of deposits during the preceding six months is based only upon the sums due depositors for their deposits, with accrued interest and declared dividends thereon. A guaranty fund held by the bank and undivided profits are not included in the term "deposits." *Re Suffolk Sav. Bank*, 151 Mass. 103, 23 N. E. 728.

In Nebraska when the capital stock of a corporation has any market value, that value may be taken as the basis to ascertain the value of the intangible corporate property, since the value of the stock is the net value of the assets and is found by deducting indebtedness from the gross value of all the corporate property, tangible and intangible; but when the capital stock has no market value it cannot be used as a basis of determining the assess-

able value of the corporate property and franchises. In that case, under a constitution requiring in terms the assessment of corporate franchises, the actual value of capital stock in a corporation under a statute for the taxation thereof is found by adding the value of the franchises to the value of its tangible property and deducting the value of the real and personal property assessed *in specie*. *State ex rel. Shriver v. Karr* (Neb.) 90 N. W. 298.

In New York it is said that the legislature in laying a tax upon the business done by a foreign corporation within the state is constitutionally competent to make it specific, and is not bound to base it upon an apportionment or appraisal, and that such an imposition, though arbitrary, is not harmful when measured by the ability of the subject to pay; that a foreign corporation thus subjected to a specific franchise tax upon its business within the state cannot complain that the method of computation provided by the act is not according to the amount of business done or capital stock employed within the state, nor, when measured by dividends declared, according to the proportion of such dividends earned within the state. *People v. Equitable Trust Co.* 96 N. Y. 387.

When the statute taxes domestic corporations on their franchises on the basis of the amount of capital employed within the state, the tax to be upon the capital stock at par in the case of a corporation paying 6 per cent or more dividends at a stated rate for each 1 per cent of dividends made or declared, and in the case of a corporation paying less than 6 per cent dividends or none at all at a different rate upon the actual value of the capital stock according to a sworn report of the corporate officers, but appraised at not less than the average price at which the shares sold during the year,—the basis of the tax upon a domestic corporation which has paid no dividends and of whose stock none has been sold during the year is the actual value of its gross assets less its debts and liabilities and plus the value of its goodwill and the right to conduct its business under its franchise. *People ex rel. Wiebusch & H. Co. v. Roberts*, 154 N. Y. 101, 47 N. E. 980, Affirming 19 App. Div. 574, 46 N. Y. Supp. 570.

In this case goodwill was declared an element of taxable value in a corporate franchise. It was again so declared, but held not the subject of local taxation, in *People ex rel. Cornell S. B. Co. v. Dederick*, 161 N. Y. 195, 55 N. E. 927, and was one of the taxable elements in *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 45 L. R. A. 126, 53 N. E. 685.

The learned court in California that decided that, in ascertaining the value of a corporate franchise, goodwill did not enter into, nor form any element of value, and in so holding, said: "No case has been produced to us, nor have we been able to find any, holding, or even intimating, that this is so. We find no such element of value in the least hinted at by anyone who has written on the subject, nor has any such been called to our attention. We cannot recognize any such element as giving value to shares in a trading corporation. It would be strange to predicate goodwill as pertaining to or extending to an abstraction, to an artificial being, invisible, intangible, and existing only in contemplation of law" (*Spring Valley Waterworks v. Schottler*, 62 Cal. 69),—would not now thus express itself. The case of *Hart v. Smith* (Ind.) 64 N. E. 661, in which the holding was that, granting goodwill to be property, yet it is not taxable unless the legislature so orders, notwithstanding the state Constitution provides that the general assembly shall 57 L. R. A.

enact laws for the taxation of all property, both real and personal, except certain classes not inclusive that may be expressly exempted, as such a clause is not self-executing, is not necessarily in conflict. Because that case involved the attempt to tax the goodwill of individual partners engaged in publishing a newspaper, and, there being no law, organic or statutory, in Indiana for the taxation of individual enterprises as entreties in going concerns, but, on the contrary, only provisions for taxation of personal property by segregation and itemization (goodwill not being in the schedule), a general assessment inclusive of goodwill where it was impossible to separate this factor from the others was thereby rendered void *in toto*. The case plainly intimates that it is otherwise of taxation of corporations where express provision is made for their taxation by the entirety, and that in such cases goodwill may be an element in the valuation.

In assessing such franchise tax upon a domestic corporation that has paid dividends amounting to at least 6 per cent the tax is based by the terms of the statute upon the par value of the stock; and hence it is not material in that case what the amount of assets is, nor are the corporate debts to be deducted. *People ex rel. Jewelers' Circular Pub. Co. v. Roberts*, 155 N. Y. 1, 49 N. E. 248.

Surplus cannot be included as part of the capital stock employed within the state as a basis of valuation for the purposes of such franchise tax. *People ex rel. United Verde Copper Co. v. Roberts*, 156 N. Y. 585, 51 N. E. 293, Reversing 25 App. Div. 89, 48 N. Y. Supp. 881.

When such statute requires the franchise tax upon domestic corporations to be computed on the basis of the capital stock employed within the state at the rate of one quarter of a mill for each 1 per cent of dividends made or declared during the year if these were 6 per cent or more on the par value of the capital stock; and if they were less than 6 per cent on such par value the tax to be at the rate of one and one half mills upon such portion of the capital stock at par as the amount thereof employed within the state bears to the entire capital stock; and if there have been no dividends, then the tax to be at the same rate upon each dollar of the appraised value of the capital stock employed within the state; and there being a further provision in such statute of a rule for valuing the capital stock of corporations which have paid none at all or less than 6 per cent of dividends according to the average selling price of the shares,—a domestic corporation which is employing its entire capital stock within the state, and which has paid a dividend of only 4 per cent, is taxable upon the appraised or actual and real value of its capital stock, and not upon the par or nominal value thereof. *People ex rel. New York & E. River Ferry Co. v. Roberts*, 168 N. Y. 14, 40 N. E. 1043, Reversing 35 App. Div. 625, 53 N. Y. Supp. 1146.

The rule laid down in this case requires that the computation of the franchise tax upon a domestic corporation that has paid or declared dividends less than 6 per cent be upon the basis of the actual, and not the par, value of the capital stock when that is at a premium. *People ex rel. New York C. & H. R. R. Co. v. Knight*, 77 N. Y. Supp. 401.

A tax upon the corporate franchise of a domestic corporation according to the amount of its capital stock employed within the state is not to be lessened by the amount thereof that may be invested in real estate subject to local taxation. *People ex rel. Postal Teleg. Cable*

Co. v. Campbell, 70 Hun, 507, 24 N. Y. Supp. 208.

In the taxation of a domestic corporation on its franchise based upon capital stock employed in the home state, real estate situated in another state, and United States bonds deposited in a third state and in Canada to enable the corporation to carry on its business in such foreign jurisdictions, are not to be included. *People ex rel. American Surety Co. v. Campbell*, 74 Hun, 101, 26 N. Y. Supp. 462, affirming on majority opinion below, 143 N. Y. 625, 87 N. E. 827.

Freight cars owned by a domestic railroad corporation and permanently engaged without the state, and stock which it owns in a foreign corporation, are also to be excluded, because these form no part of the capital employed within the home state which is the basis of such franchise tax. But it is otherwise in respect of bonds or other obligations of foreign corporations, for these have their situs at the domicile of the owner; hence capital stock invested therein is employed at the home office. *People v. Campbell*, 88 Hun, 544, 34 N. Y. Supp. 801.

Under such statute the comptroller is at liberty to appraise the capital stock according to the average selling price, although the real value thereof is reported by the corporation to be much less. *People ex rel. Brooklyn Elev. R. Co. v. Roberts*, 90 Hun, 537, 36 N. Y. Supp. 84.

Nor is he limited to the par value of the stock, but he has a right to, and should, assess it at the average selling price, although that was at premium. *People ex rel. Colonial Trust Co. v. Morgan*, 47 App. Div. 126, 62 N. Y. Supp. 191, affirmed on opinion below in 162 N. Y. 654, 57 N. E. 1116.

It is the average capital employed within the state during the year that is to be taken as the basis of such franchise tax, not the highest sum employed at any given time. *People ex rel. Brooklyn Rapid Transit Co. v. Morgan*, 57 App. Div. 335, 68 N. Y. Supp. 21.

When it appears from the controller's return to a certiorari that the only evidence before him upon which he grounded his valuation of the capital stock of a domestic railroad corporation at its full par value as the basis of a franchise tax imposed according to capital employed in his state consisted of a report from the corporation that showed the capital stock to be \$500,000 in shares of \$100 each, all paid in; and that the whole of it, with \$4,500,000 more in income bonds made a lien prior to the stock, had been expended in construction and equipment, and that no dividends had ever been paid, while the stock had sold during the year neither higher nor lower than 10 per cent.,—his valuation is clearly erroneous and illegal. Such stock cannot be said to be worth more than the 10 per cent value put upon it by the company. Nor is the fact that the franchise is valuable, that the corporation has reduced its indebtedness, and that its prospective business is good, any warrant for valuing the stock at par. *People ex rel. Staten Island Rapid Transit R. Co. v. Roberts*, 4 App. Div. 334, 38 N. Y. Supp. 724.

The New York statute providing that the capital stock of corporations, together with the surplus profits or reserved funds thereof in excess of 10 per cent of the capital after deduction of the assessed value of their real estate and stock in other taxable corporations, should be assessed at its actual value and taxed in the same manner as other real and personal property in the county, under which corporations were subjected to local taxation, was long supposed to warrant assess-

ments according to the actual market value of the share stock in the aggregate. The practice became general after the decision in *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449, in which Denio, J., who delivered the opinion of the court, substantially declared that the value of corporate capital might be enhanced above par by crediting to it the money value of the fact that the enterprise was happily chosen and skillfully conducted, and intimated plainly that the value of the share stock is the fair equivalent of capital and surplus. It was known that such a method included the franchise as an element (*People ex rel. Panama R. Co. v. New York Tax Comrs.* 104 N. Y. 240, 10 N. E. 437), but the judicial pronouncements seemed to justify its inclusion in assessing local taxes.

It was, however, finally settled that this was erroneous, and that corporate franchises were not to be included in local assessments under that statute. *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818.

Since that decision it is uniformly held in New York that corporate franchises are not subject to local taxation under a law in such form. But to get the benefit of this rule a corporation must make clear to the assessors all the facts upon which the value of the franchise depends. *People ex rel. Equitable Gaslight Co. v. Barker*, 144 N. Y. 94, 39 N. E. 13, reversing 81 Hun, 22, 30 N. Y. Supp. 586; *People ex rel. New York & Q. Gas & Electric Co. v. Feitner*, 58 App. Div. 555, 69 N. Y. Supp. 27; *People ex rel. Manhattan R. Co. v. Barker*, 28 Misc. 18, 59 N. Y. Supp. 926.

When, however, a railroad is located wholly within the territory over which the local assessors have jurisdiction they have a right to assess its value when it has been leased to another road upon an agreed rental of a specified percentage of its cost plus repairs and taxes upon a capitalization of the rental less the assessed value of the real estate. The reason is that it cannot be assumed—at least in the absence of proof to that effect—that the franchise of such road was included in the lease, and that the rental is in part paid for the use thereof when the lessee had a franchise of its own, ample for the maintenance and operation of the leased road. *People ex rel. New York C. & H. R. R. Co. v. Feitner*, 38 Misc. 204, 77 N. Y. Supp. 218.

Under that statute goodwill is no more locally taxable than is a franchise. *People ex rel. Cornell S. B. Co. v. Dederick*, 161 N. Y. 195, 55 N. E. 927.

In harmony with this decision, it was held in Indiana that a general act declaring all property in the state not expressly exempted subject to taxation, goodwill not being named as exempt, and that personal property should include certain things, not mentioning goodwill, did not render taxable the goodwill of a newspaper publishing business. *Hart v. Smith (Ind.)* 64 N. E. 661.

A foreign corporation whose property in New York consists of mains, pipes, and tanks for the reception and distribution of natural gas, laid or located in an incorporated village and made for taxable purposes by statutory definition real estate, and required as such to be assessed the same as real estate belonging to individuals and at its full value as it would be appraised in payment of a just debt due from a solvent debtor,—cannot be subjected to a local assessment when the assessors' rule of action is to value *en bloc* the property, rights, and privileges belonging to it, including the exclusive privilege of laying mains and the right to dig up and obstruct streets, consid-

ered in connection with the income from the entire plant and a comparison of its contract for supply, number of customers, share of receipts, and running expenses, since this includes the village franchise, which is not taxable. *People ex rel. Keystone Gas Co. v. Martin*, 48 Hun, 193.

A tax assessed by local assessors upon a railroad running through their jurisdiction in the state of New York, where the system of railroad taxation provides for the taxing of the franchisees under one statute and of the movables and personal property under another, and leaves to local assessors nothing assessable but real estate within their jurisdiction, is invalid, when the local assessors, in fixing upon the sum at which they assess the real property in their territory, considered such property, not as a separate piece standing alone, but as a part of an extensive and valuable railroad system, leased and occupied by the company, connecting distant and important terminals, and as a part of an extensive and valuable congeries of lines operated by the corporate owner, and based the assessment upon the cost, rentals, and earnings of the road as shown by its annual report to the state railroad commissioners; since it is obvious that both personal property and franchisees beyond their jurisdiction are important elements in cost, rentals, and earnings. *People ex rel. Delaware, L. & W. R. Co. v. Clapp*, 152 N. Y. 490, 39 L. R. A. 237, 46 N. E. 842.

In so far as the case of *People ex rel. Buffalo & S. L. R. Co. v. Barker*, 48 N. Y. 70, sanctions such a method, it cannot longer be considered an authority. *Ibid.*

Whatever may be the propriety of this rule in other states, where the assessing officers have jurisdiction over all the property of railroads in the state, and may deal with every element of value that enters into it or affects its earning capacity, it is not operative, and cannot be sanctioned, in New York. *Ibid.*

Under a system of railroad taxation similar to that adopted in New York, the rule of assessment is the same as that prevailing in that state, and when it is departed from the tax is void. *Huntington v. Central P. R. Co.* 2 Sawy. 503, Fed. Cas. No. 8,911.

In Louisiana another method of valuing corporate franchisees for taxation obtains. The law (La. Act 106 of 1890, §§ 28, 29) makes the earning capacity the standard of measurement. Corporations subject to the tax are required to furnish the assessors with a sworn statement of their earnings to form a basis for estimating the value of the franchisees. The assessors are entitled to capitalize the dividends paid at 6 per cent and assess the franchise according to the result. The corporation is not entitled to have the value of the franchise fixed at such a proportion of the sum paid for it as the length of time it has to run bears to the whole term for which it was granted. *New Orleans City & L. R. Co. v. New Orleans Bd. of Assessors*, 44 La. Ann. 1053, 1055, 11 So. 687, 820.

The assessors have a right to take the dividends actually paid as representative of earning capacity, although there would have been no dividends if profits instead of money borrowed for the purpose had been used for the betterments that were acquired. *Crescent City R. Co. v. New Orleans*, 44 La. Ann. 1057, 11 So. 681.

But dividends are not the sole measure of earning capacity. *Ibid.*; *New Orleans City & L. R. Co. v. New Orleans*, 44 La. Ann. 1053, 11 So. 687.

The gross receipts less current operating expenses are to be deemed earnings, not merely 57 L. R. A.

the aggregate dividends to stockholders, when it appears that these were diminished by annual payments from profits to reduce a bonded debt incurred to pay the purchase price of the franchise. *State ex rel. St. Charles Street R. Co. v. Board of Assessors*, 48 La. Ann. 1156, 20 So. 670.

But the assessors should consider other facts and circumstances which tend to augment or diminish the value of a franchise deductible from a capitalization of earnings. *Crescent City R. Co. v. Board of Assessors*, 51 La. Ann. 335, 25 So. 811.

When, for instance, it appears that a given railroad has actually paid its stockholders a dividend of 6 per cent upon its capital stock, the aggregate share stock may properly be regarded as the value of the franchise when the directly taxed property of the corporation has been deducted, although the actual earnings are only 8 per cent of the capital stock. *St. Charles Street R. Co. v. Board of Assessors*, 51 La. Ann. 459, 25 So. 90.

The Illinois system contemplates the assessment of corporate capital stock and corporate franchisees by a state commission under rules adopted by itself designed to determine actual values as the basis of its assessments.

When under that system the state board, in assessing a railroad for taxation according to the value of its capital stock and franchisees, adopts as the rule for determining that value the adding to the cash value of the aggregate shares of stock in the market the cash value in the market of the bonded debt, and deducting the assessed value of all the tangible property, no case is made for interference by the courts, since the market value of the share stock may fairly be considered as representing all the corporate property, including the franchise, when the corporation is free from debt, and that such market value is accordingly depressed by the amount of the debt; but when such assessing board also adds the debts of other railroads merely leased by the company assessed, by which neither it nor its property is at all liable, an injunction will be issued. *Chicago, B. & Q. R. Co. v. Cole*, 75 Ill. 591.

In following a rule to ascertain for taxation the value of the capital stock of a corporation, including its franchisees, by taking the market value of its aggregate share stock and of its bonded debt together, less the assessed value of its tangible property, there is no assessing of the corporate debts, but only an arrival at what the capital stock and franchise would be worth if the corporation owed nothing,—its indebtedness being justly regarded as reducing the marketable value of its shares in proportion to the amount thereof. *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561.

Such a rule is just, legal, and constitutional. The debt is not taxed; it is only used as evidence to show the corporation possessed of property sufficient to pay its debts and afford a dividend besides to its shareholders equal to the market value of the shares. *Ottawa Glass Co. v. McCaleb*, 81 Ill. 557.

It is not a valid objection to an assessment upon the capital stock and franchise of a railroad corporation *en bloc* that it included shares of stock to the par value of \$800,000, owned by the assessed company in another road and exempt from taxation, when the tangible property and capital stock is assessed with no showing of the value of such shares, or that they have any value, and also without showing that the tangible property or capital stock of the road that issued such shares has been assessed for taxes in the same year. Nor is the tax reducible *pro tanto* because such exempt shares were included in the assessment

by the ignorance of the assessors, when the corporation subject to the tax knew of, and did not disclose, the exemption. Without knowledge there can be no fraud, and a mistake induced by the one against whom it is made affords no ground of relief. *Huck v. Chicago & A. R. Co.* 86 Ill. 332.

The fact that the state board of equalization, in valuing for taxation the capital stock and franchises of several railroads, makes in some cases such valuation no greater than the assessed value of the tangible property, and in others considerably greater, is not in itself evidence of unjust or fraudulent discrimination against the latter companies since the valuation may honestly and without intentional unfairness be returned one way or the other according as the circumstances vary. *Chicago, B. & Q. R. Co. v. Siders*, 88 Ill. 322.

An objection that a railroad was not assessed for taxation on its capital stock and franchises at a rate uniform with other railroads, because it was a narrow-gauge road and worth 33 per cent less than standard gauge roads, is unsupported when it is not shown that the right of way, depot grounds, and buildings, capital stock, franchise, and earning power are also of less value. *Union Trust Co. v. Weber*, 96 Ill. 346.

A valid assessment, in Illinois, of the capital stock and franchise of a consolidated railroad formed of three constituents, one of which was a domestic corporation, whose road extends partly within Illinois and partly in other states, is made by taking the value of the entire capital stock of the consolidated company and adopting that amount thereof which should be to the value of the whole the same proportion as the length of the part of the line lying in Illinois bears to the entire length of the combined line owned and operated. *Ohio & M. R. Co. v. Weber*, 96 Ill. 443.

A statutory system of general taxation of domestic railroads providing for the valuation: (1) Of the real estate not part of the right of way and the localized personal property in the several localities where they are situated by the local assessors in the same manner that other real and personal property are assessed and taxed; (2) of the railroad track, right of way, grading, superstructure, depots, buildings, and other improvements thereon, and all rolling stock and transitory personal property, by a state board of equalization with an apportionment to localities according to mileage; and (3) of the invisible and intangible railroad property called its franchise and capital stock by the same state board under such rules and principles as it may adopt to determine the fair cash value thereof above the tangibles, with a like apportionment to localities upon a mileage basis pursuant to which such state board values the capital stock and franchise by taking the market value of the share stock, adding thereto the market value of the funded debt, and deducting from the total the assessed values of the property in the first and second classes,—is a fair and equitable system, neither repugnant to any provision of the United States Constitution, nor to the uniformity and equality of taxation clause in the Constitution of Illinois. *State Railroad Tax Cases*, 92 U. S. 575, 611, *sub nom.* *Taylor v. Secor*, 23 L. ed. 663, 672.

"This court has expressly held in two cases where the road of a corporation ran through different states that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise and the length of the road within each state as the basis of taxation. *Delaware Railroad Tax*, 18 Wall. 206, *sub nom.* *Minot v. 57 L. R. A.*

Philadelphia, W. & B. R. Co. 21 L. ed. 888; *Erle R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. ed. 595." *Ibid.*

It has very recently been laid down by the highest court of Illinois that in assessing the capital stock of corporations, including the franchise, it is proper to add the market or fair cash value of the shares of stock and the market or fair cash value of the debt of the corporation exclusive of that owing for current expenses, and to take the aggregate amount so ascertained as the fair cash value of the capital stock, including the franchise, and deduct therefrom the equalized or assessed value of the tangible property of the corporation; and one fifth of the remainder, under the Illinois laws, will be the net assessed valuation of the capital stock and franchise over and above the assessment of tangible property. *State Bd. of Equalization v. People ex rel. Goggin*, 191 Ill. 528, 61 N. E. 339.

In the same case it was further held that where the statute directed the state board of equalization to adopt rules and principles for ascertaining the fair cash value of corporate capital stock, including franchises, a resolution of such board, adopted for such avowed purpose, providing that the capital stock should be valued as an entirety with due consideration to the character and duration of the franchise, the contribution paid to the municipality pursuant to ordinance as compensation for the franchise or privileges, the highest and lowest stock quotations, and number of sales of stock during the year, and any other fact or circumstance assisting to fix the value of the capital stock; and then that the assessed or equalized value of the tangible property, wherever located, should be deducted, and the balance, if any, taken as the amount and fair cash value of the capital stock, including the franchise in any given case,—did not prescribe a correct and lawful method of determining the assessed valuation of the capital stock of corporations over and above the equalized and assessed valuation of the tangible property, because there was left entirely out of consideration the value of the corporate funded debt, and without taking account of that the value of the capital stock and franchise cannot be accurately determined. *Ibid.*

The corporations affected by these rulings promptly sought to prevent the application thereof to themselves. The attempt to prevent the state board from assessing them over again under stress of a mandamus in the last-cited case failed. The Federal court, in refusing an injunction upon divers grounds, said, however, that the state board of equalization was clothed with quasi judicial functions in assessing domestic corporations upon their capital stocks and franchises at the fair cash value thereof, to be ascertained under rules of its own adoption consistent with the statute; and that, although it had been adjudicated that the set of rules the board had adopted to that end were invalid, and the board had been commanded to assess anew a corporation previously assessed under them by taking into consideration its indebtedness other than for current expenses and the sales in the market of the shares of its stock, such board was not to disregard its judicial function by adopting a rigid rule of valuation according to indebtedness and the market prices of shares, but was merely to take these into account as factors in reaching the result commanded. *Chicago Union Traction Co. v. State Bd. of Equalization*, 112 Fed. 607.

Later, in course of the same litigation, the Federal court declared that in Illinois the rule of valuation for the purposes of taxation of the

capital stock and franchises of a corporation requires that the net earnings be ascertained by deducting from the gross receipts the current disbursements, increased debts, and depreciation in use of the tangible property, and then capitalizing at 6 per cent, and reducing the total thus found to the common basis of assessment throughout the state. *Chicago Union Traction Co. v. State Bd. of Equalization*, 114 Fed. 557.

In the states of Indiana, Michigan, Pennsylvania, Tennessee, and Washington no separate valuation of franchises for taxation is made. These are taxed, but only as associated with corporate property the value of which is more or less affected, usually enhanced, by the franchises in connection with which it is used. *Western U. Teleg. Co. v. Taggart*, 141 Ind. 281, 40 N. E. 1051, Affirmed in 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; *Western U. Teleg. Co. v. Henderson*, 68 Fed. 588; *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809; *Com. v. Delaware, S. & S. R. Co.* 165 Pa. 44, 54, 30 Atl. 322, 323; also 3 Dauph. Co. Rep. 249; *Com. v. Manor Gas Coal Co.* 188 Pa. 195, 41 Atl. 605; *Com. v. Ontario, C. & S. R. Co.* 188 Pa. 205, 41 Atl. 607; *Com. v. Pennsylvania Coal Co.* 197 Pa. 551, 47 Atl. 740; *Louisville & N. R. Co. v. Bate*, 12 Lea, 573; *Commercial Electric Light & P. Co. v. Judson*, 21 Wash. 49, 56 Pac. 829; *Chehalis Boom Co. v. Chehalis County*, 24 Wash. 135, 63 Pac. 1123.

In New Jersey, under a statute directing the state board of assessors in assessing railroads to value separately (1) the main stem 100 feet wide with its superstructures, (2) the other real estate used for railroad purposes, (3) the tangible personal property, and (4) the franchises,—the method adopted with respect of the franchise of a railroad taxable under the act was to take the amount of the funded and other debts and of the capital stock and ascertain the value thereof; and where the aggregate value exceeded the entire amount of the tangible property, it was lessened by such amount, and 60 per cent of the balance was deemed the value of the franchise; and where that aggregate was less than the total of the tangibles, then the gross earnings of the road were resorted to, and 20 per cent of these taken to represent the value of the franchise. The supreme court did not deem it a duty to express any opinion upon this method, but was concerned only to decide whether, when applied in the case at bar, the result was that the true value of the franchises had thereby been arrived at, and it held that the first process as to productive roads yielded no erroneous results, but that the gross-earnings rule as to unproductive roads resulted in overvaluation. *Central R. Co. v. State Bd. of Assessors*, 40 N. J. L. 1, 7 Atl. 306.

In Kentucky the state court of appeals decided that in ascertaining the value of a corporate franchise for taxation under a statutory direction to the board of valuation and assessment, from a sworn report from the corporation and such other evidence as might be before it, to deduct the value of all tangible corporate property already assessed from the entire corporate property, real and personal, tangible and intangible, including all assets on hand and the franchise as well all embraced as a unit, and to treat the balance as the worth of the franchise, the body charged with the duty of fixing the tax might justly take as a basis all the assets in the possession of the corporation, although two thirds of these were acquired with borrowed money represented by bonds outstanding and still unpaid. That this was not taxing a debtor on the amount of his

indebtedness, but on the property he had that he went into debt to get, and that neither corporations nor individuals were to be credited with their outstanding debts upon their property assessed for taxation. The court said that, by the term "capital stock" in the statutes, the legislature meant to include the entire property, real and personal, tangible and intangible, all assets on hand and the franchise also as an entirety, and, deducting the tangible property already assessed, treat the balance as the value of the franchise to be taxed. *Henderson Bridge Co. v. Com.* 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486, Affirmed in 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532.

In a subsequent case where the same corporation challenged the validity of a later tax, the same court, by Paynter, Ch. J., said, the action involved the right to compel the Henderson Bridge Company to pay its franchise tax for 1897, the franchise having been valued in the same way that it was when the right to collect the tax upon it was involved in the last cited case. Since that time, it was added, the right to collect the franchise tax on valuations under the same law by the same authority and on the same basis has been before this court in *Paducah Street R. Co. v. McCracken*, 20 Ky. L. Rep. 1294, 49 S. W. 178; *South Covington & C. Street R. Co. v. Bellevue*, 20 Ky. L. Rep. 1184, 49 S. W. 23; *Louisville R. Co. v. Com.* 20 Ky. L. Rep. 1509, 49 S. W. 486; and *Louisville & J. Ferry Co. v. Com.* 22 Ky. L. Rep. 446, 57 S. W. 624,—in each of which cases the court expressly or impliedly sustained the valuation and assessment of the franchise. To sustain the attack here necessitates overruling these cases, and this we decline to do. *Henderson Bridge Co. v. Negley*, 23 Ky. L. Rep. 746, 63 S. W. 989.

If in assessing the tangible property of a railroad under the Kentucky system the commissioners charged with that duty take into consideration the value of the franchise, no ground of complaint is thereby afforded against the assessment of the franchise by the state board of valuation when that body, without increasing the value thereof over previous years, deducts the whole valuation of the tangible property as made by the commissioners. *Southern R. Co. v. Coulter*, 24 Ky. L. Rep. 203, 68 S. W. 873.

But the Kentucky corporate tax act is deemed really, at least so far as foreign corporations are concerned, to impose a tax only upon property within the state, and not technically upon franchises though these affect the value of the property, since thereby are embraced both tangible and intangible assets, real and personal estate,—all treated as an entirety and assessed *in solido*. *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 41 L. ed. 560, 17 Sup. Ct. Rep. 527; *Western U. Teleg. Co. v. Norman*, 77 Fed. 13.

In Ohio much the same state of affairs exists. The statute differs from that of Kentucky in verbal respects only, and is interpreted in the same way. *State ex rel. Poe v. Jones*, 51 Ohio St. 492, 37 N. E. 945; *Adams Exp. Co. v. State*, 55 Ohio St. 69, 44 N. E. 506, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, Rehearing denied in 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604.

The North Carolina Constitution vested in township trustees alone the power to value real estate and personal property, and authorized, without commanding, the legislature to tax franchises. The courts held there was a lack of legislative competency to take away from township authorities their constitutional power to assess corporate tangible property, but that the assessment of franchises might be

provided for by means of a state board. The courts did not feel called upon, and would not undertake, to formulate the principles upon which corporate franchises should be valued, but contented themselves with saying that they were capable of valuation apart from the corporate property, and if erroneous principles were applied so that overvaluation resulted the corporations would in proper cases be entitled to relief. *Wilmington, C. & A. R. Co. v. Brunswick County*, 72 N. C. 10; *Richmond & D. R. Co. N. C. Div. v. Brogden*, 74 N. C. 707; *Richmond & D. R. Co. v. Alamance*, 84 N. C. 507; *Atlantic, T. & O. R. Co. v. Mecklenburg*, 87 N. C. 129.

Since these cases were decided the statute law of North Carolina in point has undergone a change. The present act, called the machinery act (Pub. Laws 1901, chap. 7, §§ 48-50, amending Laws 1899, chap. 15), requires the assessment of corporate franchises apart from tangible property after, but not until, June 1, 1903. *Jackson v. Corporation Commission*, 130 N. C. 385, 42 S. E. 128.

In Nevada it was said, in 1875, that no principle of valuation was prescribed by the laws of that state; that the statutes defined different species of property, and provided for their assessment at the actual cash value, but that, as to the mode of ascertaining the cash value, the statute law was silent. That no subsidiary principles of valuation were laid down to guide the owner in making a statement in those cases where a statement specifying values was required, and that the assessor was left wholly unrestricted in making his estimate. *State v. Central P. R. Co.* 10 Nev. 47. The court there justified the unit and entirety rule.

The question of deductions from the data upon which corporate franchises are valued is not less troublesome than the question of the elements to be included therein. Here, again, the rules vary with the varying jurisdictions, and the best that can be done in elucidation is the citation of special instances.

In Connecticut ascertained and unpaid losses owing by a mutual insurance company subject to a franchise tax equal to a stated percentage on the amount of cash capital belonging to it upon a named date are to be deducted in computing such capital. *Colts v. Connecticut Mut. L. Ins. Co.* 36 Conn. 513.

But such a company is not entitled to deduct the amount of declared but undistributed dividends applicable toward the reduction of premium notes of policy holders not included in the capital account. *Ibid.*

In Kentucky debts are not deductible. *Henderson Bridge Co. v. Com.* 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486; *Paducah Street R. Co. v. McCracken*, 20 Ky. L. Rep. 1294, 49 S. W. 178.

As the Massachusetts statute for taxing corporations according to the aggregate market value of their shares of stock only provided for deducting real estate and machinery locally taxed, a corporation taxable thereunder was not entitled to a deduction of any other taxable property it possessed. *Com. v. New England Slate & Tile Co.* 13 Allen, 391.

And it is no answer to an application by a Massachusetts corporation for a reduction of an assessment upon its real estate and machinery that the assessed valuation as it stands was deducted in assessing its franchise tax from the fair cash value of its shares. The two taxes are not complementary,—intended to divide between them the corporate property. *Tremont & S. Mills v. Lowell*, 178 Mass. 469, 59 N. E. 1007.

In New York, in assessing a tax upon the 57 L. R. A.

corporate franchise of a domestic corporation which has paid 6 per cent or more dividends under a statute providing that every domestic corporation, and every foreign one, doing business in that state shall be liable to, and pay, a tax as a tax upon its franchise or business, into the state treasury annually, computed, when during the year a dividend of 6 per cent or more has been declared upon the par value of the capital stock, at a stated rate upon the capital stock for each 1 per cent of dividend so declared, and in the case of a corporation paying no dividend or less than 6 per cent dividend, at another rate upon each dollar of the valuation of the capital made according to a method therein prescribed,—the tax is based on the par value of the stock, and hence it is immaterial what the amount of the assets are, nor are the corporate debts deductible. *People ex rel. Jewelers' Circular Pub. Co. v. Roberts*, 155 N. Y. 1, 49 N. E. 248.

It is otherwise in the case of a nondividend paying corporation where the basis of the tax is the actual, and not the par, value of the capital stock. *People ex rel. Wiebusch & H. Co. v. Roberts*, 154 N. Y. 101, 47 N. E. 980.

In Pennsylvania, under the act of June 8, 1891 (P. L. 229), in valuing the capital stock, including the franchise of a corporation, the corporate debts are facts relevant to take into account, but not specifically to be deducted. *Com. v. New York, P. & O. R. Co.* 188 Pa. 169, 41 Atl. 594; *Com. v. Manor Gas Coal Co.* 188 Pa. 195, 41 Atl. 605; *Com. v. Beech Creek R. Co.* 188 Pa. 203, 41 Atl. 605; *Com. v. Shamokin, S. & L. R. Co.* 3 Dauph. Co. Rep. 168; *Com. v. Lake Shore & M. S. R. Co.* 3 Dauph. Co. Rep. 172; *Com. v. Mammoth Vein Coal & I. Co.* 3 Dauph. Co. Rep. 220; *Com. v. Jamestown & F. R. Co.* 3 Dauph. Co. Rep. 214.

X. Administration and relief.

In this division no attempt has been made to collate the almost innumerable decisions relating to defects and irregularities, objections, acts, and omissions of either public officers in assessing and collecting, or taxpayers in reviewing or resisting taxes, or respecting suits, actions, or special proceedings, points of practice or procedure, or rights and remedies which the authorities on the one hand, or taxpayers on the other, must or may pursue or have in enforcing, contesting, or recovering back taxes, except in so far only as the cases in point have had peculiar and appropriate application to the particular kind of taxation that is the subject of this note. There have been several of these, but they do not lend themselves to systemization.

When a state imposes a specific tax upon the franchises of corporations doing business within its borders, and requires every such corporation to take out a license, not only as evidence of the payment of the tax, but also as a condition upon which its privileges may be exercised or its business pursued; and a county is without any legal authority to add thereto a county tax,—the refusal of the proper officer to issue a license to a corporation applying for one and entitled to have it, unless it will pay an additional county tax, does not justify such corporation in carrying on business without such license, nor save it from the pains and penalties of so doing; but its remedy is by mandamus to the officer to compel him to issue the license. *Phoenix Carpet Co. v. State*, 118 Ala. 143, 22 So. 627.

When a railroad has and operates under two franchises, one from the state subject to state taxation, and the other from the United States and exempt therefrom, and makes, as required—

by a state statute, a written statement to a state board for the purpose of being assessed upon its franchise, roadway, roadbed, rails and rolling stock, stating in a lump amount the value thereof within the state, while it is not of necessity concluded thereby from showing the contrary, yet in the absence of qualification or opposing proof, it is presumed that the taxable, and not the exempt, franchise was meant, and a general assessment accordingly is valid. *People v. Central P. R. Co.* 105 Cal. 578, 38 Pac. 905.

Where, under a statutory system of railroad taxation, the value of each railroad, its rights, franchises, and property for the purposes of taxation is assessed by a state board whose determination is made conclusive, and the basis of whose action is a sworn return made by the railroad annually in January covering sundry items showing its condition, including the number and market value of its shares of stock and its cash on hand on the first day of the month, the amount of which is to be deducted in fixing the assessment, but which statement such board has the right and power to correct; if an assessment is made and the tax accordingly paid, the state can recover no additional sum, although it afterwards turns out that the item deducted as cash on hand was much too large because of including many elements not properly so classified, and this although the board had too limited a time and no power to summon witnesses and investigate books to learn the truth. *State v. New York, N. H. & H. R. Co.* 60 Conn. 326, 22 Atl. 765.

When the Constitution and statutes commit to officers selected for the purpose the duty of assessing the capital stock and franchises of corporations, and provide for no review by the judicial branch of the government, the courts are powerless to reduce an overvaluation when the assessors act without fraud and according to law. *Ottawa Glass Co. v. McCaleb*, 81 Ill. 557; *Coal Run Coal Co. v. Finlen*, 124 Ill. 666, 17 N. E. 11.

The omission of a corporation to make the required statutory return to the board of equalization as the basis for that body to assess its capital stock and franchise because it was not supplied with blank forms and instructions, nor was any return demanded of it, does not invalidate a tax laid upon its capital stock and franchise when the assessing board is charged by law to value the capital stock and franchises of corporations, is empowered to do so upon other evidence than corporate returns afford, and acts at public meetings where corporations have full opportunity to appear and be heard. *Pacific Hotel Co. v. Lieb*, 83 Ill. 602, followed in *Elgin City Bkg. Co. v. Eaton*, 3 Ill. App. 432.

It is not a valid objection that the valuation of the capital stock and franchise of a railroad corporation using and operating a line of railroad, of which it owns in fee three-fifths and leases two-fifths from other roads of the mileage of the main track, is distributed to counties where only leased lines are operated, when the taxing statute requires that the aggregate assessment on capital stock and franchises shall be distributed proportionately to the several counties in like manner that the property denominated railroad track is distributed, which is in proportion that the length of the main track in each county bears to the whole length of the road in the state; and when lines leased, as well as those owned, are in express terms taxable to the corporation using and operating them as a part of its general system under charter authority. *Huck v. Chicago & A. R. Co.* 86 Ill. 352.

A charge that a board of equalization acted 57 L. R. A.

without any basis of fact in valuing the capital stock and franchise of a railroad corporation for the purpose of taxation is unsustainable when there was before it a return purporting to emanate from a representative of the corporation in conformity with a statute requiring such a return to be made by the corporation, since the board had a right to rely thereon in the absence of any showing that it was untrue or incorrect. *Union Trust Co. v. Weber*, 96 Ill. 846.

The validity of such tax is not in the least affected by the omission of such board properly to apportion the proceeds thereof among the counties thereunto entitled, nor by its improper distribution thereof. The road is not injured,—it cannot be called upon to pay twice, nor any more. It is for a county deprived of its just share to complain and seek redress from the state or the offending officers. *Ibid.*

There is a dictum in that case that the right of way, depot grounds, railroad track, and franchise of a railroad corporation are liable to taxation without reference to their ownership, and that the listing them in the wrong name as owner affords no ground for enjoining the tax, in no wise renders it inequitable and unjust. The proposition is without weight, as in the particular case the court held that the listing was to the real owner by name, and the chief justice, in concurring in the result, was careful to withhold his assent from the views expressed in the opinion. *Ibid.*

When a law requires corporations to furnish, for the purposes of taxation, to a public officer a statement under oath in a form he prescribes, showing certain facts, and makes it his duty, in case such statement is not furnished, to obtain the useful information by other means, and lay it before the state board of assessment and equalization as a basis for its action, the submission of an unsworn statement is equivalent to rendering none at all, and leaves a corporation in that situation without ground of complaint that the valuation set down by it in the unverified statement was increased without any notice to it. *Iowa & D. Teleph. Co. v. Schamber* (S. D.) 91 N. W. 78.

A statute making it a misdemeanor punishable by a fine of \$1,000, and \$50 a day additional, for a corporation or its officers wilfully to fail or to refuse to make a report to the state auditor as the basis of a tax upon the corporate franchise, is infringed, and the penalty therein prescribed is incurred, by the mere omission to make such a report, without any proof of actual knowledge of the law (since everyone is presumed to know the law), or of a demand or request from the auditor, or of any notice to the corporation. It is sufficient that the failure is voluntary. *Louisville & J. Ferry Co. v. Com.* 104 Ky. 726, 47 S. W. 877. This ruling simply nullifies the word "wilfully" in a penal statute.

The law involved required the auditor to prescribe the form of such corporate report, but the court held that this did not charge him with any duty to furnish such form to the corporations required to report, nor even to notify any corporation to make a report, in spite of the heavy penalties imposed for wilful failure or refusal to do so. *Ibid.*

The court thought it involved too much expense, and entailed too much labor upon the auditor, to go or send to corporations throughout the state, and that he was not, in the absence of explicit statutory direction, bound to undertake this labor. The corporations knew the law and where to find the auditor.

It may be remarked, in passing, that the comptroller of the state of New York performs just that labor without difficulty, notwithstanding the disparity in the area of and number of

corporations in the Empire state in comparison with the extent of and companies in Kentucky.

The validity of a tax upon corporate franchises assessed by a state board acting upon reports from the corporations themselves and such other evidence as may come before it is unaffected by the circumstance that no appeal is allowed from its determination. *Paducah Street R. Co. v. McCracken*, 20 Ky. L. Rep. 1294, 49 S. W. 178.

When the statute provides that should any corporation fail to report annually on or before a stated date the state board shall proceed to ascertain the facts and value the franchise for taxation it is intended that such board may exercise its power at any time, especially as a further section provides for the calling of it together from time to time as the business of the board requires. Such board therefore may, when no reports have been made, assess the corporation in default upon its franchise for several past years. *Louisville & J. Ferry Co. v. Com.* 22 Ky. L. Rep. 446, 57 S. W. 624; *Stone v. Louisville*, 22 Ky. L. Rep. 423, 57 S. W. 627.

When there is no statutory provision to the contrary, a corporate franchise is taxable where the corporation has its head office, and in the case of a local water corporation whose entire franchise is taxable in a city, although it is partly exercised beyond the city limits, the state board of valuation may be constrained to refrain from apportioning the tax to jurisdictions outside such city. *Frankfort v. Stone*, 22 Ky. L. Rep. 25, 56 S. W. 679, *Rehearing denied* in 22 Ky. L. Rep. 502, 58 S. W. 373.

A tax assessed according to law upon the corporate franchise of a bridge company by a state board is not invalidated by the work of computation having been intrusted to a clerk working under the direction and supervision of such board. *Louisville Bridge Co. v. Louisville*, 23 Ky. L. Rep. 1655, 65 S. W. 814.

Under the Kentucky system of railroad taxation the tangible property is assessable by the state railroad commissioners and the franchise by the state board of valuation and assessment. *Southern R. Co. v. Coulter*, 24 Ky. L. Rep. 203, 68 S. W. 873.

And when, under such system, the state board of valuation and assessment decides that a railroad corporation is not liable to a local tax upon its franchise for a given year or years because by a mistaken construction of the statute it supposed that the local tangible property must be deducted from the apportioned value of the franchise, which was ascertained in the first instance by a general deduction of all the tangibles, so that for such year or years no local tax upon the franchise was assessed or paid, the railroad thereunto liable is not discharged, nor is the public estopped from assessing it for such tax in subsequent years. *Ibid.*

Notwithstanding the language of the franchise tax statute in providing for the payment by corporations, in addition to other taxes imposed by law, of a state tax upon their franchises and a local tax thereon in the several subdivisions where they are exercised, and for a state board to value them according to rules, whereby is taken the grand total value of everything possessed by a given corporation subject to the taxes, from which the total value of its tangibles is deducted and the balance deemed the value of its franchise; and in then providing for an apportionment in the case of railroad and other transportation and transmission companies for local franchise taxes according to mileage, "less the value of any tangible property assessed or liable to assessment" in the local district,—the local tangible property is not to be taken out a second time. *Ibid.* 57 L. R. A.

A statute providing that any corporation aggrieved by a tax levied as an excise upon the value of its capital stock according to the market value of its shares may petition the supreme court in the nature of a petition of right setting forth the amount of the tax or excise and the general legal grounds, if any, for asserting that it should not have been exacted, and the specific facts upon which such assertion rests, confers no jurisdiction to correct errors of judgment resulting merely in an overvaluation of the shares, although the corporation insists that if these had been correctly valued there could and would have been no tax at all assessed, because the lawful deductions for property otherwise taxed exceed the total real value of the shares. *Boston Mfg. Co. v. Com.* 144 Mass. 598, 12 N. E. 362.

To sustain a charge of excessive valuation of corporate property and franchise so as to warrant a court in interfering with an assessment, the proof offered must relate to the values at the time of which the assessment speaks. In the absence of any proof but that which relates to an anterior time, the valuation must stand. *State, Williams, Prosecutor, v. Bettie*, 50 N. J. L. 132, 11 Atl. 17.

In New Jersey a domestic railroad corporation operating a steam surface railway between two cities, and still occasionally using its railroad tracks upon the highways of one of such cities for steam surface railroad purposes; and which in the same connection owns a powerhouse, poles, dynamos, cars, and other equipment of an electric passenger railway operated over the same tracks in such city,—is to be assessed and taxed by the state board of assessors upon its tracks and franchise, and by the municipality upon the electric line and its equipment as property not used for railroad purposes. *Camden & A. R. Co. v. Atlantic City*, 38 N. J. L. 316; 83 Atl. 198.

Notwithstanding a statute imposing a franchise tax upon a domestic railroad corporation, measured by its gross receipts, points out methods of collection, and reserves no lien upon the property, when a corporation becomes insolvent, and passes into the hands of operating receivers under sequestration proceedings instituted by a judgment creditor, and under mortgage foreclosure for debts exceeding the total assets,—the state may apply directly to the court whose officers such receivers are for and obtain an order directing them to pay the taxes in default out of the gross earnings on hand. *Central Trust Co. v. New York City & N. E. Co.* 110 N. Y. 250, 1 L. R. A. 260, 18 N. E. 92.

When, under the New York statutes, an application is made to the state comptroller by a domestic railroad corporation for a revision or readjustment of franchise taxes assessed upon it in past years, the affidavit of verification appended to the petition purporting to be that of an officer of the corporation is not fatally defective in not being signed by the affiant, when he is named therein and has signed the petition. Nor is it insufficient because of qualifying the oath that the facts set up in the petition are true by the words "to the best of the deponent's knowledge and belief." *People v. Campbell*, 86 Hun, 544, 34 N. Y. Supp. 801.

Such a petition affords jurisdiction to the state comptroller to revise and readjust the taxes according to its prayer, when the railroad officer subscribing and verifying it states in the body of it that he has examined the records kept by the railroad during the years involved, and that as shown by said records a certain part of the capital stock was employed without the state during that time, without added proof that the corporate books and records were correct. *Ibid.*

The courts are not governed by the rules applicable to appeals from judgments in actions at law in reviewing a decision of the comptroller on such an application. The strict rules of evidence in actions do not apply to such a proceeding. The comptroller is not restricted to common-law proof, but may act upon affidavits (citing *People ex rel. Harlan & H. Co. v. Campbell*, 139 N. Y. 63, 34 N. E. 753). He is in fact an assessor, and may determine matters before him upon evidence which would be inadmissible in common-law actions. (Citing *People ex rel. Roebbing's Sons Co. v. Wample*, 138 N. Y. 582, 34 N. E. 386.) *Ibid.*

That the state comptroller decided that taxes for a given year should be canceled on the ground that the subject thereof was exempt constitutes no estoppel upon his successor in office from assessing like taxes upon the same subject in later years. *People ex rel. New England Dressed Meat & Wool Co. v. Roberts*, 155 N. Y. 408, 41 L. R. A. 228, 50 N. E. 53, Reversing 20 App. Div. 521, 47 N. Y. Supp. 123.

When a franchise tax against a domestic corporation has been revised by the state comptroller, and a part thereof credited to the corporation as illegally paid, or as made to include taxes which could not have been lawfully demanded, a second domestic corporation, assignee of the first for a part of such credit, is not entitled to have its own tax account reduced by the transferred credit. The power given to the state comptroller to revise and readjust an account for taxes as above, and to charge or credit the difference as the case may require, is not sufficient to require him to transfer a credit. He has no authority to direct the refunding of a tax covered into the state treasury. There is no right in a corporation to offset its claim for taxes unlawfully exacted against the state's claim for other taxes. *People ex rel. Western U. Teleg. Co. v. Roberts*, 30 App. Div. 78, 51 N. Y. Supp. 747, Affirmed on opinion below in 156 N. Y. 693, 51 N. E. 1093.

Although the New York statute (Laws 1896, chap. 908, § 252) requires the assessors, in making their return to a writ of certiorari to review their action, to set forth, concisely, such other facts as may be pertinent and material to show the value of the property assessed on the roll and the grounds for the valuation, it is improper to insert in a writ to the state board to review an assessment upon the special franchises of a corporation a requirement that the return shall include the manner of making the assessment, the method pursued in making and fixing the valuation, and the basis adopted therefor; since, if such direction be construed to require more than does the statute, it is unauthorized, and if it requires no more, it is unnecessary. *People ex rel. Buffalo Natural Gas Fuel Co. v. State Bd. of Tax Comrs.* 55 App. Div. 186, 67 N. Y. Supp. 51.

(This is quite the same reason by which the Caliph Omar justified the famous order to burn the Alexandrian library,—if the books conformed to *Al Koran* they were superfluous, and if they did not they were pernicious.)

There is a strong dissent in the case by Kellogg, J., who took the ground that the phrase, "such other facts as may be pertinent," meant such other facts as the court called upon to review deems to be pertinent.

Under the New York statute for the taxation of special franchises (Laws 1899, chap. 712) the requirement (§ 43) that every corporation subject thereto shall, within thirty days after the act takes effect, or within the like period after a franchise is acquired, furnish a written report to the state tax commissioners as a basis for assessment; and the coupled provision for

the payment of a specific pecuniary penalty for failure to make such report, with an additional diurnal money penalty while the default continues; and a further provision that the corporation thus defaulting shall not be entitled to review its assessment upon certiorari,—the right of review upon certiorari is suspended while the default continues, not absolutely lost, to a corporation assessed upon its special franchise, by the failure to report within the time limit. The right of review may be exercised upon subsequently reporting and satisfying the pecuniary penalties. *People ex rel. New York & Q. C. R. Co. v. State Bd. of Tax Comrs.* 55 App. Div. 218, 67 N. Y. Supp. 69.

A statute requiring every domestic trust company to pay for the privilege of exercising its corporate franchise, or of carrying on its business in an organized capacity, an annual tax equal to 1 per cent on the amount of its capital stock, surplus, and undivided profits, on or before a named date each year in lieu of and as a substitute for all other assessments and taxation, from which such trust companies are thereby expressly exempted, and which took effect immediately upon its enactment (N. Y. Laws 1901, chap. 132), entitles a trust company that has complied with its terms to recover back a city tax assessed before the act became a law for the year in which it was passed, but not confirmed until afterwards, and which was collected by duress, and paid under protest. *Binghamton Trust Co. v. Binghamton*, 72 App. Div. 341, 76 N. Y. Supp. 517.

When a state constitution commits to township officers the power and duty of assessing the taxable property in their respective towns, and merely authorizes, without commanding, the legislature to tax franchisees; and when the legislature has enacted general laws for taxing real and personal property through the action of township officials, and a particular law for taxing corporate franchisees through the action of a state board,—the lands, roadbed, superstructures, and other tangible property of a railroad corporation are to be assessed and taxed where they are situated by the local taxing authorities under the general legislation, and the franchise separately and independently by the state board. And if by mistake, mutual on the part of the state board and the railroad, the corporation returns and is assessed and taxed upon, not only its franchise, but all its tangible property as well, and pays such tax, the payment is no defense to the claim of the local authorities for taxes assessed by them upon the tangible property. *Wilmington, C. & A. R. Co. v. Brunswick County*, 72 N. C. 10; *Wilmington R. Bridge Co. v. New Hanover County*, 72 N. C. 15.

A charge that a board of equalization assessed corporate franchisees for taxation without notice to the corporation is unsubstantiated when it appears that such board, upon an application to reduce the assessment, left the original assessment unchanged, and that the corporate franchisees were included therein. *Edison Electric Illum. Co. v. Spokane County*, 22 Wash. 168, 60 Pac. 132.

The franchises of a street railway corporation and the property necessary for their exercise to discharge quasi public duties, being an entirety, and the franchisees being personal estate, the tangible property, such as cars, rails, poles, wires, etc., and the power house or houses and the lots they stand on, are subject to assessment as part of the franchise, and therefore as personal property; hence drawn to the principal office of the corporate owner, and not having a situs in the wards or assessment districts where these things happen severally to be

situated. *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746.

Such franchises and property are not subject to severance by sale for taxes under the general operation of the tax law, nor upon other legal process. *Ibid.*; *Chicago & N. W. R. Co. v. Forest County*, 95 Wis. 80, 70 N. W. 77.

XI. Conclusion.

If the foregoing exposition has left unanswered many questions, it has been inevitable. The subject of taxing corporate franchises is still in the evolutionary stage. The states are continually devising new ways of taxing corporations, and the corporations are stubbornly contesting every new impost. Mr. Thomas Sewell Adams, writing of Taxation in Maryland, for the Johns Hopkins University Studies in History and Political Science, says that in the period from 1776 to 1841 that state taxed corporations exactly like individuals, but customarily imposed upon banks a franchise tax, usually twenty cents on each \$100 of paid-up capital, and that in the last two decades of the nineteenth century corporation taxes increased both relatively and absolutely, and many new ones were imposed, adding that, whereas in the ninth decade of the last century these were 13 per cent of the total tax receipts, in the succeeding ten years they had risen to 16 per cent. The case of Maryland is typical.

It is sometimes possible as yet for a few corporations to escape the more grievous burdens by migrating to more liberal jurisdictions (*vide*, *People ex rel. Davis Colby Ore Roaster Co. v. Campbell*, 66 Hun, 146, 21 N. Y. Supp. 7; *People ex rel. Southern Cotton Oil Co. v. Wemple*, 131 N. Y. 64, 29 N. E. 1002; and *People ex rel. Southern Cotton Oil Co. v. Roberts*, 25 App. Div. 13, 48 N. Y. Supp. 1028), but plainly this plan is not available to all, and the places of refuge are diminishing.

The great question, When is a tax upon a corporation to be considered a franchise tax

rather than one upon its property? is still open. The language of the statute imposing it is not decisive. It may be one or the other despite of the words employed by the legislature. *Western U. Tele. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Western U. Tele. Co. v. Norman*, 77 Fed. 13; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 41 L. ed. 980, 17 Sup. Ct. Rep. 527,—in which avowed franchise taxes that would, if such, have been invalid, were held to be not such; and *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Intern. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163, where the tax was only saved by a ruling that it was a franchise tax.

Again, notwithstanding the last cited case, it cannot yet be said to be settled that a state may impose upon a foreign corporation engaged exclusively in interstate commerce any tax for the privilege of carrying on such commerce within its borders. At least, Mr. Justice Peckham did not so regard it when writing the opinion in *McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 624.

But when it is settled that a given tax is an excise, the question as to what the value of the franchise is, and how it shall be determined, is a fruitful source of litigation. Witness the cases of *State Bd. of Equalization v. People ex rel. Goggin*, 191 Ill. 528, 61 N. E. 339, and *Chicago Union Traction Co. v. State Bd. of Equalization*, 112 Fed. 607, 114 Fed. 557.

The corporation wronged by an excessive valuation may get relief in the courts if it can prove actual fraud by the assessors; not otherwise. There is a remedy for knavishness, possibly, but none for ignorance or stupid obstinacy.

But while all this is so, none the less, the courts have established many guiding principles that must be helpful in solving the new problems connected with this subject that are sure to arise. J. B. G.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Thomas C. HINDMAN, *Plff. in Err.*,
v.
FIRST NATIONAL BANK OF LOUIS-
VILLE *et al.*

(50 C. C. A. 623, 112 Fed. 931.)

1. An exception covering several distinct propositions of the charge to the jury is insufficient if either proposition is correct.
2. An exception "to the court's measure of damages" is sufficient if the charge on the measure of damages constitutes a single subject, and the circumstances are such that the judge could not have misapprehended the scope of the exception.
3. The damages for fraudulent rep-

resentations inducing the purchase of corporate stock cannot be limited to the difference in the value of the stock on the day the representations were made and on the day of purchase, if at both dates it was of much less intrinsic value than the price paid for it, but should represent the difference between the price paid and the intrinsic value of the stock as ascertained by events in the subsequent history of the corporation, and not by the market price.

4. That the discount of subscribers' notes indorsed by an insurance company, by the bank in which they were deposited as capital, was genuine and real, does not prevent its certificate that the company's capital and surplus had been paid in, in cash, from being false and misleading.
5. That one taking stock in a corpo-

NOTE.—For an earlier report of this same case, see *Hindman v. First Nat. Bank* (C. C. App. 6th C.) 48 L. R. A. 210.

As to liability for misrepresentations inducing purchase of corporate stock generally, see in this series *Teachout v. Van Hoesen* (Iowa) 1 L. R. A. 664; *Windram v. French* (Mass.) 8 L. R. A. 750; *Gerner v. Mosher* (Neb.) 46 L. R. A. 244; and *Boddy v. Henry* (Iowa) 53 L. R. A. 769.
57 L. R. A.

As to failure of stockholder to inform one purchasing his stock that the corporation is insolvent, see *Rothmiller v. Stein* (N. Y.) 26 L. R. A. 143.

As to right to rely upon representations made to effect contract, as a basis for a charge of fraud, see *note to Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Co.* (N. D.) 37 L. R. A. 593.

ration in reliance on representations as to its condition was partly induced to purchase by the desire to secure an agency will not defeat his right to recover against the one making the representations.

6. To show the intrinsic value of the stock of an insurance company, the purchase of which was induced by fraud, the history of bank certificates of deposit representing notes of agents which are to be repaid out of the business done, and which certificates have been placed with the bank as part of the capital stock, may be shown.
7. A bank is liable for the act of its cashier in falsely certifying that the capital of an insurance company is all paid in and on deposit in the bank, if made in the general course of the bank's business from facts supposed to be known to him, although the giving of such a certificate is *ultra vires* the bank, if it is not sufficiently so to carry notice to all of its *ultra vires* character.
8. A statement by the cashier of a bank to one inquiring into the condition of one of its corporation customers, dividing its deposit into capital and surplus, is binding on the bank.
9. A bank falsely certifying that an insurance company has its authorized capital on deposit, for the purpose of inducing the insurance commissioner to grant it a license, is liable to persons who are damaged by the purchase of the stock in reliance thereon, if it is intended for the information of all who shall be disposed to deal in the company's stock, or to one who, desiring to purchase stock, applies to the bank for information and is referred to the certificate, and who purchases in reliance thereon.
10. A representation of fact with the intent to influence the conduct of another implies necessarily the belief of the person making it that it is true.
11. The jury may find that a statement by a bank cashier, that one of its corporation depositors had its entire authorized capital on deposit, made with no knowledge of the fact, is knowingly false, for the purpose of holding the bank liable for the results of the misrepresentation in case it is false and causes injury to one relying on it.
12. One who knowingly makes false representations in respect to the capital of a corporation, for the purpose of inducing another to buy its stock, is liable to him for the loss sustained by the purchase of the stock in reliance upon the truth of the statement.

(February 4, 1902.)

ERROR to the Circuit Court of the United States for the District of Kentucky to review a judgment in favor of defendants in an action to recover damages for false and fraudulent representations which were alleged to have induced plaintiff to purchase worthless stock of an insurance company. *Reversed.*

Statement by Lurton, Circuit Judge:

This was an action by Thomas C. Hindman to recover damages for the fraudulent and false representations of the defendants, whereby he was induced to buy shares of the capital stock of the Columbian Fire Insur-

ance Company of America, which shares have proved worthless. A demurrer to the petition was sustained, and the plaintiff's petition dismissed. At a former term of this court we held that the court below had erred in sustaining the demurrer, and the cause was remanded, with directions to overrule same. 48 L. R. A. 210, 39 C. C. A. 1, 98 Fed. 502. Thereupon the defendants answered, and issue was joined. There was a verdict and judgment for defendants.

The outlines of the case necessary to be stated are these: The insurance company in which Mr. Hindman became a shareholder was a Kentucky corporation. Under the law of that state, it could not begin business until all of its capital had been actually paid in, in cash, nor until the state insurance commissioner should be satisfied that this was a fact, and should issue his license accordingly. On December 31, 1892, he authorized the company to begin business, and issued a certificate or license, which, among other things, certified that the company "had a paid-up capital of \$200,000, and a net surplus of \$48,182.90, which is in cash, and deposited in the First National Bank of Louisville, Kentucky, as shown by the certificate of the cashier of said bank and the sworn statement of the president and secretary of said company." The cashier's certificate referred to is in these words: "Thos. R. Sinton, being duly sworn, deposes and says that he is cashier of the First National Bank of Louisville, Kentucky, and that said bank, on this December 31, 1892, has on deposit to the credit of the Columbian Fire Insurance Company of America, of Louisville, Kentucky, two hundred and forty-eight thousand one hundred and eighty-two and $\frac{90}{100}$ (\$248,182.90) dollars, of which amount two hundred thousand (\$200,000) dollars has been paid in as the full amount of the capital stock of said Columbian Fire Insurance Company of America, and forty-eight thousand one hundred and eighty-two and $\frac{90}{100}$ (\$48,182.90) dollars has been paid in as the net surplus of said company." There was evidence tending to show that there was a shortage in paid-up capital shares of not less than \$100,000 when these certificates were issued and the company launched in business. It was shown that the company did have a deposit in the First National Bank on that date of \$248,182.90, which was subject to its check. But there was also evidence tending to show that about \$60,000 of this sum was proceeds of notes discounted by the insurance company, purporting to be notes made by subscribers for shares, and secured by stock attached as collateral, and that the insurance company was bound on these notes either as indorser or guarantor. There was also evidence tending to show that \$25,000 of this credit was made up by the deposit of a certificate of deposit issued by the Tradesman's National Bank of New York, and that this deposit was procured by the discount in New York of the note of the New York agents of the company upon an agreement by which the premiums received

by the New York agents were to be deposited with the Tradesman's Bank, and appropriated to the payment of the discounted note; the note being also secured by shares of the company as a collateral. It was not shown that the bank knew the history of this certificate of deposit, though it is shown that it was requested to hold the certificate for thirty days, and that in fact it was so held until March 23d before being sent on for collection. Five of the notes discounted by the defendant bank were notes purporting to be made by subscribers for stock, and these notes were secured by the shares and the indorsement of the company. The sixth note discounted by the defendant bank was made by Mr. A. W. Hart, the principal organizer of the company, and its general manager. Hart's note was for \$46,875. It was discounted December 28, 1892. Shares aggregating 375 were attached to it as collateral, and it was indorsed or guaranteed by the company. Hart was not financially good for this sum, or anything like it. There was evidence tending to show that the officials of the bank knew that this note was made to take the place of subscribers who had failed to take their stock, and that it was represented to the bank that there were persons who had promised to take these shares, who were good, and that as they came forward and took the stock the proceeds of such allotments would be paid on the note, and stock withdrawn in proportion to payments. Mr. Hart himself testified that he told the officials of the bank that it was desired to begin business January 1, 1893, and urged as a reason for discounting this and other notes standing for stock that "we would have a large account in the bank, and would continue always to have a large balance for the necessities of the business, and that the stock would be taken up, and the notes would be paid." It may therefore be stated that there was evidence tending to show that the bank knew that at least to the extent of \$60,000 the capital stock of the bank had not been paid in when the certificate of December 31, 1892, was made, and that to this extent, at least, the statement in the certificate was misleading and deceptive, inasmuch as to that extent the deposit did not represent capital stock or surplus paid in, but arose from discounted paper upon which the company was liable.

In January, 1893, Mr. Hindman began negotiations with the insurance company looking to securing the general agency for California, his dealings being chiefly with A. W. Hart, the company's general manager, and Mr. C. B. Sullivan, one of the defendants, who was actively engaged as a member of its executive committee. He testified that these gentlemen pressed upon him the necessity of becoming a shareholder, as it was the policy of the company to have its important agents interested in that way; and that in answer to his inquiries they represented that the entire capital had been paid in at a premium of 25 per cent; that some subscribers had not taken their stock,

but that such stock had been taken by other of the promoters, who had therefore acquired more stock than they wished; and that he could have eighty shares of stock so taken. He says that he was referred to the defendant bank as the company's depository for information as to the capital of the company. He further testified that he did call at the bank, and was informed by its president that the stock was good, and that the bank had made a statement to the insurance commissioner showing that its entire capital had been paid in and was on deposit, and that such a statement would not have been made unless true. He further testifies that he subsequently visited the state insurance commissioner, and asked to see the certificate of the bank, and was shown same; and that, in reliance upon the truth of that certificate, and of like statements made by defendant Sullivan and others, he agreed to take, and did take and pay for, eighty shares in the capital of the company, paying therefor, on February 6, 1893, the sum of \$10,000. The stock delivered to him was part of the stock attached as collateral to the note of A. W. Hart, above referred to, which shares purported to have been originally issued to the defendant C. B. Sullivan. In about one year the company failed. Its assets were insufficient to pay its debts. The shareholders will receive nothing. Mr. Hindman did not discover the facts stated in respect to the shortage in capital until after the failure of the company, and still holds his shares.

Argued before *Lurton, Day, and Severens*, Circuit Judges.

Mr. A. M. Rutledge, with *Mr. W. W. Thum*, for plaintiff in error:

It being proper to give a true statement of the condition of the insurance company to the insurance commissioner, the bank could not escape liability if a false statement were made and anyone were directly injured thereby.

A civil action for damages growing out of a fraudulent conspiracy warrants a verdict against a single defendant, even though no other persons be implicated, if the fraud and the injury be proved. The gist of the civil action for damages is simply the injury done to the plaintiff.

6 Am. & Eng. Enc. Law, 2d ed. p. 873; *Griffing v. Diller*, 50 N. Y. S. R. 435, 21 N. Y. Supp. 407; *Keit v. Wyman*, 67 Hun, 337, 22 N. Y. Supp. 133; *Loverty v. Vanarsdale*, 65 Pa. 507; *Rundell v. Kalbfus*, 125 Pa. 123, 17 Atl. 238; *Booker v. Puyear*, 27 Neb. 346, 43 N. W. 133; *Van Horn v. Van Horn*, 56 N. J. L. 318, 28 Atl. 669; *Betz v. Daily*, 3 N. Y. S. R. 309.

It is not essential to prove an agreement between the insurance company and the bank, if the bank, in the furtherance of its own business interests, with the purpose of getting the Kentucky insurance commissioner to license the insurance company, gave the false affidavit in question; and if the company was licensed thereby, and the

plaintiff injured, then a right of recovery exists.

Hornblower v. Crandall, 78 Mo. 581, Affirmed in 7 Mo. App. 220; *Den ex dem. Stencart v. Johnson*, 18 N. J. L. 87; *Apthorp v. Comstock*, 2 Paige, 482; *Bridge v. Eggleston*, 14 Mass. 245, 7 Am. Dec. 209; *Bush v. Sprague*, 51 Mich. 49, 16 N. W. 222.

The proceeds of bona fide discounts are not lawful capital if the company be indorser or guarantor.

Thomp. Corp. § 1222.

Cashier Sinton's affidavit was within the scope of his duties as cashier.

Hindman v. First Nat. Bank, 48 L. R. A. 210, 39 C. C. A. 1, 98 Fed. 562.

Neither the presence nor the privity of a president is essential, because the giving of such information, provided that it is in the interest of the bank's business, is directly within the scope of the cashier's authority.

Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259; *Thomp. Mun. Corp.* §§ 4774, 4783; *Squires v. First Nat. Bank*, 59 Ill. App. 134; *Bank of Kentucky v. Schuykill Bank*, 1 Pars. Sel. Eq. Cas. 180; *Robinson v. Bealle*, 20 Ga. 275.

On what theory could the difference between the value of the stock as of the date of the cashier's affidavit, and its value as of the date of Hindman's purchase, be the measure of his damage? Under the true rule relating to damages in such case, it is not necessary to show that the fraud had injured the market value of the stock. It is only necessary to show that the true value of the stock by reason of the frauds was substantially less than the price paid.

Loss is the difference between what was paid for it and what the stock was actually worth.

Smith v. Bolles, 132 U. S. 125-131, 33 L. ed. 279-282, 10 Sup. Ct. Rep. 39; *Horne v. Walton*, 117 Ill. 130, 7 N. E. 100; *Slingerland v. Bennett*, 66 N. Y. 611; *Schwabacker v. Riddle*, 84 Ill. 517; *Fitzsimmons v. Chapman*, 37 Mich. 139, 26 Am. Rep. 508; *Atwater v. Whiteman*, 41 Fed. 427; *Glaspell v. Northern P. R. Co.* 43 Fed. 900.

As a matter of law, Hindman was not obliged to sell.

Hubbell v. Meigs, 50 N. Y. 480; *Redding v. Godwin*, 44 Minn. 355, 46 N. W. 563.

When the bank started the company by fraudulently deceiving the insurance commissioner, it took a step which made it absolutely liable. It was the common purpose, not only to organize and float this bubble company, but to sell the stock attached to the notes on which the company had been organized. The pleadings show that this was the intention from the beginning, and, this being the case, all the conspirators are equally liable for the representations of each, and all are responsible, because they have all done something in furtherance of the common object.

Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172; *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286; *United States v. Gooding*, 12 Wheat. 469, 6 L. ed. 693; *Jones, Ev. p.* 57 L. R. A.

255; *Bigelow, Fraud*, 246, 247; *Gillett, Indirect & Collateral Ev.* pp. 31, 32; *Abbott, Trial Ev. p.* 18; *American Fur Co. v. United States*, 2 Pet. 358, 365, 7 L. ed. 450, 453; *Lincoln v. Claffin*, 7 Wall. 132, 19 L. ed. 106; *Thomp. Corp.* § 1474; *Savile v. Roberts*, 1 Ld. Raym. 374; *Tappan v. Powers*, 2 Hall, 277; *Hutchins v. Hutchins*, 7 Hill, 104; *Parker v. Huntington*, 2 Gray, 124; *Bowen v. Matheson*, 14 Allen, 499; *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *Hauser v. Tate*, 85 N. C. 81, 39 Am. Rep. 689.

The wrongdoer must answer for those results injurious to the other party, which should be presumed to have been within his contemplation at the time of the commission of the fraud.

Smith v. Duffy, 57 N. J. L. 679, 32 Atl. 371; *Crater v. Binninger*, 33 N. J. L. 513, 97 Am. Dec. 737; *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39; *Glaspell v. Northern P. R. Co.* 43 Fed. 900; *Reynolds v. Leyden*, 24 App. Div. 395, 48 N. Y. Supp. 1078; *Sharon v. Mosher*, 17 Barb. 518.

On rehearing.

It is not essential to prove that the cashier's certificate was given by order of the board of directors.

Fisher v. United States Nat. Bank, 12 C. C. A. 413, 26 U. S. App. 448, 64 Fed. 710; *Weckler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95; *Commercial Nat. Bank v. Pirie*, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799.

A bank or other corporation can be liable for wrongful acts committed by it in pursuance of a power lawfully conferred, though wrongfully and tortiously exercised.

Edwards v. Midland R. Co. L. R. 6 Q. B. Div. 287; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73; *First Nat. Bank v. Graham*, 100 U. S. 699, 25 L. ed. 750; *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055; *Hindman v. First Nat. Bank*, 48 L. R. A. 210, 39 C. C. A. 1, 98 Fed. 566.

The scope of the ordinary duties of a cashier is a large one.

Fleckner v. Bank of United States, 8 Wheat. 360, 5 L. ed. 636; *Sturges v. Bank of Circleville*, 11 Ohio St. 153, 78 Am. Dec. 296.

It is no extraordinary, but a very proper, power to be confided to cashiers, that of certifying that a corporation has its capital in its bank, when it is to the interest of the bank that such fact should be known and certified to in order to give value to shares of stock pledged at the bank.

Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604-676, 19 L. ed. 1008-1023; *Farmers' & M. Bank v. Butchers' & D. Bank*, 16 N. Y. 125, see notes 69 Am. Dec. 678; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 250; *Swift v. Jeusbury*, L. R. 9 Q. B. Div. 301; *Ellerbe v. National Each. Bank*, 109 Mo. 445, 19 S. W. 241.

Even general information as to a customer's solvency is relevant; and when misrepresentations are made deceitfully by a

cashier in order to relieve his bank of doubtful securities and choses in action, and this end is accomplished to the injury of another, the bank will be held liable, and justly so.

Nevada Bank v. Portland Nat. Bank, 59 Fed. 338; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *First Nat. Bank v. Marshall & I. Bank*, 28 C. C. A. 42, 54 U. S. App. 510, 83 Fed. 725; *Randolph v. Allen*, 19 C. C. A. 353, 41 U. S. App. 117, 73 Fed. 23; *Newbegin v. Newton Nat. Bank*, 14 C. C. A. 71, 27 U. S. App. 712, 66 Fed. 701; *Wilson v. Pauly*, 18 C. C. A. 475, 37 U. S. App. 642, 72 Fed. 129.

For a cashier to give to the insurance commissioner of Kentucky a sworn certificate which is false and fraudulent, and on the faith of which the commissioner issues a license to the insurance company to do business, will give rise to an action in tort against the bank in favor of one who buys the stock of the company, and is thereby damaged, if the certificate was made in the interest of the bank and in order to have the insurance company licensed and floated, with a purpose on the part of the bank to secure deposits and to sell collateral pledged on notes discounted in the bank.

Bartholomew v. Bentley, 15 Ohio, 659, 45 Am. Dec. 596; *Cazeaux v. Mali*, 25 Barb. 578; *Cross v. Sackett*, 2 Bosw. 618; *Clarke v. Dickson*, 6 C. B. N. S. 459; *Morgan v. Skiddy*, 62 N. Y. 319; *Davidson v. Tulloch*, 3 Macq. H. L. Cas. 783; *Morse v. Swits*, 19 How. Pr. 275; *Gerner v. Mosher*, 58 Neb. 135, 46 L. R. A. 244, 78 N. W. 384; *Bair v. Jarboe*, 27 Pitts. L. J. N. S. 340.

Action will lie for false representation, although not made directly to the injured party, if intended to influence one to whom it may be communicated.

Carvill v. Jacks, 43 Ark. 454; *Booth v. Wonderly*, 36 N. J. L. 251; *Westervelt v. Demarest*, 46 N. J. L. 37, 50 Am. Rep. 400; *Haines v. Franklin*, 87 Fed. 141; *Hadcock v. Osmer*, 153 N. Y. 604, 47 N. E. 923; *Ward v. Trimble*, 103 Ky. 153, 44 S. W. 450; *Myers v. Alpena Loan & Bldg. Asso.* 117 Mich. 389, 75 N. W. 944; *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827; *Owens v. Boyd Land Co.* 95 Va. 560, 28 S. E. 950; *Bank of Atchison County v. Beyers*, 139 Mo. 627, 41 S. W. 325; *Bartholomew v. Bentley*, 15 Ohio, 666, 45 Am. Dec. 596; *Merchants' Nat. Bank v. Thoms*, 28 Ohio L. J. 104; *Morse v. Swits*, 19 How. Pr. 275; *Prescott v. Haughey*, 65 Fed. 659; *Delano v. Case*, 121 Ill. 247, 12 N. E. 676; *Seale v. Baker*, 70 Tex. 283, 7 S. W. 742; *Salmon v. Richardsen*, 30 Conn. 360, 79 Am. Dec. 255; *Tate v. Bates*, 118 N. C. 287, 24 S. E. 492; *Prewitt v. Trimble*, 92 Ky. 181, 17 S. W. 356; *Morgan v. Skiddy*, 62 N. Y. 325; *Kinkler v. Junica*, 84 Tex. 116, 19 S. W. 359; *United States v. Allis*, 73 Fed. 169; *National Exch. Bank v. Sibley*, 71 Ga. 726; *Andrews v. Mockford* [1896] 1 Q. B. 376, 73 L. T. N. S. 726; *Cross v. Sackett*, 2 Bosw. 617; *Cazeaux v. Mali*, 25 Barb. 578, 57 L. R. A.

Messrs. Dodd & Dodd, and Humphrey, Burnett, & Humphrey, for defendants in error:

There was a total failure of proof conducing, in any degree, to show that the certificate of the cashier, Sinton, was made by order of the board of directors of the bank. It may be conceded that a cashier can bind his bank for contracts or torts committed in the course of the corporate business and of his employment, but to extend this principle beyond that limit would be to enable every cashier at liberty to wreck his bank in matters outside of the course of the business of the bank and of his employment.

First Nat. Bank v. Marshall & I. Bank, 28 C. C. A. 42, 54 U. S. App. 510, 83 Fed. 725.

In order to hold the corporation liable for the torts of any of its agents, the acts in question must be performed in the course and within the scope of the agent's employment in the business of the principal.

Washington Gaslight Co. v. Lansden, 172 U. S. 544, 43 L. ed. 547, 19 Sup. Ct. Rep. 296; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 210, 16 L. ed. 75; *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261; *California Nat. Bank v. Kennedy*, 167 U. S. 366, 42 L. ed. 200, 17 Sup. Ct. Rep. 831; *American Surety Co. v. Pauly*, 18 C. C. A. 644, 38 U. S. App. 254, 72 Fed. 471, 170 U. S. 133-160, 42 L. ed. 977-986, 18 Sup. Ct. Rep. 552; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 1 N. E. 282; *Western Nat. Bank v. Armstrong*, 152 U. S. 352, 38 L. ed. 473, 14 Sup. Ct. Rep. 572; *First Nat. Bank v. National Exch. Bank*, 92 U. S. 128, 23 L. ed. 681; *Commercial Nat. Bank v. Pirie*, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 802; *Hadden v. Dooley*, 34 C. C. A. 338, 63 U. S. App. 173, 92 Fed. 274; *Horri-gan v. First Nat. Bank*, 9 Baxt. 137; *Weckler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95; *Dresser v. Traders' Nat. Bank*, 165 Mass. 120, 42 N. E. 567; *Mapes v. Second Nat. Bank*, 80 Pa. 163; *McOutcheon v. Merz Capsule Co.* 31 L. R. A. 415, 19 C. G. A. 108, 37 U. S. App. 586, 71 Fed. 792; *Farmers' & M. Nat. Bank v. Smith*, 23 C. C. A. 85, 40 U. S. App. 690, 77 Fed. 135.

A limit must somewhere be fixed between the near and remote, direct and indirect consequences, beyond which the law will not take cognizance of them. One of the prescribed limits is this,—that the false and fraudulent representations must have been intended to be acted on, in a matter affecting himself, by the party who seeks redress for consequential injuries.

Wells v. Cook, 16 Ohio St. 74, 88 Am. Dec. 436; *Gerhard v. Bates*, 20 Eng. L. & Eq. 136; *Hunnewell v. Duxbury*, 154 Mass. 286, 13 L. R. A. 733, 28 N. E. 267; *Peck v. Gurney*, L. R. 6 H. L. 371; *Andrews v. Mockford* [1896] 1 Q. B. 373; *Rew v. De*

Berenger, 3 Maule & S. 67; *Barry v. Oroskey*, 2 Johns. & H. 1.

Fraud does not consist in mere intention, but in intention carried out by hurtful acts.

Williams v. Davis, 69 Pa. 21; *Cooley*, Torts, top p. 581; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. ed. 259.

When there is a sufficient and independent cause operating between the wrongful act and the injury, it is not chargeable to the misfeasance or nonfeasance of the original wrongdoer.

The G. R. Booth, 171 U. S. 458, 43 L. ed. 239, 19 Sup. Ct. Rep. 9; *Ætna F. Ins. Co. v. Boon*, 95 U. S. 133, 24 L. ed. 399; *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 77, 41 C. C. A. 22, 100 Fed. 749.

Where a party complains of false representations whereby he was caused to suffer damage in a transaction with some third person, it devolves upon him to show expressly that the alleged wrongdoer intended, or that he may reasonably be supposed under the circumstances to have intended, that the plaintiff should act upon the misrepresentation; and it is not enough to prove that the misrepresentation was made with knowledge of its falsity.

Bigelow, Fraud, p. 536; *Andrews v. Mockford* [1896] 1 Q. B. 378; *Derry v. Peck*, L. R. 14 App. Cas. 337; *Kountze v. Kennedy*, 147 N. Y. 124, 29 L. R. A. 360, 41 N. E. 414; *Nash v. Minnesota Title Ins. & T. Co.* 163 Mass. 574, 28 L. R. A. 753, 40 N. E. 1039; *Endsley v. Johns*, 120 Ill. 469, 60 Am. Rep. 572, 12 N. E. 247; *New York Land Improv. Co. v. Chapman*, 118 N. Y. 288, 23 N. E. 187; *Glasier v. Rolls*, L. R. 42 Ch. Div. 436; *Lelièvre v. Gould* [1893] 1 Q. B. 491; *Angus v. Clifford* [1891] 2 Ch. 449; *Low v. Bouverie* [1891] 3 Ch. 82; *Western Bank v. Addie*, L. R. 1 Sc. App. Cas. 157; *New Brunswick & C. R. Co. v. Conybeare*, 9 H. L. Cas. 725; *Potts v. Chapin*, 133 Mass. 280.

Lurton, Circuit Judge, delivered the opinion of the court:

The plaintiff in error has presented no less than 182 assignments of error,—an unnecessarily prodigious number. No less than forty-one of these are errors assigned upon the charge of the court. These are all based upon eight exceptions taken to the charge. Objection is made that these exceptions are too general; that each is an exception covering several distinct propositions; and that, if any proposition be good, the whole exception must fail. *Johnson v. Garber*, 19 C. C. A. 556, 43 U. S. App. 107, 73 Fed. 523. An exception to a charge should be taken before the jury retire. It should be sufficiently definite to call the judge's attention to the particular matter objected to, in order that he may have an opportunity to correct it. Neither should an exception cover two distinct propositions, for such an exception is insufficient if either one should prove correct. *Mobile & M. R. Co. v. Jurey*, 111 U. S. 596, 28 L. ed. 531, 4 Sup. Ct. Rep. 566; *Bogk v. Gassert*, 149 U. S. 25, 37 L. ed. 635, 13 Sup. Ct. Rep. 57 L. R. A.

738; *Holloway v. Dunham*, 170 U. S. 619, 42 L. ed. 1107, 18 Sup. Ct. Rep. 784; *Felton v. Newport*, 34 C. C. A. 470, 92 Fed. 470. This objection must be regarded as fatal to most of the exceptions taken to the charge as delivered, though there is one objection which may fairly be regarded as sufficiently definite to base assignments of error upon. That exception is in these words: "We desire to also except to the court's measure of damages in this case." What the court had said on this subject was this: "If the jury should conclude that the plaintiff is entitled to recover anything, then the measure of the plaintiff's damages would be the difference between the value of the eighty shares of stock on the 31st day of December, 1892, and its value of February 6, 1893, when the plaintiff bought it. Interest may be allowed on this, if the jury see fit. For any depreciation which may have resulted after the latter date the defendants would not be responsible, inasmuch as that depreciation may have been the result of causes with which the defendants had no connection." This paragraph was followed by some observations upon parts of the evidence, intended as an application of the proposition of law quoted, which did not involve the statement of any new or distinct proposition. This exception has been criticised, but we think the trial judge could not have misapprehended the scope of the exception, and that the charge on this subject of damages may be regarded as constituting a single subject. In dealing with an objection to an exception this court, in *Felton v. Newport*, 34 C. C. A. 470, 92 Fed. 470, speaking by Circuit Judge Severens, said: "The charge upon this subject was entire, and bound up in a single proposition. If it was erroneous in any substantial particular, it would seem that the exception would reach the error, especially where it pervades the whole instruction given upon the subject." The instruction limited the plaintiff to a recovery of the difference between the value of the shares on December 31, 1892, the day the company was licensed to do business, and February 6, 1893, the date when plaintiff bought his share; in other words, if the shares of the company were worth as much on February 6, 1893, as they had been on December 31, 1892, the plaintiff had sustained no loss, although at both dates the shares may have been of much less intrinsic value than the price paid for them. This instruction was erroneous, and must result in a reversal and a new trial.

In its essence Mr. Hindman's action was a common-law action for deceit. His complaint, in substance, is that he has been led into the purchase of shares in the Columbian Insurance Company, which has proved a most ruinous investment, and that he was induced to buy through reliance upon the certificate made by the defendant bank, upon which that corporation was licensed to do business, and upon like representations made to him, when negotiating, by the defendant Sullivan, who was at least his nominal vendor. There was evidence tending to

show that the defendant Sullivan was one of the promoters and corporators of the company, and an active member of its directory; and that Sullivan, to induce Hindman to become interested in the company, made representations in respect to the capital stock of the company in substance identical with those found in the certificate made by the cashier of the defendant bank; and that Sullivan, together with Hart, the company's general manager, referred plaintiff to the bank for a verification of their statements in respect to the company's paid-in capital. In the former opinion of this court we had occasion to point out some of the principles upon which the bank might make itself liable to Mr. Hindman's action, and we will not at this point stop to consider how far the evidence produced tended to make a case against either the bank or Mr. Sullivan. If the bank and Sullivan knowingly made misleading and false statements in respect to the financial condition of the insurance company, upon which Mr. Hindman, under the circumstances, was entitled to rely, and if he was induced thereby to purchase shares, what is the measure of the liability of the defendants? The plaintiff, in reliance upon the representations made by the defendants, has done an act by which he says he has sustained the loss of his entire investment. But does it follow that, because there has been an ultimate loss of his entire investment, that he is entitled to recover that entire loss? He has paid out \$10,000. He has received eighty shares of the company's stock. The defendants are responsible only for the difference between the value of that which he received and the price he paid. Compensation is all that he is entitled to. If the stock was worthless when he bought it, the price he paid, with interest, is the measure of his recovery. If, on the other hand, the shares had some intrinsic value, that value should be deducted from the price. That the shares had then and afterwards a market value is of no importance. The plaintiff was under no obligation to sell, and might hold for an investment, if he saw fit. *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39; *Peek v. Derry*, L. R. 37 Ch. Div. 541; *Smith v. Duffy*, 57 N. J. L. 679, 32 Atl. 371. The rule seems to be that the damages recoverable in an action for deceit, where the plaintiff has been induced to purchase shares in reliance upon untrue representations, is the difference between the price paid and the real intrinsic value of such shares at the time of their purchase; and that such value is to be ascertained in the light of subsequent events in the history of the company, and not by the market price. Where the subject of the purchase is tangible property, the real actual value and the market value are for the most part one and the same. But market sales of corporation shares may not be any real indication of real intrinsic value. In *Peek v. Derry*, L. R. 37 Ch. Div. 541, Cotton, L. J., in commenting upon the injustice of measuring intrinsic value by market price of shares,

said: "I do not know whether there was any market in this case, but the market might have been affected by the representations which were made by the defendants which induced the plaintiff to act, and which might have induced others to act."

The ascertainment of the real and intrinsic value of shares in a corporation at a given date presents difficulties which do not occur with respect to more tangible kinds of property. Justice would seem to forbid that in such circumstances the plaintiff should be allowed to gain a benefit by subsequent independent acts tending to depreciate such shares, wholly disconnected with the vice in the company which existed when he acquired his shares. These difficulties were appreciated in *Peek v. Derry*, cited heretofore; for Lord Cotton, in speaking of subsequent events, said: "Nor do I think he ought to be precluded from taking into account the subsequent events. Although the value of the shares is not to be ascertained at the subsequent period, so as to take into account for the benefit of the plaintiff events subsequent which depreciated their value, yet those events, if they show that the company was originally, with the capital which it had got, a company which was worthless, may, in my opinion, be taken into account as evidence of what was the value of the shares immediately after they were allotted to the plaintiff. So that it may be that, useful as this discussion has been in order to elucidate what ought to be the proper time for ascertaining the value, it may ultimately produce no good result to the defendants. But I think it is in accordance with the cases, and in accordance with the principle, that the real value, and not the market value, is to be ascertained immediately after the day when the shares were allotted to the plaintiff." In the same case, Sir James Hannen, in dealing with this matter of damages in actions for deceit in sales of shares, said: "The question is, How much worse off is the plaintiff than if he had not bought the shares? If he had not bought the shares, he would have had his £4,000 in his pocket. To ascertain his loss, we must deduct from that amount the real value of the thing he got. That must be ascertained by the light of the events which have happened down to the time of the inquiry—not what the shares might have been sold for, because he was not bound to sell them, and subsequent events may show that what the shares might have been sold for was not their true value, but a mistaken estimate of their value." That the price should be reduced by the actual value of the property acquired seems to have the sanction of the Supreme Court, for in *Smith v. Bolles*, 132 U. S. 125, 130, 33 L. ed. 279, 282, 10 Sup. Ct. Rep. 39, 40, the court said:

"What the plaintiff paid for the stock was properly put in evidence, not as the basis of the application of the rules in relation to the difference between the contract price and the market or actual value, but as establishing the loss he had sustained in

that particular. If the stock had a value in fact, that would necessarily be applied in reduction of the damages."

The falsity of the certificate issued by the cashier of the defendant bank, upon the strength of which the plaintiff claims the insurance commissioner licensed the company, and upon which he claims to have acted in buying this stock, consists in its plain implication that the capital and surplus of the company had been fully paid in, and that this capital and surplus was on deposit, free from all claims and liabilities. The evidence tended to show that probably \$100,000 of the capital stock had never been paid in cash, and that the bank officials were quite aware that this was so to at least the extent of \$60,000, inasmuch as they knew that the deposit account of the company included proceeds of discounted subscribers' notes to that extent, upon which the company was then bound as indorser or otherwise. That the bank had on deposit \$248,182.90 was, doubtless, true, and that this was subject to the check of the company appears to have been also true. That the discounts were absolute, and not "pretended" or "fictitious," may, in a sense, have been also true. But the ground of action in this case consists in the fact that the capital stock of the company had not been paid up in cash, as required by law, and that it was not true that \$200,000 of the amount on deposit had "been paid in as the full amount of the capital stock of said Columbian Fire Insurance Company of America, and \$48,182.90 has been paid in as the net surplus of said company." If any substantial part of the sum so on deposit arose from the discount of the notes of real or pretended subscribers upon which the insurance company remained liable as indorser or otherwise, then it was not true that \$248,182.90 had been paid in as capital and surplus. Whether the discounts made by the bank of such paper were bona fide or "pretended," the result would be the same. The plain purpose of the Kentucky corporation law was to make it a condition upon which such companies might engage in business, that their authorized capital stock should be actually and fully paid in before a license should issue to do business. Shares sold on a credit were not shares paid in, and the discount of notes made by such credit purchasers, upon an indorsement or guaranty of the company itself, would be a fraudulent evasion of the law; and proceeds arising from such discounts would not be capital stock paid in, but borrowed money masquerading as capital. If, therefore, the jury should believe that the bank knew that a large proportion of the sum on deposit arose from proceeds of such notes, it would know that the deposit did not consist of either capital or surplus, and the certificate would be false and misleading, without regard to whether the discounts were "false," "pretended," "fictitious," or genuine and real.

That Mr. Hindman was partly induced to purchase this stock in order to secure an

agency is no defense, if his action was in fact influenced by his confidence in the truth of the financial condition of the company as shown by this bank statement. It was competent upon the question of the intrinsic value of the shares, to show what the true condition of the company was at that date. It was competent to show any and every fact touching the various contracts under which this deposit of \$248,182.90 had been secured. For this purpose it was competent to show the history of the New York certificate of deposit, and the agreement under which that certificate had been obtained, and how it was finally paid. It was also competent to show the inside history of the organization, including the history of each of the discounted notes, and the mode in which they were subsequently taken up or paid off. The true inquiry will be, What was the real, intrinsic value of the share bought by plaintiff? for his damages must be reduced by deducting that value. Whatever tended to show the want of intrinsic value of shares in a company in the circumstances of this company at the time of the purchase was competent evidence.

The other exceptions to the charge, so far as they bear upon the merits of the case, are insufficient in form to be the basis of an assignment of error. There are, however, a very large number of assignments of error based upon rulings made by the court below during the course of the trial, and a number of other assignments based upon the refusal of the court to give special instructions duly requested. It would be an unnecessary and unprofitable labor to deal with these assignments seriatim. Some of them are good, and some are bad. Neither must we be understood as indorsing the charge of the learned court. It seems to lay altogether too much stress upon the charge of conspiracy, and the averments that the deposit was not bona fide subject to the check of the insurance company. The petition of the plaintiff is unnecessarily rich in vigorous averments, many of which are not essential to the maintenance of an action for fraud and deceit. The gravamen of the plaintiff's case, against both the bank and Sullivan, lay in the alleged falsity of the representation that \$248,182.90 had been paid in on account of capital stock and surplus. Whether the bank had conspired with the insurance company, or with Sullivan, or with certain other promoters and managers of the insurance company, for the purpose of foisting on the public an unripe corporation whose capital stock had not been paid in as required by law, constituted one phase of the plaintiff's case. But the plaintiff's case did not altogether depend upon proof of a conspiracy, or upon evidence that the public at large were invited to become purchasers of shares in reliance upon the representations made by either Sullivan or the bank, or both. Facts enough were stated in the plaintiff's voluminous and redundant petition to justify a recovery if the jury should believe that the bank, for its own business purposes, knowingly misrepresent-

ed the financial condition of the insurance company, in respect to the nature of its account as a depositor, with the intent that the plaintiff should be induced to buy shares. This aspect of the case was not properly put to the jury, and, inasmuch as the case must go back for a new trial, we shall briefly indicate the general principles upon which such new trial should proceed, without applying our views to particular specifications of error.

1. The implied authority of the cashier to bind the bank by misrepresentations in the statement or certificate which is the foundation of the plaintiff's action against the bank was more than doubted by the court below, and to this question we shall first address ourselves. That the giving of such a certificate at the instance of a customer would not be *ultra vires* the corporate power of the bank, even if it should include a statement of the purpose for which the deposit had been paid in, was decided in our opinion upon the former writ of error. That question need not be reconsidered or the argument repeated. 48 L. R. A. 210, 39 C. C. A. 1, 98 Fed. 562. We did not there consider the authority of the cashier to bind the bank by false statements in such a certificate. If given by him without the direction of the directors, because the questions then decided arose upon a demurrer to a petition which averred that the cashier acted by order of the board of directors. But how can it be said that, without the authority of the board of directors, the cashier's action in giving such a certificate would not be the act of the bank? This is not an action to enforce a contract made by the cashier. Different rules prevail when a suit is upon contract than those applicable in an action for a tort. If the cashier's act is the act of the bank, the liability of the latter for the tort may be plain, although it might not be liable for a promise by the cashier made under the same circumstances. *Morse, Banks & Bkg.* § 171; *Thomp. Corp.* §§ 4779, 6283. The cashier is the proper officer to receive deposits and to give certificates or vouchers in respect thereto. *Morse, Banks & Bkg.* § 161. If he knew, or assumed to know, the source from which the deposit arose, we see no reason why he might not include such a fact in his certificate, if the customer consented or the business of the bank would be thereby subserved. We quite agree with Judge Barr, who heard this case below on a demurrer, who, on this subject, said: "As the First National Bank had the right to accept the deposits of the insurance company, it would seem to follow, as an incident to receiving deposits, that the cashier might state, orally or in writing, to those authorized to inquire, the amount of the deposits and the nature of the deposits, whether on account of capital stock or surplus, or whether a general deposit. That far he was acting under the corporate powers and in the usual course of his business. He had also the corporate power, in the course of his business, to state more than what the books of the bank showed, if he

personally knew the fact, or assumed to know the fact, in the performance of his official duties, as to the amount of the deposit or the character of the deposit. In the absence of any evidence, and assuming that the allegations of the bill are true, it may be presumed that thus far the fact stated by the cashier of the First National Bank in regard to the character of the deposit, whether it was capital stock or capital stock and surplus, was such as the books of the bank showed, or such as the cashier of the bank and the custodian of the deposits had a right to know and might communicate. So that, if he knew the deposit was made up by discounts credited with the intention of swelling the deposit, with a view to deceiving the insurance commissioner into believing that the capital stock was paid up, it would be within the bank's corporate powers. The liability in such a case would be because the false representations were made about a thing which was the bank's business in connection with its corporate powers, and in the usual course of the business of the cashier of the bank." 86 Fed. 1013, 1016.

The division into capital stock and surplus was equally within his competency to state to one entitled to inquire, though of no particular significance to the state insurance commissioner, whose duty was limited to inquiring and certifying that the company's capital "had been paid in and is possessed by it in money." Act 1870 (Gen. Stat. 1888, p. 66, § 7). The material thing to the commissioner was that this certificate, if true, established the conditions which entitled the company to begin business. The mere fact the company had to its credit an amount of money equal to its authorized capital would be an immaterial fact, unless it should also appear that that deposit constituted capital stock paid in and "possessed by it in money." This was, therefore, the material thing to which the cashier certified, and if this fact appeared from the books or deposit slips of the bank, or was otherwise known or supposed to be known to the cashier, he, as the custodian of the deposit and chief executive of the bank, was acting within the apparent scope of his duty and authority when he gave this statement. That it was sworn to does not affect its character as an act of the bank. It was the certificate of the bank's cashier, and so officially signed. It was sworn to by the gentleman who filled that office. The jurat was necessary for the purpose of the state insurance commissioner, and added weight to the representation, to whomsoever it may have been addressed. If the act itself was not so far beyond the general scope of the powers of a banking corporation as to carry notice to all of its *ultra vires* character, and the certificate was given, not for the personal purposes of the cashier, but in the general course of the bank's business, the bank would be liable in an action of tort as fully as if made by direction of the board of directors.

It is no answer to say that the bank did

not authorize a false statement. That may be true. But, as observed by Mr. Justice Willes, in *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259, it has "put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in." In *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 544, 43 L. ed. 543, 548, 19 Sup. Ct. Rep. 296, 300, the Supreme Court said: "The result of the authorities is, as we think, that, in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation and by the corporate agents who were competent to employ the corporate powers actually exercised. There need be no written authority under seal, nor vote of the corporation constituting the agency or authorizing the act. But in the absence of evidence of this nature there must be evidence of some facts from which the authority of the agent to act upon or in relation to the subject-matter involved may be fairly and legitimately inferred by the court or jury. *Salt Lake City v. Hollister*, 118 U. S. 256, 260, 30 L. ed. 176, 177, 6 Sup. Ct. Rep. 1055; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 609, 30 L. ed. 1146, 1148, 7 Sup. Ct. Rep. 1286; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 109, 37 L. ed. 97, 102, 13 Sup. Ct. Rep. 261, 263, and cases cited at page 110, 147 U. S. 37 L. ed. 102, and page 264, 13 Sup. Ct. Rep."

The cases of *Manufacturers' Bank v. Scofield*, 39 Vt. 590, and *Ellerbe v. National Exch. Bank*, 109 Mo. 445, 472, 19 S. W. 241, are instances of corporate liability for misrepresentations made by an officer of the corporation. *Mapes v. Second Nat. Bank*, 80 Pa. 163, is not a case which meets our approval. In *First Nat. Bank v. Marshall & I. Bank*, 28 C. C. A. 42, 54 U. S. App. 510, 83 Fed. 725, we held that when a cashier, as a mere act of courtesy, answered an inquiry as to the financial standing of a customer, the bank would not be liable if the answer should prove false. But the reason of the decision, as stated in the opinion of Judge Clark, was that the cashier was not at the time acting in respect to some interest or business of the bank; his response being a mere voluntary statement "having no relation to any business transaction with the bank."

2. To what extent did the plaintiff have a right to rely upon the truth of the representations contained in the cashier's certificate? Some direct connection between the bank and the plaintiff in error in the communication of this certificate is essential to a recovery. If the statement was addressed to, and intended only to influence the action of, the state insurance commissioner in respect to the licensing of the in-

surance company, he cannot sustain a recovery, even though he and others may have been led into the purchase of the shares of the insurance company as a consequence of the action of the insurance commissioner in admitting the company to do business upon the representation of the bank's certificate. The plaintiff's action, in the aspect of it now under consideration, is for fraud and deceit, and such an action must be bottomed upon false representations made to him, and with intent that he should be influenced thereby. The plaintiff does not sufficiently connect himself with the misrepresentations by the bare fact that he bought stock in a company which was improperly admitted to do business upon representations addressed to the state commissioner. The injury in such case is too remote. In *Bedford v. Bagshaw*, 4 Hurlst. & N. 538, an action was sustained against certain promoters and managers of a company who had made false statements in respect to the capital of the company in order to secure its insertion in the official lists of the stock exchange. The plaintiff, knowing that the rules of the stock exchange admitted no stocks to its lists until two thirds of the shares had been paid up, bought on the exchange in reliance that the shares so bought had been paid up accordingly. This proving not to be the case, the plaintiff was suffered to recover, although the false representation had been made to the committee of the stock exchange, and not to the plaintiff directly. The decision was subsequently overruled in *Peek v. Gurney*, L. R. 6 H. L. 377, 397. Lord Chelmsford, in commenting on the decision, said: "The actions were brought upon the allegation of a false representation made to the plaintiff. But no representation at all was made which reached either his eyes or his ears. From his knowing the rules of the stock exchange, he assumed that a certain representation had been made, and acted upon it." In *Peek v. Gurney* a descriptive prospectus was put forth by the directors of a company, in reliance upon which the plaintiff bought shares on open market. It was held that the prospectus in its terms was not an invitation to the public ultimately to become holders of shares, but to join the company at once by becoming original allottees of shares, and that only those drawn in by the misrepresentations of the prospectus to become allottees could have a remedy in action for the deceit. In line with *Peek v. Gurney* is the case of *Hunnewell v. Dunbury*, 154 Mass. 236, 13 L. R. A. 733, 28 N. E. 267. The law of Massachusetts required the officers of a foreign corporation desiring to do business in the state to file with the commissioner of corporations a certificate showing its financial condition. The plaintiff gave credit upon the faith of the statements in such a certificate, which had been called to his attention by his own attorney. The Massachusetts court held that the action would not lie, saying: "To sustain such an action, misrepresentations must either have

been made to the plaintiff individually, or as one of the public, or as one of a class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains. This certificate was not communicated by the defendants or by the corporation to the public or to the plaintiff. It was filed with a state official for the definite purpose of complying with a requirement imposed as a condition precedent to the right of the corporation to act in Massachusetts. Its design was, not to procure credit among merchants, but to secure the right to transact business in the state. The terms of the statute carry no implication of such a liability."

That this certificate constituted a part of the files in the office of the state insurance commissioner, and that it was his duty, on demand, to furnish copies to any of the public, or that he might himself, as a state official, include such certificate in his own official publications, is not enough to show that the bank had any other design in giving it than to influence the action of the commissioner. The circumstance that it might thus come to the eye of persons disposed to deal in the company's shares, and thus induce them to buy, is only evidence to be looked at with other circumstances tending to show that the bank designed to influence the public at large or the plaintiff in particular to buy the company's shares. The Kentucky statute carries no implication of civil liability for a false statement, although it does make the giving of a false statement to the commissioner a criminal offense. The right of one of the public who has sustained a loss by the wrongful setting on foot of an insurance company whose capital has not been paid in, and of one who has bought shares or given credit to such a company in reliance upon the truth of representations made to the commissioner only for the purpose of inducing his action, must depend upon the general principles of law in respect of actions for false representations. It has never been a ground of action that the defendant made a dishonest representation, and that the plaintiff had relied upon it and sustained injury. The moral obligation to speak the truth is not ground for a civil action, unless the misrepresentation was intended to induce the very action by the plaintiff which has resulted in his damage. *Cooley, Torts*, p. 493; *Wells v. Cook*, 18 Ohio St. 67, 88 Am. Dec. 436; *Barry v. Croskey*, 2 Johns. & H. 1. However lamentable the eventual results of a dishonest representation to persons who in reliance thereon have come to grief, they cannot recoup such losses unless they are able in one way or another to bring themselves within the class of persons for whom the representation was intended.

But it was never meant to decide in *Peek v. Gurney* that a company's prospectus might not be broad enough to stand, not only as an invitation to original allottees, but to all others who might be disposed to deal in the company's shares. And so the 57 L. R. A.

case was explained in *Andreus v. Mockford* [1896] 1 Q. B. 372, where it was held that if the object of a prospectus is not only to induce applications for original allotments of shares, but also to induce persons to whom it was sent to purchase shares in the market, its function would not be exhausted when all the shares should be subscribed, and that the persons issuing the prospectus would be responsible for the injury sustained in reliance upon the truth of statements therein, known to be false, by any person to whom the paper was sent who should, in consequence, buy on the market. *Scott v. Dixon*, 29 L. J. Exch. N. S. 62, note, was approved in *Peek v. Gurney*. The case seems only to be reported in a note to *Bedford v. Bagshaw*, 4 Hurlst. & N. 538. As stated in the opinion of Lord Chelmsford, the action was for a misrepresentation made in a report by the directors to the shareholders of a banking company. Plaintiff was not a shareholder, and, in the absence of other circumstance, could not be regarded as addressed. But it was shown that copies of the report were left at the bank, and were to be had by brokers and all persons applying for them who desired information with a view to the purchase of shares, and that the plaintiffs, through their broker, purchased at the bank a copy of the report, and in reliance bought shares and sustained a loss; a material statement being false. There was a judgment for the plaintiffs. Lord Chelmsford said: "I do not doubt the propriety of this decision. The report, though originally made to the shareholders, was intended for the information of all persons who were disposed to deal in shares; and the representation must be regarded as having been made, not indirectly, but directly to each person who obtained the report from the bank, where it was publicly announced it was to be bought, in the same manner as if it had been personally delivered to him by the director."

The true inquiry is, Who did the bank design to influence by its false representation? If the representation here involved was not only made to induce favorable action by the state insurance commissioner, but was also intended for the information of all who should be disposed to deal in the company's shares, and who should inspect it for information in respect of the company's capital, it should be regarded as addressed to every such person. So, if the jury should find that the plaintiff was known to the bank as a person disposed to buy such shares, and was referred to this statement for information concerning its capital, they would be justified in finding that the representation was addressed to him personally. Such reference of the plaintiff to the certificate would be a repetition of the misrepresentation, addressed directly to him, and render it liable, irrespective of the original design and purpose with which the certificate was given.

3. Was the misrepresentation knowingly false? One who has been induced by false representations to buy property has open to

him no less than three remedies. He may rescind and sue at law for the consideration, he may bring an equitable suit for rescission and obtain full relief, or he may retain what he has received and bring his action for fraud and deceit. The first two kinds of relief lie, as is most evident, only against the vendor. The third will lie against either the vendor or any third person through whose false representations, directly made, the plaintiff has sustained damages. *Cook, Corp.* § 354, and cases cited. Before the plaintiff can recover in an action of deceit, he must prove two things: that the representation was false, and that the person making it knew it was false. *Glasier v. Rolls*, L. R. 42 Ch. Div. 436; *Derry v. Peek*, L. R. 14 App. Cas. 337; *Kountze v. Kennedy*, 147 N. Y. 124, 29 L. R. A. 360, 41 N. E. 414; *Cook, Corp.* § 355; *Trimble v. Reid*, 97 Ky. 713, 31 S. W. 861. Such an action differs essentially from one brought for rescission of a contract on the ground of misrepresentation. In the latter kind of suit it is immaterial whether the representation was made dishonestly or not. If the contract was obtained by misrepresentation, however honestly made, it cannot stand. But, when the action is for fraud and deceit, it is not enough to show that the representation was untrue; for, if it was honestly believed to be true, that is a good defense. *Derry v. Peek*, cited above. But a representation recklessly made, without knowledge of its truth, could not be a statement honestly believed. *Cooper v. Schlesinger*, 111 U. S. 148, 28 L. ed. 382, 4 Sup. Ct. Rep. 360. "Fraud must concur with the false statement in order to give a ground of action." *Evans v. Collins*, 5 Q. B. 804, 820; *Pasley v. Freeman*, 3 T. R. 51, 2 Smith, Lead. Cas. 74. Lord Herschell, in *Derry v. Peek*, thus summed up the authorities: "First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second; for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground; for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

A representation in respect to a matter, with the intent to influence the conduct of another, implies necessarily the belief of the party making it that the statement is true. If the fact be one within his means

of knowledge, and he have no knowledge of the fact, a jury would be authorized to believe that the statement was knowingly false. *Kountze v. Kennedy*, 147 N. Y. 124, 29 L. R. A. 360, 41 N. E. 414; *Prewitt v. Trimble*, 92 Ky. 176, 17 S. W. 356; *Cole v. Cassidy*, 138 Mass. 437, 52 Am. Rep. 284.

In respect to evidence tending to establish that the false representation was made knowingly, Lord Herschell, in *Derry v. Peek*, L. R. 14 App. Cas. 337, 375, expressed a view which meets with our hearty approval when he said: "At the same time I desire to say distinctly that, when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie v. Campbell*, L. R. 5 App. Cas. 925, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false."

In such an action it is not essential to show that any benefit was derived from the deceit. *Endsley v. Johns*, 120 Ill. 479, 60 Am. Rep. 572, 12 N. E. 247; *Pasley v. Freeman*, 2 Smith, Lead. Cas. p. 66, 3 T. R. 51; *New York Land Improv. Co. v. Chapman*, 118 N. Y. 288, 23 N. E. 187. It need not be the sole inducement moving the plaintiff. *Cook, Corp.* § 355; *Morgan v. Skiddy*, 62 N. Y. 319. The plaintiff's action must, however, have been affected materially by the deceit. *New York Land Improv. Co. v. Chapman*, 118 N. Y. 288, 23 N. E. 187.

4. In respect of the defendant Sullivan, the vendor from whom plaintiff in error bought the shares in question, it is needless to say that, if he made false representations knowingly in respect of the capital of the insurance company to the plaintiff for the purpose of inducing him to buy shares in the company, he would be liable for the damages sustained, if the plaintiff acted in reliance on the truth of the statement. And this would be so whether the plaintiff bought shares from him or from another. *Cook, Corp.* § 355; *Sigafus v. Porter*, 28 C. C. A. 443, 51 U. S. App. 693, 84 Fed. 430; *Hubbell v. Meys*, 50 N. Y. 480.

5. Upon each of the questions we have considered there was some evidence upon which the plaintiff was entitled to go to the jury.

The judgment below must be reversed.

It is accordingly ordered that the cause be remanded for a new trial upon principles not inconsistent with this opinion.

Petition for writ of certiorari denied by Supreme Court of United States April 28, 1902.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Kate TOOTLE *et al.*, *Plffs. in Err.*,
v.

R. R. COLEMAN *et al.*

(46 C. C. A. 132, 107 Fed. 41.)

1. The right to garnish a debtor is not limited to the situs of the chose in action; and a garnishment by a citizen of one state of a debtor of the same state, whose creditor resides, whose debt was contracted and is payable, in another state, is such an attachment of the chose in action as will authorize the court to obtain jurisdiction to dispose of it by publication of the summons against the defendant.
2. One who removes a case from a state to the Federal court is estopped from attacking the jurisdiction of the latter upon any ground except that the court from which it was removed had no jurisdiction.
3. One who instigates another to do a wrongful action, and, when the wrongdoer is sued, takes upon himself and conducts the defense of the case, is estopped from again litigating with the plaintiff in that action the issues there decided.
4. A defect of parties plaintiffs or defendants through misjoinder or nonjoinder is waived by a failure to suggest the same by demurrer or answer.
5. A creditor who indemnifies an officer against damages for seizing and converting property, and defends an action against the officer individually for the conversion, is estopped by the judgment against him from again litigating with the plaintiffs in that action the issues there decided.

(March 11, 1901.)

ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment in favor of plaintiffs in an action brought to hold defendants liable on a judgment which had been obtained against a marshal for wrongful attachment of property at the instance of defendants. *Modified.*

*Headnotes by SANBORN, Circuit Judge.

Statement by Sanborn, Circuit Judge:

Kate Tootle, W. W. Wheeler, Joshua Motter, and F. S. Dameron, the plaintiffs in error, are the surviving members of the co-partnership styled Tootle, Hosea, & Co., which in 1890 was composed of these plaintiffs in error and W. E. Hosea. Hosea died in 1893, and the plaintiffs in error continued the mercantile business of Tootle, Hosea, & Co., assumed their liabilities, and received their assets, as partners under the name of Tootle, Wheeler, & Motter. On January 10, 1890, Tootle Hosea, & Co. commenced an action against Thomas Lynch, and caused a writ of attachment to be issued against him and delivered to the United States marshal for the district of Kansas. R. L. Walker was at that time the marshal, and they gave him a bond of indemnity in the sum of \$4,102, conditioned, among other things, that they would pay all damages to him which should result from his seizure under this writ of attachment of "certain merchandise situated in the storeroom now occupied by Coleman & Lynch, on Douglas avenue, Wichita, Kansas." The Coleman & Lynch referred to in this bond were R. R. Coleman and C. T. Lynch, the defendants in error in this action. Walker seized their goods under this writ of attachment, and disposed of them. Coleman & Lynch brought an action at law against him in one of the state courts of Kansas for his seizure and conversion of their goods. He delivered the summons served upon him to the attorneys for Tootle, Hosea, & Co., and they answered for him that the property which he seized was the property of Thomas Lynch, the defendant in the attachment suit, and that he had lawfully taken it under the writ in that action. This action resulted on December 4, 1895, in a judgment against Walker for \$4,873.20 damages and \$214.42 costs. H. C. Solomon, John W. Adams, and George W. Adams were the attorneys for Tootle, Hosea, & Co., who brought the attachment suit, and they continued to act for that firm until the plaintiffs in error succeeded them, and have since acted for the plaintiffs in

NOTE.—As to situs of debt for purpose of garnishment, see earlier cases in this series as follows: *Missouri P. R. Co. v. Sharitt* (Kan.) 8 L. R. A. 385; *Illinois C. R. Co. v. Smith* (Miss.) 19 L. R. A. 577, and *note*; *Singer Mfg. Co. v. Fleming* (Neb.) 23 L. R. A. 210; *Root & McB. Bros. v. Davis* (Ohio) 23 L. R. A. 445; *Reimers v. Seasco Mfg. Co.* (C. C. App. 6th C.) 30 L. R. A. 364; *Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co.* (Mo.) 27 L. R. A. 651; *Neufelder v. German American Ins. Co.* (Wash.) 22 L. R. A. 287; *Bragg v. Gaynor* (Wis.) 21 L. R. A. 161; *Douglass v. Phenix Ins. Co.* (N. Y.) 20 L. R. A. 118; *Ward v.* 57 L. R. A.

Boyce (N. Y.) 36 L. R. A. 549; *Lancashire Ins. Co. v. Corbetta* (Ill.) 36 L. R. A. 640; *Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co.* (Va.) 40 L. R. A. 237; *Louisville & N. R. Co. v. Nash* (Ala.) 41 L. R. A. 331; *Swedish American Nat. Bank v. Blecker* (Minn.) 42 L. R. A. 283; *Stewart v. Northern Assurance Co.* (W. Va.) 44 L. R. A. 101; *National Bank v. Furtick* (Del.) 44 L. R. A. 115; *Balk v. Harris* (N. C.) 45 L. R. A. 257; *Portsmouth Gas Co. v. Sanford* (Va.) 45 L. R. A. 246; *Strause Bros. v. Aetna Ins. Co.* (N. C.) 49 L. R. A. 452; and *Bullard v. Chaffee* (Neb.) 51 L. R. A. 715.

error in all the litigation which has grown out of that attachment. They were hired and paid by Tootle, Hosea, & Co. and their successors to defend Walker in the action just mentioned, and Walker neither paid nor agreed to pay anything for their services. On October 28, 1897, the defendants in error, Coleman & Lynch, commenced the action now before us. They were residents and citizens of the state of Kansas, and the plaintiffs in error were residents and citizens of St. Joseph, in the state of Missouri. For the sake of brevity the plaintiffs in error will be called the "defendants," and the defendants in error the "plaintiffs," in speaking of this action. The defendants were conducting a mercantile business in St. Joseph under the name of Tootle, Wheeler, & Motter, and various parties resident in Kansas were indebted to them in various sums, payable at St. Joseph, for goods purchased of them in that city. Coleman & Lynch sued the defendants in a state court in the state of Kansas, and garnished their debtors residing in that state. These debtors answered in the garnishee proceedings that they were indebted to the defendants in amounts which in the aggregate exceeded the claim of Coleman & Lynch. No service of summons was made upon the defendants otherwise than by publication under the statutes of Kansas. On December 11, 1897, the defendants removed this action to the United States circuit court for the district of Kansas. They then appeared specially in that court, and moved to dismiss the action and to discharge the garnishees because the state court of Kansas had not acquired and could not acquire any jurisdiction over them by the garnishment of their debtors and the publication of the summons, and because the United States circuit court had acquired no jurisdiction. This motion was denied, and the defendants excepted.

For a cause of action the plaintiffs alleged in their original petition that the defendants had directed and caused R. L. Walker, the United States marshal, to seize and convert their property. They also averred that they had brought the action and recovered against Walker the judgment for this conversion which has been recited, and that the defendants had employed and paid the attorneys and conducted the defense of that action for Walker, and were the real parties in interest therein. On motion of the plaintiffs these averments regarding the trial of the action and the judgment against Walker were stricken from the petition, and thereupon the plaintiffs filed an amended petition in which they alleged that the defendants instigated and caused the conversion of their property, and sought to recover the value thereof. The defendants answered with a denial of every allegation of the amended petition, and an averment that the property in controversy belonged to Thomas Lynch, the defendant in the attachment suit, and that it was lawfully levied upon by Walker under the writ in that action. The plaintiffs replied that

the issues tendered by the plea of justification had been tried in the action between them and Walker; that, while Walker was the nominal defendant, the defendants were the real defendants in that action; that they had given the bond of indemnity which induced Walker to make the levy; that they had employed and paid the lawyers who defended him in the action against him for conversion; that they were the real defendants in that suit; that judgment had been rendered against Walker therein; and that all the issues tendered by the plea of justification became *res judicata* between the plaintiffs and defendants by virtue of that judgment. The defendants moved to strike from the reply all allegations referring to the trial and judgment in the action against Walker. They demurred to the reply. They moved to dismiss the action. They objected to any evidence under the pleadings, to the introduction in evidence of the pleadings and judgment in Coleman & Lynch against Walker, and insisted in every way possible that the trial and judgment in that case were immaterial to any issue in this action. The court below denied their motions, overruled their demurrer, received the pleadings and judgment in the Walker case in evidence, and refused to permit the defendants to contradict the findings in that case relative to the ownership of the goods seized by Walker and their value. The plaintiffs introduced evidence, which was not contradicted, tending to show that Tootle, Hosea, & Co. gave the bond of indemnity to Walker before he seized the goods of the plaintiffs; that he was a mere nominal party to the action of Coleman & Lynch against him; that the defendants were the real parties in interest in that action; that they hired and paid the attorneys who acted for Walker, and really inspired and conducted the defense. At the close of the evidence the court below instructed the jury to return a verdict for the plaintiffs for the amount of the judgment against Walker, and interest at 6 per cent from the date of its entry. The defendants challenge this judgment by their writ of error.

Argued before Caldwell, Sanborn, and Thayer, Circuit Judges.

Messrs. John W. Adams, George W. Adams, and H. C. Solomon, for plaintiffs in error:

This case could not have been commenced in the United States circuit court in the second district of Kansas.

McCormick Harvesting Mach. Co. v. Walthers, 134 U. S. 41, 33 L. ed. 833, 10 Sup. Ct. Rep. 485; Acts of Congress 1888; U. S. Rev. Stat. 1891, pp. 611, 612.

The special appearance of the plaintiffs in error to remove this case to the Federal court does not preclude them from objecting to the jurisdiction of the court.

Perkins v. Hendryx, 40 Fed. 657; *Atchison v. Morris*, 11 Biss. 191, 11 Fed. 582; *Clews v. Woodstock Iron Co.* 44 Fed. 31.

The supreme court of the state of Kansas has never construed the statute provid-

ing for service by publication as applied to an action in garnishment, where the defendants were nonresidents of the state and no personal service was made upon them. The situs of a debt is at the place where it is payable, and if a debt is payable in another state wherein the creditor resides, and no personal service has been made in the state of Kansas upon the defendant, garnishment cannot be had.

Missouri P. R. Co. v. Sharitt, 43 Kan. 375, 8 L. R. A. 385, 23 Pac. 430; *Wright v. Chicago, B. & Q. R. Co.* 19 Neb. 175, 56 Am. Rep. 747, 27 N. W. 90; *Hamilton v. Rogers*, 67 Mich. 135, 34 N. W. 278; *Laurence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Jones v. Winchester*, 6 N. H. 497; *Nye v. Liscombe*, 21 Pick. 263; *Tingley v. Buteman*, 10 Mass. 343; *Mathews v. Smith*, 13 Neb. 190, 12 N. W. 821; *Danforth v. Penny*, 3 Met. 564; *Gold v. Housatonic R. Co.* 1 Gray, 424; *Louisville & N. R. Co. v. Dooley*, 78 Ala. 524; *Lovejoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630; *Miller v. Hooe*, 2 Cranch, C. C. 622, Fed. Cas. No. 9,573; *Drake v. Lake Shore & M. S. R. Co.* 69 Mich. 168, 37 N. W. 70; *Baylies v. Houghton*, 15 Vt. 626; *Tonole v. Wilder*, 57 Vt. 622; *Pieros v. Chicago & N. W. R. Co.* 36 Wis. 283; *Sawyer v. Thompson*, 24 N. H. 510; *Western R. Co. v. Thornton*, 60 Ga. 300; *Green v. Farmers' & C. Bank*, 25 Conn. 452; *Cronin v. Foster*, 13 R. I. 196; *Bates v. New Orleans, J. & G. N. R. Co.* 4 Abb. Pr. 72; *Willet v. Equitable Ins. Co.* 10 Abb. Pr. 193; *Noble v. Thompson Oil Co.* 79 Pa. 354, 21 Am. Rep. 66; *Myer v. Liverpool, L. & G. Ins. Co.* 40 Md. 595; *Williams v. Ingersoll*, 89 N. Y. 508; *Green's Bank v. Wickham*, 23 Mo. App. 663; *Pickler v. Jessup*, 24 Mo. App. 91; *Keating v. American Refrigerator Co.* 32 Mo. App. 293; *Todd v. Missouri P. R. Co.* 33 Mo. App. 110; *Wheat v. Platte City & Ft. D. R. Co.* 4 Kan. 370.

A Federal court does not acquire jurisdiction of a suit removed from a state court by virtue of an attachment made in the state court, where there was no personal service of process on defendant, a resident of another state.

Perkins v. Hendryx, 40 Fed. 657.

The right of the defendant to insist upon the objection to the illegality of service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or, what we consider as intended, that the service be set aside, nor, when that motion was overruled, by their answering for him to the merits of the action.

Mexican C. R. Co. v. Pinkney, 149 U. S. 207, 37 L. ed. 704, 13 Sup. Ct. Rep. 859; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; *Re Atlantic City R. Co.* 164 U. S. 635, 41 L. ed. 580, 17 Sup. Ct. Rep. 208; *Donahue v. Calumet Fire-Clay Co.* 94 Fed. 27.

The action brought against Walker was brought against him individually as a trespasser, and a judgment rendered against him in the same capacity. This judgment had no extraterritorial force, and at this 57 L. R. A.

time the plaintiffs in error were inhabitants and residents of Missouri, and neither one of them had ever seen said Walker or been in the state of Kansas. And though nonresidents, in the manner in which the suit was brought the petition failed to disclose that it involved questions arising under the laws of the United States. Hence plaintiffs in error would be precluded from removing said case to the Federal court, though this could have been done by Walker, had he been sued as marshal.

Walker v. Collins, 167 U. S. 57, 42 L. ed. 70, 17 Sup. Ct. Rep. 738.

Nor could the plaintiffs in error in any manner litigate such question in the Federal court,—not even by substitution.

Burnham v. First Nat. Bank, 3 C. C. A. 486, 10 U. S. App. 485, 53 Fed. 163; *Grand Trunk R. Co. v. Twitchell*, 8 C. C. A. 237, 21 U. S. App. 45, 59 Fed. 730.

This judgment was not binding upon plaintiffs in error.

Atchison, T. & S. F. R. Co. v. Jefferson County, 12 Kan. 127; 12 Am. & Eng. Enc. Law, p. 90; *Stoops v. Woods*, 45 Cal. 439; *Brooking v. Dearmond*, 27 Ga. 58; *Marshall v. Rough*, 2 Bibb, 628; *Crenshaw v. Creek*, 52 Mo. 101; *Lord v. Wilcox*, 99 Ind. 491; *Mooney v. Maas*, 22 Iowa, 380, 92 Am. Dec. 395; *Oronan v. Frizell*, 42 Ill. 319; *Rathbone v. Hooney*, 58 N. Y. 463; *Bigelow, Estoppel*, p. 123.

An estoppel originating in defense of a suit to which the party against whom the estoppel was pleaded was not a party of record must be mutual.

Andreus v. National Foundry & Pipe Works, 19 C. C. A. 548, 34 U. S. App. 632, 73 Fed. 516; *Lane v. Welds*, 39 C. C. A. 528, 99 Fed. 286; *Herman, Estoppel*, p. 157; 2 Van Fleet, Former Adjudications, § 523; *Black, Judgm.* 540; *Freeman, Judgm.* § 189; *Cramer v. Singer Mfg. Co.* 35 C. C. A. 508, 93 Fed. 636; *Schroeder v. Lahrman*, 26 Minn. 87, 1 N. W. 801.

Where an election has been made to pursue the several remedy, such remedy must be pursued throughout, and the others cannot be sued jointly.

Sessions v. Johnson, 95 U. S. 347, 24 L. ed. 596; *Drake v. Mitchell*, 3 East, 258; *Floyd v. Browne*, 1 Rawle, 121, 18 Am. Dec. 602; *Davis v. Caswell*, 50 Me. 284.

Messrs. J. D. Houston and J. V. Daugherty, for defendants in error:

Jurisdiction in garnishment of a debt due to a nonresident creditor may be acquired without service on him except by publication, etc.

Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co.* 127 Mo. 242, 27 L. R. A. 651, 29 N. W. 1010; *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32; *Burlington & M. River R. Co. v. Thompson*, 31 Kan. 180, 47 Am. Rep. 497, 1 Pac. 622; *Bragg v. Gaynor*, 85 Wis. 468, 21 L. R. A. 161, 55 N. W. 919; *Plimpton v. Bigelow*, 93 N. Y. 592; *Neufelder v. German American Ins. Co.* 6 Wash. 336, 22

L. R. A. 287, 33 Pac. 870; *Harvey v. Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84, 52 N. W. 905.

Service may be made in a garnishment action by publication.

Searing v. Benton, 41 Kan. 758, 21 Pac. 300.

A defendant cannot remove a case to the Federal court, where from the nature of the proceeding the state court has jurisdiction, but the Federal court has not, and then ask the court to dismiss it for want of jurisdiction of the court to which he has removed it.

Cowley v. Northern P. R. Co. 159 U. S. 569, 40 L. ed. 263, 16 Sup. Ct. Rep. 127; *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. ed. 736; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444; *Wabash R. Co. v. Brow*, 13 C. C. A. 222, 31 U. S. App. 192, 65 Fed. 941; *Toland v. Sprague*, 12 Pet. 300, 9 L. ed. 1093; *Ft. Wayne Electric Corp. v. Franklin Electric Light Co.* 91 Fed. 292; *Baltimore & O. R. Co. v. Joy*, 173 U. S. 226, 43 L. ed. 677, 19 Sup. Ct. Rep. 387; *Golday v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Purdy v. Wallace Muller & Co.* 81 Fed. 513; *Long v. Long*, 78 Fed. 369; *Hinds v. Keith*, 6 C. C. A. 231, 13 U. S. App. 314, 57 Fed. 10.

Where a party procures an attachment of one's goods, and gives an indemnity bond to the officer to induce such attachment, and participates in defense of the officer in an action brought against him for wrongful attachment and conversion of the goods, then any judgment procured against the officer in such suit is binding on the party procuring said attachment, furnishing said indemnity bond, and participating in the defense of said officer.

Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129; *Knight v. Nelson*, 117 Mass. 459; *Wells, Res Adjudicata*, §§ 85, 73; 1 *Herman, Estoppel*, §§ 156, 158, 190; *Freeman, Judgm.* § 187; *Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co.* 37 C. C. A. 146, 95 Fed. 457; *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564; *Carey v. Roosevelt*, 83 Fed. 242; *Theller v. Hershey*, 89 Fed. 575; *Shugart v. Miles*, 125 Ind. 445, 25 N. E. 551; *Hart v. Moulton*, 104 Wis. 349, 80 N. W. 599; *Landis v. Hamilton*, 77 Mo. 554; *Stoddard v. Thompson*, 31 Iowa, 80; *Clafin v. Fletcher*, 10 Biss. 281, 7 Fed. 851; *Miller v. Liggett & M. Tobacco Co.* 2 McCrary, 375, 7 Fed. 91; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427; 1 *Shinn, Attachm.* §§ 361, 362, 387; *Lammon v. Feuser*, 111 U. S. 17, 28 L. ed. 337, 4 Sup. Ct. Rep. 286.

Sanborn, Circuit Judge, delivered the opinion of the court:

The first objection urged against the judgment in question is that the court below was without jurisdiction because the state court of Kansas, in which the action was commenced, could not obtain jurisdiction over the defendants, who were residents and citizens of Missouri, or over the choses in 57 L. R. A.

action owned by them, by means of garnishment of their debtors, who resided in Kansas, and by service of the summons upon the defendants by publication at the suit of the plaintiffs, who were also residents and citizens of Kansas. The statutes of that state in terms authorize such garnishments, and the application of the amounts due to the defendants from the garnishees to the satisfaction of the plaintiffs' demand, upon publication of the summons against the defendants. Kan. Gen. Stat. 1897, chap. 95, §§ 48, 72, 227, 228. The ground of the objection is that the situs of the choses in action attached by the garnishment was in St. Joseph, Missouri, where the debts were contracted and were payable, and where the creditors resided; and the argument is that these choses in action could not be attached where they were not located. This theory has received the sanction of the supreme court of Kansas in *Missouri P. R. Co. v. Sharitt*, 43 Kan. 375, 8 L. R. A. 385, 23 Pac. 430, and the condemnation of the Supreme Court of the United States in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, in which the Kansas case is reviewed and disapproved. There is no essential difference between the facts of the case in hand and those which conditioned the latter decision, and it is not only decisive of the issues in this case, but is in accord with reason, with the great weight of authority, and with the general understanding and practice of the profession. It is true, generally speaking, that the situs of a chose in action is the residence of its owner,—the domicile of the creditor. But the power to prescribe the remedies by which a debt may be collected and disposed of is not limited to the domicile of its owner. The creditor must often resort to the residence of the debtor to recover the amount due him, and must avail himself of the remedies prescribed by the debtor's state for this purpose. In this state of the case it is competent, just, and common legislation for the state of the debtor to provide for the protection of its home creditors by statutes which enable them to prevent their debtors residing in another state from taking out of the state the money due them from their debtors within the state, and from compelling their creditors to follow them into another state to collect moneys they justly owe them, while the debts to the home creditors can be more conveniently and speedily satisfied out of the moneys due to their debtors from debtors residing in their own state. Administration, attachment, and garnishment laws are all of this character, and they have met general approbation. They do not rest upon the proposition that the situs of the chose in action is the domicile or the state of the debtor, but upon the fact that the debtor himself is there, and that his state governs his acts, and may lawfully so prescribe and control the remedies for the collection and transmission to his creditor of the money he owes that justice shall be done, not only to his creditor, but also to that creditor's cred-

itor residing in the state of the debtor. They rest upon the fact that while the situs of the debt or of the personal property, for all the purposes of its ownership, is in the state of the creditor, yet the debtor has its control, its actual possession, and a legal notice to him places it in the custody of the law, and subject to the process of the court of the state in which he resides. This is solid ground. It is consonant with reason and with reality. It governs the administration of estates of deceased persons, concerning which Mr. Justice Gray, in *Wyman v. Halstead*, 109 U. S. 654, 658, *sub nom. Wyman v. United States ex rel. Halstead*, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417, said: "The general rule of law is well settled that, for the purpose of founding administration, all simple-contract debts are assets at the domicile of the debtor." *Wilkins v. Ellett*, 9 Wall. 740, 19 L. ed. 586, 108 U. S. 256, 27 L. ed. 718, 2 Sup. Ct. Rep. 641. It lies at the foundation of the attachment and garnishment laws of the states, and sustains the action of the court below in this case. The origin of these laws is the custom of foreign attachment in the city of London. Under that custom the garnishee alone was summoned. The defendant received no notice, and at the conclusion of the proceedings the garnishee was required to pay his debt to the plaintiff, and was released from liability to the defendant. An attachment or garnishment is in the nature of a proceeding *in rem*. It proceeds upon the theory that the *res* is attached; that notice to the debtor or the party in control of the personal property places his obligation to pay or the property in his control at the disposition of the court. Such a notice attaches the debt,—the *res*; and, when this has been done, notice to the defendant which will give to the court ample jurisdiction to dispose of the thing attached may be given by publication, or by such other means as have been lawfully provided by statute, upon well-settled principles. Our conclusion is that the right to garnish a debtor is not limited to the situs of the chose in action, and a garnishment by a citizen of one state of a debtor of the same state, whose creditor resides, whose debt was contracted and is payable, in another state, is such an attachment of the chose in action as will authorize the court to obtain jurisdiction to dispose of it by publication of the summons against the defendant. *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Reimers v. Seitco Mfg. Co.* 30 L. R. A. 364, 17 C. C. A. 223, 37 U. S. App. 426, 429, 70 Fed. 573, 574; *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 421, 427, 34 U. S. App. 581, 592, 72 Fed. 32, 38; *Newland v. Reilly*, 85 Mich. 151, 48 N. W. 544; *Cofrode v. Gartner*, 79 Mich. 332, 7 L. R. A. 511, 44 N. W. 623; *Cahoon v. Morgan*, 38 Vt. 236; *Drake, Attachment*. § 474; *Embree v. Hanna*, 5 Johns. 101; *Blake v. Williams*, 6 Pick. 286, 303, 17 Am. Dec. 372; *Harvey v. Great Northern R. Co.* 50 Minn. 405, 407, 17 L. R. A. 84, 52 N. W. 905; *Wyeth Hardware & Mfg. Co. v.* 57 L. R. A.

H. F. Lang & Co. 127 Mo. 242, 246, 27 L. R. A. 651, 29 S. W. 1010; *Howland v. Chicago, R. I. & P. R. Co.* 134 Mo. 474, 478, 36 S. W. 29.

The position of counsel for the defendants that, notwithstanding this rule of law, the state court had no jurisdiction of this case, because the supreme court of Kansas had decided in one case in 1890 that a court of that state could not obtain jurisdiction by the means here employed, while the decision of the Supreme Court in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, had not been rendered when this action was commenced, in 1897, cannot be permitted to prevail, for two reasons: In the first place, the law was not changed by the erroneous decision of the supreme court of Kansas in *Missouri P. R. Co. v. Sharitt*, 43 Kan. 375, 8 L. R. A. 309, 23 Pac. 430, and the power had been granted and the duty imposed by the legislature of Kansas upon its courts to take jurisdiction of actions of this kind by service of garnishment and publication of summons in the manner adopted in this case. Under this settled rule of law, the state court had jurisdiction notwithstanding the mistake of the supreme court of Kansas. In the second place, a single decision of the highest court of a state is insufficient to establish an erroneous rule of construction of the statutes of that state, clearly disapproved by the Supreme Court of the United States and the great weight of authority throughout the country.

It follows from this conclusion, that the state court obtained sufficient jurisdiction of the subject of this action and of the defendants by the garnishment and the service of the summons upon the defendants by publication, to authorize the disposition of the moneys due from the garnishees by the judgment of the court; and the defendants are estopped by their removal of the cause from attacking the jurisdiction of the Federal court on any other ground. It does not lie in the mouth of one who has removed a cause from the state to the Federal court to claim that the latter has no jurisdiction of the case, except upon the ground that the court from which it was removed was without jurisdiction. *Cowley v. Northern P. R. Co.* 159 U. S. 569, 583, 40 L. ed. 263, 207, 16 Sup. Ct. Rep. 127; *Purdy v. Wallace Muller & Co.* 81 Fed. 513, 515.

The next question for consideration is the effect of the pleading and evidence of the judgment between the plaintiffs and R. L. Walker, who was the United States marshal whose deputy levied the writ upon the property of the plaintiffs. The defendants gave to Walker the bond of indemnity which induced him to seize this property. The plaintiffs sued him for the conversion of these goods. The defendants hired and paid the lawyers who conducted his defense. These were the same lawyers who brought the attachment suit, and who are protecting the defendants in the present case. In all this litigation they represented the defendants. While in the action against

Walker they signed the pleadings and papers as his attorneys, they were in reality conducting these proceedings, defending the action, procuring evidence, cross-examining the witnesses of the plaintiffs, not only for Walker, but also for the real parties in interest,—the defendants who had indemnified him. The issues presented and tried in that case were whether the property seized by Walker belonged to the plaintiffs or to Thomas Lynch, the defendant in the attachment suit, and what the value of that property was when it was taken from the plaintiffs. The defendants, through their attorneys, conducted the trial of these issues in the action against Walker, and the jury found them in favor of the plaintiffs. While their names did not appear upon the record, they were the real defendants, the real parties in interest, and the parties who actually made and conducted the defense. The inevitable effect of these facts is that, in any suit between the plaintiffs and the defendants upon the same cause of action involved in the action against Walker, the issues concerning the title and the value of the property seized are *res judicata*, and cannot be again litigated. One who instigates another to do a wrongful act, and, when the wrongdoer is sued, takes upon himself and conducts the defense of the case, is estopped from again litigating with the plaintiff in that action the issues there decided. *Lovejoy v. Murray*, 3 Wall. 1, 18, 18 L. ed. 129, 134. The judgment against Walker was therefore a conclusive determination against the defendants of the issues whether or not the plaintiffs were the owners of the property seized, and of the value of that property.

But it is contended that in the pleading of this judgment and in its introduction in evidence many and fatal errors were committed. Let us first clearly understand the nature of this action, and then consider the soundness of this contention. This was not an action upon the judgment against Walker. It was an action for the same seizure and conversion of the property for which the judgment against Walker was rendered. But that judgment did not determine that these defendants were liable for or should pay the amount thereof. For this reason that judgment alone would not authorize the court to enter a judgment against the defendants. Other evidence was requisite to establish the proposition that they were liable for this conversion. It was necessary to try and determine issues which were not considered in the action against Walker, before the judgment against him would warrant a recovery against the defendants. Those issues were whether or not the defendants gave the bond of indemnity, and thereby instigated the taking and conversion, and whether or not they assumed and conducted the defense, and thus became the real defendants in the action against Walker. In other words, it was important to the plaintiffs' recovery here that they should establish four propositions: (1) That the defendants gave the bond of indemnity, and

instigated Walker to take and convert the property; (2) that they assumed and conducted the defense to the action against him for the conversion; (3) that the property seized was their property; and (4) its value. The judgment against Walker was no evidence of the first two propositions, but it was conclusive evidence against the plaintiffs of the last two. Thus it will be seen that the cause of action could not be based upon the judgment, but that it was for the conversion, and that it was necessary to establish two propositions by evidence *dehors* the record in the *Walker Case*, while that judgment was conclusive evidence of the other two. We are now ready to consider the objections to the pleadings and the evidence of this judgment.

It is assigned as error that the trial court overruled the motion to strike from the reply that part which related to the judgment against Walker, and that it overruled a demurrer to the reply. There are two reasons why this judgment cannot be reversed on account of these rulings: The first is that the defendants pleaded new matter in their answer,—that the property seized was owned by Thomas Lynch, and was taken by Walker under the writ in the attachment suit against him,—and the averments in the reply concerning the judgment against Walker constituted a pertinent answer to this new matter, under the statutes of Kansas. Kan. Gen. Stat. 1897, p. 122, § 103. The argument that it was unnecessary for the defendants to plead this new matter, under the decision in *Kerwood v. Ayres*, 59 Kan. 343, 53 Pac. 134, in order to prove it, and that therefore the plaintiffs had no right to reply to it, is not persuasive. When the defendants unnecessarily pleaded this matter, they opened the door and invited the plaintiffs to reply to it. However, their remedy was not a motion to strike out part of the reply; it was not to pick the mote out of their brother's eye; but it was to take the beam out of their own, to cure their own fault, to withdraw the unnecessary new matter from their answer. This they did not do, and the motion to strike out this part of the reply was properly denied. The second reason is that the pleadings, proceedings, and judgment in the action against Walker were competent and conclusive evidence, between the parties, of the title to the property in controversy and its value; and if they were pleaded when they should not have been, the only effect of this error was to give the defendants notice of this evidence earlier than they would otherwise have received it. This notice could not have prejudiced them, and error without prejudice is no ground for reversal.

It is insisted that the ruling of the court in striking the plea of this judgment from the original petition rendered the question whether or not it could be properly pleaded in the reply *res judicata*. But the two questions are not the same, and a court is not estopped before the trial of a case from correcting any erroneous ruling it may have made in the settlement of the pleadings.

It is said that the admission into the reply of this plea of the judgment against Walker constituted a departure in pleading. But the cause of action remained the same,—the taking and conversion of the property; and the plea of the judgment was a mere plea of an estoppel of the defendants from denying the truth of the two facts—the title and the value of the property seized—whose existence was challenged by the new matter in the answer. There is no departure from a cause of action for conversion to a cause of action on the judgment.

It is insisted that the court below should have dismissed this action at the trial because it appeared from the pleadings that Walker and the defendants were joint tortfeasors, that the plaintiffs had elected to sue Walker separately, and that, having made that election, they could not maintain an action against the defendants jointly. This objection was that there was a defect of parties defendant. If there was any such defect, the defendants were required to present it by demurrer if it appeared on the face of the pleadings, and by answer if it did not. 2 Kan. Gen. Stat. 1897, chap. 95, §§ 89-91. The objection here under consideration appeared upon the face of the original petition. It was not suggested by demurrer or by answer, and was first presented by a motion to dismiss the action upon the opening of the trial. The defendants' silence, and their answer to the merits of the case without suggesting the defect, waived this objection. Their motion came too late, and it was rightly overruled.

It is insisted that the pleadings and judgment against Walker were not competent evidence of the title and value of the property, because that action was not brought against Walker as marshal, and because the evidence does not establish the fact that the plaintiffs knew that the defendants were conducting Walker's defense. But it is not the name, title, or capacity in or under which Walker was sued that conditions the estoppel of the defendants by the judgment against him. It is the fact that they instigated the taking, and assumed and conducted the defense of the action for the taking, of the property of the plaintiffs. It was their own acts which estopped them, and it was utterly immaterial under what name or title they performed these acts. It made no difference, therefore, whether Walker was sued for this taking, and the defendants defended him, as marshal, gentleman, yeoman, or man. They were equally estopped by their deeds.

Nor is the objection that this judgment can have no effect because the plaintiffs did not know that the defendants were defending Walker worthy of more serious consideration. H. C. Solomon, John W. Adams, and George W. Adams were the attorneys of Tootle, Hosea, & Co. and of the defendants. As such attorneys they brought the action against Lynch, and issued the writ of attachment. They defended Walker, and their names appear as his attorneys upon all the pleadings and papers of the defend-

ant in that suit. It is the common, almost the universal, practice for plaintiffs who procure the levy of an attachment to defend the person who levies it, when he is attacked by third parties on account of his seizure of the property under the levy. We cannot be blind, and we cannot presume that the defendants were blind, to this fact. The names of the attorneys for the defendants upon the pleadings and papers of Walker raised a clear presumption that the defendants were conducting his defense, and, in the absence of contradicting evidence, this was sufficient evidence to warrant the conclusion that the plaintiffs were aware of this fact.

It is specified as error that one of the witnesses for the plaintiffs was permitted to testify that he handed to Solomon the bond of indemnity in the attachment suit in the presence of Wheeler, one of the defendants, and Solomon said: "I wrote that myself, and signed the name of Tootle, Hosea, & Co. to it. We were not required to do anything further towards it." But this was certainly competent evidence against Wheeler, and Wheeler was a member of the co-partnership composed of the defendants in this suit. He saw the bond, heard the testimony of his attorney, and silently admitted its truth.

It is contended that the court erroneously admitted a part of a letter written by H. C. Solomon, one of the attorneys of the defendants, on September 4, 1890, to R. L. Walker, in which he wrote that his clients were paying all the costs of the litigation growing out of the attachment suit against Lynch. But the testimony of one of the defendants was that he left the entire charge and control of this matter to his attorneys, and the evidence was conclusive and uncontradicted that this letter was written by Mr. Solomon, one of these attorneys, and that the portion of it which was not produced could not be found after diligent search. In this state of the case, it was a competent admission of the defendants that they were paying the expense of conducting the defense of Walker, as well as of the other litigation growing out of the seizure of the property of the plaintiffs.

After the plaintiffs had introduced in evidence the pleadings and judgment against Walker, and had produced evidence tending to show that the defendants gave the bond of indemnity to him before the writ was levied upon the property of the plaintiffs, and that they had assumed and conducted his defense of the plaintiffs' action against him, the court refused to permit the defendants to introduce evidence that the defendant in the attachment suit was the owner of the property, and directed the jury to return a verdict for the plaintiffs for the amount of the judgment against Walker, and interest from the date of its entry. It is contended that these rulings were erroneous because the defendants were entitled to contest the title to the property in issue, because the evidence was insufficient to warrant the instruction, and because interest should have been allowed upon the value

of the property, and not upon the amount of the judgment against Walker. There was no error in the exclusion of the evidence offered by the defendants, because the judgment against Walker rendered the title to the property *res judicata* as against them. The evidence was uncontradicted and conclusive that the defendants assumed and conducted Walker's defense, and that they gave him the bond of indemnity before he seized the property. But this was an action for damages for the taking and conversion of the property. It was not an action upon the judgment against Walker, and for that reason interest should not have been computed upon the judgment, but upon the value of the property converted. This error

made the judgment \$232.44 more than it should have been.

The judgment of the court below is accordingly affirmed to the amount of \$5,870.56, but it is not affirmed as to the remaining \$232.44, or any part thereof. It is modified as to this amount, and the case is remanded to the court below, with directions to so modify its judgment of March 16, 1900, that it shall stand for the amount of \$5,870.56, instead of for the sum of \$6,103. *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 622, 37 L. ed. 292, 306, 13 Sup. Ct. Rep. 444.

Petition for writ of Certiorari denied by Supreme Court of United States October 21, 1901.

ILLINOIS SUPREME COURT.

City of CHICAGO, *Appt.*,

v.

Walter H. WILSON *et al.*

(195 Ill. 19.)

An ordinance providing for the construction of a cement sidewalk 20 feet wide on each side of a street, at the expense of the abutting property, is not unreasonable, where the locality is one of residence and business, the property is worth from \$150 to \$300 per front foot, and the existing walks, varying from 6 to 20 feet in width, are in bad condition.

(February 21, 1902.)

APPEAL by plaintiff from a judgment of the Cook County Court sustaining objections to the confirmation of assessments for the construction of sidewalks. *Reversed.*

The facts are stated in the opinion.

Messrs. Charles M. Walker and Robert Redfield, for appellant:

It requires a clear and strong case to justify a court in holding that an ordinance passed by a municipality apparently acting within the scope of its authority is unreasonable, unjust, oppressive, and therefore void.

Warren v. Chicago, 118 Ill. 329, 9 N. E. 883; *English v. Danville*, 150 Ill. 92, 36 N. E. 994; *Hawes v. Chicago*, 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373.

The presumption is always in favor of the validity of a statute or of an ordinance passed in pursuance of a competent legal authority.

Harmon v. Chicago, 140 Ill. 375, 29 N. E. 732.

In the passage of an ordinance providing for a local improvement, the city council is clothed with power to determine what local

improvement is required, its nature and character, when it shall be made, and the manner of its construction.

English v. Danville, 150 Ill. 92, 36 N. E. 994; *Vane v. Evanston*, 150 Ill. 616, 37 N. E. 901; *Fagan v. Chicago*, 84 Ill. 227; *Dill. Mun. Corp.* 4th ed. §§ 58, 94, and authorities cited.

Messrs. Mason & Noyes, for appellees:

The court had ample power to change, alter, and annul the assessment as justice required.

Act 1897, §§ 47, 52.

If, from all the surrounding circumstances, the court deems the ordinance unreasonable and oppressive, it may sustain the objections and dismiss the proceedings.

Hawes v. Chicago, 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373; *Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506; *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888; *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067.

Ricks, J., delivered the opinion of the court:

This is an appeal from an order of the county court of Cook county sustaining objections of appellees to the confirmation of a special assessment to pay the cost of constructing a cement sidewalk in front of appellees' properties on certain portions of Cottage Grove avenue, between Forty-Seventh and Fifty-First streets, in the city of Chicago. Appellees objected on the ground that the ordinance, so far as it affected the property objected for, was unreasonable, unjust, burdensome, and therefore void. The court found the issues for the objectors, and from this holding the appeal was prosecuted.

The ordinance in question was passed on the 14th day of May, 1900, under the provisions of the act of June 14, 1897 (*Hurd's Rev. Stat.* 1899, chap. 24, p. 362), and no complaint is made that there was any irregularity in the passage of the ordinance, the sole and only question presented being whether the ordinance is unreasonable. It

NOTE.—For a case in this series holding that an ordinance requiring the substitution of a cement sidewalk for a plank walk in good condition is unreasonable and oppressive, see *Hawes v. Chicago* (Ill.) 30 L. R. A. 225. 57 L. R. A.

provides for the construction of a 20-foot cement walk on each side of Cottage Grove avenue, from the south curb line of Forty-Seventh street to the north curb line of Fifty-First street. The basis of the complaint against the ordinance is that appellees had sufficient walks in front of their premises, and that a walk such as this ordinance provides for is unnecessary, and that the requirement to build it is, under the circumstances, unreasonable. The total length of the improvement, counting both sides of the street, is about 1 mile. The street is 100 feet wide, the roadway 60 feet wide, and 20 feet from the curb line on each side to the lot line. The locality of the improvement is in the vicinity of Washington park, Fifty-First street, the south end of the improvement district forming the north line of said park. It is one block west of Drexel boulevard, one of the most important and desirable streets on the south side in said city. The evidence shows that the general character of the walks, outside of the cement walks, is that they are built of plank; walks varying in width from 6 to 20 feet; uneven as to grade, and in a generally dilapidated and worn condition. The property along the line of the proposed walk becomes more valuable as it extends south from Forty-Seventh street and to Washington park, varying, according to the improvements surrounding each particular locality, from \$150 to \$300 per front foot, exclusive of the improvements. Between Forty-Seventh and Forty-Eighth streets, on the west side, are one or two buildings in the middle of the block and one on the southeast corner of the block. On the east side, beginning at Forty-Seventh street, are buildings for 100 feet extending south. Between Forty-Eighth and Forty-Ninth streets, on the east side, is vacant; on the west side there are buildings; and between Fiftieth and Fifty-First streets, on the east side, there are three or four flat buildings and stores. The west side of the street, between Fiftieth and Fifty-First streets, is well built up to within 75 feet of Fiftieth street, there being but 75 feet of vacant ground in that block on the west side. The buildings are flat buildings, store buildings, saloons, and summer gardens. The buildings in value vary from \$5,000 to \$50,000 each. The property of one set of objectors, owners of lot 4, Cormack's subdivision, had a 20-foot plank walk that was built some seven or eight years ago; had been a number of times repaired; stringers were rotten, boards decayed and broken at the ends, and a number of holes in the walk; and the testimony showed that it would cost from 25 to 50 per cent of the value of the walk to put it in proper condition. The walk is 132 feet long. The property of the other objector, Wilson, being lot 1 and part of lot 2, Lafin's sublots 1 and 2, is improved property, with a frontage of 72 feet, and has in front of it a 14-foot plank walk, the age of which it is hard to ascertain from the testimony, but is old, and its condition was shown to be very bad. It had been a number of times repaired and improved, and the 57 L. R. A.

evidence showed that it would cost from 25 to 50 per cent to put it in fair and safe condition. The evidence further showed that after the passage of this ordinance, and pending this proceeding, the objector had a number of stringers put in and a number of planks put down, using about 150 feet of lumber; but still, with these improvements, the evidence clearly demonstrates that this walk was an unsafe and unfit walk for a city, and that it was 4 or 5 inches lower than the cement walk to which it joined. The property of this objector is improved, having upon it a four-story building of the value of \$30,000 to \$40,000. The assessment on this property was \$290.80, and upon lot 4, above, \$516.92. The evidence further showed that a great many of the owners of lots, under the notice to them from the city, built the walk as required, so that one third of it was completed at the hearing.

The insistence of appellant is that, taking the character and location of this street and the properties along it, the improvement was one in keeping therewith, and that, as to the particular objectors, their walks were in such condition that it was necessary that they be replaced with other and safe walks, and that to attempt to repair them would not only be at unreasonable cost, and still have unsuitable walks, but, in addition thereto, would conflict with an ordinance of the city establishing what was termed the "stone district." This latter ordinance defines a large amount of territory, and requires that all walks therein shall be made or rebuilt of stone or other incombustible material, and that no wood walks in that territory which should become worn should be relaid or repaired where the cost of the necessary repairs would exceed 10 per cent of the original cost of such wood walks. Appellees insist that this latter ordinance cannot control, because the territory defined as "stone district" has a broken line. We have examined the ordinance, and, in so far as it would affect this property, think that it sufficiently shows it to be within the stone district. We do not, however, regard that as controlling, as, if the ordinance for the improvement in question is so unreasonable as to render it void, the ordinance creating the stone district could not aid it.

Appellees, in stating their position with reference to this ordinance, say: "If, from all the surrounding circumstances, the court deems the ordinance unreasonable and oppressive, it may sustain objections and dismiss the proceedings." In support of this position appellees cite *Hawes v. Chicago*, 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373. In that case, on page 659, 158 Ill., page 227, 30 L. R. A., and page 375, 42 N. E., it is said: "The rule is that it requires a clear and strong case to justify a court in annulling the action of a municipal corporation acting within the apparent scope of its authority." Appellees also cite other cases, which are not, as we regard them, in point, and arose upon an entirely different state of facts. The *Hawes Case*, 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373, relied upon by

appellees, was, as it seems to us, a strong appeal for the application of the rule of unreasonableness. There the objector owned a 20-acre tract with a frontage of 1,266 feet on the street being improved, and was required to build a cement sidewalk, and his assessment was \$1,638.75. The property was used for a hay field, and did not have a building of any sort upon it. Five months prior to the passage of the ordinance requiring the construction of the cement sidewalk the owner of the property, in compliance with a prior ordinance, had constructed and put down, in the same place that the cement walk was to be, a 6-foot wood walk, which at the time of the ordinance there objected to was practically new, and as near in perfect order as a walk five months old could be. It further appeared in that case that the streets upon which it was to be built had never been improved, curbed, graded, or sewered, and the ordinance requiring the cement walk was, under such circumstances, held unreasonable and void. It must be borne in mind that in the passage of ordinances providing for local improvements it is the peculiar province of the city council to determine the necessity and character of the improvement and the manner of its construction (*English v. Danville*, 150 Ill. 92, 36 N. E. 994; *Vane v. Evanston*, 150 Ill. 616, 37 N. E. 901; *Fagan v. Chicago*, 84 Ill. 227); and we must also keep before us the presumption that always exists in favor of the validity of a statute or of an ordinance passed in pursuance of competent legal authority (*Harmon v. Chicago*, 140 Ill. 374, 29 N. E. 732). The question of the construction of walks and that class of improvements is expressly committed to the city council, and it may determine the extent and character of improvement required upon any given street, and include the same in one ordinance as one improvement, and under this rule may require walks to be built upon both sides of the same street by the same ordinance. *Watson v. Chicago*, 115 Ill. 78, 3 N. E. 430. In fact, it hardly seems necessary to extend any consideration of this question, as it is not contended by appellees that the city did not have power to pass an ordinance for an improvement of the street in question by building walks on both sides, but the insistence is that the particular ordinance that was passed is unreasonable in that it requires the objectors to build a walk where no walk was necessary, or under such circumstances as that the building of the walk by special assessment imposed upon the objectors such an unjust and unnecessary burden as to render the ordinance unreasonable. We do not think this contention is supported by the facts in this case. In *Walker v. Morgan Park*, 175 Ill. 570, 51 N. E. 636, we had under consideration an ordinance providing for the building of one sidewalk 2,475 feet in length, of which the objector owned 1,950 feet on one side of his premises, and of another sidewalk upon another side of the same premises 1,850 feet in length, of which the objector owned 1,150 feet, and that the cost

to him of this walk would be \$682 if done by the objector and \$1,178 if done by the village. It was there averred that there were no improvements of any character on the property owned by the objector, but that there were a few scattering buildings upon occasional lots, owned by other persons, along the line of the proposed improvement, and that the only benefit to be derived from the walk was to enable people to go to a certain railroad station; and it was there contended that under that state of facts the ordinance providing for the walk was an unreasonable one, and for that reason void. Of that contention it was said (p. 573, 175 Ill., and p. 637, 51 N. E.): "From the allegations of the bill it is apparent that the real ground relied upon to defeat the ordinance providing for the construction of the sidewalk is that the locality where the sidewalk is ordered constructed is so thinly settled that there is no necessity whatever for the construction of a sidewalk,—that no sidewalk was needed where it was ordered to be laid. What the public necessities were was a question solely for the determination of the president and board of trustees of the village of Morgan Park; and when the incorporation clothed with power has acted in strict conformity to the statute conferring the power, as was the case here, its decision must be held final and conclusive, unless it is apparent that the action of the municipality is unreasonable, unjust, and oppressive, as held in *Hawes v. Chicago*, 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373. It may be that there was no pressing demand for the sidewalk in question, and that it would in the end have been better had its construction been postponed until the population of the village had increased; but that was a matter for the board of trustees to settle for themselves." And in that case the *Hawes Case* was distinguished. *Field v. Western Springs*, 181 Ill. 186, 54 N. E. 929, was also a case where the unreasonableness of the ordinance was relied upon. That was a case for the construction of cement sidewalks upon certain blocks in said village, wherein it was alleged and contended that the streets along which the walks were to be laid existed in name only, and had never been laid out; that they were unpaved, uncurbed, ungraded, and but little-used dirt roadways, overgrown with grass and weeds, and that there were no conditions requiring, at that time, the building of such walks. In speaking of the powers of the city it is there said (p. 191, 181 Ill., and p. 931, 54 N. E.): "The question of the necessity of a local improvement is by the law committed to the city council, and courts have no right to interfere to prevent such improvement, except in cases where it clearly appears that such discretion has been abused. The ground on which courts interfere is that the ordinance is so unreasonable as to render it void."

The case at bar seems to us to be much stronger than either of the latter cases. The district where this improvement is to be made is, as shown by the evidence, both

a residence and business locality, and within one block of one of the finest and most desirable residence portions of the city of Chicago. The walks existing at the time of the passage of the ordinance were as diversified in form of construction, width, material, and condition as could well be in the distance covered by the improvement, running, as the evidence showed, from 6 feet in width to 20 feet,—which latter was the width designed for all the walks of that district, as established by the curb shown to have been already placed on each side. They were uneven, many of them old, and especially those of the objectors were both old, out of repair, and unsafe. The fact that objector Wilson, after the passage of the or-

dinance, caused considerable repairs to be placed on the walk in front of his premises, instead of being an argument against the reasonableness of this ordinance, seems to us to be an admission of the reasonableness of it. In fact, the one who made the repairs, by the mere statement of the character of them, showed that the walk was both unsafe and unfit for a place of such prominence.

We think that the court was not warranted in holding this ordinance void for unreasonableness, and its judgment is accordingly reversed, and the cause remanded for further proceeding not inconsistent with the views here expressed.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

City of MADISONVILLE, Appt.,

v.

M. W. BISHOP.

(.....Ky.....)

An unorganized assemblage of merry-makers to the number of 1,000 in the main street of a city, exploding fireworks, obstructing the use of the street, and endangering life and property, is a "riotous or tumultuous assemblage of people," within the meaning of a statute making the municipality liable for injuries done by such an assemblage.

(March 19, 1902.)

A PPEAL by defendant from a judgment of the Circuit Court for Hopkins County in favor of plaintiff in an action brought to recover damages for injury to property alleged to have been caused by a mob. *Affirmed.*

The facts are stated in the opinion.

Messrs. Worthington, Pratt & Waddill, for appellant:

The reason for and purpose of the enactment, the title of the act, the subsequent legislation, its history, letter, and spirit, and even the side references and section titles, conclusively show that it never was contemplated that this statute dealing with mobs, riotous, tumultuous, frenzied, excited, inflamed assemblages, requiring the force of the city to suppress, should be construed to refer to an unorganized crowd of happy, jolly citizens making merry by shooting crackers for the sake of good Old Kris.

Prather v. Lexington, 13 B. Mon. 559, 56 Am. Dec. 585; *Ward v. Louisville*, 16 B. Mon. 184; *Pollock v. Louisville*, 13 Bush, 221, 26 Am. Rep. 260; *Jolly v. Hawesville*,

89 Ky. 279, 12 S. W. 313; *Taylor v. Owensboro*, 17 Ky. L. Rep. 856, 32 S. W. 948; *Barilett v. Clarksburg*, 45 W. Va. 393, 43 L. R. A. 295, 31 S. E. 918; *Aron v. Wausau*, 98 Wis. 592, 40 L. R. A. 733, 74 N. W. 354; *Love v. Raleigh*, 116 N. C. 296, 28 L. R. A. 192, 21 S. E. 503; *Gianfortone v. New Orleans*, 24 L. R. A. 592, note, 61 Fed. 64; *O'Rourke v. Sioua Falls*, 4 S. D. 47, 19 L. R. A. 789, 54 N. W. 1044; *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665; *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Ball v. Woodbine*, 61 Iowa, 83, 47 Am. Rep. 805, 15 N. W. 846; *Norristown v. Fitzpatrick*, 94 Pa. 121, 30 Am. Rep. 771; *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711.

Messrs. John Fleming Gordon and William L. Gordon, with *Mr. Maurice Kirby Gordon*, for appellee:

The petition of appellee as plaintiff below states a cause of action in his favor, at common law, and it was error for the lower court to sustain the demurrer as to it.

Note to Scanlon v. Wedger (Mass.) 16 L. R. A. 395; *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585; *Ward v. Louisville*, 16 B. Mon. 191; *Speir v. Brooklyn*, 139 N. Y. 6, 21 L. R. A. 641, 34 N. E. 727.

Inasmuch as the court overruled the demurrer to the second paragraph, which distinctly states a cause of action under the statute, and correctly rendered judgment thereon for plaintiff (appellee), he is content to ask an affirmation of that judgment.

Ky. Stat. § 8; *Henderson v. Pargny*, 15 Ky. L. Rep. 745; *Higgins v. Crab Orchard*, 9 Ky. L. Rep. 404; Webster's International Dictionary; *State v. Archibald*, 59 Vt. 548, 59 Am. Rep. 755, 9 Atl. 362; *Stockton v. Stockton*, 59 Ind. 574.

NOTE.—For a case in this series holding that one injured by the explosion of a cannon cracker fired by persons assembled in the streets, without any common purpose to injure, although in violation of an ordinance, cannot recover under a statute making the city liable 57 L. R. A.

for injury done by a mob or riot, see *Aron v. Wausau* (Wis.) 40 L. R. A. 733.

As to liability of city for injury by fireworks generally, see *note to Scanlon v. Wedger* (Mass.) 16 L. R. A. 395; also *Fifield v. Phoenix* (Ariz.) 24 L. R. A. 430.

Hobson, J., delivered the opinion of the court:

Appellee, M. W. Bishop, is a merchant in the city of Madisonville. He filed this suit to recover for the destruction of a costly plate glass window in his store. He alleged in his petition these facts: On Saturday night, December 23, 1899, the city caused and permitted a nuisance in the street in front of his store by suffering a riotous and tumultuous assembly of about 1,000 persons, unorganized, assembled for the purpose of violating the laws of the state as well as the city, and actually violating them by obstructing the street, rendering the use of it by the traveling public precarious, unpleasant, and dangerous, by discharging large quantities of fireworks, torpedoes, bombs, skyrockets, Roman candles, and other missiles loaded with powerful explosives, at and near the plaintiff's buildings situated on one of the principal business streets of the city, and in the heart thereof, where the buildings are close together and contain valuable merchandise displayed in expensive plate glass windows; that the mob or unlawful assemblage, without plaintiff's fault, exploded and fired their fireworks at plaintiff's building and at the plate glass windows in it; that it was formed and commenced firing about 5 o'clock in the evening, and continued all night; that the damage to his house occurred about 9 o'clock, after the shooting had been continued over four hours, and after other property in the neighborhood had been destroyed by the same assemblage of persons, with the knowledge of the officers of the city, who knew of the damage it was doing and was likely to do to the property of the citizens, but refused to take any steps to check the nuisance endangering life and property; that they had the power and ability of themselves and with the power of the citizens of the city to prevent the damage, and had notice and good reason to believe, and in fact did believe, that the tumultuous assemblage was about to take place, and were present among the assembly, and saw and heard what was going on in ample time to prevent it from doing injury; but that they refused to allay or suppress the tumult or mob, and by reason thereof his property was destroyed. The defendant demurred to the petition. Its demurrer was overruled, and it elected to stand by its demurrer, and, declining to plead to the petition, judgment was entered against it, and from this judgment it appeals.

The action is brought under section 8, Ky. Stat.: "If within any city, any church, convent, chapel, dwelling house or house used or designed for the transaction of lawful business, or ship, or shipyard, boat, or vessel, or railroad, or property of any kind belonging to any street or other railroad company, or any article of personal property, shall be injured or destroyed, or if any property therein or thereon shall be taken away or injured by any riotous or tumultuous assemblage of people, the full amount of damages so done shall be recoverable by

the person injured, by action against the city, if the authorities thereof have the ability of themselves or with the aid of their own citizens to prevent such damage; but no such liability shall be incurred by such city unless the authorities thereof shall have had notice or good reason to believe that such riot or tumultuous assemblage was about to take place, or, having taken place, shall have had notice of the same in time to prevent said injury or destruction, either by their own force or by the aid of the citizens of such city. No person shall maintain such action who shall have unlawfully contributed by word or deed toward exciting or inflaming such tumult or riot, or who shall have failed to do what he reasonably could toward preventing, allaying, or suppressing it."

It is insisted for the city that the words "any riotous or tumultuous assemblage of people" refer only to an unlawful assemblage bent on evil, such as a mob, and that it was not contemplated that it should apply to a crowd of merrymakers celebrating the advent of Christmas. The purpose of the assembly, or the aim that it had primarily in view, is not material, if it was in fact riotous or tumultuous, and the city authorities had notice of it and ability to prevent the damage it did. The word "tumultuous" is thus defined: "Conducted with disorder; noisy, confused, boisterous, disorderly, as a tumultuous assembly or meeting." "Riotous" is defined thus: "Partaking of the nature of an unlawful assembly or its acts; seditious, tumultuous." Webster. Under these definitions an assemblage of 1,000 people in the main street of a city, obstructing the use of the street, and discharging bombs, skyrockets, Roman candles, and other missiles loaded with powerful explosives, at private property, endangering life and preventing the use of the street for the purposes of business, must certainly be held a riotous or tumultuous assembly. In *Jolly v. Harrosville*, 89 Ky. 280, 12 S. W. 313, the intestate had been killed in a celebration of this kind, and the suit was brought against the city for his death. The court, after showing that the city was not liable aside from the statute above quoted, said: "But the care and particularity with which the conditions of such liability are set out in the statute, and the restriction of it in express terms to cases of injury to property, shows the legislature did not intend to thereby authorize a recovery against a city for personal injury resulting from the malfeasance or negligence of police officers." The action before us is for an injury to property. The purpose of the statute is to secure the property of the citizen from loss by these disorderly assemblages which the city has reason to believe will do damage, and may be suppressed by it. Such statutes have been passed in many of the states, and are upheld. 2 Dill. Mun. Corp. § 959. The statute should be liberally construed, with a view to promote its purposes. Ky. Stat. § 460. Its aim is the protection of private property against injury by disorderly gath-

erings of persons, and to require the city to exercise its police power to this end. One of the objects of municipal government is the better security of life and property where the population is crowded. It is known that the police do not always suppress disorderly persons, and the purpose of the statute is to put a check upon tumultuous assemblages of people in the cities, and induce greater vigilance on the part of the police in the maintenance of quiet and good order as well as the proper transac-

tion of business. In *State v. Brown*, 69 Ind. 95, 35 Am. Rep. 210, under a statute making it a misdemeanor for three or more persons to "act in a violent and tumultuous manner," it was held that a party who went out to charivari a newly-married couple with clubs, bells, trumpets, tin pans, cannon, and other weapons, making a great tumult and disturbance, might be convicted. See also *Sanders v. State*, 60 Ga. 126.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Harry L. AINSWORTH

v.

Addie L. LAKIN, Admr., etc., of James A. Lakin, Deceased.

(.....Mass.....)

1. The owner of walls left standing after the destruction of the building by fire is under no obligation to adjoining property owners to remove or protect the walls, until he has had a reasonable time to make necessary investigation and take such precautions as are required.
2. The owner of walls left standing by a fire, which cannot be used for rebuilding, owes adjoining owners the duty, after a reasonable time for investigation, to exercise such care in the maintenance of walls likely to fall on their property as will absolutely prevent injuries except from causes over which he would have no control, such as *vis major*, acts of public enemies, or wrongful acts of third persons which human foresight could not reasonably be expected to anticipate and prevent.
3. A new trial will not be granted for permitting the jury to allow interest upon the amount allowed for injury to property from falling walls from the time of the injury, instead of instructing them to put the plaintiff in as good a position as if the damages had been paid at the time of the injury, in the absence of anything to show that defendant was injured thereby.

(February 25, 1902.)

EXCEPTIONS by defendant to rulings of the Superior Court for Hampden County made during the trial of an action brought to recover damages for injuries to property caused by the fall of a wall which defendant's intestate was alleged to have negligently permitted to remain standing in a dangerous condition, which resulted in a verdict in plaintiff's favor. *Overruled.*

The facts are stated in the opinion.

NOTE.—For other cases in this series as to individual liability for falling walls or buildings, including walls left standing after fire, see *Ryder v. Kinsey* (Minn.) 34 L. R. A. 557, and *note*; *Dettmering v. English* (N. J. L.) 48 L. R. A. 106; and *Waterhouse v. Joseph Schlitz Brewing Co.* (S. D.) 48 L. R. A. 157.

As to validity of ordinance declaring any portion of a building left standing after a fire to be a nuisance, see *Evansville v. Miller* (Ind.) 38 L. R. A. 161.

57 L. R. A.

Messrs. Robert A. Allyn, S. S. Taft, and Arthur S. Kneil, for defendant:

The plaintiff did not exercise due care, and therefore is precluded from recovery.

If one has reasonable cause to apprehend injury to his property, and has sufficient time and opportunity to remove or secure the same, and fails to do so, he is guilty of contributory negligence, and cannot recover for such injury.

Toledo, P. & W. R. Co. v. Pindar, 53 Ill. 447, 5 Am. Rep. 57; *Illinois C. R. Co. v. McClelland*, 42 Ill. 355; *Eaton v. Oregon R. & Nav. Co.* 19 Or. 391, 24 Pac. 415; *Marquette, H. & O. R. Co. v. Spear*, 44 Mich. 169, 38 Am. Rep. 242, 6 N. W. 202; *Krum v. Anthony*, 115 Pa. 431, 8 Atl. 598; *Washburn v. Tracy*, 2 D. Chip. (Vt.) 128, 15 Am. Dec. 661; *Snyder v. Pittsburgh, C. & St. L. R. Co.* 11 W. Va. 15; *Chicago & A. R. Co. v. Pennell*, 94 Ill. 448; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223, 7 Am. Rep. 69.

The defendant's intestate was not bound to exercise towards the plaintiff such a high degree of care as was required by the charge of the court.

The rule of *Rylands v. Fletcher*, L. R. 3 H. L. 330, is that he who (a) brings on his land and keeps there anything (b) likely to do mischief if it escapes, must keep it at his peril (want of negligence being no excuse for its bringing or escape), subject, among other exceptions not important to this consideration to these: (c) When the bringing or escape come from a natural user of the land; (d) when the thing brought or escaping is something in which plaintiff has an interest or which is brought on the land for his benefit; and (e) when the existence and dangerous character of the thing brought or escaping is not known to defendant, either actually or impliedly; and (f) when he has no legal or actual control over it sufficient to prevent its escape. The culpable defendant is the one who brings "for his own purposes." The voluntary and positive characteristics of the act seem to be necessarily involved in a bringing "for a purpose."

Carstairs v. Taylor, L. R. 6 Exch. 217; *Anderson v. Oppenheimer*, L. R. 5 Q. B. Div. 602; *National Teleph. Co. v. Baker* [1893] 2 Ch. 186.

A thing "apt to do mischief if it escapes"

is regarded by the authorities as one necessarily having in itself escaping tendencies.

Bigelow, Torts, 4th ed. p. 277; *Wilson v. Newberry*, L. R. 7 Q. B. 31; 1 *Thomp. Neg.* p. 67; *Quinn v. Crimmings*, 171 Mass. 255, 42 L. R. A. 101, 50 N. E. 624.

The erection of such a wall as this, if it had remained in normal condition, was a natural use of land, and so entirely outside of the rule.

Fletcher v. Smith, L. R. 2 App. Cas. 781; *Hurdman v. North Eastern R. Co.* L. R. 3 C. P. Div. 168; *Wilson v. Waddell*, L. R. 2 App. Cas. 95; *Pollock, Torts*, 6th Am. ed. 471; *Bamford v. Turnley*, 3 Best & S. 83.

To hold that the bare erection of such a wall is within the rule is to impede artificial progress and hinder industrial enterprise.

Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147.

Another exception to the rule is where the thing on the land is maintained for the common benefit of plaintiff and defendant.

Pollock, Torts, 6th Am. ed. 476; *Carstairs v. Taylor*, L. R. 6 Exch. 217; *Hughes v. Percival*, L. R. 8 App. Cas. 443; *Ross v. Fedden*, L. R. 7 Q. B. 661.

Knowledge of the dangerous condition of the thing is indispensable under the rule.

Pollock, Torts, 6th Am. ed. 135; *Parrott v. Barney*, 1 Sawy. 423, Fed. Cas. No. 10,773; *Nitro-glycerine Case*, 15 Wall. 524, sub nom. *Parrott v. Wells*, 21 L. ed. 206.

The thing must also be owned by defendant, or be under his control, before a duty arises to prevent its escape.

Earle v. Hall, 2 Met. 353; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Saxby v. Manchester, S. & L. R. Co.* L. R. 4 C. P. 197.

The extreme rule of care applied by *Rylands v. Fletcher*, L. R. 3 H. L. 330, to causes of escape, of dangerous things from land, has never been adopted in Massachusetts.

Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318; *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234; *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56; *Mears v. Dole*, 135 Mass. 508; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314; *Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6; *Jager v. Adams*, 123 Mass. 26, 25 Am. Rep. 7.

One doing a lawful act upon his own premises cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence.

Hocland v. Vincent, 10 Met. 371, 43 Am. Dec. 442; *Rockwood v. Wilson*, 11 Cush. 221; *Boynton v. Rees*, 9 Pick. 528; *Brown v. Kendall*, 6 Cush. 292; *Tourtlot v. Rosebrook*, 11 Met. 460.

Maintaining a mere wall of a building did not necessarily carry with it extraordinary liability.

Searle v. Laverick, L. R. 9 Q. B. 122; *Crowhurst v. Burial Board of Amersham*, L. R. 4 Exch. Div. 5; *Moreland v. Boston* 57 L. R. A.

& *P. R. Corp.* 141 Mass. 31, 6 N. E. 225; *Fitzpatrick v. Welch*, 174 Mass. 486, 48 L. R. A. 278, 55 N. E. 178.

The prevailing American view is directly against any extraordinary liability in this class of cases, and places the duty no higher than the ordinary degree.

Cumberland Teleph. & Teleg. Co. v. United Electric R. Co. 12 L. R. A. 544, 42 Fed. 273; *Cosulich v. Standard Oil Co.* 122 N. Y. 118, 25 N. E. 259; *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Marshall v. Welwood*, 38 N. J. L. 339, 20 Am. Rep. 394; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; *Murphy v. Gillum*, 73 Mo. App. 487; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 164; *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372; *Underwood v. Waldron*, 33 Mich. 232.

A party who comes into possession of lands as grantee or lessee, with a nuisance already existing upon it, is not liable for the continuance of the nuisance until his attention has been called to it and he has been requested to abate it.

McDonough v. Gilman, 3 Allen, 264, 80 Am. Dec. 72; *Dodge v. Stacy*, 39 Vt. 558; *Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co.* 51 N. Y. 573, 10 Am. Rep. 646; *Pillsbury v. Moore*, 44 Ma. 154, 69 Am. Dec. 91; *Johnson v. Lewis*, 13 Conn. 303, 33 Am. Dec. 405; *Woodman v. Tufts*, 9 N. H. 88; *Leahan v. Cochran*, 178 Mass. 566, 53 L. R. A. 891, 60 N. E. 382; *Jones v. Williams*, 11 Mees. & W. 176; *Parrott v. Barney*, 1 Sawy. 423, Fed. Cas. No. 10,773; *Nitro-glycerine Case*, 15 Wall. 534, sub nom. *Parrott v. Wells*, 21 L. ed. 210.

Messrs. J. B. Carroll and W. H. McClintock, for plaintiff:

There was evidence that the gale during which the walls fell was not of greater force than had been frequently experienced in Westfield before that time; and so the destruction of the plaintiff's property cannot be considered as having been caused by *vis major*.

Gray v. Harris, 107 Mass. 492, 9 Am. Rep. 61; *Cork v. Blossom*, 162 Mass. 330, 26 L. R. A. 250, 38 N. E. 495.

It cannot be said, as matter of law, that the danger of the walls' falling was so obvious that the plaintiff was not in the exercise of due care in not moving his stock out of the building, especially when he probably could not obtain a suitable location for his business.

Fox v. Sackett, 10 Allen, 535, 87 Am. Dec. 682; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Watkins v. Goodall*, 138 Mass. 533; *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155, 29 N. E. 464; *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366.

A building which is so out of repair that it is liable to fall upon and injure the adjoining premises would clearly be a private nuisance.

Cork v. Blossom, 162 Mass. 330, 26 L. R. A. 250, 38 N. E. 495; *Gray v. Boston Gas-light Co.* 114 Mass. 149, 19 Am. Rep. 324;

Rockport v. Rockport Granite Co. 177 Mass. 246, 51 L. R. A. 779, 58 N. E. 1017; *Sturges v. Society for Promotion of Theological Education*, 130 Mass. 414, 39 Am. Rep. 463; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234.

If the person who brings a nuisance upon his land is responsible for damages inflicted thereby, is it not equally true that the person who keeps it there after it has been brought on is liable?

Gray v. Boston Gaslight Co. 114 Mass. 149, 10 Am. Rep. 324; *Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6.

The owner of land has been held liable for allowing a dangerous condition of things on his land to continue, either after knowledge of it or after reasonable opportunity to know of it.

Laugher v. Pointer, 5 Barn. & C. 547; *Quarman v. Burnett*, 6 Mees. & W. 499; *Rapson v. Cubitt*, 9 Mees. & W. 710; *Rich v. Basterfield*, 4 C. B. 783; *Hobbit v. London & N. W. R. Co.* 4 Exch. 244; *White v. Jameson*, L. R. 18 Eq. 303; *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234; *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 4 L. R. A. 213, 21 N. E. 482; *Seesengut v. Posey*, 67 Ind. 408, 33 Am. Rep. 98; *Anderson v. East*, 117 Ind. 126, 2 L. R. A. 712, 19 N. E. 720; *Glover v. Mersman*, 4 Mo. App. 90; *Benson v. Suarez*, 43 Barb. 408; *Kappes v. Appel*, 14 Ill. App. 170; *Savannah, F. & W. R. Co. v. Lawton*, 75 Ga. 102; *Carman v. Steubenville & I. R. Co.* 4 Ohio St. 399.

Knowlton, J., delivered the opinion of the court:

The defendant's intestate was the owner of the land and of the first two stories of the building which stood upon it before the fire. The third story had been conveyed by the former owners to Lewis, Noble, and Lafflin, trustees, to hold during the life of the building. By the fire the life of the building was destroyed, and the ownership of Lewis and others in the third story was terminated. *Ainsworth v. Mt. Moriah Lodge, A. F. & A. M.* 172 Mass. 257, 52 N. E. 81. The defendant's intestate was left with his land and the walls and some other parts of the first and second stories standing upon it, and with the walls of the third story, which had previously belonged to the trustees, resting on the structure below, and connected with it as part of the realty. All rights of other persons in the walls of the third story had come to an end. As owner of the land and of the first and second stories of the building, he was owner of everything upon it which was a part of the real estate. *Stockwell v. Hunter*, 11 Met. 448, 45 Am. Dec. 220; *Shavmut Nat. Bank v. Boston*, 118 Mass. 125. His position in reference to the walls of the third story was like that of a landlord whose tenant leaves the leased land at the end of the term with structures that he has erected upon it, which have become a part of the realty. These structures which are abandoned by 57 L. R. A.

the tenant immediately become the property of the landlord to whose land they are affixed. *Burk v. Hollis*, 98 Mass. 55; *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371; *Watriss v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694; *McIver v. Estabrook*, 134 Mass. 550. As owner of the land and the structures upon it, which were subject to the power of gravitation, and likely to do injury to others if they fell, the defendant's intestate owed certain duties to adjacent landowners. His duty immediately after the fire was affected by the fact that until then he had had no ownership or control of the upper part of the wall, and that the condition of the whole had been greatly changed by the effect of the fire and the destruction of the connected parts. For dangers growing out of changes which he could not prevent he was not immediately liable. *Gray v. Boston Gaslight Co.* 114 Mass. 149, 19 Am. Rep. 324; *Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6. The jury were therefore rightly instructed that, before a liability could grow up against the defendant's intestate after the fire, he was entitled to a reasonable time to make necessary investigation and to take such precautions as were required to prevent the wall from doing harm.

We come next to the question, "What was his duty and what was his liability after the lapse of such a reasonable time?" There is a class of cases in which it is held that one who, for his own purposes, brings upon his land noxious substances or other things which have a tendency to escape and do great damage, is bound at his peril to confine them and keep them on his own premises. This rule is rightly applicable only to such unusual and extraordinary uses of property in reference to the benefits to be derived from the use and the dangers or losses to which others are exposed as should not be permitted except at the sole risk of the user. The standard of duty established by the courts in these cases is that every owner shall refrain from these unwarrantable and extremely dangerous uses of property, unless he provides safeguards whose perfection he guarantees. The case of *Rylands v. Fletcher*, L. R. 3 H. L. 330, L. R. 1 Exch. 207, rests upon this principle. In this commonwealth the rule has been applied to the keeping of manure in a vault very near the well and the cellar of a dwelling house of an adjacent owner. *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56. See also *Fitzpatrick v. Welch*, 174 Mass. 486, 48 L. R. A. 278, 55 N. E. 178. That there are uses of property not forbidden by law to which this doctrine properly may be applied is almost universally acknowledged. This rule is not applicable to the construction and maintenance of the walls of an ordinary building near the land of an adjacent owner. In *Quinn v. Crimmings*, 171 Mass. 255, 258, 42 L. R. A. 101, 103, 50 N. E. 624, 626, Mr. Justice Holmes shows that, in reference to the danger from the falling of a structure erected on land, "the decision as to what precautions are proper, naturally may vary

with the nature of the particular structure." He says: "As it is desirable that buildings and fences should be put up, the law of this commonwealth does not throw the risk of that act, any more than that of other necessary conduct, upon the actor, or make every owner of a structure insure against all that may happen, however little to be foreseen." The principle applicable to the erection of common buildings whose fall might do damage to persons or property on the adjacent premises holds owners to a less strict duty. This principle is that, where a certain lawful use of property will bring to pass wrongful consequences from the condition in which the property is put, if these are not guarded against, an owner who makes such a use is bound at his peril to see that proper care is taken in every particular to prevent the wrong. *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 4 L. R. A. 213, 21 N. E. 482, and cases cited; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421; *Pye v. Faxon*, 156 Mass. 471, 31 N. E. 640; *Harding v. Boston*, 163 Mass. 14-19, 39 N. E. 411, and cases cited; *Cabot v. Kingman*, 166 Mass. 403-406, 33 L. R. A. 45, 44 N. E. 344; *Robbins v. Atkins*, 168 Mass. 45, 46 N. E. 425; *Thompson v. Lowell, L. & H. R. Co.* 170 Mass. 577, 40 L. R. A. 345, 49 N. E. 913; *Quinn v. Crimmins*, 171 Mass. 255, 256, 42 L. R. A. 101, 50 N. E. 624; *Boomer v. Wilbur*, 176 Mass. 482, 53 L. R. A. 172, 57 N. E. 1004; *Sessengut v. Posey*, 67 Ind. 408, 33 Am. Rep. 98; *Anderson v. East*, 117 Ind. 126, 2 L. R. A. 712, 19 N. E. 726; *Chicago v. Robbins*, 2 Black, 418-428, 17 L. ed. 298-304; *Homan v. Stanley*, 66 Pa. 464, 5 Am. Rep. 389; *New York v. Bailey*, 2 Denio, 433; *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314; *Gray v. Pullen*, 5 Best & S. 970-981; *Dalton v. Angus*, L. R. 6 App. Cas. 740, 829. The duty which the law imposes upon an owner of real estate in such a case is to make the conditions safe so far as it can be done by the exercise of ordinary care on the part of all those engaged in the work. He is responsible for the negligence of independent contractors as well as for that of his servants. This rule is applicable to everyone who builds an ordinary wall which is liable to do serious injury by falling outside of his own premises. It is the rule on which the decision in *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234, rests, and the case is not an authority for any liability of a landowner that goes beyond this. See also *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61; *Shrewsbury v. Smith*, 12 Cush. 177. The uses of property governed by this rule are those that bring new conditions which involve risks to the persons or property of others, but which are ordinary and usual, and, in a sense, natural, as incident to the ownership of the land. The rule first referred to applies to unusual and extraordinary uses which are so fraught with peril to others that the owner should not be permitted to adopt them for his own purposes without absolutely protecting his neighbors from injury or loss by reason of

57 L. R. A.

the use. In England this rule, which was laid down in *Rylands v. Fletcher*, L. R. 3 H. L. 330, L. R. 1 Exch. 267, in reference to a reservoir of water, has since been held to be inapplicable where the collection of the water is in the natural and ordinary use of the land. *Fletcher v. Smith*, L. R. 2 App. Cas. 781. See *Carstairs v. Taylor*, L. R. 6 Exch. 217. So far as we know, there is no case in which it has been applied to the erection or maintenance of the walls of an ordinary building.

The construction which should be put upon the judge's charge in regard to liability for standing walls is by no means certain. Some broad statements in it might seem to indicate that he was laying down a rule applicable to the construction and maintenance of walls of ordinary buildings so situated that if they fall they will be likely to injure the property of the adjacent owner. If this were the true meaning, the instruction would be wrong. But, taking the charge in its different parts in connection with the facts stated in the bill of exceptions, we think it was intended to state the rule applicable to the kind of wall that the jury were considering, and not to the walls of buildings generally. As was decided in a previous suit brought by this plaintiff, the life of the building had been destroyed by fire, and the walls which subsequently fell were no longer used in supporting a building. *Ainsworth v. Mt. Moriah Lodge, A. F. & A. M.* 172 Mass. 257, 52 N. E. 81. Not only was this the testimony of the plaintiff's witnesses, but it was the substance of the evidence introduced by the defendant. His experts testified that, before any part of the wall could safely be built upon, the third story, at least, would have to be taken down. This upper part of the wall was that which was most in danger of falling, and the part whose fall would be most likely to do damage. To maintain it, or to leave it standing to its full height, could serve no useful purpose. Its condition in reference to fitness for use was an undisputed fact on the evidence. Instead of being a part of a building adapted to occupation, it was a part of the ruins of a building. To maintain such a wall after the expiration of a reasonable time for investigation and for its removal would not be a reasonable and proper use of one's property. It was the duty of the defendant not to suffer such a wall to remain on his land, where its fall would injure his neighbor, without using such care in the maintenance of it as would absolutely prevent injuries, except from causes over which he would have no control, such as *vis major*, acts of public enemies, or wrongful acts of third persons which human foresight could not reasonably be expected to anticipate and prevent. This was the rule of law stated by the judge to the jury. With this construction of the charge we think that the jury were rightly directed to a consideration of the evidence on the principal issue of fact.

The jury were instructed to allow inter-

est on the amount of damages from the date of the injury. It would have been more accurate to instruct them that in assessing damages of this kind a plaintiff is not to be awarded interest as interest, but that in ascertaining the damage at the date of the verdict the jury should take into account the lapse of time, and put the plaintiff in as good a position in reference to the injury as if the damages directly resulting from it had been paid immediately. *Fraser v. Bigelow Carpet Co.* 141 Mass. 126, 4 N. E. 620. This principle would authorize the jury to fix the damages at the date of their verdict by adding interest at the legal rate on the amount of damages at the time of the injury, but it would not require them to do this. There might be circumstances such that an allowance less than interest at 6 per cent would compensate for the delay.

The damages in this case were of a different character from the amount to be awarded for the taking of land under the right of eminent domain, in which the value of the property rights taken should be paid at the time of the taking. See *Old Colony R. Co. v. Miller*, 125 Mass. 1-3, 28 Am. Rep. 194. But it does not appear that there was anything in this case to take it out of the ordinary rule in regard to compensation for a delay in payment by the allowance of interest. In the absence of anything in the bill of exceptions to show that the defendant was injured by the instruction, we are of opinion that a new trial should not be granted.

The defendant made many requests for instructions, which we do not think it necessary to consider more particularly.

Exceptions overruled.

MISSOURI SUPREME COURT.

Agnes FUCHS, *Respt.*,

v.

City of ST. LOUIS, *Appt.*

(.....Mo.....)

1. Objection to the overruling of a demurrer to plaintiff's evidence is waived by the introduction of evidence on behalf of defendant.
2. Preserving an exception to the refusal by the trial court of a peremptory instruction to find for defendant on the whole evidence requires the appellate court to review the evidence as a whole.
3. No recovery can be had against a city for injuries caused by an explosion in a sewer, which is alleged to have resulted from negligently permitting petroleum to be turned into it, where the evidence shows that the explosion might have resulted from another cause, and there is nothing to show that it did not do so.
4. A city is not bound to open vents and manholes leading to its sewers, to permit the escape of gases which are generated therein, as a means of avoiding an explosion, although it may have notice that a quantity of crude petroleum has found its way into the sewer as a result of a fire at the refinery.
5. Under an allegation of negligence on the part of a municipality in failing to prevent the formation and accumulation of gases in a sewer, and in failing to open the vents to permit their escape, which resulted in an explosion, evidence is not admissible that the explosion might have been prevented by the use of ventilating apparatus.
6. Testimony of a mining engineer who has never investigated the ventilation of sewers, as to a method of preventing an explosion in a sewer, is not admissible in an action to recover for loss caused by such explosion, where he states that he never

saw any practical attempt made to utilize the method suggested, and never knew of such attempt, and has made no experiments himself.

7. The mere fact of an explosion of gases in a sewer is not sufficient to charge the municipality with liability for the injury caused thereby.
8. The explosion of gases in a sewer to the injury of abutting property owners cannot reasonably be anticipated from the fact of the escape of a quantity of crude petroleum into it, so as to charge the municipality with negligence in failing to provide for the escape of the gases generated thereby.
9. A judgment in plaintiff's favor on his appeal from and involuntary nonsuit granted at the close of his evidence is not conclusive on an appeal by defendant from a judgment in plaintiff's favor at the close of all the evidence, which differs in many essential particulars from that introduced at the first trial.

(Brace, J., dissents in part.)

(March 19, 1902.)

APPEAL by defendant from a judgment of the Circuit Court for St. Louis County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of her husband. *Reversed.*

The facts are stated in the opinion.

Messrs. B. Schnurmacher and Charles Claffin Allen, for appellant:

If the proof had shown the presence of a large body of oil, it also showed that there was no practical, feasible method by which the city authorities could have removed it, the mouth of the sewer being submerged by high water in the Mississippi river. And it also showed that there was no practical, feasible measure or precaution for preventing the formation of gases, or for ventilating the sewer. There was therefore nothing practical which the city could do, or which it omitted to do. Therefore it was not guilty of negligence.

NOTE.—For another case in this series as to liability of municipality for damages caused by explosion of sewer, see *Fuchs v. St. Louis (Mo.)* 34 L. R. A. 118.
57 L. R. A.

Graney v. St. Louis, I. M. & S. R. Co. 157 Mo. 666, 50 L. R. A. 153, 57 S. W. 276; *Shearm. & Redf. Neg.* §§ 15, 57; *Jones, Neg. of Mun. Corp.* §§ 230, 231; *Troth v. Norcross*, 111 Mo. 630, 20 S. W. 297; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847, 28 S. W. 1069; *Thomas v. Missouri P. R. Co.* 109 Mo. 187, 18 S. W. 980.

No such explosion in a sewer had ever before occurred. The accident was one that could not be foreseen; it was unexpected, unavoidable, and inevitable, and for its consequences the city is not liable.

Graney v. St. Louis, I. M. & S. R. Co. 157 Mo. 666, 50 L. R. A. 153, 57 S. W. 276; *Cobb v. St. Louis & H. R. Co.* 149 Mo. 609, 50 S. W. 894; *American Brewing Assn. v. Talbot*, 141 Mo. 674, 42 S. W. 679; *Sullivan v. Jefferson Ave. R. Co.* 133 Mo. 1, 32 L. R. A. 167, 34 S. W. 566; *Fuchs v. St. Louis*, 133 Mo. 182, 34 L. R. A. 118, 31 S. W. 115, 34 S. W. 508; *Henry v. Grand Ave. R. Co.* 113 Mo. 525, 21 S. W. 214; *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L. R. A. 794, 51 N. E. 1; *Hutchinson v. Boston Gaslight Co.* 122 Mass. 219.

The evidence showed the presence of explosive gases other than those arising from oil; gases which are usually present in sewers, the result of decaying organic and vegetable matter. An explosion of these gases would as readily (and more readily) account for the explosion as the theory of plaintiff. Under such circumstances, there can be no recovery in the absence of positive proof as to which of the two causes produced the accident.

Breen v. St. Louis Cooperage Co. 50 Mo. App. 202; *Searles v. Manhattan R. Co.* 101 N. Y. 661, 5 N. E. 66; *Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537.

The sewer was maintained by the city purely as a sanitary measure. Even if the officers in charge thereof were negligent under the peculiar circumstances of the case, the city would not be liable.

Murlaugh v. St. Louis, 44 Mo. 479; *Helier v. Sedalia*, 53 Mo. 159, 14 Am. Rep. 444; *Hannon v. St. Louis County*, 62 Mo. 313; *Armstrong v. Brunswick*, 79 Mo. 319; *Keating v. Kansas*, 84 Mo. 415; *Kiley v. Kansas*, 87 Mo. 103, 56 Am. Rep. 443; *Ulrich v. St. Louis*, 112 Mo. 138, 20 S. W. 466; *Jefferson County v. St. Louis County*, 113 Mo. 619, 21 S. W. 217; *Hughes v. Auburn*, 161 N. Y. 96, 46 L. R. A. 636, 55 N. E. 389.

The fact that the court reversed and remanded the case for a new trial on the former appeal disposed absolutely of no question in the case, except that if, upon such new trial, the plaintiff's evidence should be the same she would be entitled to go before the jury.

Wells v. Moore, 49 Mo. 229; *Norton v. Bohart*, 105 Mo. 615, 16 S. W. 598; *Steinhauser v. Spraul*, 127 Mo. 541, 27 L. R. A. 441, 28 S. W. 620, 30 S. W. 102; *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300; *Young v. Downey*, 150 Mo. 331, 51 S. W. 751; *Wilson v. Beckwith*, 140 Mo. 369, 41 S. W. 985; *Re Meeker*, 45 Mo. App. 186; *Gratton & K. Mfg. Co. v. Troll*, 77 Mo. App. 339. 57 L. R. A.

Messrs. Lubke & Muench, for respondent:

The rules of law applicable to this case were fully and finally stated and laid down by this court when the case was before it on the former appeal.

Fuchs v. St. Louis, 133 Mo. 168, 34 L. R. A. 118, 31 S. W. 115, 34 S. W. 508; *Overall v. Ellis*, 38 Mo. 209; *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Adair County v. Ownby*, 75 Mo. 282; *Conroy v. Vulcan Iron Works*, 75 Mo. 651; *Chouteau v. Gibson*, 76 Mo. 38; *Keith v. Keith*, 97 Mo. 223, 10 S. W. 597; *Chapman v. Kansas City, C. & S. R. Co.* 146 Mo. 481, 48 S. W. 646; *Hombs v. Corbin*, 34 Mo. App. 397; *Lane v. Chicago, R. I. & P. R. Co.* 35 Mo. App. 567; *McKinney v. Harral*, 36 Mo. App. 338; *Galbreath v. Newton*, 45 Mo. App. 312; *Galbreath v. Rogers*, 45 Mo. App. 324; *Shroyer v. Nickell*, 67 Mo. 589; *Gaines v. Fender*, 82 Mo. 497; *Lackland v. Smith*, 75 Mo. 307; *Forester v. St. Louis, I. M. & S. R. Co.* 26 Mo. App. 123; *Bevis v. Baltimore & O. R. Co.* 30 Mo. App. 564; *Teichman Commission Co. v. American Bank*, 35 Mo. App. 472; *Elliott, Appellate Procedure & Trial Pr.* § 578, p. 491; *Hibbits v. Jack*, 97 Ind. 570, 49 Am. Rep. 478; *Hardigree v. Mitchum*, 51 Ala. 151; *Wells, Res Adjudicata & Stare Decisis*, § 613; *F. H. Hesse Printing Co. v. Travellers' Protective Assn.* 81 Mo. App. 469.

The state has recognized the business of handling petroleum and its products as dangerous to human life, and has put it under regulation by providing for the appointment of inspectors, commonly known as coal-oil inspectors.

Rev. Stat. 1889, chap. 87, p. 1323; *St. Louis County Ct. ex rel. Jenks v. Fassett*, 65 Mo. 418.

When the safety of human life is in question, a high degree of care is required in conducting a business in itself lawful.

Lee v. Vacuum Oil Co. 54 Hun, 157, 7 N. Y. Supp. 426.

The evidence showed that the sewer in question was maintained by the city in part for private purposes of its own,—those of draining the city hall, the four courts, and the jail. The case at bar therefore falls within the rule that the municipality is liable, like any individual, for the negligent use of its property.

Flori v. St. Louis, 3 Mo. App. 231; *Flori v. St. Louis*, 69 Mo. 341, 33 Am. Rep. 504; *Carrington v. St. Louis*, 89 Mo. 212, 58 Am. Rep. 108, 1 S. W. 240.

If a city neglects, after notice, or after time after which notice will be imputed to it, to remove obstructions in its sewers, and property is overflowed and damaged by reason thereof, then the property owner has a cause of action against it.

Woods v. Kansas, 58 Mo. App. 272; 2 Dill. Mun. Corp. 3d ed. § 1049; *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463; *Fink v. St. Louis*, 71 Mo. 52; *Smith v. New York*, 66 N. Y. 295, 23 Am. Rep. 53; *Gilluly v. Madison*, 63 Wis. 518, 52 Am. Rep. 299, 24 N. W. 137; *Krans v. Baltimore*, 64 Md.

491, 2 Atl. 908; *Hitchins Bros. v. Frost-burg*, 68 Md. 100, 11 Atl. 826.

Tittman, Special Judge, delivered the opinion of the court:

This suit, which is an action brought by Agnes Fuchs to recover damages for the death of her husband, Carl E. Fuchs, was filed September 16, 1892, in the circuit court of the city of St. Louis. The defendants in the suit as originally brought were the city of St. Louis and the Waters-Pierce Oil Company. The case first came to trial in April, 1893, in which plaintiff was forced to submit to a nonsuit. She appealed to this court, which affirmed the judgment of the lower court as to the Waters-Pierce Oil Company, but reversed the judgment as to the city of St. Louis, and remanded the case for a new trial. The opinion of the court on that appeal will be found in *Fuchs v. St. Louis*, 133 Mo. 168, 34 L. R. A. 118, 31 S. W. 115, 34 S. W. 508. The case was finally tried in the circuit court of St. Louis county, to which it had been taken by change of venue, resulting in a verdict and judgment for plaintiff against the remaining defendant, the city of St. Louis. After an unsuccessful motion for a new trial, the city appealed to this court.

The petition alleges that her deceased husband, on or about May 26, 1884, became the owner of a lot of ground lying on the east side of Fourth street, about 139 feet southwardly of Chouteau avenue, and that in the following year he erected on said lot a building, covering the entire width of the lot, and extending back about 70 feet; that said building was of brick, three stories high, with a cellar, the cellar and the first floor being designed for the storing of wines and liquors, and the carrying on of a wine and liquor business; and that upon the completion of said building her husband fitted up and furnished said cellar and first floor with bar fixtures, shelving, etc., and thereafter, and until his death, carried on a wine and liquor business in said premises. The petition further alleges that on the 22d day of July, 1892, the Waters-Pierce Oil Company engaged in the business of buying, storing, and selling oils, had on hand in its premises a large stock of oil, in barrels and other packages, and that on said day a fire occurred in said company's premises, "and that said oil company then and there carelessly and negligently did cause, suffer, and permit the said oils to escape, and to run into the sewer hereinafter mentioned, and to fill up said sewer, and to generate the gases which caused the explosion in and destruction of said sewer on the 26th day of July, 1892;" the city of St. Louis constructed a main sewer, known as the "Mill Creek Sewer," leading from the center of the city to the Mississippi river, and designed to drain the surface waters falling within the reach of the sewer, and to carry off into the river waters from private dwellings and certain city buildings; that, so far as it was practical to do so, the sewer was constructed beneath the public streets and alleys of the 57 L. R. A.

city, and that it thus crossed underneath Fourth street to the east line of said street, where said line intersects the lot of ground purchased by the deceased husband of plaintiff; that, under a license from the then owners of said lot, the city was permitted to construct said sewer underneath the same, and to carry it eastwardly under said lot towards the river, said sewer being located below the cellar thereafter constructed by said deceased; that when the city obtained said license from the owners it agreed with them and their assigns to keep and maintain the sewer in good order, and to care for the same, so that said lot and any improvements which might thereafter be placed thereon would be free from danger of injury on account of said sewer or the use thereof. The petition then alleges "that said sewer was provided with openings specially designed to carry off any gases which might arise in said sewer and be liable to combustion and explosion, and that said sewer and the openings thereof aforesaid, on and prior to the said 26th day of July, 1892, were in the sole care and control of defendant the city of St. Louis, its agents and servants, yet the said city, its agents and servants, knowing that said defendant the Waters-Pierce Oil Company had flooded said sewer with oil, neglected to open said vents and carelessly and negligently failed to take measures and precautions to prevent gases arising and accumulating in said sewer so as to endanger the same; and that between the said 22d and 26th days of July, 1892, gases did arise and accumulate in said sewer in great and very dangerous quantities, and on the date last named, and within six months next before the commencement of this suit, ignited and exploded with great force, throwing open said sewer underneath the property of said Carl E. Fuchs, shattering his said building, and also then and there causing the death of said Carl E. Fuchs;" that by reason of said wrongful acts of defendants, whereby the death of her said husband was caused, she has been damaged in the sum of \$5,000, for which she prayed judgment. The answer of defendant was a general denial. At the close of plaintiff's case, defendant offered an instruction in the nature of a demurrer to her evidence, and at the close of the whole case it offered a peremptory instruction to find for the defendant. Both instructions were overruled by the court.

The evidence shows that "Mill Creek Sewer," as it is called, is one of the leading public sewers of the city of St. Louis, and, considering its length and dimensions, is one of the largest sewers in the world. It was built some thirty-four years before the explosion therein, in a most substantial manner that left nothing to be desired, of heavy, massive masonry, sides and arch. It takes its name from the fact that it follows an old natural creek which was known as "Mill Creek," and which formerly constituted the natural drainage of a large portion of the city, emptying into the Mississippi river at a point between Chouteau avenue and Con-

vent street, about four blocks east of the Fuchs premises. At its mouth at the river, the sewer is about 24 feet by 14 feet in dimensions, and grows smaller as it reaches its western or beginning point. At the place where it runs under Fuchs' premises its dimensions, according to the testimony of Mr. Colby, the sewer commissioner, is 20 by 15 feet. The natural creek ran in a diagonal direction over the lot acquired in 1884 by Mr. Fuchs. At the time when he purchased the sewer had already been constructed and covered with earth or ballast. This he removed, in order to construct his cellar, leaving about 6 inches of earth or cinders between the floor of the cellar and the top of the sewer arch. The premises of the Waters-Pierce Oil Company were situated on Gratiot and Thirteenth streets, and in their yards were erected a number of sheet-iron tanks, and stored a number of barrels containing oils. On July 22, 1892, a fire broke out in these premises, during which a number of tanks and barrels caught fire. Some were left intact, the oil in some exploded and was consumed in the explosion, while in others it was displaced by the throwing of water into the tanks by the fire engines. The water mixed with burning oil ran through the premises and down into what is known as the railroad valley. There being danger that some of the standing cars might catch fire, drains or chutes were constructed by the railroad people and by the firemen, and it appears that this running water and oil was led between the tracks to a drain or inlet in the valley, the surface of which was covered with cinders. Some of the oil and water ran into a drain or inlet in the yard of the oil company's premises. At the time of the fire the Mississippi river was at a very high stage, and the mouth of the sewer was submerged by high water. The explosion which caused Mr. Fuchs' death occurred in the afternoon of July 26, 1892, or four days after the fire. It appears that the Peters Fish & Oyster Company, a concern doing business at the French Market, which was somewhat south of Mr. Fuchs' place, used in connection with their business a basement under house No. 1026 South Fourth street, about five stores south of Mr. Fuchs' place. An employee named Humpert was at work in the cellar storing melons, and, happening to pass over a drain in the cellar floor with a lighted candle, there was a sudden flash of flame, and almost simultaneously the explosion in the Mill Creek sewer occurred. The drain or sewer thus referred to connected with a sewer in the rear of the premises, which in turn connected with the Mill Creek sewer, as one of its numerous connections. Only that portion of the sewer was blown up which was immediately under the cellar. In the back yard, where the earth had not been removed, the sewer remained intact. According to the testimony, the break in the sewer at Mr. Fuchs' place indicated clearly the outlines of the former cellar floor. About two blocks east of the Fuchs place, and nearer the river, where the slope of the ground is downward,

with but little surface ballast to cover it, there was an open break of 300 feet or more in length. These are the general facts of the case, as shown by the voluminous record in this case. Other specific facts, bearing more immediately on the principles of law involved, will be noticed and mentioned hereafter.

Counsel for appellant, in his brief and in his printed and oral argument, insisted that the court erred in not sustaining its demurrer to plaintiff's evidence at the close of her case. When that demurrer was overruled, defendant waived its objection to the action of the court, by afterwards introducing evidence in its behalf. But having offered a peremptory instruction to find for the defendant at the close of the case, and having duly preserved the point, we are required to review the evidence taken as a whole (*Hilz v. Missouri P. R. Co.* 101 Mo. 36, 13 S. W. 946; *Weber v. Kansas City Cable R. Co.* 100 Mo. 194, 7 L. R. A. 819, 12 S. W. 804, 13 S. W. 587; *Hite v. Metropolitan Street R. Co.* 130 Mo. 132, *loc. cit.* 141, 31 S. W. 262, 32 S. W. 33), and when this is done, then, in the light of the principles of law applicable thereto, there can be but one conclusion, and that is that the plaintiff cannot recover in this action. At the outset it may be stated that there is not the slightest testimony in the record tending to prove the allegation in plaintiff's petition that, when the city constructed the sewer through and underneath the lot subsequently acquired by the deceased, it agreed with the then owners and their assigns to keep and maintain said sewer in good order, and to care for the same, so that said lot and any improvements which might thereafter be placed thereon would be free from danger or injury on account of said sewer or the use thereof. This allegation, of necessity, implies a contractual relation existing between the deceased and the city. There being no evidence to support it, it follows that any idea of such contractual relation between the parties must be eliminated from this inquiry, and it further follows that whatever claim the plaintiff may have against the city must be predicated upon the nonperformance of a legal duty due and owing by it to the deceased. Such duty and its violation, upon which the plaintiff bases her claim for damages, must be found in and determined by the allegations of the petition. These allegations are: That oils escaped from the Waters-Pierce Oil Company at the time of the fire hereinbefore referred to; that they ran into the Mill Creek sewer; that such oils generated gases, and that such gases caused the explosion in and destruction of the sewer on July 26, 1892, by which explosion deceased lost his life; that the sewer was provided with openings specially designed to carry off any gases which might arise in said sewer and be liable to combustion and explosion; that, nevertheless, the city, knowing of the presence of oil in the sewer, neglected to open said vents and carelessly and negligently failed to take measures and precautions to pre-

vent gases arising and accumulating in said sewer so as to endanger the same. It will thus appear from these allegations that plaintiff charges that the gases which were generated in the sewer were so generated from the oils which escaped and ran into the sewer from the Waters-Pierce Oil Company, at the time of the fire on its premises which caused the explosion. It will also appear that there are two charges of negligence, namely, one as a specific charge of negligence, in that the city, knowing of the existence of oils in the sewer, did not open the vents specially designed for the purposes of, presumably, to permit the gases thus generated to escape, and, in addition, another charge of negligence to the effect that it carelessly and negligently failed to take measures and precautions to prevent gases arising and accumulating in the sewer. In these allegations of nonaction on the part of the city are contained the charges against it of legal duties not performed.

1. It is conceded that oil escaped from the Waters-Pierce Oil Company at the time of the fire, and it may fairly be inferred from the evidence that some of the escaping oil ran into the Mill Creek sewer; but a careful reading and re-reading of the record herein fails to disclose any evidence from which even an inference could be drawn that sufficient oil flowed into this large sewer from which were generated sufficient gases to cause the explosion complained of. Indeed there is a total lack of evidence to prove that the explosion was, in fact, caused by gases generated from the escaping oils, as charged. On the other hand, the evidence showed that there were gases other than those arising from oil, present in the sewer at the time of the explosion,—gases which are always present in sewers, and which form as the result of decaying organic and vegetable matter, and which are both inflammable and explosive. Plaintiff's witness Frederick Egner, a gas engineer, testified that from his general reading he knew there was a constant generation of inflammable gas in sewers from vegetable and animal matters, which is called sewer gas, and is a mixture of sulphuretted hydrogen and marsh gas, the latter of which emanates from decaying vegetable matter. He had heard of gases which would ignite and burn spontaneously on the surface of water in a stream or lake when stirred up. He had read of such cases, and believed such gas was common in sewers, because the conditions were favorable. Such gas was generated from human excrement and rotting vegetables and animal matter. He believed that the explosion of sulphuretted hydrogen and marsh gas would be of the same violence as the explosion of petroleum vapor. So also testified plaintiff's expert Hunicke. He states that a gas generates from decomposing vegetable matters which is called methane or marsh gas, and which is explosive; another gas, according to witness, which generates from human excrement, being carbonic acid, more or less, and sulphuretted hydrogen. The latter gas smells like rotten eggs, and is quite explo-

sive when mixed with air. These are the only witnesses who refer to the subject on behalf of plaintiff. That explosive gases form in sewers and are ever present therein was also shown by experts introduced by defendant. Since, then, the gases which form naturally in sewers are as highly inflammable and explosive as the vapors thrown off by kerosene or other oils, and since there was no evidence furnished by plaintiff from which the jury could draw the inference that the explosion was of the latter rather than of the former character of gas, it cannot be said that the allegations of the petition were established, or that the verdict should be permitted to stand. In fact the theory that the explosion was caused by the usual sewer gases is the more likely one, since all the witnesses agreed that the oils which escaped during the fire at the Waters-Pierce Oil Company's premises will throw off vapors in comparative abundance only when subjected to heat. Upon this subject Egner stated that it could not be told how much oil it would take to generate enough gas in Mill Creek sewer under ordinary temperature to cause such an explosion as that which occurred. He did say, however, "I should think it would require a good deal of it in a large sewer like that. Assuming the temperature of the sewer to have been 60 or 70 degrees, or even 75 degrees, the quantity of vapor generated from crude petroleum would be comparatively small." Witness further stated that the temperature in a sewer would likely be lower than the temperature in the exposed atmosphere. Mr. Choller, also a gas engineer, who had made a special study of the subject, testified that even if petroleum or crude oil got into the sewer it would not have cast off gasoline or coal oil under a temperature below 95 degrees. Therefore, if at the fire crude oil found its way into the sewer, that would not account for the presence of either coal oil or gasoline, because the application of heat would be necessary to produce either. As for coal oil, or kerosene, they are combustible, but not explosive. It was for plaintiff to account for the explosion and the causes of it, and, there being present at least two independent causes, and no proof as to which of the two was responsible for the accident, there can be no recovery. *Breen v. St. Louis Cooperage Co.* 50 Mo. App. 202; *Searles v. Manhattan R. Co.* 101 N. Y. 661, 5 N. E. 66; *Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537.

2. There is no evidence in the record to show that there were openings into the sewer "especially designed to carry off any gases which might arise in said sewer and be liable to combustion and explosion." The evidence, what there was of it on this subject, tends to show that there were certain manholes and certain inlets. The former were intended as a means of ingress and egress for making inspections of and repairs in the sewer, whilst the latter were intended to permit the surface water from the streets to flow into it. Moreover, the evidence tends

to show that from the river to Sixth street, one block west of Broadway, there were, besides the many private sewer connections, altogether six manholes, which, with the exception of perhaps one, had perforated covers, twenty-seven open inlets, and two open vaults. Two of these open, grated iron covers were situated in the alley in the rear of the Fuchs place; an open inlet on the southwest corner of Broadway and Chouteau avenue opposite thereto, and one manhole somewhat south thereof, near the meat market, which had a solid cover. But as to this the removal of the cover would have been useless, because, at the request of the people of the neighborhood, the city had put a "goose neck" device into that manhole to prevent the odors and gases of the sewer from emanating therefrom. It was so constructed that the gas could not issue out of the sewer, cover or no cover. Notwithstanding all these openings, it is apparent that whatever gases there were in the sewer did not rise and escape therefrom. But suppose we concede, as is claimed by respondent, that there were certain closed covers to some of the sewer openings which might have been removed; it does not appear that their removal would have done any practical good. To say so is to indulge in mere conjecture.

3. Assuming that the allegations of respondent's petition with respect to the matters hereinbefore referred to have been proved, what was, as a matter of law, the appellant's duty with respect to the premises? A sewer is defined to be "a drain or passage to carry off water and filth under ground; a subterranean channel, particularly in cities." Webster, Dict. Sewers are constructed as sanitary measures, for the public good, to carry off all sewage, consisting of human excrements and refuse animal and vegetable matter, which, as the testimony shows, and as everybody knows, constantly and continuously generates gases, noxious and dangerous, as the result of the constant and continuous process of nature. It is intended and is the object of sewers to carry off and to guard the substances from which they spring. Sewers are supposed to be covered, and to be so constructed as to prevent the escape of gases generated in them. It is not intended that they be permitted to disseminate and breed disease, or to cause injury to personal or property rights. If this is not so, then there is no need of sewers, and whilst it is necessary, in order that the city may, in the exercise of its ministerial function, properly repair and maintain its sewers, that there should be certain openings or manholes, to permit ingress thereto and egress therefrom, and hence it becomes necessary to occasionally remove the covers, the city would be remiss in its duty were it to deliberately remove the covers for the purpose of permitting the escape of all the vile, noxious, and dangerous gases which, through nature's laws, are constantly produced therein. Thus, in *Atlanta v. Warnock*, 91 Ga. 210, 23 L. R. A. 301, 18 S. E. 135, Mrs. Warnock brought her petition for injunction against the city 57 L. R. A.

of Atlanta, alleging that the city had opened two manholes, 2 feet in diameter, with perforated tops, into the large sewer extending along Wheat street, both within a few feet of petitioner's property, which fronts 290 feet on Wheat street, and 150 feet on Courtland street, where she and her family have resided for twelve years, one of the manholes being on the corner of the two streets, and the other on Wheat street, with no trap or obstruction to prevent the foul sewer gas from coming up through the same; that this gas is exceedingly offensive and dangerous to the health and lives of petitioner and other occupants of her premises. It comes up in great volumes, especially after a short dry spell, and is distressingly troublesome and annoying in warm weather, driving petitioner and her family and friends from the veranda of her house, compelling her to shut the windows in the warmest weather, and making life unbearable; that she had made frequent applications to the various officers of the city, all with no effect, etc.; that the way to abate the nuisance is to place a solid instead of a perforated top on the manhole, and she prayed "that the state's writ of injunction do issue, restraining the said defendant from keeping said mouths of said manholes open, and from continuing said nuisance in front of petitioner's premises." The court below, after hearing, ordered "that the defendant be enjoined from continuing said manholes in such condition as to allow the escape of noxious gases," and this action of the lower court was affirmed by the supreme court. *Hardy v. Brooklyn*, 90 N. Y. 435, 43 Am. Rep. 182, was an action against the city for damages resulting from a nuisance alleged to have been caused by the negligent construction of a sewer. It appeared that by the plan of the sewer, as adopted and filed by the board of water commissioners, it ran past plaintiff's premises to a point where it would find a proper discharge. The sewer was constructed to a point a short distance above the plaintiff's premises, and there a wooden trough or shoot was built to carry off its contents, in consequence of which noxious and deadly gases were emitted, injuriously affecting plaintiff's premises. The plaintiff recovered damages, and the court of appeals affirmed the judgment. The plaintiff in this case charges a dereliction of duty on the part of the defendant in not opening its vents or manholes to permit the generated gases to escape. In the Georgia case referred to, the city was enjoined from opening the manholes permitting the gases to escape. In the New York case, the city was mulcted in damages because it permitted gases to escape. We have thus presented to us the anomaly that, if plaintiff's theory be correct, the city is liable, on the one hand, for not opening the manholes, and for not permitting the gases to escape, and, on the other hand, to be enjoined or mulcted in damages for doing so. As Judge Sherwood says, in his dissenting opinion on the former decision of this case (133 Mo. loc. cit. 200, 34 L. R. A. 126, 34 S. W. 514): "Again, if the city is to

be held responsible for failing to keep open the vents to the sewers within its jurisdiction, is it to be held liable also if some person passing while the vents are open casts a lighted match into one of them, or the gas from it rises and catches fire from a street lamp, thereby causing an explosion? Is it possible that the city be thus held responsible whether it does or does not open vents? And yet if the position taken by plaintiff as ground for recovery in this action be correct, that the city is responsible for the gases which breed in its sewers, then the spectacle will soon be presented of actions for damages against the city, because: First, it does not open its sewers, and thereby allow the gases therefrom to escape, thereby causing an explosion; because, second, it does open its sewers, and thereby an explosion is caused; because, third, it opens its sewers to allow the gases to escape, and thereby becomes liable for diseases and death, scattered by reason of the escape of such gases." That the manholes or vents should not be kept open to permit the escape of dangerous gases is demonstrated by the facts of this case. If the drain or sewer in Peters' cellar, four or five stores south of Fuchs' place, into which gas was evidently forced from the Mill Creek sewer through connecting sewers, had not been open, permitting gas to escape into the cellar, and to come into contact with Humpert's lighted candle, the catastrophe would never have happened. The cause of the unfortunate death of Mr. Fuchs was because there was an open inlet, through which gas escaped, which, coming into contact with the flame of the candle, caused the explosion. We conclude therefore that it was not the duty of the city to open its manholes in order to permit the escape of gases that had accumulated in the sewer.

4. The other allegation of negligence, namely, that the defendant "carelessly and negligently failed to take measures and precautions to prevent gases arising and accumulating in said sewer," is easily disposed of. There was no evidence to sustain this allegation. As we have stated, the testimony shows that there is a constant generation of inflammable gases in sewers, and there was not the slightest suggestion on the part of any one of the witnesses as to any known method of arresting what counsel for appellant aptly calls "one of the never-ceasing processes of nature." On the contrary, the testimony was all the other way.

5. At the trial of this case, the plaintiff, against defendant's objection, was allowed to show by her expert witness, Prof. H. A. Hunicke, that, if a manhole cover had been removed, in his opinion the use of a fan or blower of seven horse power would have eliminated the gases, so as to render them nonexplosive by blowing air into or sucking the gases out of the sewer. The petition in the case alleged two specific acts of negligence against the city: A failure to prevent the formation and accumulation of gases, and a failure to ventilate the sewer by open-

ing the vents specially designed to carry off gases. There was no allegation of neglect of duty on the part of the city in not using a fan or blower or any other contrivance or design to carry off or destroy the gases. It is settled that, where specific acts of negligence are charged, evidence of other acts is inadmissible. *Atchison v. Chicago, R. I. & P. R. Co.* 80 Mo. 213. The testimony should therefore have been excluded. There are other reasons why the testimony of this witness should have been disregarded, and the jury should have been instructed so to do as requested by appellant. His testimony, so far as it is necessary to refer to it, is substantially as follows: "I am a consulting chemist and mining engineer, and have been for sixteen years. I was for four years professor of applied chemistry at Washington University, St. Louis, from which university I am a graduate. I have had practical experience in mines in New Mexico, Colorado, and Illinois, and am familiar with coal oils and other substances. Petroleum is the term applied to a mineral oil occurring in nature. Petroleum means oil from the rock, and is equivalent to crude oil as it is pumped from the earth. Petroleum when released will evaporate at all temperatures. It will give up the lighter constituents until the air about it is saturated. It is the same as with water. The air around it will take up so much water as will saturate it. The evaporation naturally increases as the temperature increases; that is, the higher the temperature the more rapid the evaporation. The less volatile and more solid portion of the oil will remain. All the vapors of petroleum are combustible, and will explode when mixed with the proper amount of air or oxygen. Explosion is a rapid burning. In order to produce an explosion there must be an ignition. . . . None of these oils or products that I have mentioned appear in mines, but gases do. Gases accumulate more in coal mines than in metal mines. I had some experience in taking care of mines and removing gases from them. I have heard the manholes on Fourth and Fifth streets described, but don't know that I have ever seen them. Q. Now, suppose these manhole covers were removed, or a manhole cover was removed from one of the manholes, what scientific appliance was there, well known previous to 1892, for creating a draft through this manhole? (To which question counsel for defendant objected, on the ground that the witness had not qualified or undertaken to qualify to answer the question, he not having pretended that he ever made a study of the science or method of removing gases from sewers.) Court: From the experience you have had, practically and scientifically, can you answer that question? A. To know what to do? Court: Yes. A. I might say at the outset that it is an engineering, not a scientific, problem, and would depend very largely on the individual who has charge of it. Q. As an engineer, can you answer us? A. Well, things that might suggest themselves to me as a mining engineer might not present

themselves to others. Q. Professor, I will ask you the question this way: Was there, previous to 1892, any well-known appliance or means for ventilating, by means of which a sewer could be ventilated, a manhole cover being removed? (To which question defendant, by its counsel, again objected, on the ground that the witness had not qualified as an expert on the ventilating of sewers, and had further already stated that he is a mining engineer, and what would suggest itself to an engineer in charge of a sewer.) The Court: If you know of any one you may answer it. (To which action and ruling of the court, defendant, by counsel, then and there duly excepted.) A. So it refers only to one hole? Q. Yes. (Counsel for defendant again objected, on the ground that this question of the witness and answer of counsel made the question still more incompetent.) The witness proceeds: The means would have been possible, but under the circumstances it would require considerable time to eliminate the gases by simply opening a manhole. It would be necessary to apply means, and nothing short of a blower would have done in that case. A blower of, say, seven horse power would have removed the air, or replaced the air sufficiently to be nonexplosive, within thirty-six hours. When the crude oil got into the sewer, it would tend to evaporate and rise, like sugar in coffee, although the sugar is heavier than the coffee. This vapor, rising up in the sewer, would continue through the air until the air was saturated and could take up no more, and will tend to creep out through any overhead holes. The most natural point for placing the blower would be at the opening closest to the river. Either a pressure blower or suction fan might have been applied at a point further up. Fans will either blow or draw air, so the point may differ. It would be preferable to blow the air in instead of drawing it out. Cross-examination: I never saw any practical attempt made, either in the city of St. Louis or in this country, or anywhere in the world, to extract gas out of a sewer by means of a fan or blower. Neither did I ever know of any sewer commissioner anywhere in the United States attempt to blow air into a sewer filled with gas, or suck air out of a sewer filled with gas, by means of a fan. I can't give any positive information touching that, and I never saw it done. I know that experiments have been made in London, but I have no knowledge or observation of its ever having been put to practical use. I don't know whether, in order to suck air out of a sewer, it would be necessary to close all of the apertures except the one at which the fan was at work in order to create a suction. That would depend upon what the purpose of the suction was. If you were trying to suck gas out of this court room, and the windows were all up, and you put your fan at one of the windows, it would not work. In order to make the fan work and create a suction, I would want an opening at which to put the fan, and the balance of the openings closed. I would

want a certain ratio of inlet and outlet. I don't know how many drains, inlets, openings, or connections there were to the Mill Creek sewer within a circle of 500 feet around the manhole where I stood and would station the blower or fan, but I say that without knowing that, and without myself having experimented with this sewer, or having seen it attempted anywhere in the world, my plan would have prevented an explosion. I say that, because the connections can be opened and closed, and if the gas had been sucked out the fresh air would have rushed in to supply its place to such an extent that a flame held at the opening would not have ignited it. I have never attempted to use a blower myself in connection with a sewer, nor have I ever seen one used, and, as I have stated, I have no experience or observation in that direction. I know that the Mill Creek sewer extends to a mile west of the river, and that other sewers, of various sizes, and from all directions, lead into it, and I know that some of them have open or perforated covers. But, notwithstanding all these connections and openings into the main sewer, I should not hesitate to apply the blower on my plan. I know that a blower would have been effective without ever having experimented. I do not recollect whether or not at the last trial I testified that the thought of using the fan or blower had occurred to me as a scientific possibility, but that without a practical experiment I could not say whether it would accomplish any result; since I testified last time I have made no experiments to ascertain whether the plan was a practicable or feasible one." It will appear from the foregoing that the witness is a mining engineer and a consulting chemist; that he never, as a scientist, investigated the ventilation of sewers, and never gave the subject of sewers a particular or special study; that he did not claim that his proposed remedy had ever been practically applied, or even made the subject of experiment by himself. He says that he never saw any practical attempt made in St. Louis, or in this country, or anywhere in the world, to extract gases out of a sewer by means of a fan or blower, nor did he ever know of any sewer commissioner anywhere within the United States attempting to blow air into a sewer filled with gas, or suck air out of a sewer filled with gas, by means of a fan. He could not give any positive information about that, and he never saw it done. Experiments were made in London, but he had no knowledge or observation of its ever having been put to practical use. He never had attempted to use a blower in connection with a sewer, nor had he ever seen one used, nor had he ever had any experience or observation in that direction. He had testified in the case twice before, but had made no experiments with respect to the matter since that time. So far as the record shows, Prof. Hunicke's proposed remedy is a mere theory of his own. Practical engineers, who had devoted years to the study and management of sewers, testified that Mr. Hunicke's scheme is entirely

impracticable. Not one of them had ever heard of it. Not one of them knew of any known practical or feasible method by which the gases could have been extracted from the sewer. It would be monstrous to predicate a charge of negligence against the city on such testimony as that. It should never have been admitted; having been admitted, it should have been entirely disregarded, and the jury instructed to do so, as requested by appellant in its instruction No. 2 refused by the court. *Graney v. St. Louis, I. M. & S. R. Co.* 157 Mo. 666, 50 L. R. A. 153, 57 S. W. 276.

6. Eliminating from consideration the testimony of the witness Hunicke, and from what has been heretofore stated, it will appear that the respondent had nothing on which to go to the jury save the bare fact that the sewer exploded. But the mere fact of an accident, and the consequent injury resulting therefrom, does not, as a rule, make out a prima facie case. There are cases where the doctrine of *res ipsa loquitur* applies, but we can find no adjudicated case where that doctrine was applied to a case like the one before us. Except in cases relating to common carriers of goods and passengers, or arising out of other contractual relations, the mere fact of an explosion, without affirmative proof of negligence, does not raise a prima facie presumption of negligence on the part of defendant. *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864; *Cosulich v. Standard Oil Co.* 122 N. Y. 123, 25 N. E. 259; *Walker v. Chicago, R. I. & P. R. Co.* 71 Iowa, 658, 33 N. W. 224; *Loose v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623. The plaintiff, therefore, made out no case to be submitted to the jury, and she is not aided by any testimony introduced by defendant.

7. Irrespective of what has been said before, there is a vital and fatal objection to respondent's right of recovery in this action. In the case of *American Brewing Assn. v. Talbot*, 141 Mo. loc. cit. 683, 42 S. W. 682, the court says: "Numerous authorities hold that it is not negligence not to take precautionary measures to prevent an injury which, if taken, would have prevented it, when the injury could not reasonably have been anticipated, and would not, unless under exceptional circumstances, have happened," and in support of that doctrine the court cites, with approval, in addition to a large number of cases, Ray, *Negligence of Imposed Duties*, pp. 133, 134, as follows: "Mischiefs which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong. A reasonable man does not consult his imagination, but can be guided only by a reasonable estimate of probabilities. The reasonable man, then, to whose idea of behavior we are to look as the standard of duty, will neither neglect what his reason and experience will enable him to forecast as probable, nor conduct, on a basis of bare chances, a business whose success is dependent upon

his accuracy in forecasting the future. He will order his precaution by the measure of what appears likely in the usual course of things. The proper inquiry is not whether the accident might have been avoided if the one charged with negligence had anticipated its occurrence, but whether, taking the circumstances as they then existed, he was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor of any particular means which it may appear, after the accident, would have avoided it. The requirement is only to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident. . . . The prudence and propriety of men's doings are not judged by the event, but by the circumstances under which they act. If they act with reasonable prudence and good judgment, they are not to be made responsible because the event, from causes which could not be foreseen nor reasonably anticipated, has disappointed their expectations." Also Webb's *Pollock, Torts*, enlarged Am. ed. pp. 45, 46, as follows: "Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability." And the statement proposed, though not positively laid down, in *Greenland v. Chaplin*, 5 Exch. 248, namely, "that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur," appears to contain the only rule tenable on principle, where the liability is founded solely on negligence. "Mischiefs which could by no possibility have been foreseen, and which no reasonable person would have anticipated" may be the ground of legal compensation under some rule of exceptional severity, and such rules, for various reasons, exist; but under an ordinary rule of due care and caution it cannot be taken into account. The same principle is recognized and applied in *Sullivan v. Jefferson Ave. R. Co.* 133 Mo. 1, 32 L. R. A. 167, 34 S. W. 566, and also in the large number of cases cited in the dissenting opinion in *Fuchs v. St. Louis*, 133 Mo. 168, 34 L. R. A. 118, 31 S. W. 115, 34 S. W. 508. A

reference to a few other cases, very analogous to the case before us, is not inappropriate. In *Sofield v. Sommers*, 9 Ben. 526, Fed. Cas. No. 13,157, the facts were these: The fumes of crude petroleum carried in a tank on a lighter used in the oil trade escaped into a locker, which locker,—there being no watchman on board, when the lighter lay one night with other vessels at a pier in Jersey City,—was forced open during the night by a thief, who, exploring the locker with a lighted match, set fire to the gas and caused an explosion and a fire, whereby the lighter and the libellant's lighter that lay alongside were destroyed. Held, that the escape of the gas into the locker was an accident, and the presence of a lighted match in the locker not the natural result of the absence of a watchman; that between the act of omission charged upon the defendant and the explosion charged there intervened an independent human agency, the presence of which had no natural relation to any act of defendant, and which therefore entailed no responsibility upon the defendant for the explosion. In the case of *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L. R. A. 794, 51 N. E. 1, decided by the supreme judicial court of Massachusetts, in July, 1898, the facts were that the railroad company maintained a passenger station, freight house, and freight yard, all adjoining a public street or highway, in the village of Spencer. On one side of the freight house was a wooden platform about 8 feet wide, and set on posts in the ground about 4 feet high. The under side of the platform was left open and exposed. It seems that the railroad company was in the habit of storing oil in barrels on and under this platform until called for and taken away by the consignees, and that in consequence thereof the platform had become saturated with oil, much of which dripped to the ground underneath, saturating the rubbish and straw which had collected there. On September 13, 1893, one Casserly, a teamster, brought a load of goods to this platform to be shipped by the railroad company. Lighting his pipe, he threw down the match, which fell to the ground, underneath the platform, and in consequence of the saturation of the rubbish and the platform with oil a fire resulted which spread with great rapidity, exploding several barrels of oil, and soon communicating with plaintiff's buildings fronting upon the street, and about 75 feet distant from the platform, which buildings it destroyed. The testimony of plaintiff showed that some 25 to 30 barrels of oil had been left upon the platform for more than forty-eight hours prior to the accident; that the platform had been thoroughly saturated with oil for at least eight years. The action was to recover from the railroad company the value of plaintiff's buildings thus destroyed. The lower court directed a verdict for defendant, upon which judgment was entered, and this action of the lower court is approved and affirmed by the supreme court. After considering the evidence somewhat in detail, 57 L. R. A.

the court reaches the conclusion that the railroad company was guilty of negligence in the keeping of the oil and in the maintenance of the platform saturated as it was with oil. Having reached this conclusion, the court proceeds to inquire whether this state of facts was the proximate cause of the accident, so as to result in the liability of the company. Discussing this feature of the case, the court says: "Nevertheless the question remains, and in our view this becomes the important and decisive question of the case, whether, assuming that the defendant was thus in fault, the plaintiff introduced any evidence which would warrant a finding by the jury that the damage to his property was a consequence for which the defendant is responsible; or, in other words, whether the act of Casserly in starting the fire was such a consequence of the defendant's original wrong in allowing the oil to remain upon the platform that the defendant is responsible to the plaintiff for it. . . . The rule is very often stated that in law the proximate, and not the remote, cause is to be regarded, and in applying this rule it is sometimes said that the law will not look back from the injurious sequences beyond the last sufficient cause, and especially that where an intelligent and responsible human being has intervened between the original cause and the resulting damage the law will not look back beyond him. This ground of exonerating an original wrongdoer may be found discussed or suggested in the following decisions and text-books, among others: [Here follows a host of references bearing upon the question. Thereupon the court continues its discussion.] It cannot, however, be considered that in all cases the intervention even of a responsible and intelligent human being will absolutely exonerate a preceding wrongdoer. Many instances to the contrary have occurred, but these are usually cases where it has been found that it was the duty of the original wrongdoer to anticipate and provide against such intervention, because such intervention was a thing likely to happen in the ordinary course of events. . . . Was the starting of the fire by Casserly the natural and probable consequence of the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind ought this result to have been apprehended? The question is not whether it was a possible consequence, but whether it was probable; that is, likely to occur to the usual experience of mankind. That this is the true test of responsibility applicable to a case like this has been held in very many cases according to which a wrongdoer is not responsible for a consequence which is merely possible according to occasional experience, but only for a consequence which is probable according to the ordinary and usual experience. One is bound to anticipate and provide against what usually happens, and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or

what, as it is sometimes said, is only remotely and slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible; but it is not negligence in a legal sense to omit to do so. . . . Tried by this test the defendant is not responsible for the consequences of Casserly's act. There was no close connection between it and the defendant's negligence. There was nothing to show that such a consequence had ever happened before during the eight years covered by the plaintiff's testimony, or that there were any existing circumstances which made it probable that it would happen. It was, of course, possible that some careless person might come along and throw down a lighted match where a fire would be started, . . . but it was not according to the usual and ordinary course of events. In failing to anticipate and guard against such an occurrence or accident, the defendant violated no legal duty which it owed to the plaintiff." It being contended, however, that the negligence of the railroad company concurred with that of Casserly to produce the injury, the court met that contention as follows: "The plaintiff further contends that the negligence of the defendant in keeping the oil upon the platform was concurrent with the careless act of Casserly, and that therefore it was a case where two wrongdoers, acting at the same time, contributed to the injurious result. But this is not a just view of the matter. The negligence of the defendant preceded that of Casserly, and was an existing fact when he intervened." The application of the principles announced in these cases and text-books to the case before us is obvious. To warrant the inference of negligence on the part of the city, it is necessary to conclude: (1) That oil works would burn; (2) that by reason thereof oil would flow into the sewer; (3) that oil reached the sewer in sufficient quantities to generate gas sufficient in quantity to explode it; (4) that during the period whilst the oil was in the sewer someone with a lighted candle would cross a drain leading into a private sewer, leading in turn into another sewer, which, in turn, led into the Mill Creek sewer; and (5) that, before the happening of this later occurrence, the city could have removed the oil or the gases, although, as the testimony shows, no method for doing so existed unless we adopt the individual theory of the witness Hunicke, which, as has already been stated, should be entirely eliminated from consideration in this case. In short, this case presents the instance of an injury which could not have reasonably been anticipated. It would not, unless in exceptional cases, have happened. Whilst the explosion was possible, it was not probable, according to ordinary and usual experience. Although the sewer had been in existence for some thirty-four years, no such explosion had ever happened before, and, in all likelihood, will never happen again. Had it not been for Humpert's legitimate act, the oil and the gases might 57 L. R. A.

have remained in the sewer without injury to anyone until the subsidence of the high water in the river, and without any foundation for fear of hurtful consequences. The facts of the case simply present a case of inevitable accident for which the city cannot be held responsible, because it was not negligent.

8. Counsel for respondent strenuously urges upon the court the plea of *res judicata*, relying, in its support, upon the opinion and judgment of this court in the former appeal between these parties. When the case was here before, it came up on plaintiff's appeal from an involuntary nonsuit, which she was compelled to suffer. The only question which was then presented to the court was whether, upon the evidence then submitted to the jury and preserved in the record, she made out a prima facie case entitling her to go to the jury. The court held that she did make out such prima facie case, and reversed the judgment and remanded the case for a new trial. Upon the retrial, her case was sent to the jury, countervailing evidence was offered by the defendant, instructions were given, others refused, rulings were had on the competency and admissibility of testimony, and the appellant now appeals from the judgment rendered against it in favor of the respondent. Appellant is, of course, entitled to be heard on the matters of which it complains, and to have the case, as it appears from the present record, reviewed by this court. Moreover, a careful comparison of the facts as they appear from the record now here with the facts as stated by Judge Barclay in his opinion based upon the record then before the court shows that they are not the same, but differ in many essential particulars. Under such circumstances, the doctrine of *res judicata* does not apply. A reference to a few cases on this subject decided by our own appellate courts will suffice. *Nieinhaus v. Spraul*, 114 Mo. 551, 21 S. W. 515, 859; *Kelly v. Thuey*, 143 Mo., *loc. cit.* 437, 45 S. W. 300; *May v. Crawford*, 150 Mo., *loc. cit.* 525, 51 S. W. 693; *Gratton & K. Mfg. Co. v. Troll*, 77 Mo. App., *loc. cit.* 344. The view we have taken of this case makes it unnecessary to review the instructions given and refused. This suit was instituted in September, 1892. It was tried three times in the St. Louis circuit court, once in the county of St. Louis, and it was argued in this court at least four times.

As, in our opinion, the defendant cannot be held liable in this action, it will serve no useful purpose to remand the case for a new trial. In so far as the opinion in *Fuchs v. St. Louis*, 133 Mo. 168, 34 L. R. A. 118, 31 S. W. 115, 34 S. W. 508, conflicts with this opinion, it is overruled, and the judgment of the court below is, with the concurrence of the other judges, reversed.

Burgess, Ch. J., and Sherwood, Robinson, Valliant, and Gantt, JJ., concur. Brace, J., concurs, except as to paragraphs 1 and 5 of the opinion. Marshall, J., not sitting.

NEBRASKA SUPREME COURT.

SWIFT & COMPANY, *Pfif. in Err.*,
v.

Edward BLEISE.

(.....Neb.....)

- *1. Allegation that defendant corporation did certain things by its foreman is a sufficient allegation of the latter's authority, as against an objection to all evidence at the trial.
2. Negligent act of a foreman, with general control, and authority to employ and discharge workmen, in ordering a subject workman upon an elevator, and himself operating the elevator with negligence, to the workman's injury,—*Held*, properly, regarded by the trial court as not the act of a fellow servant, but of a vice principal.
3. Instruction that defendant's answer denied lameness of plaintiff, where answer really denied that it was caused by defendant, and by the means alleged,—*Held*, prejudicial error, where there was evidence tending to show a previously existing lameness.
4. Refusal of instruction to the effect that defendant was not responsible for damage caused by want of reasonable care on plaintiff's part after the alleged injury,—*Held*, erroneous, where evidence had been admitted, without objection, tending to show that plaintiff's condition, expense, and suffering were in part due to his failure to exercise reasonable care after the hurt received.

(February 6, 1902.)

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Reversed*.

The facts are stated in the Commissioner's opinion.

Mr. I. R. Andrews for plaintiff in error.

Messrs. Ed. P. Smith and James B. Sheehan, for defendant in error:

It was unnecessary to allege in this petition anything further than such facts as would warrant an inference of superiority on the part of Apel over Bleise, and the negligence of such superior servant.

Burlington & M. River R. Co. v. Crockett, 19 Neb. 138, 26 N. W. 921; *Chicago, B. & Q. R. Co. v. Sullivan*, 27 Neb. 673, 43 N. W. 415; *Sioux City & P. R. Co. v. Smith*, 22

Headnotes by HASTINGS, C.

NOTE.—As to vice principalship considered with reference to the superior rank of a negligent servant, see, in this series, *Stevens v. Chamberlin* (C. C. App. 1st C.) 51 L. R. A. 513, and *note*.

As to vice principalship determined with reference to the character of the act which caused the injury, see *Lafayette Bridge Co. v. Olsen* (C. C. App. 7th C.) 54 L. R. A. 33, and *note*; also *Wellston Coal Co. v. Smith* (Ohio), 55 L. R. A. 99.

57 L. R. A.

Neb. 775, 36 N. W. 285; *Union P. R. Co. v. Doyle*, 50 Neb. 555, 70 N. W. 43; *New Omaha Thomson-Houston Electric Light Co. v. Baldwin* (Neb.) 87 N. W. 27.

The vice principal's character as such comes from his authority and his direct representation of his master.

Burlington & M. River R. Co. v. Crockett, 19 Neb. 138, 26 N. W. 921; *Sioux City & P. R. Co. v. Smith*, 22 Neb. 775, 36 N. W. 285; *Chicago, B. & Q. R. Co. v. Sullivan*, 27 Neb. 673, 43 N. W. 415; *Crystal Ice Co. v. Sherlock*, 37 Neb. 19, 55 N. W. 294; *Union P. R. Co. v. Doyle*, 50 Neb. 555, 70 N. W. 43; *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550, 48 N. E. 915; *Shumway v. Walworth & N. Mfg. Co.* 98 Mich. 411, 57 N. W. 251; *Illinois C. R. Co. v. Coleman*, 22 Ky. L. Rep. 878, 59 S. W. 13.

Hastings, C., filed the following opinion:

Thirty-seven assignments of error are made in this case. Comparatively few of them, however, are urged by counsel, and only those will be considered. The first is that the petition does not state a cause of action, for the reason that it is nowhere alleged that the foreman, Fred Apel, had authority or control over the plaintiff, or that it was any part of his duty to operate the elevator in question. The defendant company says that such an allegation was necessary to disclose a right of action against it. The plaintiff's claim in this action is that he was ordered by the defendant, through its foreman, Mr. Apel, to place two trucks upon the elevator in defendant's packing house, and to go down into the lower part of said building to obtain material for sausages required on the sixth floor, for the purpose of smoking them; that the elevator man was absent, and the foreman instructed plaintiff to place himself and the trucks upon the elevator, and that it would be operated by the foreman himself; that he did so; that the foreman attempted to manage the elevator and lower it, but was ignorant of its manner of operation, and incompetent to perform such duties, and lowered the elevator so carelessly, negligently, and recklessly, and with such want of skill, that it fell to the bottom of the building with such violence that plaintiff was thrown against its floor and upon the trucks, and sustained injury in the breaking of the knee cap of his left leg, injuring the tendons and ligaments connected with it, and was otherwise bruised; that his injuries were caused by the ignorance, carelessness, negligence, and lack of skill of the foreman, of which plaintiff was not previously advised. The answer admits that defendant is a corporation; admits that plaintiff was in its service prior to August 3, 1894, and, with other employees, accustomed to use the elevator and go up and down with trucks "as directed;" that Apel operated the elevator in which the plaintiff was descending; denies that plaintiff was injured as alleged; denies

that the alleged "lameness and stiffness in his left knee, as well as his suffering in body and mind, is in any wise owing to or the result of any injury received by him in going down in said elevator, as set forth in said plaintiff's petition;" and denies generally. Plaintiff's allegation was that defendant ordered these things to be done, and the admission is that the plaintiff was accustomed to use this elevator "as directed." Ordinarily it is sufficient to enable one to introduce proof of acts done by means of an agent, to allege that the principal did it. *Bank of Metropolis v. Gutschliok*, 14 Pet. 19, 10 L. ed. 335; *Hoosac Min. & Mill. Co. v. Donat*, 10 Colo. 529, 18 Pac. 157; *Edison Electric Light Co. v. United States Electric Lighting Co.* 35 Fed. 134; *Burnham v. Milwaukee*, 69 Wis. 379, 34 N. W. 389; *Todd v. Minneapolis & St. L. R. Co.* 37 Minn. 358, 35 N. W. 5. Of course, the defendant corporation could act only by an agent. It would seem that the allegations here are sufficient to indicate, at least after a verdict, that the several directions which plaintiff is alleged to have received came from defendant by authority, and that Apel had, with defendant's assent, control of the appliances which it is admitted that plaintiff was accustomed to use "as directed." Assuming, then, that Apel's authority is sufficiently indicated, the question is whether the injury, under the circumstances, is simply a result of the acts of a fellow servant,—a risk which the plaintiff had assumed,—or of negligence by a vice principal. Undoubtedly the simple fact that Apel was foreman would not cause an injury arising from his merely assisting in the work, entirely independent and apart from any exercise of authority by him, to be imputed to the employer. No decisions of this court, nor of any other, have been called to our attention which preclude the same person acting at different times in different capacities. He might be foreman at one time, and assistant workman at another, and that all on the same day and in the same place, so far as any decisions cited here are concerned. Counsel for the defendant is entirely correct in saying that the decisions of this court do not hold "that the master is liable for the personal act of the foreman wholly disconnected with his duties of supervision." Liability for the acts of a vice principal is, in this state, derived from the authority given him, and, of course, cannot be separated from an exercise of that authority. The question here is whether or not the action of Apel in ordering the plaintiff on the elevator with the trucks, and in himself undertaking the task of lowering him, were so far separate transactions that the latter is to be considered as wholly distinct from the duty of supervision. It would not seem so. If the doctrine of responsibility for the act of the vice principal is to be derived from his authority, it ought to be applied whenever the vice principal's negligence coincides with an exercise of that authority. The position of plaintiff is quite different from that in which he would have been if he had at his

own instance, and without specific direction, entered upon the elevator with the trucks, and a fellow workman, or even the foreman himself, had simply volunteered to lower the elevator. He would have been taking the risk himself. Here he was ordered into the elevator with the trucks by the foreman, who is conceded to have had the authority, in fact, and the right to employ and discharge workmen. His refusal would undoubtedly have cost him his place. While carrying out this order he was injured, as the jury find, by the fault of this foreman. The trial court held that under such circumstances the negligence of the foreman is to be deemed the negligence of his employer. In this respect we are unable to distinguish this case from *Crystal Ice Co. v. Sherlock*, 37 Neb. 19, 55 N. W. 294; *Sioux City & P. R. Co. v. Smith*, 22 Neb. 775, 36 N. W. 285; *New Omaha Thomson-Houston Electric Light Co. v. Baldwin* (Neb.) 87 N. W. 27. The negligent act was not by any means wholly disconnected with his duties of supervision. It was the direct result of his exercise of those duties in giving orders to, and directing the movements of, plaintiff in connection with his own contemporaneous acts. To hold that the sole cause of the injury was the bad manipulation of the elevator is to ignore a large part of the transaction, and the important part, so far as plaintiff's position is concerned. That manipulation was only a part of the foreman's authoritative arrangements.

There are various errors complained of, in the giving and refusal of instructions, which must be noted. The first is a complaint that the trial court misstated defendant's answer. The statement in paragraph 2 of the instruction is, "Defendant denies that the plaintiff was injured in manner and form as stated in his petition, and denies the alleged lameness of plaintiff, and denies each and every allegation." This instruction, given on the court's own motion, is in accordance with certain refusals of instructions asked by the defendant, which will be considered later. The defendant complains that it indicates a complete denial of any injury to the plaintiff, and any lameness on his part, whereas the answer is a denial that plaintiff was injured as alleged, and a statement "that the alleged lameness and stiffness in his left knee, as well as his suffering in body and mind, is in no wise owing to, or the result of, any injury received by him while going down in said elevator, as set forth in said plaintiff's petition." That this is quite decidedly a different matter from a complete denial that any injury was received, or that any lameness existed at the time of the trial, must be conceded. In some states of the evidence it might be entirely unprejudicial. In this case, however, we find that plaintiff, in his brief, concedes "there was some evidence received, which, if the proper issues had been raised by the answer, might have entitled the defendant to have submitted to the jury the question of the condition of plaintiff's knee prior to the accident, and also whether

or not the injury was aggravated by his own conduct."

By instruction No. 10 defendant asked the court to charge that it was the plaintiff's duty to take all reasonable care of the injured knee, and that if he failed to take such care, and conducted himself in a manner to aggravate and enhance the alleged injury, and on account of his failure the injury was increased or enhanced, he was not entitled to damages which resulted from his failure to take such proper and reasonable care. This instruction was refused. It has to be admitted that the matter sought by the above instruction to be laid before the jury was not specifically pleaded. It is claimed on behalf of plaintiff, in the first place, that any error in refusing said instruction was cured by the general instruction on damages given by the court in its No. 5. This instruction was as follows: "You are instructed that, if you find for the plaintiff, you will assess the damages to which you believe him entitled as shown by the evidence. In so doing you should allow him his necessary expenses for treatment of his injuries while in the hospital, and reasonable compensation for his loss of time in consequence of the injuries inflicted upon him, if you find such injuries were inflicted upon him through the carelessness, neglect, or negligence of the defendant, as hereinbefore explained,—a just and reasonable compensation on account of the pain and suffering, if any has been shown by the evidence, caused by said injuries; and if you find from the evidence that the plaintiff's injuries are permanent, and that a partial disability, resulting from those injuries, will continue in the future, you may allow plaintiff something, also, on account of such future disability, taking care that such allowance is just and reasonable, and supported by a preponderance of the evidence." This instruction, it will be observed, while very clearly stated, and placing the proper elements of damages distinctly before the jury, contains no exception as to aggravation by plaintiff's carelessness, or as to the consideration of his previous condition. We do not see how this instruction No. 5, while admittedly correct in stating the positive elements which go to make up the damages in a case of this kind, can be held to take the place of defendant's requested instruction as to the negative elements which it is admitted the evidence in this case developed. Counsel for plaintiff contends that instruction No. 10 was not embraced within the issues; that this matter of subsequent conduct of plaintiff, and of his previous condition, must be specifically pleaded, in order to be available by way of instruction. Of course, if this is true, the evidence was not admissible under the pleadings, and the failure to submit it by instructions cannot be complained of. *Union P. R. Co. v. Elliott*, 54 Neb. 305, 74 N. W. 627; *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1, 78 N. W. 359, and *Union Stock-Yards Co. v. Goodwin*, 57 Neb. 138, 77 N. W. 357, are cited to uphold this contention.

All three of these cases are holdings that contributory negligence, as a defense to an action, must be alleged. They are not cases holding that mere proof in reduction of damages must be based upon a specific allegation; nor do they hold that a defendant is not entitled to have the effect of such evidence stated to the jury, in the absence of specific allegations. Instruction No. 10 only asked that the evidence be considered in reduction of damages, and it would seem that evidence for that purpose was competent, and an instruction submitting such evidence to the jury right and proper, without any specific allegation. Such matters are peculiarly within the knowledge of plaintiff. They are liable not to come to defendant's knowledge until the trial, and, if they appear for the first time in the course of it, they are proper matters for the jury's consideration. They would seem to be distinctly part of these matters in mitigation of the injury; rather than of damages actually arising from it, which Greenleaf says may always be shown. 2 Redfield's ed. Greenl. Ev. § 266; *Crete v. Childs*, 11 Neb. 252, 9 N. W. 55; 1 Enc. Pl. & Pr. p. 827. The defendant would seem to have the right to have them submitted in a properly drawn instruction for that purpose. This was especially true in connection with the version of defendant's answer which was given by the trial court to the jury. The instruction given, with the refusal of the one requested by defendant, would indicate that the court's view was either the one now taken by the plaintiff's counsel, that the matter was not in issue, or else one which the plaintiff's brief admits was wrong, namely, that there was no evidence to support it. It would seem that there was error, and error liable to be prejudicial, in the two, taken together.

The other complaints of both instructions given and those refused are based upon the defendant's assumption that the injury was the result of Apel's personal act, and not the result of any act of himself as foreman; and, as we have not deemed that contention well taken, it is not necessary to consider them further.

Complaint is made because of the refusal of the trial court to permit defendant to prove that the falling of the elevator five floors would have resulted in the breaking of its frame. It was objected to as incompetent, and it must be said that there is no showing that the witness knew anything more about that part of the matter than the jurors themselves might be presumed to know. Whether opinion evidence should be taken on this subject at all was probably discretionary with the court, but, at all events, the qualification of the witness is not shown to have been such that his answers would have been valuable.

Complaint is made of the misconduct of two of the jurors in taking notes of the evidence at the trial. We are not prepared to say that this was misconduct, in and of itself. It is difficult to conceive how this could have happened to any great extent in

a public trial without coming to a diligent defendant's knowledge, and if it did, of course, error would be waived if no objection was taken. In some of the states, taking notes by jurors is expressly authorized by statute. It does not seem to be necessarily prejudicial. It is not claimed that any prejudicial circumstances, beyond the bare fact that two of the jurors took shorthand notes of greater or less extent, is shown. From the affidavit of one of the note takers and of other jurors, the trial court would have been amply warranted in finding that shorthand notes were taken by Smith and Weinberger, but were not read or referred to in the jury room. This would not, in our opinion, call for a reversal of the case.

The complaint of prejudice on the part of the juror Adams it is not necessary to discuss, as he cannot serve again on this case.

For the error in telling the jury that defendant denied the lameness, and in refusing to instruct that defendant was not responsible for any additional injury caused by plaintiff's own carelessness and neglect of reasonable subsequent precautions, the cause should be reversed. It is therefore recommended that the cause be reversed and remanded for further proceedings.

Day and Kirkpatrick, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, *the judgment of the District Court is reversed*, and the cause remanded for further proceedings.

PHILADELPHIA MORTGAGE & TRUST COMPANY, Appt.,

City of OMAHA.

(.....Neb.....)

- *1. Tax levied on real estate for general revenue purposes, or by way of special assessment for benefits received on account of local improvements, is not a debt, in the ordinary meaning of the word, against the owner of the property, to be enforced as a personal liability, but a charge upon the real estate against which assessed, to be enforced and collected by a sale of the property liable for the taxes so levied and assessed.
2. By reason of the provision of § 144, art. 1, chap. 77, Comp. Stat. 1901, an injunction will not be granted to restrain the collection of taxes, unless the assessment is void, or levied for an illegal or unauthorized purpose.

*Headnotes by HOLCOMB, J.

NOTE.—For other cases in this series as to injunction to restrain collection of taxes, see *Odlin v. Woodruff* (Fla.) 22 L. R. A. 699; *Bloxham v. Consumers' Electric Light & Street R. Co.* (Fla.) 29 L. R. A. 507; *Levi v. Louisville* (Ky.) 28 L. R. A. 480; *Portland Hibernian Ben. Soc. v. Kelly* ((Or.) 30 L. R. A. 167; *Hayes v. Douglas County* (Wis.) 31 L. R. A. 57 L. R. A.

3. Ordinarily the rule of estoppel in pais will not be held applicable to the acts of municipal officers in the exercise of governmental agencies of the municipality of which they are public agents; and where a city treasurer erroneously and by mistake marked on the tax records of his office that certain taxes levied on real estate were "paid," and a third party, relying on, and in faith of, the record so erroneously made, loaned money and acquired title to the land, believing the taxes assessed thereon were paid,—*Held*, that the rule of equitable estoppel did not apply as against the municipality, and that it could not by injunction be restrained from enforcing the collection of the taxes actually due and unpaid, which had been lawfully levied and assessed on such property.

On Rehearing.

- †4. It seems that where the agent of a prior lien holder falsely, but without the knowledge of his principal, represents that the lien is satisfied, whereby another is induced to loan money upon mortgage on the property, the result is only to postpone such prior lien to the mortgage, not to extinguish it; and hence if the mortgagee acquires the property by foreclosure, paying less than the amount of the mortgage debt, his remedy on discovering that the prior lien remains unpaid is to foreclose as to such lien, setting up the facts by reason whereof it should be postponed, or to compel the holder thereof to redeem from the mortgage, and not to enjoin all assertion of the lien and cut it off entirely.
5. In consequence of § 144, art. 1, chap. 77, Comp. Stat., an action to quiet title to real property and remove a cloud therefrom, directed against an apparent lien by way of tax or special assessment, is only maintainable in case such tax or assessment itself is absolutely void.
6. If the tax is not wholly void in itself, nor levied or assessed for an unauthorized purpose, a person who claims for some other reason that he or his property should not be held to pay it is left to the remedy provided by § 144, art. 1, chap. 77, Comp. Stat., or to make his defense when the alleged tax lien is sought to be enforced.
7. Whether the doctrine of equitable estoppel may be applied to a municipal corporation acting in its governmental capacity,—*quære*.

(December 18, 1901.)

APPREAL by plaintiff from a judgment of the District Court for Douglas County in favor of defendant in a suit to enjoin the collection of certain taxes. *Affirmed*.

The facts are stated in the opinions.

Messrs. Wharton & Baird, for appellant:

Appellant had a right to rely upon the correctness of the records in the city treasurer's office as to the payment of the taxes

†Rehearing headnotes by POUND, C.

213; *Davis v. Petrlovich* (Ala.) 36 L. R. A. 615; *Wells, F. & Company's Exp. v. Crawford County* (Ark.) 37 L. R. A. 371; *Buck v. Miller* (Ind.) 37 L. R. A. 385; *Johnson v. De Bary-Baya Merchants' Line* (Fla.) 37 L. R. A. 518; and *Northwestern Lumber Co. v. Chehalis County* (Wash.) 54 L. R. A. 212.

in question, and, having acted on the faith of the same, the city is estopped from denying the correctness of said records.

Comp. Stat. 1897, chap. 77, § 108.

The city treasurer, or his lawfully constituted deputy, entered the record of payment as provided by the law. It is a legal presumption that the act of the city treasurer or his deputy in making the record of the payment of the taxes in question was rightfully done.

Tecumseh Town Site Case, 3 Neb. 234.

The fact that the record showed the tax paid was presumptive evidence that it was paid; and the appellant, having no notice of any irregularity in paying the same, had a right to act on that presumption, and, having acted on it in good faith, the city is certainly estopped from denying the payment.

6 Walt, Act. & Def. p. 592.

A municipal corporation may be estopped by the action of its proper officers when acting in its private as contradistinguished from its governmental, capacity, and having lawful power to do the act.

Chicago v. Sexton, 115 Ill. 230, 2 N. E. 263; 2 Herman, Estoppel, § 1222; *Luse v. Rankin*, 57 Neb. 632, 78 N. W. 258; *Reading v. Krause*, 167 Pa. 23, 31 Atl. 366; *Curnen v. New York*, 79 N. Y. 511; *Kuhl v. Jersey City*, 23 N. J. Eq. 84.

On petition for rehearing.

The duties of the city treasurer in receiving taxes and marking the same "paid" on the records are not governmental, but purely ministerial, duties, and the city, in the performance of those duties, through its treasurer, is not engaged in a governmental or public act.

Chicago v. Sexton, 115 Ill. 230, 2 N. E. 263; *Boone, Corp.* § 300; *Mechem, Agency*, § 592; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *Lacour v. New York*, 3 Duer, 406; *Jones v. New Haven*, 34 Conn. 1; *Herman, Estoppel*, § 1225; 2 Dill. Mun. Corp. 3d ed. §§ 980, 981; *Murtaugh v. St. Louis*, 44 Mo. 479; *Bailey v. New York*, 3 Hill, 539, 38 Am. Dec. 669; *Luse v. Rankin*, 57 Neb. 632, 78 N. W. 258; *Curnen v. New York*, 79 N. Y. 511; *Reading v. Krause*, 167 Pa. 23, 31 Atl. 366.

Messrs. W. J. Connell and Edgar H. Scott for appellee.

Holcomb, J., delivered the opinion of the court:

Plaintiff and appellant instituted this action in the court below, in the exercise of its equity jurisdiction, for the purpose of having the title to certain real estate quieted in it, and to compel the defendant city treasurer of Omaha to note on his records the payment of certain taxes appearing against said real estate as being unpaid and an apparent lien thereon, and also to enjoin the defendant treasurer from changing the records after they were made to show and record the fact that the said taxes were paid. The relief sought was based substantially on the following facts which were pleaded in the petition, and the truth of 57 L. R. A.

which sufficiently appears from the entire record before us: At the time of the transaction hereinafter narrated, one Henry Bolln was city treasurer, and had applied to the plaintiff for a loan of money on the real estate involved in this action, of which he was the owner. The loan was negotiated on the faith of the security offered, and, default having been made in the payment of the loan so made and the interest according to the terms of the agreement, such proceedings were thereafter had as resulted in a sale of the mortgaged property, and the purchase of the same by the plaintiff in satisfaction of its mortgage lien thereon, so that it became the owner of the property in fee simple. At the time the loan was negotiated the taxes for municipal purposes assessed and levied on the real estate offered for security for the years 1892 and 1893, and certain instalments of special paving taxes, in all amounting to \$258.62, were marked "Paid" on the tax records of the city. The plaintiff negotiated the loan and advanced the money to the borrower, relying on the correctness of the tax records as they thus appeared. The taxes were, in truth and fact, never paid; and subsequent to the transaction resulting in the loan, and prior to the bringing of the present action, the records were altered by the erasure of the word "Paid," so that the taxes again appeared as unpaid, and an apparent lien on the property against which assessed and levied. On these facts the trial court found the plaintiff's bill was without equity, and that it was not entitled to the relief sought, and dismissed the action. From the decree of dismissal the cause is brought to this court by appeal.

It is agreed by all the parties interested, as we understand the record, that the entry on the tax records showing payment of the taxes was a mistake, and that the taxes so recorded as being paid were never in fact paid into the city treasury, and that the records ought not to have been so marked. At all events, there is no shadow of claim put forth by appellant to the effect that the taxes have ever been paid. The law provides that whenever taxes are paid the treasurer shall write on the tax lists, opposite the description of the real estate or personal property whereon the same were levied, the word "Paid," together with the date of such payment, and the name of the person paying the same. Section 108, art. 1, chap. 77, Comp. Stat. 1901. And it is the contention of the appellant that the law presumes that a public officer does his duty, and, the record showing the taxes to have been paid, it will be presumed the entry of payment was rightly made, and that, in any event, the city is estopped from enforcing the taxes so marked "Paid," as against the land on which levied, and afterward purchased by plaintiff, because of its having made the loan mentioned and parted with its money relying on and in good faith of the record as it then appeared, showing all of the taxes mentioned to have been paid. The problem thus presented is an interest-

ing one, and, were the transactions such as to affect only private individuals, or corporations acting in their corporate capacity as an individual, we would not regard it as difficult of solution. We are, however, constrained to the view that because of the nature and quality of the act relied on to operate as an estoppel, and a proper application of the statutes relating to the public revenues and the manner of their collection, an altogether different question is presented from that first suggested. The plaintiff asks, in effect, that the tax records be changed from their present condition, so as to show all of the taxes mentioned in the petition to have been paid; that it be decreed that such taxes are not a lien on the real estate against which they were assessed; and that the defendant city and its treasurer be forever restrained from enforcing or attempting to enforce the collection of such taxes as against the real estate, the title to which, free from any lien by reason of such taxes, it is sought to have quieted in the plaintiff. The relief demanded is shocking to a court whose conscience is appealed to, since it is obvious that the record thus made under compulsion would be a false one, and deprive the city of the collection of some of its revenues to which it is lawfully entitled. Let us see what the effect of a decree of the kind prayed for would be. The special assessments and the taxes assessed and levied for municipal general revenue purposes are a charge upon and against the particular tracts of land on which assessed, and, unless the real estate can be made to respond to the charges thus made, the taxes cannot be collected, although lawfully levied and justly due, and the city must lose all right thereto. It is suggested in the brief of counsel for appellant that the collection of these taxes may be enforced against Bolin, the owner of the real estate at the time they were levied. But this cannot be, under the laws of this state. It will hardly be contended by any, we assume, that a special assessment levied solely on the ground of benefits to the property assessed, and on the theory that, for the benefits received because of local improvements, special assessments to correspond to the benefits received may rightfully be made a charge against the property, can be converted into a just and legal demand *in personam*, against the owner of the fee. The law authorizes the taxation of property specially benefited by reason of local improvements, but not the taxation of the owner of such property. On taxes levied on real estate for general revenue purposes this court has more than once held that the tax was not a debt, in the ordinary meaning of the word, against the owner of the property, to be enforced as a personal liability, but a charge upon the real estate against which assessed, to be enforced and collected by a sale of the property liable for the taxes so levied and assessed. *Grant v. Bartholomew*, 57 Neb. 673, 78 N. W. 314; *Carman v. Harris*, 61 Neb. 635, 85 N. W. 848.

57 L. R. A.

If our conclusions in respect of the matter last discussed are correct, then it must follow that the ultimate object and purpose to be accomplished by these proceedings are permanently to restrain the collection of the taxes assessed against the property involved in the controversy, although it is conceded that the taxes are in all respects valid, and legally due to the municipality to which they are owing. By § 144, art. 1, chap. 77, of the Compiled Statutes of 1901, it is provided that no injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof, except the tax enjoined be levied or assessed for an illegal or an unauthorized purpose. These provisions are to be given the effect the language used, expressive of the legislative intent, fairly warrants; and the uniform holdings of this court have been that unless the assessment is void, or levied for an illegal or an unauthorized purpose, injunction cannot be resorted to in order to prevent the enforcement of the collection of such taxes. *South Platte Land Co. v. Crete*, 11 Neb. 344, 7 N. W. 859; *Wilson v. Auburn*, 27 Neb. 435, 43 N. W. 257; *Thatcher v. Adams County*, 19 Neb. 485, 27 N. W. 729; *Spargur v. Romine*, 38 Neb. 736, 57 N. W. 523; *Bellevue Improv. Co. v. Bellevue*, 39 Neb. 885, 58 N. W. 446; *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369, 70 N. W. 955. In *Bellevue Improv. Co. v. Bellevue*, 39 Neb. 885, 58 N. W. 446, it is stated in the opinion of the court: "In many states, courts of equity interfere to restrain the enforcement of invalid taxes upon real estate upon the ground that they cast a cloud upon plaintiff's title, but an inspection of the decisions of this court shows that this principle has not been here recognized. This feature has existed in each of the cases where relief has been refused upon the general ground that no established rule of equity jurisprudence has been invoked to sustain the suit." The case at bar does not commend itself as coming within any established equitable principles justifying the relief asked, unless it be on the ground of estoppel, which will be noticed hereafter. Counsel for appellant insists that it is not sought to enjoin the collection of the taxes assessed against the property which it is desired to have released from the lien thereof, but only to have the apparent lien removed, and that the city is yet at liberty to proceed and collect the taxes in any manner it may adopt, except by proceedings against the real property on which assessed. It is obvious, from an inspection of the revenue laws and the decisions heretofore cited, that the assessments must be collected, if at all, from the property alone liable therefor, and that a suit against the person owning the land at the time of the assessment is unauthorized. It then appears that, as to the equities in the case in favor of or against the respective parties, the question is whether the municipality shall lose the taxes lawfully assessed against the property described in the plaintiff's petition, or be permitted to enforce the collection of the

amount due notwithstanding the error made by one of its officers or agents, and leave the plaintiff to his remedy against those responsible for the mistake which led the plaintiff to take the action it did. The plaintiff answers the question by saying that the doctrine of estoppel *in pais* applies, and the city, because of the erroneous action of one of its agents, on the faith of which plaintiff acted, is prohibited from asserting or enforcing any lien it may have had for the payment of such taxes. Counsel for appellant, in their brief, say: "A municipal corporation may be estopped by the action of its proper officers, when acting in its private as contradistinguished from its governmental, capacity, and having lawful power to do the act." Conceding the proposition thus enunciated to be correct, can it be said that the act of the city treasurer in erroneously noting on the tax records of a municipality that certain taxes were paid, when, as a matter of fact, they were not, is the act of the corporation in its private or individual capacity and not one pertaining to the government of its affairs? It is frequently said that a municipality has a double character,—one, governmental, legislative, or public; and the other, proprietary or private. Dill. Mun. Corp. 4th ed. § 86. The authority to assess property, collect taxes, and make disbursements thereof is founded solely and exclusively on the theory that it is essentially a part of the machinery of government, necessary to maintain its existence for the benefit of the public; and it would seem to follow as a natural deduction that the agencies employed in respect of such matters, including the agency authorized to collect the taxes levied for public purposes, exercise powers of a public and governmental character. If correct in the statement just made, then it follows, according to the rule advanced by plaintiff, that the action taken by one of the public officers of the corporation, which is relied on to operate as an estoppel, was not an act of the corporation, in its private or proprietary character, and hence the doctrine invoked is not applicable. The reasons for the distinction have been recognized and applied by this court in an action wherein it was sought to establish the liability of a city for the negligent acts of one of its servants and employees, committed while in the performance of his duties as an agent or servant of the municipality. *Gillespie v. Lincoln*, 35 Neb. 34, 18 L. R. A. 349, 52 N. W. 811. It is there held, in substance, that the exception to the general rule as to liability is based upon a public policy which subordinates private interests only to the welfare of the public generally, and we apprehend that this is the underlying and distinguishing principle as to the law of estoppel when it is invoked against a city for the erroneous acts of one of its officers engaged in the management of some branch of the governmental affairs of the municipality. For reasons as potent as those relieving a city from liability because of the negligent acts of its officers, it would seem estoppel cannot

be predicated on or arise from acts of negligence or mistake by an agent of the corporation while in the discharge of the governmental affairs of the municipality. If the rule can be invoked by reason of such errors or mistakes, then, indeed, would the public welfare be seriously menaced, and the ability of the corporation to perform its public functions in many instances dangerously crippled. The correct rule, therefore, is, and should be, that the doctrine can be appealed to effectively, as against a municipal corporation, only when it is acting in its private, as contradistinguished from the public or governmental, capacity. There may be, and probably are, exceptions to the rule stated, as when a municipality has gained a clear and decided advantage by the act relied on to operate as an estoppel, when equity will prevent it from retaining the advantage, and at the same time denying its binding force. In the present case, it is to be borne in mind, nothing of advantage has been gained by the city by the erroneous and mistaken action of its city treasurer, and that the success of the plaintiff can result only in a corresponding loss to the city.

The authorities are, we think, quite uniform in support of the proposition that the doctrine cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of one of its agents or officers which has been relied upon by a third party to his detriment. In the case of *People v. Brown*, 67 Ill. 435, it is stated in the headnotes that "public policy, to prevent loss to the state through the negligence of public officers, forbids the application of the doctrine of estoppel to the state, growing out of the conduct and representations of its officers. On the same ground that the government is excused from the consequence of laches, it should not be affected by the negligence, or even wilfulness, of any of its officers." Says Mr. Justice Breese, who delivered the opinion of the court: "It is a familiar doctrine that the state is not embraced within the statute of limitations, unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues, and property would be at fearful hazard, should this doctrine be applicable to a state. A great and overshadowing public policy of preserving these rights, revenues, and property from injury and loss by the negligence of public officers, forbids the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government. The doctrine is well settled that no laches can be imputed to the government, and by the same reasoning which excuses it from laches, and on the same grounds, it should not be affected by the negligence, or even wilfulness, of any one of its officials." In *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263, upon the subject of estoppel as to a municipal corporation, the rule is stated in the opinion as follows: "We hold, simply, that

a municipal corporation may be estopped by the action of its proper officers, when the corporation is acting in its private, as contradistinguished from its governmental, capacity, and has lawful power to do the act." See also authorities bearing generally on the proposition: *Martel v. East St. Louis*, 94 Ill. 67; *Ast v. Jackson School Twp.* 90 Ind. 101; *Berry v. Bickford*, 63 N. H. 328; *Sievers v. San Francisco*, 115 Cal. 648, 47 Pac. 687. A case somewhat related to the one at bar is reported in [*Kuhl v. Jersey City*], 23 N. J. Eq. 84, wherein a party purchased land relying on the fact of payment of the taxes levied on the same, to evidence which the proper officer had issued a receipt for the taxes, which appeared afterward had not been actually paid; and, on an application for an injunction, it was held that the doctrine of estoppel did not apply, and the injunction was therefore denied. While the reasoning employed does not commend itself to us, the result reached is in harmony with the general trend of authority. Counsel for appellant cite us some authorities holding that by an injunction a municipality will be restrained from enforcing tax liens on the ground of estoppel, but in each of the two cases cited the sole question considered was that of enforcement of the lien, and not the collection of the taxes, as must be the result in the case at bar if the relief prayed for is granted. The equities of the appellant in the present case are not such as to entitle it to an injunction restraining the collection of the taxes lawfully assessed against the property it now owns, nor can the doctrine of estoppel *in pais* be successfully invoked to accomplish that result.

It follows that the decree of the District Court should be affirmed, which is accordingly done.

A rehearing having been granted, **Pound, C.**, on June 4, 1902, filed the following additional opinion:

This is a rehearing. The facts are stated in the former opinion (*Philadelphia Mortg. & T. Co. v. Omaha*), but may be stated briefly as follows: One Bolln, city treasurer of the defendant municipality, obtained a loan of plaintiff secured by mortgage upon real property. At that time the taxes upon the property for certain years and certain instalments of special assessments thereon were marked "Paid" on the tax records of the city, as required by law when such taxes or assessments are collected. The plaintiff afterwards became owner of the property through foreclosure of its mortgage. In fact, the taxes had not been paid, and we may take it that the false entry upon the records was a fraud upon the city as well as upon the mortgagee. After plaintiff took its mortgage, the word "Paid" was erased, and the taxes and assessments once more appeared as liens upon the property. Thereupon plaintiff brought this suit to quiet its title, remove the cloud thereon by reason of the taxes and assessments, and require said taxes and assess-

ments to be noted as paid upon the records. The district court dismissed the suit, and its decree was affirmed at the former hearing.

We think the judgment of affirmance was right, and should be adhered to. The taxes themselves are conceded to be regular and valid in every respect, and to be unpaid; but plaintiff asserts an estoppel by reason of the condition of the city's records when it made the loan, and claims that the city should not be permitted to erase the entries and claim a lien afterwards to the prejudice of a mortgagee in good faith who took in reliance on such records. Plaintiff bought in the property under its decree of foreclosure for less than the amount found due on its lien. Hence we may treat it, with respect to other lienholders not parties to the foreclosure, as in the position of mortgagee rather than purchaser, since it paid nothing beyond the credit on the mortgage debt. Stated in general terms, plaintiff's case amounts to this: The agent of a prior lienholder falsely, but without the knowledge of his principal, represented that the lien was satisfied, whereby plaintiff was induced to loan money upon mortgage on the property. It would seem, under such circumstances, that the estoppel should extend only to postponing such prior lien to the plaintiff's mortgage lien. 2 Pom. Eq. Jur. §§ 731, 732. The requirements of justice would be met fully by permitting or requiring the holder of the tax lien to redeem. It is not necessary to wipe it out utterly in order to protect the mortgagee. Plaintiff might maintain a suit to foreclose against the tax lien, so long as it was not involved in the first suit, compelling its holder to redeem from the mortgage or confining its operation to any surplus that might remain after satisfaction thereof. *Shaw v. Heisey*, 48 Iowa, 468; *State Bank v. Abbott*, 20 Wis. 570; *Foster v. Johnson*, 44 Minn. 200, 46 N. W. 350; *Robinson v. Ryan*, 25 N. Y. 320. Instead, plaintiff seeks to cut the tax lien off entirely. We do not think such course just or equitable, and doubt whether a suit of this character would be maintainable under the circumstances, in view of the ordinary rule that he who seeks equity must do equity.

If this objection did not exist, however, there is another and insuperable difficulty in § 144, art. 1, chap. 77, Comp. Stat. By whatever name called, any suit which has for its real end the enjoining of a tax or special assessment is within the purview of that section. Otherwise, the statute would be deprived continually of all force or efficacy by very trivial exercises of professional ingenuity. If a tax or assessment is absolutely void in itself, so as to be no tax, but a mere pretense under color whereof rights are affected and titles clouded, an action to quiet title and remove the cloud is maintainable. *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369, 70 N. W. 955; *Touzalín v. Omaha*, 25 Neb. 817, 41 N. W. 796. As was said in the latter case: "A void tax is no tax. How, then, can the statute debar

the taxpayer from enjoining the unlawful sale of his property to pay such alleged taxes?"

But here the taxes themselves are valid, and they were not levied or assessed for an unauthorized purpose. Plaintiff's contention is that for other reasons it ought not to pay them, and they ought not to be held a lien on its lands. Such claims come fairly within the scope and purpose of § 144, and afford no ground for injunction or proceedings in equity tantamount thereto. If the tax is not wholly void in itself, nor levied or assessed for an unauthorized purpose, one who claims for some other reason that he or his property should not be held to pay it is left to the remedy provided by said § 144, or to make his defense when the alleged tax lien is sought to be enforced. *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369, 70 N. W. 955; *Bellevue Improv. Co. v. Bellevue*, 39 Neb. 885, 58 N. W. 446; *Spargur v. Romine*, 38 Neb. 736, 57 N. W. 523.

Hence we do not think it necessary to decide whether or how far the doctrine of equitable estoppel may be applied to a municipal corporation acting in its governmental capacity, nor whether the acts here in controversy are to be put in that category. The former opinion states the arguments, and cites the cases in support thereof, whereby it is contended that the doctrine does not apply. On the other hand, it might be argued that though courts cannot judge between sovereign and subjects as of course, when the sovereign comes into court or permits itself to be sued courts must apply the ordinary principles of law and justice as in other cases. It might be urged that equitable estoppel, rightly understood and administered, is as essential to just determination of causes as a defense of payment or denial of a plaintiff's claim. It might be urged that it is of the essence of justice to have a universal standard, and that there should not be one standard for the state and one for the citizen. The authorities directly in point on either side are few, and the question must be determined by principle and analogy. It is too important to be settled by mere dictum, and ought to be left open. Conceding all that the plaintiff asserts as to the force and scope of its claim of estoppel, the action by which it seeks to avail itself thereof is not maintainable. We recommend that the former judgment be adhered to.

Barnes and Oldham, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the former judgment of this court is adhered to and the judgment of the District Court is affirmed.

L. R. A.

Rowland P. HILLS, *Plff. in Err.*,
v.

STATE of Nebraska.

(61 Neb. 589.)

- *1. A wife is a competent witness against her husband in a prosecution for bigamy.
2. The mere allegation or averment of a marriage as a fact implies that the marriage was legal.
3. A communication to a minister of the gospel or priest is not privileged, where it is shown that it was not made in confidence of the relation, or was not to be kept as a secret.
4. A confession of a prisoner, voluntarily made, is admissible, when not prompted by any inducement of hope or fear.
5. A marriage solemnized in good faith is not void merely because the contracting parties may at some prior time have entered into an agreement or understanding that the marriage should be invalid.
6. A marriage legal where solemnized is valid everywhere.

(April 10, 1901.)

*Headnotes by NORVAL, Ch. J.

NOTE.—*Conflict of laws as to validity of marriage.*

- I. *Manner or form of solemnization; preliminaries*, 155.
- II. *Polygamous marriages; temporary marital unions*, 159.
- III. *Matrimonial capacity of the parties.*
 - a. *In general; lex loci or lex domicilii; public policy*, 161.
 - b. *Incestuous marriages*, 166.
 - c. *Marriages between members of different races*, 167.
 - d. *Remarriage of divorced person*, 169.
 - e. *Former husband or wife living*, 171.
 - f. *Nonage; consent of parents or guardian*, 172.
- IV. *Summary*, 173.

- I. *Manner or form of solemnization; preliminaries.*

As to consent of parents or guardians, see *infra*, III. f.

Subject to certain exceptions hereafter referred to, it is unquestionably a general principle of international and interstate law that the validity of a marriage, so far as it depends upon the preliminaries, and the manner or mode of its celebration or solemnization, is to be determined by reference to the law of the place where it was celebrated or solemnized.

The general rule of law is that a marriage valid where it is celebrated is valid everywhere; and the converse of this proposition is equally general,—that a marriage void where it is celebrated is void everywhere. *Hutchins v. Kimball*, 31 Mich. 126, 18 Am. Rep. 164; *Phillips v. Gregg*, 10 Watts, 158, 36 Am. Dec. 158.

The validity of a marriage entered into in the state of Indiana must be determined by the laws of that state, although the question arises in Kentucky. *Dumaresny v. Flashy*, 3 A. K. Marsh. 368.

The contract of marriage is of universal ob-

ERROR to the District Court for Washington County to review a judgment convicting defendant of bigamy. *Affirmed.*

The facts are stated in the opinion.

Messrs. Brome & Burnett and *Martin H. Leamy* for plaintiff in error.

Messrs. F. N. Prout, Attorney General, and *Norris Brown*, for defendant in error:

Bigamy is a crime against the wife, and not against the "relation."

State v. Bennett, 31 Iowa, 24; *State v. Hazen*, 39 Iowa, 648; *State v. Sloan*, 55 Iowa, 219, 7 N. W. 516; Wharton, *Crim. Ev.* 8th ed. § 390, note 6; *Morrill v. State*, 5 Tex. App. 447; *Roland v. State*, 9 Tex. App. 277, 35 Am. Rep. 743; *Lord v. State*, 17 Neb. 526, 23 N. W. 507.

The information charges the crime of bigamy in almost the exact language of the statute, and under the rulings of this court must therefore be sustained.

ligation, and by the law and practice of all civilized nations a marriage valid by the law of the place where it is entered into is binding everywhere. *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 540. The court said that this was the rule, even where the parties were domiciled in one jurisdiction and went into another jurisdiction with a view to evade the law of the former, holding that the decision in *Robinson v. Bland*, 2 Burr. 1077, to the contrary, was against the weight of authority.

Smith v. Smith, 52 N. J. L. 207, 19 Atl. 255, *infra*, also says that the intent to evade the law of the domicile is immaterial.

And a marriage must be proved according to what would be the proof of it where it took place. *Patterson v. Gaines*, 6 How. 550, 12 L. ed. 553.

So, a marriage valid where celebrated is valid everywhere. *Fornhill v. Murray*, 1 Bland, Ch. 479, 18 Am. Dec. 344; *Corrie's Case*, 2 Bland, Ch. 489; *Jackson v. Jackson*, 82 Md. 17, 34 L. R. A. 773, 33 Atl. 317; *King v. Brampton*, 10 East, 282; *Herbert v. Herbert*, 2 Hagg. Const. 263.

Thus, a marriage *per verba de presenti*, without religious or other ceremony, if valid where celebrated, is, in general, valid everywhere. *Meister v. Moore*, 96 U. S. 76, 24 L. ed. 820; *Jackson v. Jackson*, 82 Md. 17, 34 L. R. A. 773, 33 Atl. 317; *Clark v. Clark*, 52 N. J. Eq. 650, 30 Atl. 81; *Smith v. Smith*, 52 N. J. L. 207, 19 Atl. 255; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538.

And, in accordance with this principle, it was held that marriages in Scotland *per verba de presenti*, without religious or other ceremony, prior to 19 and 20 Vict. chap. 96, between persons domiciled in England, would be recognized in England, notwithstanding that they would have been invalid if celebrated in England. *Ilderton v. Ilderton*, 2 H. Bl. 145; *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54; *Bell v. Graham*, 13 Moore, P. C. C. 242, 1 L. T. N. S. 221, 8 Week. Rep. 98; *Dysart Peerage Case*, L. R. 6 App. Cas. 489.

So, in *Rooker v. Rooker*, 3 Swabey & T. 526, 33 L. J. Mat. N. S. 42, 9 Jur. N. S. 1320, 12 Week. Rep. 807, it was assumed that the mere cohabitation in a foreign country of a man and woman who proclaimed themselves, and were received in society, as man and wife, would constitute a marriage, which would be recognized as valid in England, if valid according to the law of the country where the acts occurred.

A marriage in Illinois in conformity with the laws of that state between persons domiciled 57 L. R. A.

Whitman v. State, 17 Neb. 224, 22 N. W. 459; *Hodgkins v. State*, 36 Neb. 160, 54 N. W. 86.

On the theory that the communication to Young was not received by him as a priest of the church under the pledge of secrecy, and that it was a voluntary statement not prompted by hope of reward,—a theory abundantly supported by the record,—it was clearly admissible.

Langtry v. State, 30 Ala. 536; *Halbrook v. State*, 34 Ark. 511, 36 Am. Rep. 17; *State v. Johnson*, 12 Minn. 476, Gil. 378, 93 Am. Dec. 241; *State v. Sanders*, 30 Iowa, 582; *Wolverton v. State*, 16 Ohio, 173, 47 Am. Dec. 373; *Squire v. State*, 46 Ind. 459.

On indictment for bigamy the first marriage may be proved by the admission of the prisoner, and it is for the jury to say whether what he said was an admission that he was actually and legally married accord-

in that state, the husband, however, being a subject of the Kingdom of Wurtemberg, is valid and binding in Illinois, notwithstanding that it was in violation of a law of such Kingdom declaring all such marriages in a foreign state, without the license of the sovereign, absolutely null and void. *Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81. The court admitted, however, that while such law had no extraterritorial effect, yet upon the return of the parties to the Kingdom of Wurtemberg, the law might properly be enforced against them by the courts of that country in the same manner and to the same extent as if their infraction had occurred within the Kingdom.

In *Re Willbur*, 8 Wash. 35, 35 Pac. 407, the court, while denying the validity of a marriage between a white man domiciled in Washington, and an Indian woman, celebrated within an Indian reservation, held that if both parties had been Indians the marriage would undoubtedly have been upheld, although there was no ceremony other than the mere selling of the woman to the husband by her father, and the subsequent cohabitation of the parties, and notwithstanding that the relations which were thus created were not attended by any such circumstances as would have amounted to a common-law marriage.

A marriage valid according to the laws of the state where it took place will be recognized as valid in Nebraska under the express provision of Neb. Comp. Stat. chap. 52, § 1, that "all marriages contracted without this state, which would be valid by the law of the country in which the same were contracted, shall be valid in all courts and places in this state." *Gibson v. Gibson*, 24 Neb. 394, 39 N. W. 450.

And, in general, though the rule is subject to a number of exceptions, a marriage invalid where celebrated is invalid everywhere.

Thus, Lord Hardwicke said in *Butler v. Freeman*, 1 Amb. 301, with reference to a marriage in Antwerp, of British citizens, according to the rites and ceremonies of the Church of England, that such marriage would not be held valid in England unless it was so by the laws of the country where it was celebrated.

A marriage between English subjects, celebrated abroad, will not be recognized as valid in England where it would be null and void according to the law of the country where it was celebrated, on account of the incompetency of the minister who celebrated the same, the minority of one of the parties, or the want of publication of banns. *Middleton v. Janverin*, 2 Hagg. Const. 437.

ing to the laws of the country where the marriage was solemnized.

Miles v. United States, 103 U. S. 304, 26 L. ed. 481; *Com. v. Henning*, 10 Phila. 209.

There was a marriage contract and a marriage ceremony. The agreement to keep it secret was not a pretense, and could not avoid or invalidate it. Any agreement that it should not be binding and valid, before it was made, could not affect its validity after the ceremony was performed.

Schouler, *Husb. & W.* §§ 38, 39.

Norval, Ch. J., delivered the opinion of the court:

This was a prosecution for bigamy. A verdict of guilty was returned, and the defendant was sentenced to the penitentiary for the term of four years. The complaint before the examining magistrate was signed and sworn to by Eliza C. Hills, the first wife

of the defendant. His counsel filed a plea in abatement to the complaint on the ground that Eliza C. Hills was not a competent witness against accused, which was overruled, and the magistrate, finding probable cause to believe that defendant was guilty of the crime of bigamy as charged, held the accused to the district court where the county attorney filed an information charging the offense substantially in the language of the complaint. The defendant presented to the district court a plea in abatement, based on the same ground as that incorporated in the one filed before the examining magistrate. A demurrer by the state to this plea was sustained, and a general demurrer to the information was overruled. On the trial, Mrs. Eliza C. Hills, over the objection of the defendant, was examined, and testified as a witness on behalf of the state.

The first contention of counsel for defend-

In *Lacon v. Higgins*, 3 Starkie, 178, Dowl. & R. N. P. 38, a marriage celebrated in France was held invalid because it was not contracted according to the legal ceremonies which were essential to a valid marriage in that country. It does not appear, in this case, where the parties were domiciled at the time of the marriage, but the decision is apparently broad enough to cover any case irrespective of the domicile of the parties.

It is a general rule that a marriage invalid where it is celebrated is invalid everywhere. The only exceptions to this rule relate to parties sojourning in a foreign country, who may, in certain cases, contract a valid marriage without celebrating it according to the local requirements. *Canale v. People*, 177 Ill. 219, 52 N. E. 310. In this case a marriage celebrated in Italy, between persons domiciled there, was held invalid because the parties were under the age fixed by the law of Italy, and the formal requirements of that law were not complied with.

A marriage in China, according to its laws, is valid in the United States, although the husband was domiciled within the United States, and was within the United States at the time of the ceremony. *Re Lum Lin Ying*, 59 Fed. 682. In this case it was proved that, according to the law of China, the presence of the bridegroom was not essential to a marriage. The court was in doubt whether the marriage could be regarded as having been solemnized in China, under the circumstances, but did not decide the question, and did not actually pass upon its validity.

Exceptions.

Excluding matters affecting the matrimonial capacity of the parties, and matters affecting the nature and vital character of the relation created by the marriage, there seem to be no exceptions to the principle that a marriage valid where celebrated is valid everywhere. It is true that it was held in *Holmes v. Holmes*, 1 Abb. (U. S.) 525, Fed. Cas. No. 6,638, and *Norman v. Norman*, 121 Cal. 620, 42 L. R. A. 343, 54 Pac. 143, that a marriage celebrated on the high seas, between persons domiciled in California, who resorted there for the express purpose of evading the California statute prescribing the manner in which marriages should be contracted and solemnized, would not be recognized as valid; but these decisions are expressly upon the ground that the place where the marriage was celebrated was not subject to the jurisdiction of any state or country. In the

latter case it was said that the law of the high seas, as it may relate to the marriage of citizens of the United States domiciled in California, cannot be referred to the common law of England any more than it can to the law of France or Spain, or any other foreign country.

The converse of the foregoing proposition, however, namely, that a marriage invalid where celebrated is invalid everywhere, is subject to certain exceptions affecting even the formalities of celebration or solemnization. Thus, *Phillips v. Gregg*, 10 Watts, 158, 36 Am. Dec. 158, after stating the general rule that a marriage invalid where celebrated is invalid everywhere, said there were certain well-recognized exceptions to the rule, among others, marriages celebrated in foreign countries by citizens entitling themselves, under certain circumstances, to the benefit of the laws of their own country. See also *Canale v. People*, 177 Ill. 219, 52 N. E. 310, *supra*, where similar language was used.

In *Ruding v. Smith*, 2 Hagg. Const. 390, the court said: "It is true, indeed, that English decisions have established this rule, that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere else; but they have not, *e converso*, established that marriages of British subjects, not good according to the general law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England. It is therefore certainly to be advised that the safest course is always to be married according to the law of the country, for then no question can be stirred; but if this cannot be done on account of legal or religious difficulties, the law of this country does not say that its subjects shall not marry abroad. And even in cases where no difficulties of that insuperable magnitude exist, yet, if a contrary practice has been sanctioned by long acquiescence and acceptance of the one country that has silently permitted such marriages, and of the other that has silently accepted them, the courts of this country, I presume, would not incline to shake their validity upon these large and general theories, encountered, as they are, by numerous exceptions in the practice of nations."

The foregoing case upheld the validity, in England, of a marriage celebrated between British subjects at the Cape of Good Hope, by a chaplain of the British army then occupying that settlement under capitulation, notwithstanding that the parties did not obtain the consent of their parents, as was required by the Dutch law. Several possible grounds for the

ant is that the court below erred in sustaining the demurrer to the plea in abatement, since the information was based on a complaint verified by the first wife of the accused. The argument is that Mrs. Hills was an incompetent witness against her husband in a prosecution for bigamy, and therefore was disqualified from swearing to the complaint. Section 331 of the Code of Civil Procedure declares that "the husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other." This provision was under consideration in *Lord v. State*, 17 Neb. 526, 23 N. W. 507, where it was distinctly ruled that a wife was a competent witness against her husband on an indictment for adultery,

since that was a crime committed by the latter against the former. This holding was cited with approval in *Owens v. State*, 32 Neb. 174, 49 N. W. 226. See *State v. Bennett*, 31 Iowa, 24; *State v. Hazen*, 39 Iowa, 648; *State v. Sloan*, 55 Iowa, 219, 7 N. W. 516; *State v. Hughes*, 58 Iowa, 165, 11 N. W. 700. There are authorities—some of which are cited in the brief of counsel for defendant—which affirm the doctrine that a statutory provision like our § 331, quoted above, is merely declaratory of the common law, and that neither a husband nor a wife is a competent witness in a criminal cause against the other, except in cases of personal violence the one upon the other. To this latter view we are unable to assent. The statute in question was not simply declaratory of what the law would be without § 331. To so hold would be to impute to the legis-

decision were suggested in the opinion, but the decision was expressly limited to cases including the same elements as the case at bar, namely, the British character of the parties; their independence of the Dutch law in their own British transactions; the insuperable difficulties of obtaining any marriage conformable to the Dutch law, because of the practical impossibility of applying for the consent of the parents owing to the fact that they were at a distance; the countenance given by the British authorities and British ministration and the fact the the whole country was under British dominion.

Other exceptions are illustrated by the following cases:

A marriage between an English woman and a domiciled French man, at the house of the British ambassador at Paris, by the chaplain to the embassy, is a valid marriage under the statute 4 George IV. chap. 91. *Lloyd v. Petitjean*, 2 Curt. Eccl. Rep. 251.

So, in *Este v. Smyth*, 18 Beav. 112, 23 L. J. Ch. N. S. 703, 18 Jur. 300, it was held that a marriage of persons domiciled in England, celebrated in the chapel of the British ambassador at Paris, in such a manner as to be a valid marriage according to the law of England, would be regarded as a valid marriage in England, irrespective of the question whether or not it was valid according to the law of France.

In *Kent v. Burgess*, 11 Sim. 361, 5 Jur. 166, a marriage between persons domiciled in England, celebrated in the presence of the British consul, and in the English church at Antwerp, before a clergyman of the Church of England who had been appointed chaplain to the church and was paid by the British government, was held to be invalid because certain ceremonies prescribed by the law of Belgium had not been observed. It was held that the case did not come within 4 George IV. chap. 91, which provides for the case of a marriage solemnized by a minister of the Church of England, in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in a house of any British subject residing at such factory. The case was distinguished from *Ruding v. Smith* upon the ground that in that case insuperable difficulties existed in effecting a marriage according to Dutch law, while in the case at bar there was no such difficulty.

In *Petrrels v. Tondear*, 1 Hagg. Const. 136, it was held that a marriage celebrated in England, without banns or license, could not be held valid because it took place within the chapel of the Bavarian ambassador, neither of

the parties being of the ambassador's country, nor of his household.

In *Loring v. Thorndike*, 5 Allen, 257, a marriage before the United States consul in the free city of Frankfurt, between a citizen of Massachusetts and a citizen of the Grand Duchy of Hesse-Darmstadt, was held valid, although the provisions of the local law were not complied with. The decision, however, is not upon the ground that the marriage, having taken place before the United States consul, must be regarded as having been celebrated on American territory, but upon the ground that the preponderance of evidence showed that the requirements of the local law of Frankfurt did not apply to foreigners, and that the marriage would be recognized as valid by the authorities of that city.

In *Re Hall*, 61 App. Div. 266, 70 N. Y. Supp. 406, it was held that, even upon the assumption that a marriage between a woman, a citizen of the United States, and a man, a citizen of the Argentine Republic, in France without compliance with the requirements of the Civil Code as to domicile, publication, consent of parents, and celebration before a civil officer, was contracted at a consulate, the marriage could not be upheld as a common-law marriage, it being invalid both by the laws of France and the laws of the Argentine Republic, the domicile of the husband.

In *Waldegrave Peerage Case*, 4 Clark & F. 649, the House of Lords held that the marriage of an officer, celebrated by a chaplain of the British army, within the lines of the army when serving abroad, was valid, though the army was not serving in a country in a state of actual hostility, and although no authority for the marriage was previously obtained from the officer's superior in command. This case was governed by a statute.

In *Culling v. Culling* [1896] P. D. 116, 63 L. J. P. D. & A. N. S. 59, 74 L. T. N. S. 252, a marriage between British subjects, solemnized on a British man-of-war at a foreign station, before a clergyman of the church of England, without a license or publication of banns, was upheld. The marriage in this case seems to have been treated as if it had occurred on English territory.

In *Lantour v. Teesdale*, 8 Taunt. 830, 2 Marsh. 243, it was held that the validity of a marriage between two British subjects, solemnized by a Catholic priest at Madras was to be determined by the law of England, but this was on the ground that they were a part of the British settlements, and were governed by the laws of England which they carried with them, and were unaffected by the laws of the natives.

lature a useless purpose, since the common law was then in force, except where modified by statute. The lawmaking body evidently, by this section, intended to establish a new rule, and make the husband and wife competent witnesses one against the other in any criminal action for a crime committed by one against the other, whether by the infliction of personal violence or not. The wife is a competent witness against the husband in a criminal prosecution for bigamy or adultery, inasmuch as these are crimes specially against her, and not merely against the relation.

It is strenuously insisted that reversible error was committed in overruling the demurrer to the information. The argument is that the information did not charge a crime, because it did not allege that the first marriage was a lawful one. The in-

formation avers that "Rowland P. Hills, on the 11th day of September, 1885, in the county of York, England, then and there being, did then and there marry one Eliza Cook Adsetts, spinster, and her, the said Eliza Cook Adsetts, then and there had for his wife; and the said Rowland P. Hills being so married to the said Eliza Cook Adsetts, afterwards, and during the life of the said Eliza Cook Adsetts, his wife, who had not been continually and wilfully absent from the said Rowland P. Hills and unheard from by him for five years, together, next before the 11th day of March, 1899, did on the 11th day of March, 1899, in the county of Washington and state of Nebraska, then and there, and then and there being, unlawfully, wilfully, and feloniously, marry one Dollie Powell, the said Eliza Cook Adsetts, his former wife, being then alive, etc. The

In *Overseers of Poor v. Overseers of Poor*, 2 Vt. 151, 19 Am. Dec. 703, it was held that a marriage by capable parties, before a justice of the peace, in the Province of Lower Canada, although such justice was not at the time authorized to celebrate marriages, would nevertheless be upheld as a valid marriage upon the theory that what took place amounted to a marriage *per verba de presenti*, the ceremony being followed by cohabitation for several years.

In *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538, in which the validity of a marriage depending upon certain acts, some of which occurred on a vessel crossing the English channel, and some in France, was upheld upon the presumption that the *lex loci* was the same as the law of New York, the court refrained from passing upon the question whether, if acts which would make a valid marriage when done in New York are done outside its bounds, and not in accordance with the law of the place where done they will create a relation which will be upheld as a valid marriage.

II. Polygamous marriages; temporary marital unions.

The court, in *Hyde v. Hyde*, L. R. 1 Prob. & Div. 131, 35 L. J. Mat. N. S. 57, 12 Jur. N. S. 414, 14 L. T. N. S. 188, 14 Week. Rep. 517, announced a principle (which is applicable to the nature of the relation created by, and the character of the contract involved in, marriage, rather than to the form or mode of the solemnization, or the matrimonial capacity of the parties) to the effect that a marriage, wherever celebrated, in order to be entitled to recognition upon the principles of international law, must be a marriage in the sense that that institution is generally understood throughout Christendom,—that is, it must be the voluntary union for life of one man and one woman to the exclusion of all others; and any relation, though termed marriage at the place of its inception, which does not possess such requisites, will not be regarded as a marriage within the principle that a marriage valid where contracted is valid everywhere. In that case it was held that a so-called marriage, contracted in Utah, between persons then domiciled there and professing the faith of the Mormons, which allowed polygamy, would not be recognized as valid in England, and would not support an action for divorce, although it was assumed to be valid in Utah where it was celebrated. Neither of the parties to this marriage had entered into any previous matrimonial alliance, and it was urged that the court might recognize the marriage without countenancing polygamy, but 8; L. R. A.

the court declined to take this view, holding that the marriage was vitiated by the fact that the husband was at liberty to take other wives during its continuance.

The same position was taken in *Bethell v. Hildyard*, L. R. 38 Ch. Div. 220, 57 L. J. Ch. N. S. 487, 58 L. T. N. S. 674, 36 Week. Rep. 503, where it was held, in an action involving the legitimacy of children of the marriage, that a marriage in South Africa at a place within the control of a semibarbarous tribe of natives, though celebrated according to their custom, would not be recognized as valid in England, because, according to that custom, the husband was at liberty to take subsequent wives. The man, in this case, was a native of England, but was apparently domiciled at the place where the marriage was contracted at the time thereof, and it was the first marriage. It was assumed, in this case, that the marriage would have been recognized as valid in England, if, notwithstanding the custom referred to, the parties had intended to contract a marriage in the Christian sense, but it was held that the evidence did not warrant a finding that such was their intention.

Polygamous marriages are frequently referred to as an exception to the rule that a marriage valid where celebrated is valid everywhere. Thus: *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Hutchins v. Kimmell*, 31 Mich. 128, 18 Am. Rep. 164; *Jackson v. Jackson*, 82 Md. 17, 34 L. R. A. 773, 33 Atl. 317; *Campbell v. Crampton*, 18 Blatchf. 150, 2 Fed. 417; *True v. Ranney*, 21 N. H. 52, 53 Am. Rep. 164.

The foregoing cases, however, are all *obiter* on the point in question, and, with the exception of *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321, which apparently approves of the position taken in *Hyde v. Hyde*, *supra*, and *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509, which, on the contrary, states that to bring a marriage within that exception one of the parties to the marriage must have had another husband or wife living, they cannot be cited either for or against the position taken in *Hyde v. Hyde*, and *Bethell v. Hildyard*, *supra*, that a marriage which contemplates polygamy, even if it is a first marriage, will not be recognized as valid though valid according to the *lex loci*.

In *Wall v. Williamson*, 8 Ala. 48, the exception of polygamous marriages from the rule that a marriage valid where celebrated is valid everywhere, was held not to apply to an Indian marriage unless there had been a previous marriage by one of the parties. This was ap-

infirmity imputed to the information is lacking of merit. It is averred that the defendant was married at a specified time to a certain woman in England. This implies that the marriage was a lawful one. If unlawful, then there was no marriage. *State v. Hughes*, 58 Iowa, 165, 11 N. W. 706.

Rev. A. T. Young, the rector of the Episcopal church at Blair, was called and examined as a witness for the prosecution. His evidence reveals that almost immediately after the arrest of the defendant the latter sent for Rev. Young, who called upon him in the county jail. Hills's object in requesting his presence was to have the rector intercede with his first wife for a settlement of the criminal proceedings. Hills wrote a letter to the county attorney somewhat along the same line, which, at defendant's request, was delivered to the prosecuting attorney by

Young. The latter was also prevailed upon by defendant to carry his wishes to his first wife, the prosecuting witness. At the time Hills wrote out a synopsis of what he wanted Rev. Young to say to Mrs. Hills No. 1, which follows: "(1) Months to stay as prosecuting witness, with several trials; (2) promise of immediate divorce, which will free her in a few weeks; (3) payment of some of her expenses; (4) the fact that she has severely punished me already; to carry it further might change public feeling, and be thought vindictive." This paper was put in evidence by the state, and its admission is assigned for error. The first objection to the paper in question is that it was received in evidence in violation of § 333 of the Code of Civil Procedure, which provides that "no practising attorney, . . . minister of the gospel, or priest of

parently on the assumption that the Indian custom with reference to marriages contemplated that the man might take other wives during the lifetime of the first wife.

In *State v. Ta-cha-na-tah*, 64 N. C. 614, it was held that the cohabitation of an Indian man and woman, as husband and wife, which, according to the ancient custom of their tribe, entitled them to recognition as man and wife, but which left them free to dissolve the connection at pleasure and marry again, was not a valid marriage in North Carolina. In this case, however, the parties were subject to the jurisdiction of North Carolina at the time of the marriage, and the validity of the marriage was tested by the law of North Carolina. The case is therefore distinguished from those in which the marriage took place within Indian territory not subject to the jurisdiction of the state.

It is apparent from the foregoing citations that the American decisions have not extended the exception with reference to polygamous marriages so as to cover the first marriage. It was even held in *Kobogum v. Jackson Iron Co.* 76 Mich. 498, 43 N. W. 602, that a second marriage by a person having a wife living and undivorced will be recognized, if valid by the *lex loci*. In that case a member of an Indian tribe, living in tribal relations, took a second wife while his first wife was living and undivorced. The validity of both marriages, and the legitimacy of children of each marriage, and their right to succeed to their father's property, were recognized. The court, in justification of its position, said that while most civilized nations have discarded polygamy, and it is not lawful anywhere among English speaking nations, yet it is a recognized and valid institution among many nations, and not universally unlawful. This decision, however, seems to be opposed to the clear weight of authority, which at the farthest recognizes only the validity of the first marriage.

In a dissenting opinion in *State v. Ross*, 76 N. C. 242, Reade, J., said: "I timidly, but very positively, deny what a great judge (Rufin) has said, that a Turk with his many wives, or a Mormon, can have his rights which he has in his own country recognized here, because it is revolting to our people and against their best interests."

In the following cases the validity of Indian marriages between members of an Indian tribe living as a separate community or people was recognized by state courts, notwithstanding that the Indian custom with reference to marriage contemplated the dissolution of the relation at any time at the mere will of one or both

parties. *Wall v. Williamson*, 8 Ala. 48; *Earl v. Godley*, 42 Minn. 361, *sub nom.* *Earl v. Wilson*, 7 L. R. A. 125, 44 N. W. 254.

These decisions are contrary to the *dictum* in *Hyde v. Hyde*, L. R. 1 Prob. & Div. 131, 35 L. J. Mat. N. S. 57, 12 Jur. N. S. 414, 14 L. T. N. S. 188, 14 Week. Rep. 517, that to entitle a marriage to recognition under the principles of international law, it must be the voluntary union of a man and woman for life.

In *Johnson v. Johnson*, 30 Mo. 72, 77 Am. Dec. 598, involving the legitimacy of children and their right to inherit from their father, the relation existing between a white man and Indian woman who lived together in the Indian country, assuming it to be such as to constitute a marriage according to the custom of the Indians, was recognized as constituting a marriage *de facto*, notwithstanding that, according to such custom, the idea of permanency did not enter into the marriage relation, which was dissolvable at any time at the mere pleasure of the husband. It is to be observed in this case, however, that it was only necessary to establish a marriage *de facto*, and not necessarily the existence of a valid marriage, since the Missouri statute expressly provided that the issue of a marriage null in law should be legitimate.

The principles announced in the last case were approved in *Boyer v. Dively*, 58 Mo. 510, and *La Riviere v. La Riviere*, 77 Mo. 512.

In *Morgan v. McGhee*, 5 Humph. 13, a marriage, consummated according to usages of the Cherokee tribe of Indians, within that portion of the Cherokee country which was within the limits of Tennessee by the extension of the laws of Tennessee over it, was held valid. The character of the matrimonial agreement as to permanency, exclusiveness, etc., does not appear. It was held that all that was necessary to constitute a marriage according to such custom was a public agreement to live together as man and wife.

In *Roche v. Washington*, 19 Ind. 53, 81 Am. Dec. 376, the court denied the validity of a so-called marriage between members of the Miami tribe of Indians, contracted according to the custom of the tribe, while the parties were residing in Indiana. The real ground of the decision was that the marriage was contracted after all territorial jurisdiction of the tribe had ceased in the state, and after the tribe itself, with its government, had disappeared from the borders of the state. The court, however, intimated its opinion that a tribe of North American Indians did not constitute a state in the international sense, so as to come within the rule that a marriage valid according to the law

any denomination, shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." To render a communication to a minister of the gospel or priest privileged, it must have been received in confidence. By this we do not mean that it must be made under the express promise of secrecy, but rather that the communication was in confidence, and with the understanding, express or implied, that it should not be revealed to anyone. The mere fact that a communication is made to a person who is a lawyer, a doctor, or a priest does not of itself make such communication privileged. To have that effect, it must have been made in confidence of the

relation, and under such circumstances as to imply that it should forever remain a secret in the breast of the confidential adviser. In the case at bar there was adduced evidence tending to show that the paper was not committed to Rev. Young as a secret or in confidence. On the other hand, he was enjoined by the defendant, as is shown by the evidence, to make the contents thereof fully known to Mrs. Hills, the first wife of the defendant. Had the defendant requested Rev. Young to call a public meeting of the citizens of Blair in the interest of the former, and to address the same upon the subjects included in the paper in question handed to the godly man as the subjects of his discourse, it would hardly have been questioned by anyone that the paper would not be privileged. In principle there is no distinction between the supposed case and

of the place where celebrated is valid everywhere; and the court further expressed the opinion that, even if it were to be regarded as a state in the international sense, the so-called marriage was not such a marriage as is contemplated by the rule referred to, since the real relation, which was called a marriage, was a mere state of concubinage which, according to the custom of the tribe, could be dissolved by the consent of the parties.

Although marriage, like other civil contracts, must be regulated by the *lex loci contractus*, it is not every marriage which may be valid by the law of the place where it was consummated, that will be recognized as legal everywhere else. Every sovereign state is the conservator of its own morals, and may nullify incestuous and polygamous contracts (*obiter*). Sneed v. Ewing, 5 J. J. Marsh. 460, 22 Am. Dec. 41.

A marriage between a British citizen, temporarily resident in Japan, and a Japanese woman, celebrated according to the forms required by the laws of that country, will be recognized as valid in England. Brinkley v. Atty. Gen., L. R. 15 Prob. Div. 76. There was no question as to the capacity of the parties in this case. It was pointed out that the contract of marriage, according to the Japanese law, involved the union of one man with one woman to the exclusion of all others. The court took the position that the rule that a marriage valid where contracted is valid everywhere is not confined to marriages contracted in Christian countries, but extends to marriages wherever contracted, if the contract, in its essence, conforms to the general principles prevailing throughout Christendom.

In Armitage v. Armitage, L. R. 3 Eq. 343, it was held that the testimony of a witness that he went to New Zealand before it was an English colony, and that he was there married to a native woman according to the customs and usages then in force in New Zealand, was not sufficient to establish a marriage, in the absence of evidence of what those customs or usages were.

III. Matrimonial capacity of the parties.

a. In general; *lex loci* or *lex domicilii*; public policy.

There are expressions in the opinions in some of the cases which seem to favor the doctrine that, while the *lex loci* governs with respect to matters affecting the manner or mode of solemnization of the marriage and the preliminaries thereof, the question of matrimonial capacity is to be determined by the *lex domicilii*. L. R. A.

et al.; and some of the decisions seem to be the result of the application of that doctrine. Most, but not all, of these decisions, however, are reducible to one or the other of the exceptions (which have been formulated in Brook v. Brook, 9 H. L. Cas. 193, 7 Jur. N. S. 422, 4 L. T. N. S. 93, 9 Week. Rep. 461; Jackson v. Jackson, 82 Md. 17, 34 L. R. A. 778, 83 Atl. 317; Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509; and Courtright v. Courtright, 26 Ohio L. J. 309) to the general principle that the validity of a marriage is to be determined by reference to the *lex loci*, namely, (1) marriages which are polygamous, or which are incestuous according to the general view of Christendom; (2) marriages which the local lawmaking power has declared shall not be allowed any validity. By the first exception the Christian standard of marriage is applied to every marriage wherever celebrated and without reference to the domicile of the parties at the time of its celebration. If the marriage falls below this standard, it will be held void, although it may be valid according to the *lex loci* and *lex domicilii*. The application of this exception to polygamous marriages has been discussed in division II., *supra*, and its application to incestuous marriages will be discussed in division III., b, *infra*.

To bring a marriage within the second exception, that very marriage must be within the legislative prohibition. A marriage will not necessarily come within that exception because it would have been within the prohibition if it had been celebrated within the state or country which enacted the same. The question whether a marriage comes within the prohibition, and therefore within the exception, is, in its last analysis, one of legislative intention. There can be no question as to the power of the legislature to prescribe what marriages shall be void in its own state, wherever celebrated, or wherever the parties may have been domiciled at the time of celebration, if they subsequently came or returned to the state (Pennegar v. State, 87 Tenn. 244, 2 L. R. A. 703, 10 S. W. 305). Therefore, the language of the statute is the first matter for consideration, and if the marriage comes within the terms of the statute, its invalidity necessarily follows without reference to the *lex loci* or *lex domicilii*. When, however, as is generally the case, the legislature merely prohibits, in general terms, marriages between persons standing in a certain relation to each other it becomes necessary to examine the nature and object of the statute in order to determine the scope of the prohibition (Brook v. Brook, 9 H. L. Cas. 193, 7 Jur. N. S. 422, 4 L. T. N. S. 93, 9 Week. Rep. 461). Examining the statute from this point of view,

the one with which we have been dealing. It is plain that Rev. Young betrayed no confidence of the prisoner in revealing the contents of this paper or writing.

It is also urged that this paper was inadmissible as a confession, because it was prompted by an inducement of hope or fear. The evidence on behalf of the state discloses that it was voluntarily written and delivered by defendant to Rev. Young without any suggestion on the part of the latter that the accused would in the least be benefited thereby, or that it was given on any promise of reward or threat of punishment.

After the state had made out its case in chief, the defendant moved *ore tenus* to strike from the record all the evidence and certain exhibits adduced by the prosecution relating to the marriage ceremony between the accused and the first Mrs. Hills in Eng-

land, in September, 1885, for the reason that the evidence on the part of the state did not prove, or tend to prove, that the marriage was valid. In passing upon the motion, the court, in the hearing and presence of the jury, stated: "There was evidence in the record tending to show cohabitation in the larger sense." Exception was taken to this remark, and its utterance is urged as a ground of reversal. It is true, as contended, that it was for the jury to determine whether the accused and Mrs. Hills No. 1 were lawfully married and cohabited as husband and wife. The remark of the court did not take this issue from the consideration of the triers of fact. The remarks of the court were elicited by the motion of the defendant, and in passing thereon the court gave its reason for denying the motion; and, as there was some evidence in the

it is apparent that the nature and object of the law may be such that its purpose is fully subverted by limiting it to marriage celebrated in the state or country where it was enacted, between persons there domiciled. Thus, in *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131, *infra*, III., c, the court seems to have proceeded upon the theory that the purpose of the statute was fully subverted by applying it to marriages celebrated within the commonwealth, and that it did not extend to marriages celebrated out of the commonwealth, even between persons domiciled in the commonwealth who went out of it to celebrate the marriage for the express purpose of evading the statute. In *Brook v. Brook*, 9 H. L. Cas. 193, 7 Jur. N. S. 422, 4 L. T. N. S. 93, 9 Week. Rep. 461, *infra*, III., c, on the contrary, it was held that, in view of the nature and objects of the statute there involved, it must be held to apply to marriages between domiciled citizens of England, although celebrated out of England and in a country according to the law of which the marriage would be valid. Considerable stress was laid in this case upon the fact that the act of Parliament declared the marriages of the kind contemplated by it to be contrary to the law of God. Perhaps, in the absence of such a declaration, it might have been regarded that the purpose of the act would be subverted by limiting it to marriages celebrated in England. And, on the other hand, the presence of such a declaration might have been regarded as a strong argument for extending it to marriages celebrated in another country between persons domiciled in that country if the question should arise in England. As a matter of fact, however, it was conceded in the opinion of the Lord Chancellor in this case, that if the parties had been domiciled in the country where the marriage was celebrated, it would have been held valid even in England. It will be observed that in some of the cases cited in III., c, *infra*, a statutory prohibition in general terms has been extended to embrace marriages celebrated out of the state between persons who, at the time, were domiciled out of the state but who subsequently came within it to reside. As suggested in the opinion in *Pennegar v. State*, 87 Tenn. 244, 2 L. R. A. 707, 10 S. W. 303, the courts of one state may, by reason of peculiar local conditions, regard a statute as a part of the distinctive policy of the state, and therefore as applicable to marriages occurring outside of the state, whereas the courts of another state, by reason of different local conditions, may take the view that a similar statute is not a part of the distinctive policy of the state, and therefore applies only to marriages celebrated

within the state. This point was illustrated in the last case by contrasting the decision in *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131, where it was held that a statute prohibiting the intermarriage of white and colored persons did not apply to marriages celebrated out of the commonwealth, though the parties were domiciled therein, with the decisions in the southern states, holding a similar statute applicable to marriages celebrated without as well as to those celebrated within the state. It must be admitted that this theory, according to which every marriage must, in order to be upheld, pass, not only the test furnished by the generally accepted principles of Christendom, but likewise the test furnished by the distinctive policy of the state or country where the court is sitting, determined in the manner above explained, has the disadvantage that under it the parties to the marriage may be husband and wife in one state or country, and not in another. Upon the other hand, the acceptance of the doctrine of *lex loci* without exception other than that with reference to marriages contrary to the general principles of Christendom, would put the courts in the position of recognizing the validity of marriages which are opposed to the distinctive state policy, notwithstanding that the parties to the marriage were, at the time of its celebration, domiciled within the state. In any case, whether the doctrine of *lex loci* or *lex domicilii* is adopted, it is subject to alteration by the legislature of a state if that body sees fit to condemn, in express terms, a marriage celebrated out of the state between persons domiciled in the state, and in such a case it would necessarily follow that a marriage might be valid in one state, and not in another.

It is to be observed that this theory, by which a marriage, wherever celebrated or wherever the parties to it are domiciled, is subjected to the test of the distinctive policy of the state or country where the court is sitting, does not constitute an independent doctrine like the doctrine that the *lex domicilii* governs, or the doctrine that the *lex loci* governs, but operates by way of exception to the doctrine of *lex loci*, which seems to be favored by the weight of authority over the doctrine of *lex domicilii* as a general principle of international law. This exception might, with equal propriety, be attached to the doctrine of *lex domicilii*, if that should be adopted as the general principle. The exception leaves free scope for the doctrine of *lex loci*, or, if it is preferred, the doctrine of *lex domicilii*, when a marriage, celebrated out of the state between persons not domiciled in the state, is contrary neither to

record upon which the remark could properly be predicated, the criticism upon this particular action of the trial court is overruled. The mere overruling of the motion by the court without giving any reasons therefor would be an expression of the opinion that there was sufficient evidence to establish the marriage of Hills in England. The language of the court was not prejudicially erroneous.

The court, at the request of the state, gave this instruction: "(4) You are instructed that in this case, so far as the validity or invalidity of the alleged first marriage is concerned, it makes no difference whether or not the defendant, Hills, or the witness Eliza Cook Hills, or either of them, resided or had their usual place of abode or residence in the parish of Sheffield, England, before obtaining the license, or before the

marriage ceremony; and you will therefore disregard all evidence received upon the trial of this case on the subject of said residence and places of abode prior to the marriage ceremony on September 11, 1885, in so far as the question of the validity or invalidity of the license and marriage ceremony are concerned.

It is in evidence that the license under which the defendant was married to his first wife was obtained by her in the parish of Sheffield, England, and in which parish the marriage ceremony was pronounced. In the affidavit upon which the license was issued the contracting lady stated that she had been a resident in the parish of Sheffield, England, for the fifteen days immediately prior thereto, and there was introduced evidence conducing to show that neither Mr. Hills nor his intended wife had ever been a

resident in the parish of Sheffield, England, prior to the marriage ceremony. The principles of Christendom nor the distinctive policy of the state. Thus, in *Dannell v. Dannell*, 4 Bush, 51, a court of Kentucky expressly applied the doctrine of *lex loci* and upheld a marriage celebrated in Switzerland, according to the law of which it was valid, between a man and the widow of his deceased brother, who were domiciled at the time in Lombardy, then a province of Austria, by the law of which such marriages were forbidden, notwithstanding that the marriage was celebrated in Switzerland for the purpose of evading the law of Lombardy, and the parties immediately returned to the latter country and resided there. It is to be observed that in this case the marriage was neither contrary to the principles of Christendom, nor to the distinctive policy of Kentucky so that the general principle of international law had free scope. On the contrary, in the case of *Sottomayer v. De Barros*, L. R. 3 Prob. Div. 1, 47 L. J. Prob. N. S. 23, 26 Week. Rep. 455, the court of appeal, upon the assumption that both parties to the marriage were domiciled in Portugal, held that a marriage in England between first cousins, being forbidden by the law of Portugal, though valid according to the law of England, must be regarded as invalid even in England. In this case, also, it is apparent that the court was free to adopt a general principle of international law, and was not embarrassed by any consideration arising from the principles of Christendom, or the distinctive policy of England. But in this case the court, unlike the Kentucky court, preferred the doctrine of *lex domicilii* to the doctrine of *lex loci*. The decision in this case was strictly limited to the assumption that both parties were domiciled in Portugal at the time of the marriage, and the court of appeal expressly refrained from passing upon the validity of the marriage on the assumption that one of the parties was domiciled in England. The case subsequently came before the probate division (L. R. 5 Prob. Div. 24, 49 L. J. Prob. N. S. 1, 41 L. T. N. S. 281, 27 Week. Rep. 917) upon a changed state of facts,—it then being found that the husband was domiciled in England at the time of the marriage and the wife in Portugal,—and it was then held by the probate division that the marriage, being valid according to the law of England (*lex loci*), would be upheld in England notwithstanding that it would be invalid according to the law of Portugal, the domicile of the wife at the time of the marriage. The probate division took advantage of the fact that the court of appeal expressly left open the question of the validity of the marriage on such an assumption of facts, but the reasoning

in the opinion of the president of the probate division weakens somewhat the force of the decision of the court of appeal as a precedent for courts not actually bound by it. Cotton, L. J., who delivered the judgment of the court of appeal, said: "But it is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnized is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; and if the laws of any country prohibit its subjects, within certain degrees of consanguinity, from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction wherever such marriage may have been solemnized." The president of the probate division, referring to the language just quoted, said that the proposition that the capacity of the parties was to be determined by the law of the domicile was a novel one for which, up to that time, there was no English authority, but that, on the other hand, the authority was the other way, and to the effect that the capacity was to be determined by the *lex loci*.

Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241, merely involved the question whether the capacity of a married woman to contract is governed by the *lex domicilii*, or the *lex loci contractus*. The court, however, stated that the decision in *Sottomayer v. De Barros*, L. R. 3 Prob. Div. 1, 47 L. J. Prob. N. S. 23, 26 Week. Rep. 455, to the effect that matrimonial capacity is to be determined by the *lex domicilii*, was utterly opposed to "our law."

In the four cases next cited it will be observed that the *lex loci* was applied:

1. *Re Allison*, 31 L. T. N. S. 638, 23 Week. Rep. 226, it was held to be absolutely necessary that both parties to the marriage shall be capable in the country where the marriage takes

resident of said parish. Chapter 76, Stat. 4 Geo. IV., relating to the solemnization of marriages in England, was introduced on the trial in evidence. Section 10 of said chapter provides that no license shall be issued to solemnize any marriage in any other church or chapel than in the parish church, or in some public chapel of the parish or chapelry within which the usual place of abode of one of the parties to be married shall have been for the space of fifteen days immediately before the granting of such license. Section 14 of the same statute provides, *inter alia*, in substance that the applicant for license shall make affidavit that one of the contracting parties has had a usual place of abode in such parish or chapelry within which the marriage is to be solemnized for fifteen days prior to the date of the license. Section 22 declares that, if

any person "shall knowingly and wilfully intermarry . . . without due publication of banns, or license from a person having authority to grant the same first had and obtained, . . . the marriages of such persons shall be null and void to all intents and purposes whatsoever." Section 28 provides "that after the solemnization of any marriage . . . where the marriage is by license, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of fifteen days as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary in any suit touching the validity of such marriage." The English decisions rendered under the foregoing provisions, some of which were introduced on the trial and incorporated in

place. The marriage in this case was held invalid because by the law of Persia, where it took place, the woman was incapable of marriage because she was pregnant. The woman was an Armenian and living under the protection of the British minister to Persia, and the man was a British vice-consul.

In *Campbell v. Crampton*, 18 Blatchf. 150, 2 Fed. 417, the court, while holding that the capacity of the parties to enter into a contract for a future marriage must be determined by the law of Alabama, the place where the contract was made, and not by the law of New York, where it was contemplated that the marriage should take place, conceded that the general rule was that a marriage good at the place of solemnization is good everywhere. This concession goes to the validity of the marriage as affected by the capacity of the parties, and it is made without reference to the domicile of the parties.

The act of Congress of 1882 with reference to pensions provides that in determining the fact of marriage, the law of the place controls. *United States v. Hays*, 20 Fed. 710. The validity of the marriage in this case was attacked for incapacity of one of the parties.

In *Kynnauld v. Leslie*, L. R. 1 C. P. 389, 35 L. J. C. P. N. S. 226, 12 Jur. N. S. 468, 14 L. T. N. S. 756, 14 Week. Rep. 761, where the validity of a foreign marriage by a citizen of England previously attainted of treason was involved, Willes, J., said that whatever might have been the case if the marriage had been contracted in England, the marriage having been contracted abroad with an innocent woman, who may not even have known of the attainder, the rule, according to which the *lex loci*, with some exceptions founded on public policy, governs contracts, must prevail. It was held in this case, however, that the marriage would have been valid even if contracted in England.

In *Sussex Peerage Case*, 11 Clark & F. 152, the House of Lords held that the English statute providing that no descendant of King George II. shall be capable of contracting marriage without the previous consent of the reigning sovereign, rendered the marriage of such a descendant without such consent invalid, although it occurred in Rome; but this decision is clearly upon the ground that the purpose and object of the statute required its extension to a marriage celebrated out of England. In other words, the statute in this case was a part of the distinctive policy of England, and the case, therefore came within the second exception stated above.

The court, in *Kinney v. Com.* 30 Gratt. 858, 32 Am. Rep. 690, and *Greenhow v. James*, 80 57 L. R. A.

Va. 636, 56 Am. Rep. 603, *infra*, III., c. seems to adopt the *lex domicilii* as the test of matrimonial capacity. It is to be observed, however, that in these cases the domicile and the forum were the same, so that the same result was reached by applying the doctrine of *lex domicilii* as would have been reached by applying the distinctive national policy theory by way of exception to the doctrine of *lex loci*. It is at least doubtful whether the court would have been willing to abide by the *lex domicilii* if the parties had been domiciled at the place where the marriage was celebrated at the time of its celebration, but had subsequently removed to Virginia. Adherence to the doctrine of *lex domicilii* in such a case would compel the recognition of the marriage. Such seems to have been the state of facts in *State v. Bell*, 7 Baxt. 9, 32 Am. Rep. 549, *infra*, III. c (one of the cases relied on by *Greenhow v. James*), in which case, however, the marriage was held invalid.

In *State v. Kennedy*, 78 N. C. 251, *infra*, III., c, the court, after referring to some of the cases and text books which advocate the doctrine that the matrimonial capacity of parties is to be determined by the *lex loci* rather than the *lex domicilii*, said: "It seems to us, however, that when it is conceded, as it is, that a state may by legislation extend her law prescribing incapacities for contracting marriage over her own citizens who contract marriage in other countries, by whose law no such incapacities exist, as Massachusetts did after the decision in *Medway v. Needham*, the main question is conceded, and what remains is of little importance. Nothing remains but the question of legislative intent to be collected from the statute. About the intent in this case we have no doubt."

In *Pennegar v. State*, 87 Tenn. 244, 2 L. R. A. 703, 10 S. W. 305, *infra*, III., d, where a marriage between persons domiciled in Tennessee, who went out of the state to evade its statute which forbade their marriage, was held invalid though valid according to the law of the place where it was celebrated, the decision is expressly put upon the ground that it was a part of the distinctive policy of the state, as evidenced by the statute, to forbid marriages contemplated by the statute between persons domiciled within the state, although the marriage was celebrated out of the state. If the facts in this case had required it, the court might have gone to the extent of holding that it was a distinctive part of the policy of the state to refuse recognition of marriages of the kind contemplated by the statute, even if celebrated out of the state, between persons at the

the bill of exceptions, affirmed the doctrine that a marriage is not void merely because neither of the contracting parties was at the time a resident of the parish wherein the marriage ceremony occurred, and that the residence or place of abode of the parties does not affect the validity of the marriage. Manifestly, these adjudications are sound. No other interpretations can properly be placed on § 26, already quoted. But it is urged that said section is not applicable here, for the reason that it declares a rule of evidence relating to the remedy only, and that it can be given no extraterritorial effect. A ready answer to this is that a marriage legal where solemnized is valid everywhere. 1 Bishop, Mar. & Div. 6th ed. §§ 371-389. Therefore § 26 can be considered for the purpose of ascertaining whether the first marriage of the defendant was valid

in England. The validity of a marriage is to be determined by the law of the place where the same was solemnized, and § 26 was a part of the law of England when the first marriage took place. Under the authorities we have no doubt of its validity, and, being binding upon the parties there, its validity cannot be successfully assailed here. The instruction was therefore not inappropriate or erroneous.

The final contention of counsel for accused is that the court below erred in instructing the jury to the effect that the validity of the alleged first marriage of Hills was not affected by any agreement or understanding of the parties entered into before such alleged marriage that the same should not be considered as a valid or binding marriage. We quite agree with the learned counsel for the prisoner that there can be no valid mar-

riage domiciled out of the state but who afterward came to reside within the state. Such conclusion, however, does not necessarily follow from the decision, as it is conceivable, at least, that the court might regard the purpose of the statute as fully subserved by applying it to marriages of persons domiciled within the state wherever celebrated, without applying it to marriages of persons not at the time domiciled within the state.

In *Conway v. Beazley*, 3 Hagg. Eccl. Rep. 636, the court said that the *lex loci* will not prevail when either of the contracting parties is under a legal incapacity by the law of the domicile, but this language is broader than the exigencies of the case required. It was held in that case that a remarriage in Scotland between parties domiciled in England, after a Scotch divorce, which was valid in Scotland but invalid in England because the parties to the divorce were domiciled in the latter state at the time it was rendered, would not be recognized in England although valid in Scotland. It is apparent that the adoption of the view that it was opposed to the public policy of England to recognize the validity of such a marriage would have sufficed for the purposes of the case without going to the extent of adopting the *lex domicilii* as a general principle of international law. And it will be observed that the House of Lords in *Shaw v. Gould*, L. R. 3 H. L. 55, 37 L. J. Ch. N. S. 433, 18 L. T. N. S. 833, held such a marriage invalid in England, notwithstanding that after the Scotch divorce the party who obtained it became domiciled in Scotland, and that both parties to the second marriage were, at the time of its celebration, domiciled in Scotland. It was immaterial, for the purposes of the last case, whether the *lex loci* or *lex domicilii* should be regarded as the general principle of international law. The application of either doctrine to the case in hand would have upheld the marriage, and it is therefore apparent that the marriage must have been regarded as coming within some exception to the general principles of international law. The case of *McGown v. McGown*, 18 Misc. 708, 43 N. Y. Supp. 745, affirmed in 19 App. Div. 368, 46 N. Y. Supp. 285, was substantially like the last case. In this case the New York court refused to recognize as valid a second marriage contracted by a woman in North Dakota, after obtaining a divorce in that state based on service by publication, even on the assumption that the parties to the second marriage were to be regarded as domiciled in North Dakota at the time the marriage took place, and that the marriage was valid in that state. It would seem that the last three cases might be referred to

the exception with reference to polygamous marriages, since the hypothesis on which they are decided is that the first marriage was not dissolved. It is obvious, at least, that the last two must be referred to some exception to the general principle of international law, whether that principle be deemed the *lex loci* or *lex domicilii*, for the application of either would have upheld the marriage.

In *Davis v. Davis*, 1 Abb. N. C. 140, the validity of a marriage *per verba de presenti* was tested by the *lex domicilii*, but this was because the place at which the acts relied upon as constituting the marriage occurred was not subject to any local law, so far as parties to the marriage were concerned. The alleged marriage occurred within the limits of the Chickasaw nation in the Indian territory, and the parties, who were not members of the tribe, were expressly excluded from the jurisdiction of the nation. In this case, therefore, there was no *lex loci* which could be applied, and it was for that reason that the *lex domicilii* was applied.

It must be admitted that it is not easy in all cases to determine whether or not a statute is a part of the distinctive policy of the state, and, if so, whether the distinctive policy evinced thereby requires the condemnation of marriages celebrated out of the state between persons domiciled out of the state, or is satisfied with the condemnation of marriages celebrated out of the state between persons domiciled in the state. The latter object could be accomplished by the adoption of the *lex domicilii* as the test of matrimonial capacity without reference to the distinctive policy of the forum. But the adoption of that doctrine for the purpose is objectionable, not only because it is contrary to the weight of authority which favors the *lex loci* as the general test, but also because adherence to it would require the court to recognize the validity of a marriage, valid according to the *lex domicilii*, celebrated in another state between persons who were domiciled in such state at the time of the marriage, although they subsequently came to reside at the forum. The adoption of the distinctive national policy theory, on the other hand, admits of the condemnation of marriages celebrated between persons domiciled at the forum, and, if the conditions require it, the condemnation of marriages between persons not at the time domiciled at the forum.

It is to be observed that the exceptions thus far discussed operate, if at all, to invalidate a marriage valid according to the *lex loci* or *lex domicilii*, and never to validate a marriage invalid according to the *lex loci* or *lex domicilii*.

riage without an agreement and consent of the parties to become husband and wife. The instruction criticised is not in conflict with the principle just stated. The instruction did not tell the jury that if, at the time of the alleged first marriage of defendant, there was an agreement that the marriage ceremony was to be regarded as a sham, and to be of no binding force, and in pursuance of such understanding of the parties the marriage ceremony was pronounced, the marriage was not to be affected thereby. The purport of the charge was that any understanding or agreement between the contracting parties before marriage would not invalidate the marriage subsequently solemnized. This was undoubtedly sound, especially when the marriage was not solemnized in conformity with such prior agreement. The criticism of defendant's

counsel upon this instruction is ably met by the brief of the attorney general, wherein it is stated: "An agreement to be married, and an agreement that the marriage contract shall not be binding on either party, are inconsistent and contradictory. If the nullifying agreement is to receive the sanction of courts, then the marriage contract can be dissolved by the parties themselves. All that would be necessary to dissolve or annul the marriage would be, not a decree of court, but a simple agreement prior to the ceremony that the marriage would not be binding on either party. Neither public policy nor public conscience would suffer such a doctrine to live. We confess our inability to find where any court has ever before been asked to sustain this new and novel doctrine. In this case a valid first marriage was sought to be proved.

It was, indeed, suggested in the opinion in *Minor v. Jones*, 2 Redf. 289 (a surrogate's decision), as a ground for upholding a slave marriage invalid according to the law of Virginia (*lex loci* and *lex domicilii*), that, as the parties did all they could to make the marriage valid, the court might, in analogy to the exception by which marriages contrary to the general principles of Christendom are excluded from the rule that a marriage valid where celebrated is valid everywhere, except from the rule that a marriage invalid where celebrated is invalid everywhere, marriages which, though invalid according to the *lex loci*, conform to the moral code and to the public sentiment of the state where the court is sitting. But a similar marriage was held in *Harris v. Cooper*, 31 U. C. Q. R. 182, to be invalid in Canada because invalid where celebrated, though it would have been valid if celebrated in Canada.

A third exception, however, has been suggested which would operate in certain cases to uphold a marriage between parties domiciled in the state where the court is sitting, though invalid in a foreign country where it was celebrated. This exception has been defined as including marriages celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country. The extent to which this exception has been applied with reference to matters affecting the form of ceremony or the preliminaries has been shown in subdivision I., and is further illustrated by some of the cases cited in subdivision III., *2, infra*. Although there seem to be no cases applying this exception to matrimonial capacity, it has been suggested by Mr. Wharton, in his work on *Conflict of Laws*, § 165 (3) note, that the restrictive legislation of foreign states should not invalidate marriages of our domiciled citizens solemnized in such states, or marriages of their domiciled citizens solemnized in one of our states. It may be remarked that if the doctrine of *lex loci* is adopted as a general principle of international law in determining the matrimonial capacity of parties it is only necessary to invoke the exception referred to for the purpose of upholding a marriage between "our" citizens in a foreign country; and the other class of marriages, *i. e.*, marriages celebrated in our country between domiciled citizens of a foreign country, would be upheld upon the general principle. On the other hand, if the *lex domicilii* were adopted as a general principle, it would only be necessary to invoke the exception for the purpose of sustaining marriages of the latter class, and marriages of the former class, *i. e.* marriages between our 57 L. R. A.

domiciled citizens in foreign countries, would fall within the general principle.

* b. Incestuous marriages.

See also *supra*, III. a.

Whether the general principle of international law be that the *lex loci* or *lex domicilii* governs with respect to matrimonial capacity, in either case it is subject to the first exception referred to in III. a, *supra*, *viz.*, that marriages will not be recognized if incestuous according to the general consent of Christendom as being contrary to natural law. Lord Wensleydale, in his opinion in *Brook v. Brook*, 9 H. L. Cas. 193, took the position that a marriage between a man and his deceased wife's sister would fall within such exception. The real ground, however, upon which the law lords agreed in this case was that the case came within the second of the exceptions referred to in subdivision III., a, *supra*, *i. e.*, marriage contrary to the distinctive policy of England.

In *Sutton v. Warren*, 10 Met. 451; *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509 (*obiter*); *Stevenson v. Gray*, 17 B. Mon. 193; *Courtright v. Courtright*, 26 Ohio L. J. 309; and *Pennegar v. State*, 87 Tenn. 244, 2 L. R. A. 703, 10 S. W. 305 (*obiter*),—the first exception was expressly limited to marriages regarded as incestuous by the common consent of Christendom as contrary to natural law, and, more specifically, to marriages in the direct lineal line of consanguinity, and, in the collateral line, between brothers and sisters.

In *Sutton v. Warren*, 10 Met. 451, it was assumed, presumably in view of the evidence in the case as to the law of England on the subject, that a marriage celebrated in England between a man and his mother's sister domiciled in that country was valid according to the law of England; and, upon that assumption, it was held that it must be regarded as valid in Massachusetts, notwithstanding that if celebrated in that state it would have been invalid. This decision was severely criticised by the Lord Chancellor in *Brook v. Brook*, but the justice of the criticism is not apparent, since, upon the assumption of fact in the case that the marriage was valid according to the law of England, the case was in principle exactly the same as the supposed case of a marriage between a man and his deceased wife's sister domiciled in Denmark, which, it was conceded by the Lord Chancellor, would have been held valid even in England. In *Stevenson v. Gray*, 17 B. Mon. 193, a marriage celebrated in Tennessee, valid by the law of that state, between a man and

There was record evidence of the ceremony. The wife testified to it. The defendant on the witness stand admitted the ceremony, and his participation therein; admitted the authority of the Reverend Blakeney, vicar of the parish church, to issue license; admitted the authority of the Reverend Charles Knight to solemnize the marriage; did not deny the paternity of the child born eighteen months after marriage; introduced the woman as his wife to relatives and others; admits he signed the marriage register kept in the church where the ceremony was performed. Is he to be permitted now to claim this marriage was void because of an antenuptial agreement that it should not be binding? Where there is a pretense of marriage for some other and ulterior purposes, mutually and jointly beneficial and agreeable to both parties, then there is no mar-

riage. It is a pretense, and in law ends there. This is the rule so elaborately sustained by counsel's citations. In the case at bar there was no pretense. There was a marriage contract and a marriage ceremony. The agreement to keep it secret was not a pretense and could not avoid or invalidate it. Any agreement that it should not be binding and valid, before it was made, could not affect its validity after the ceremony was performed."

The defendant is a clergyman, "a teacher of high and noble precepts," and yet the record before us discloses that he has violated one of the Ten Commandments and the teachings of Holy Writ. The jury have found him guilty, and the verdict is manifestly right.

The judgment is accordingly affirmed.

the widow of his deceased uncle, was recognized as valid in Kentucky, although at the time of its celebration the Kentucky statute forbade the marriage of persons standing in such relation, and notwithstanding that both parties were domiciled in Kentucky at the time of the marriage and continued to be domiciled there after the marriage, merely going to Tennessee transiently and for the very purpose of evading the Kentucky statute.

In *Dannell v. Dannell*, 4 Bush, 51, *supra*, III., a. it will be observed that the *lex loci* was applied to a marriage between a man and the widow of his deceased brother, and the marriage was upheld, although forbidden by the *lex domicilii*, while in *Sottomayor v. DeBarros*, L. R. 3 Prob. Div. 1, 47 L. J. Prob. N. S. 23, 26 Week. Rep. 455, *supra*, III., a. on the contrary, the *lex domicilii* was applied and the marriage held invalid because incestuous by the *lex domicilii*, though not within the specific exception already mentioned as to marriages incestuous by the general consent of Christendom.

In *Blaisdell v. Bliskum*, 139 Mass. 250, 1 N. E. 281, it was assumed without discussion that a marriage in New Hampshire between a man and the daughter of his mother's sister, being null and void under the New Hampshire statute, was null and void in Massachusetts. In this case, however, it will be observed that the marriage was invalid where celebrated, and so the decision is merely the result of the application of the *lex loci*, it being remembered that the exception with reference to incestuous marriages never operates to validate a marriage invalid where celebrated, but only in certain cases to invalidate a marriage valid where celebrated.

In *Mette v. Mette*, 1 Swabey & T. 416, 28 L. J. Prob. N. S. 117, it was held, upon the authority of *Brook v. Brook*, that a marriage of a naturalized citizen of Great Britain domiciled in England, with his deceased wife's sister, was invalid in England, although it took place in a foreign country where such sister was domiciled.

And in *Chapman v. Bradley*, 4 DeG. J. & S. 71, 12 Week. Rep. 140, 9 L. T. N. S. 495, 10 Jur. N. S. 5, 33 L. J. Ch. N. S. 139, 3 New. Rep. 1, it was held that a marriage in Switzerland between an uncle and a niece of his deceased wife, domiciled in England, though valid where celebrated, was invalid in England.

So, in United States *ex rel.* *Devine v. Rodgers*, 109 Fed. 886, it was held that a marriage in Russia between Russian Jews who were uncle and niece, though lawful where celebrated, would not be recognized as valid in Pennsylvania. The court conceded the general rule 57 L. R. A.

that a marriage valid where celebrated is valid everywhere, but said that the rule was subject to at least the following exception: "If the relation, . . . although lawful in the foreign country [where it was entered into], is stigmatized as incestuous by the law of Pennsylvania, no rule of comity requires a court sitting in this state to recognize the foreign marriage as valid."

The decisions in the last three cases, like that in *Brook v. Brook*, must be referred to the second exception mentioned in subdivision III., a, *supra*, with reference to marriages contrary to the distinctive policy of the state or country where the court is sitting, rather than to the first exception, which relates specifically to marriages incestuous according to the principles of Christendom. It is thus apparent that there is a conflict of authority upon the question whether a statute which extends the prohibition of marriages between relatives beyond the limit referred to in the first exception is to be regarded as a part of the distinctive policy of the state or country which enacts it.

The conclusion with reference to incestuous marriages seems to be that the marriage is, in the first instance, to be tested by the *lex loci*; if it meets that test, it may still be held invalid because incestuous by the common consent of Christendom, as previously explained; and if valid by the *lex loci*, and not incestuous according to the general consent of Christendom, it may still be held invalid because contrary to the distinctive national policy of the forum as evidenced by a municipal law declaring such marriages incestuous. The condemnation of such a marriage, as contrary to the distinctive national policy of the forum, is more probable if the parties were, at the time, domiciled at the forum, but it is not apparent why the court might not take the view that such policy required the condemnation of marriages between persons not domiciled at the forum at the time of its celebration, but who subsequently became domiciled therein.

c. Marriages between members of different races.

See also *supra*, III. a.

In *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131, *supra*, III., a. it was held that a marriage between a mulatto and a white woman, domiciled in Massachusetts, which was celebrated in Rhode Island, must be recognized as valid in Massachusetts, it not being prohibited by the law of Rhode Island (*lex loci*), notwithstanding that it would have been invalid if

celebrated in Massachusetts (*lex domicilii*). In this case the parties returned to Massachusetts and made their matrimonial domicile there and apparently went into Rhode Island to celebrate the marriage for the express purpose of evading the law of Massachusetts. The decision was put upon the ground that a marriage valid where celebrated is valid everywhere, and while the court conceded that there are exceptions to this rule as in case of incestuous marriages contrary to the religion and laws of a country, yet the exception could not be extended to cover a case where, as in the case at bar, the marriage was prohibited merely from motives of political expediency. At the time of the decision in this case, the statute had been repealed, and it may be remarked that there was no such social or political expediency requiring the condemnation of such marriages as is the case in the southern states. None of the other cases have gone so far as *Medway v. Needham* in upholding marriages between negroes and white persons when opposed to the law of the state where the court was sitting. In *State v. Ross*, 76 N. C. 242, it was held that a marriage between a negro man and a white woman, in a state where they were bona fide domiciled and according to the law of which a marriage was valid, would be recognized as valid in North Carolina, notwithstanding that it would have been invalid if it had been solemnized in the latter state. It was urged in this case that such a marriage should be excepted from the general rule that the validity of a marriage is to be tested by the law of the place where it is solemnized, upon the same ground that incestuous and polygamous marriages are excepted from the rule; but the court said that, however revolting such marriages were to persons who, by reason of living in states where the races are nearly equal in number, have an experience of matrimonial connection between them, it cannot be said that the common sentiment of the civilized and Christian world condemns them.

So, where one owning a slave in Missouri removed with her to the territory of Utah, and, after becoming domiciled there, married her, such marriage, being valid where contracted, is valid in California, although it would have been invalid if contracted in the latter state. *Pearson v. Pearson*, 51 Cal. 120. In this case there was a statute which expressly provided that all marriages contracted without the state, which would be valid by the laws of the country in which the same were contracted, should be valid in all courts and places within California. The court, however, said that the statute accorded with the general principle of law previously prevailing, to the effect that the validity of a marriage, except it be polygamous or incestuous, is to be tested by the law of the place where it is celebrated, and if valid there is valid everywhere, and if invalid there is equally invalid everywhere.

It will be observed that the last two cases differed from *Medway v. Needham* in the essential point that in these cases the parties at the time of the marriage were not domiciled in the state which enacted the statute, while in the *Medway* case they were.

It was implied in *State v. Ross*, 76 N. C. 242, and expressly held in *State v. Kennedy*, 76 N. C. 251, decided at the same term of court, that a marriage between such persons, domiciled in North Carolina, though celebrated in another state where they went for the express purpose of evading the law of North Carolina immediately returning to the latter state, was invalid, notwithstanding that it was valid according to the law of the place where it was celebrated. The court in the latter case said: "As to the

formalities of the marriage, the *lex loci* will govern. But when the law of North Carolina declares that all marriages between negroes and white persons shall be void, this is a personal incapacity which follows the parties wherever they go so long as they remain domiciled in North Carolina. And we conceive that it is immaterial whether they left the state with the intent to evade its law or not, if they had not bona fide acquired a domicile elsewhere at the time of the marriage."

Kinney v. Com. 30 Gratt. 858, 32 Am. Rep. 690, and *Greenhow v. James*, 80 Va. 636, 56 Am. Rep. 603, *supra*, III., a, are to the same effect as the last case, both holding that a marriage between a white person and a negro, both domiciled in Virginia, who went out of the state to celebrate the marriage for the purpose of evading the law of Virginia, was void notwithstanding that it was valid by the law of the place where it was celebrated. In both these cases the court formally takes the position that the *lex domicilii* determines the matrimonial capacity.

So a marriage between a white man domiciled in Washington, and an Indian woman, will not be recognized in Washington, although it took place beyond the jurisdiction of Washington, where the parties went to the place in question to contract the marriage for the purpose of evading the Washington statute prohibiting the marriage of a white man and Indian woman. *Re Wilbur*, 8 Wash. 35, 35 Pac. 407. The court said that the general rule that the *lex loci contractus* is controlling as to the validity of marriages is subject to an exception in case the marriage is prohibited either by the statute or those laws of morality and decency which make it against the natural law of civilized nations for two persons to marry, and that in such a case it is vain for them to go beyond their domicile to engage in a contract of marriage for the purpose of avoiding the prohibition.

In *Re Walker (Ariz.)* 46 Pac. 67, also, it was held that a statute of Arizona which forbids the intermarriage of white persons and Indians would invalidate a marriage between a white man and an Indian woman, celebrated on an Indian reservation according to the custom of the tribe; but the decision in this case is evidently on the ground that the place where the marriage was celebrated was within the jurisdiction of the territorial government.

In *State v. Tutty*, 7 L. R. A. 50, 41 Fed. 753, the United States circuit court, sitting in Georgia, held that a marriage celebrated in the District of Columbia, between a white man and colored woman, would be held invalid in Georgia, notwithstanding that it was valid according to the law of the District of Columbia where it was celebrated. It appeared in this case that the Georgia statute expressly provided that marriages solemnized in another state by parties intending at the time to reside in Georgia should have the same legal consequences and effect as if solemnized in Georgia, and that parties residing in that state could not evade any of the provisions of its laws as to marriage by going into another state for the solemnization of the marriage ceremony. The court, however, takes the broad ground that the rule that a statute with reference to marriage cannot operate extra-territorially is subject to certain exceptions, among which are marriages involving polygamy and incest, and those positively prohibited by the law of a country upon motives of policy. The court says in one part of its opinion: "By statute and by unbroken authority then except by the case of *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131, such marriages, between parties domiciled at the

time in the state, as are declared void by the laws of the state, will be held invalid no matter where they were contracted."

Even when the parties were domiciled, at the time of the marriage, out of the state which enacted the statute, there is some authority for holding the marriage invalid though valid according to the *lex loci* and *lex domicilii*.

A marriage valid where celebrated, but denounced by the positive state policy of the state where the question of its validity arises as affecting the morals or good order of society, will not be treated as valid. *Jackson v. Jackson*, 82 Md. 17, 34 L. R. A. 773, 83 Atl. 317. The court, by way of illustration, said that a marriage between a white person and a negro, though valid where celebrated, would be invalid in Maryland because against the policy of that state as declared by statute. This statement was not expressly confined to the hypothesis that the parties were domiciled in Maryland, and is apparently broad enough to cover such a marriage between persons not domiciled in Maryland at the time of its celebration.

And in *State v. Bell*, 7 Bart. 9, 82 Am. Rep. 549, it was expressly held that a marriage of a white man and negro woman in Mississippi, according to the law of which it was valid, would not be recognized as valid in Tennessee so as to protect the parties from prosecution under the act of the general assembly for living together in that state. So far as appears, the parties to this marriage were domiciled in Mississippi when it took place. At least, the ground upon which the decision is based seems to be broad enough to cover such a case. The court says that the rule that a marriage valid where celebrated is valid everywhere applies only to the manner and form of the marriage, and not to the capacity of the parties to contract the marriage. That the doctrine of this case was not intended to be limited to persons domiciled in Tennessee at the time of the marriage is shown by the illustrations used by the court. For instance, it says that if the rule referred to were extended to cover matrimonial capacity, it might happen that a father and daughter, or a brother and sister, could live in Tennessee in lawful wedlock because they had formed such relations in a state or country where they were not prohibited, and that a Turk or Mohammedan, with his numerous wives, might establish his harem within the state.

A marriage contracted in France between a white person and a person of color was held, in *Dupre v. Bouliard*, 10 La. Ann. 411, to be invalid in Louisiana. It does not expressly appear in this case that the parties in question were domiciled in Louisiana, but apparently they were, since the court said that it could not give effect to the marriage without sanctioning an evasion of the laws and setting at naught the deliberate policy of the state.

The conclusion with respect to intermarriages between members of different races seems to be that the validity of the marriage is, in the first instance, to be tested by the *lex loci*, but that, even if valid according to the *lex loci*, it may be held invalid because contrary to the distinctive policy of the forum on the subject as evidenced by its statutes. It is not apparent why this distinctive policy may not be held to condemn marriages celebrated without the state between persons at the time domiciled elsewhere but who subsequently become domiciled therein, as well as marriages between persons who, at the time of their celebration, were domiciled within the state. This is a question as to the public policy of the forum which must be answered in the light of local conditions.

57 L. R. A.

d. Remarriage of divorced person.

See also *supra*, III. a.

See also, on this subject, *note to Hernandez's Succession* (La.) 24 L. R. A. 831.

There is a decided conflict of authority upon the question whether the courts of a state which has enacted a statute prohibiting and rendering void the remarriage, during the lifetime of the former spouse, or a shorter period, of a person for whose misconduct a divorce has been granted, will recognize as valid the remarriage of such a person occurring out of the state while he was still domiciled within the state. The weight of authority, however, seems to hold that if the marriage is valid according to the *lex loci*, it will be upheld by the courts of the state which enacted the statute, and in which the parties to the remarriage are domiciled, notwithstanding that the parties went out of the state to solemnize the second marriage, for the express purpose of evading the law of the domicile and of the forum. *Re Webb*, Tucker, 372; *State v. Weatherby*, 43 Me. 258, 69 Am. Dec. 59; *Com. v. Hunt*, 4 Cush. 49; *Putnam v. Putnam*, 8 Pick. 433; *VanVoorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Thorp v. Thorp*, 90 N. Y. 602, 43 Am. Rep. 189; *Moore v. Hageman*, 92 N. Y. 521, 44 Am. Rep. 408, *Affirming* 27 Hun, 68; *Peugnet v. Phelps*, 48 Barb. 566; *People v. Chase*, 28 Hun, 310; *Kerrison v. Kerrison*, 8 Abb. N. C. 449; *State v. Shattuck*, 69 Vt. 403, 40 L. R. A. 428, 38 Atl. 81; *State v. Richardson*, 72 Vt. 49, 47 Atl. 103.

At least, when but one of the parties to the marriage intended to evade the statute. *Ponsonford v. Johnson*, 2 Blatchf. 51; *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509.

A contrary view, however, was taken in *Williams v. Oates*, 27 N. C. (5 Ired. L.) 535; *Stull's Estate*, 183 Pa. 625, 39 L. R. A. 539, 39 Atl. 16; *Pennegar v. State*, 87 Tenn. 244, 2 L. R. A. 703, 10 S. W. 305.

It is not entirely clear whether the decision in *Williams v. Oates*, 27 N. C. (5 Ired. L.) 535, is upon the ground that matrimonial capacity of the party is to be determined by the law of his domicile, or upon the ground that the case came within the principle that while marriages are generally to be judged by the *lex loci contractus*, every country must so far respect its own laws and their operation on its own citizens as not to allow them to be evaded by acts performed in another country, purposely to defraud them. The decision may perhaps be more safely referred to the latter ground than to the former, though some support for both may be found in the opinion.

Three distinct grounds for the decision in *Stull's Estate*, 183 Pa. 625, 39 L. R. A. 539, 39 Atl. 16, were assigned in the opinion, the combination of which were held to require a decision against the validity of the marriage, though the judge writing the opinion was disposed to regard each one of them as fatal to the marriage: (1) That the foreign marriage was contrary to the positive statute of the domicile; (2) that it was contrary to the public policy of the government of the domicile in that it offended against the prevailing sense of good morals among the people there dwelling; and (3) it was contracted for the express purpose of evading the positive law of the domicile, and was therefore to be regarded as a fraud upon the government and people of the domiciliary residence.

The decision in *Pennegar v. State*, 87 Tenn. 244, 2 L. R. A. 803, 10 S. W. 305, is upon the ground that the prohibitory statute is expres-

sive of a distinctive state policy, and that the parties went out of the state of their domicile to evade the statute. (See further, as to this case, *supra*, III., a.)

In *Carmena v. Blaney*, 18 La. Ann. 245, it was also held that such a marriage would be invalid in Louisiana, where the parties were domiciled, and where the decree of divorce was rendered; but it does not clearly appear in this case that the marriage would be valid, even as tested by the law of Mississippi where it was celebrated.

In *McLennan v. McLennan*, 31 Or. 480, 38 L. R. A. 863, 50 Pac. 802, it was held that a marriage by a resident of Oregon before the expiration of the time allowed for an appeal from a decree of divorce obtained by her in that state was absolutely void, notwithstanding that it took place in another state. In this case, however, the statute provided that the decree should terminate the marriage, except that neither party should be capable of contracting marriage with a third person until the expiration of the period allowed for an appeal; and the court attempted to distinguish the decisions in other states which have upheld similar marriages upon the ground that the statutes there involved merely forbade the remarriage of the guilty party as a punishment, and were therefore penal in their nature, while the Oregon statute applies to the innocent as well as the guilty, and goes to the capacity of either party to marry within the prescribed time. It is to be observed, however, that the statutes involved in the cases referred to purport to make the remarriage absolutely void if celebrated within the state.

When the question first arose in New York it was held in *Marshall v. Marshall*, 2 Hun, 238, that the marriage would be invalid if the parties to the second marriage were domiciled in the state and went out of it to celebrate the marriage for the purpose of evading the statute, and immediately returned to the state and resided there. This decision, however, has been overruled by the subsequent cases in New York.

The right of the legislature of a state to make such a statute apply to marriages outside the state, of persons domiciled in the state, is conceded, even by the courts which refuse to give such effect to a statute which merely in general terms prohibits the marriage. *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *State v. Shattuck*, 69 Vt. 403, 40 L. R. A. 428, 38 Atl. 81. The legislature of Massachusetts has enacted (Mass. Pub. Stat. 145, § 10) that where persons resident in the commonwealth, in order to evade any of the provisions of the preceding sections of the chapter, and with an intention of returning to reside in the commonwealth, go into another state or country and there have their marriage solemnized, and afterwards return and reside in the commonwealth, the marriage shall be deemed void in the commonwealth. It was held in *Whippen v. Whippen*, 171 Mass. 560, 51 N. E. 174, that to bring a case within the statute, both parties to the marriage must have intended to evade the provisions of the statute. So, in *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509, it was held that the statute did not apply, it not appearing that the parties went out of the state to celebrate the marriage in order to evade the provisions of the statute.

Where the parties to the subsequent marriage are not at the time thereof domiciled in the state where the divorce was rendered, it seems to be conceded that the statutory prohibition against remarriage does not apply if, notwithstanding such prohibition, the first marriage may be regarded as actually

and the remarriage is celebrated in another state.

In *Willey v. Willey*, 22 Wash. 115, 60 Pac. 145, it was held that the provision of Wash. Code 1881, § 2008, that neither party to a decree of divorce shall be capable of marrying a third person until the expiration of the time for an appeal, or, if an appeal is taken within that time, until the cause has been fully determined, was penal, and did not apply to a common-law marriage contracted in California, where the parties to the subsequent marriage were domiciled, before the expiration of the time to appeal. The court took the position that the provision did not prevent the decree from becoming absolute before the expiration of the time to appeal, but merely made the parties incapable of marrying with a third person during that time.

In the last case it will be observed that the validity of the second marriage was passed upon by a court of the country which enacted the prohibitory statute. In *Reed v. Hudson*, 13 Ala. 570; *Fuller v. Fuller*, 40 Ala. 301; *Wilson v. Holt*, 83 Ala. 528, 3 So. 321; *Phillips v. Madrid*, 83 Me. 205, 12 L. R. A. 862, 22 Atl. 114; *Roberts v. Ogdensburgh & L. C. R. Co.* 34 Hun, 324; *VanStorch v. Griffin*, 71 Pa. 240; *Dickson v. Dickson*, 1 Yerg. 110, 24 Am. Dec. 444; and *Frame v. Thormann*, 102 Wis. 653, 79 N. W. 39,—it was also held that the prohibitory statute did not apply where the parties to the second marriage were, at the time of its celebration, domiciled and were married out of the state which enacted it, but in these cases the question was not passed upon by the court of the state which enacted the statute, though no special point is made of that fact.

The remarriage, in England, with a person domiciled in that country, of a woman for whose adultery a divorce was granted in Cape Colony, where, at the time, she was domiciled, will be held valid in England, notwithstanding that by the law of Cape Colony she was prohibited from remarrying during the lifetime of her former husband. *Scott v. Atty. Gen. L. R. 11 Prob. Div. 128*, 55 L. J. Prob. N. S. 57, 56 L. T. N. S. 924, 50 J. P. 824. The court, in this case, emphasized the fact that while the law of Cape Colony forbade the guilty party to remarry, yet, under that law, the decree of divorce dissolved and terminated the first marriage. In *Warter v. Warter*, L. R. 15 Prob. Div. 152, however, it was held that the remarriage in England of a woman after an Indian divorce to which she was a party could not be recognized as valid in England, notwithstanding that the other party to the second marriage was domiciled therein. The case is distinguished from *Scott v. Atty. Gen.* upon the ground that in that case the incapacity to remarry only attached to the guilty party, and was therefore penal in its character, while in the case at bar the Indian law did not completely dissolve the marriage tie until the lapse of the six months.

The Louisiana supreme court in *Hernandez's Succession*, 43 La. Ann. 962, 24 L. R. A. 831, 15 So. 461, held that the New York statute which forbids a subsequent marriage during the lifetime of the former spouse of a person for whose adultery a divorce has been granted was a penal statute, having no extraterritorial effect, and therefore did not annul a contract of marriage solemnized in that state between persons domiciled in Louisiana, one of whom had been divorced, on account of her adultery, by a decree of a court of the latter state. So, in *Bullock v. Bullock*, 122 Mass. 3; *Clark v. Clark*, 8 Cush. 385; and *Phillips v. Madrid*, 83 Me. 205, L. R. A. 862, 22 Atl. 114,—it was held that

the statutory prohibition does not apply in case of divorce granted in another state. In *Smith v. Woodworth*, 44 Barb. 198, however, it was held that it was not necessary, in order to bring a case within that statute, that the first marriage shall have taken place in New York, or that it shall have been dissolved within that state. It does not appear where the parties to the second marriage were domiciled at the time it occurred.

In *Simonds v. Allen*, 33 Ill. App. 512, the rule that the validity of a marriage is to be tested by the law of the place where it occurred, was applied so as to hold invalid a marriage contracted in New York by a woman from whom, while domiciled in New York, her former husband had procured a divorce in Michigan upon service by publication only. The decision is upon the ground that the courts of New York have established the doctrine that the validity of such a foreign divorce against a person domiciled in New York will not be recognized in that state as valid, and that, therefore, the second marriage in New York was invalid according to the law of that place, and must therefore be deemed invalid by the court of Illinois irrespective of the question whether the Illinois courts would have recognized the foreign divorce and upheld the second marriage if it had occurred in that state.

In *Crawford v. State*, 73 Miss. 172, 35 L. R. A. 224, 18 So. 848, it was held that a marriage of a divorced person, during the lifetime of his former wife, in violation of a prohibitory statute of Alabama, was not void although it was celebrated in Alabama. The decision, however, is upon the ground that the Alabama statute merely forbade the marriage, but did not make it void.

The conclusion with respect to the remarriage of divorced persons contrary to a statute of the forum seems to be as follows: If the marriage is valid by the *lex loci* it will be held valid or invalid accordingly as the statute of the forum prohibiting such marriages is, or is not, regarded as a part of the public policy of the state. Thus far the public policy evinced by such a statute has never been held to extend to marriages between persons not at the time domiciled at the forum.

e. Former husband or wife living.

See also *supra*, II.

Although the general principles of Christendom which prevail in most civilized countries forbid the remarriage of a person having a husband or wife living and undivorced, yet a conflict of law sometimes arises with respect to the effect of such a remarriage. Thus, in some states and countries such a remarriage is voidable only, and not void *ab initio*, if the first husband or wife had been absent and unheard from for such a length of time as to raise the presumption of his or her death, while in other states or countries such a marriage would be deemed void *ab initio*. In *People v. Crawford*, 62 Hun, 160, 16 N. Y. Supp. 575, Affirmed in 133 N. Y. 535, 30 N. E. 1148, it was held that a statute of New Jersey making such a marriage void *ab initio* governed with respect to a marriage celebrated in New Jersey. It did not appear in this case, however, where the parties were domiciled at the time of the marriage. So, in *Webster v. Webster*, 58 N. H. 3, the effect of such a marriage was determined by reference to the law of Massachusetts where it was celebrated; and, in accordance with that law, it was held that the marriage was void, and that the woman could not, after the death of the man, be regarded as his widow. It does not appear in this case where the parties were domiciled at the time of the marriage, or what the effect of the marriage would 57 L. R. A.

have been if it had been celebrated in New Hampshire where the court was sitting, but in this case, as in the preceding case, the effect of the marriage was determined by reference to the *lex loci*.

The court in *Kubanks v. Banks*, 34 Ga. 407, did not deny that the validity of a second marriage contracted by a woman whose first husband was still living, but who had been away and not heard from for more than nineteen years, should be determined by the statute of North Carolina, where the second marriage took place; but, in the absence of any decision by the North Carolina courts to the contrary, it construed a statute of that state, which in terms forbade a second marriage while the other spouse of the first marriage was still living, not to, apply to a case where such spouse had not been heard from for a long period of years and was supposed to be dead, notwithstanding that the statute in question omitted a proviso which was embodied in an earlier statute expressly excepting such a case. There are some intimations in the opinion that if the statute had not been susceptible of such a construction, the court would have refused to apply it upon the ground that it was contrary to the public policy of the forum.

In *Wilcox v. Wilcox*, 46 Hun, 32, the court said that the rule that the law of the place where the marriage is celebrated governs, and if valid there is valid everywhere, and if void there is invalid everywhere, has its qualifications, and perhaps exceptions, which go in support of the marriage contract and relation, in so far that, as between citizens of one country, while in another, the marriage may be celebrated according to the laws of their domicile, and though not solemnized in the manner required by law may be treated as a contract to marry *per verba de presenti*, and treated as valid when followed by cohabitation and by reason of such cohabitation. In this case a marriage ceremony, between persons domiciled in New York state and who, after the ceremony, returned to that state and resided there, was performed in Montreal. According to the law of the latter place, the parties were not competent to marry because the woman had a former husband living, but they were competent according to the law of New York, because the former husband had been away and unheard from for a sufficient period to create a presumption of his death. It was not held in this case that a valid marriage was consummated by the ceremony performed in Montreal, but it was held that that ceremony was a circumstance from which the jury might infer that the subsequent cohabitation of the parties in New York was matrimonial, thus creating a common-law marriage.

The *lex loci contractus* governs the validity of a marriage, and if valid where consummated it must be held valid everywhere, and if invalid, a like result follows. *Leonard v. Braswell*, 99 Ky. 528, 36 L. R. A. 707, 36 S. W. 684. The parties were domiciled in Kentucky and went to Illinois for the sole purpose of being married there, and immediately returned to Kentucky and resided there. In this case, however, the marriage was invalid according to the law of either state, since the husband had a former wife living, and there was therefore no conflict of laws involved.

In *Patterson v. Gaines*, 6 How. 550, 12 L. ed. 553, it was held that it was not necessary to the validity of a second marriage that a sentence of dissolution should have been first pronounced against a third person who had contracted a bigamous marriage with the woman. The court said that that was the law of Pennsylvania where the second marriage

took place, as well as of Louisiana, where the parties were domiciled and where the Federal court in which the action was brought was sitting.

1. Nonage; consent of parents or guardian.

See also *Middleton v. Janverin*, 2 Hagg. Const. 437; *Canale v. People*, 177 Ill. 219, 52 N. E. 310; and *Ruding v. Smith*, 2 Hagg. Const. 390, *supra*, I.

It is clear that, where the parties to a marriage were domiciled in the state or country where it took place, its validity, so far as it depends upon the consent of the parents of one or both parties, is to be tested by the law of that place, wherever the question may arise. Thus, in *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555, it was held that the marriage of a minor in Massachusetts, where the parties were domiciled, not being invalid in that state, although it was without the consent of the parents of the minor as provided by the Massachusetts statute, would be held valid in Maine.

In *Harford v. Morris*, 2 Hagg. Const. 423, the consistory court held that the validity of a marriage in a foreign country between domiciled British subjects, without the consent of the parents or guardian of the woman, who was of tender age, must be determined by the law of England; and the marriage was held valid, although it would have been invalid according to the law of the country where it took place. The decision in this case, as shown by a note appended to the report of it in 2 Hagg. Const. 436, was reversed by the high court of delegates, but from the note it would seem that the reversal was upon the ground that the woman was induced to enter into the marriage through fear.

In *Scrimshire v. Scrimshire*, 2 Hagg. Const. 395, however, it was held that a clandestine marriage in France between British subjects, both of whom were under the age at which they were competent to marry without the consent of their parents, being null and void according to the law of France, would be regarded as null and void in England, notwithstanding that, according to the law of the latter country, the marriage would be irregular, but not null.

Whether the failure to obtain the consent of the parents as required by the *lex loci* will invalidate a marriage between persons domiciled in another country, where such consent is not required, the weight of authority seems to be that the failure to obtain such a consent when required by the *lex domicilii* will not invalidate a marriage celebrated in another country where such consent is not required.

Thus, in *Steele v. Braddell*, Milw. Const. 1, it was held that the provisions of 9 George II., chap. 11, for annulling the marriage of a minor, had without the consent of parent or guardian, did not apply to a marriage contracted in Scotland, although the parties left Ireland to celebrate it in order to avoid the act, and returned the next day. Dr. Radcliff took the position that the case could not be brought within the statute, either by virtue of the terms of the statute, or the intended evasion of the same.

So, also, in the following cases courts of the state or country of the domicile of the parties have upheld the validity of marriages between minors, celebrated in a foreign state or country, according to the law of which the marriages were valid, notwithstanding that they were celebrated without the consent of parents or guardians, as required by the *lex domicilii*. *Compton v. Bearchcroft*, Bull. N. P. 114; *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54; *Swift* 57 L. R. A.

v. Kelly, 3 Knapp, 257; *Com. v. Graham*, 157 Mass. 73, 16 L. R. A. 578, 31 N. E. 706; *Courtright v. Courtright*, 26 Ohio L. J. 309. In the first and the last two cases it expressly appeared that the parties left the state of their domicile to celebrate the marriage for the very purpose of evading the law of the domicile, but the marriage was nevertheless held valid.

In *Com. v. Graham*, 157 Mass. 73, 16 L. R. A. 578, 31 N. E. 706, the court said: "The general rule of law is that marriage contracted elsewhere, if valid where it is contracted, is held valid here, although the parties intended to evade our laws, unless the statutes declare such a marriage void, or the marriage is one deemed 'contrary to the law of nature as generally recognized in Christian countries.'" At the time of this decision there was a statute (Mass. Pub. Stat. 145, § 10) providing that under certain circumstances a marriage solemnized in another state by persons resident in the commonwealth, who go into the other state for the purpose of having the marriage solemnized there and afterwards return to and reside in the commonwealth, should be deemed void; but the case at bar was held not to be within the statute.

In *Heller v. Heller*, 28 Chicago Leg. News, 288, two persons, domiciled in Illinois, in order to avoid the provision of the Illinois statute which requires a license if the woman is under the age of eighteen, and prohibits the issuance of a license without the consent of the parents, went into the state of Wisconsin and were there married, immediately returning to Illinois. The marriage was held valid notwithstanding that the woman was under the age of eighteen. The decision, however, is upon the ground that the marriage would not have been invalid for noncompliance with the Illinois statute, even if it had been celebrated in Illinois. The implication of the opinion is that if the effect of the statute had been to invalidate marriages performed within the state in violation of its provisions, such effect could not have been evaded by going out of the state for that purpose.

In *Simonlu v. Mallac*, 2 Swabey & T. 67, 29 L. J. Mat. N. S. 97, 6 Jur. N. S. 561, 2 L. T. N. S. 327, it was held that a marriage in England, valid according to the law of England, of persons domiciled in France, was valid, notwithstanding that the law of France (*lex domicilii*) with reference to the observance of certain formalities, and obtaining the consent of parents, was not complied with. This position was taken, even on the assumption that by the law of France the marriage would be void because of noncompliance with such requirements. This case was distinguished in *Sottomayer v. DeBarros*, L. R. 3 Prob. & Div. 1, 47 L. J. Prob. N. S. 23, 26 Week. Rep. 455, III., *a. supra* (which adopted the general doctrine that the *lex domicilii* governs as to matrimonial capacity), upon the ground that the matter of consent went to the ceremony, rather than the capacity of the parties.

A statute of Massachusetts declaring void a marriage when either party is under the age of consent, if they separate during such nonage, has no relevancy to a marriage performed in another state, although between citizens of Massachusetts. *Everett v. Morrison*, 69 Hun, 140, 23 N. Y. Supp. 377, Denying Rehearing in 50 N. Y. S. R. 33, 21 N. Y. Supp. 328.

And, on the other hand, it was held in *McDeed v. McDeed*, 67 Ill. 545, that such a marriage, celebrated in Ohio, between persons domiciled there, being void under the law of that state, must be held void in Illinois, rendering the children of the marriage incapable of inheriting real property of the father in the lat-

ter state. The decision in this case was expressly on the ground that the *lex loci* governed.

In *Smith v. Smith*, 84 Ga. 440, 8 L. R. A. 362, 11 S. E. 496, the Georgia supreme court held that the effect of a marriage between persons, under the age of consent, domiciled in Georgia, who went to Alabama to have the ceremony performed in order to evade the law of Georgia, was to be determined by reference to the law of Georgia, and not by the law of Alabama; but in this case there was a statute of Georgia which expressly provided that parties residing in that state could not evade any of the provisions of its laws as to marriage by going into another state for the solemnization of the marriage ceremony.

IV. Summary.

The foregoing review of the authorities seems to warrant the following general propositions:

(1) So far as the validity of a marriage depends on the preliminaries or the manner or form of its solemnization, a marriage valid where celebrated is valid everywhere; and to this rule, when confined strictly to preliminaries or matters of form or ceremony, there seem to be no exceptions. *Supra*, I.

(2) So far as the validity of a marriage depends on the preliminaries or the manner or form of solemnization, a marriage invalid where celebrated is, in general, invalid everywhere; but this rule is subject to the exception that, under certain circumstances, as where compliance with the *lex loci* is impossible, a marriage in a foreign country will be upheld if celebrated in accordance with the *lex domicilii*, though not in accordance with the *lex loci*. *Supra*, I. The rule is also subject to further exception, under some circumstances, with reference to marriages performed at foreign consulates. *Supra*, I.

(3) A polygamous marriage, at least if it is a second or subsequent marriage, will not be recognized as valid in other countries, though valid according to the law of the place where celebrated. *Supra*, II. But there is a difference of opinion whether the first marriage will be recognized when it contemplated that the husband might take other wives during its continuance. *Supra*, II. The American decisions thus far seem to uphold the first marriage and the English decisions condemn it.

(4) The mere fact that by the law or custom of the place where a marriage was celebrated it is dissolvable at the pleasure of the parties, does not, according to the American authorities at least, exclude it from the general principle that a marriage valid where celebrated is valid everywhere; but there are *dicta* in England to the contrary effect. *Supra*, II.

(5) The doctrine that best accords with the decisions, though there is a decided conflict of authority on the point, is that the *lex loci* governs with respect to the matrimonial capacity of the parties, as well as with respect to the manner or form of solemnization. *Supra*, III. a. In any event, however, this doctrine is subject to two general exceptions: the first relat-

ing to marriages which are incestuous according to the general consent of Christendom, more specifically marriages between persons in the direct lineal line of consanguinity, and in the collateral line, between brothers and sisters (*supra*, III., b); the second relating to marriages which are contrary to the statute of the forum (that is contrary to a statute of the forum which contemplates marriages celebrated elsewhere), or to the distinctive public policy of the forum. *Supra*, III., a. The second of these exceptions is applicable to a variety of circumstances which may affect the capacity of the parties. Its application to different classes of cases is shown in III. b, c, d, e, and f, *supra*. By this exception the distinctive public policy of the forum only, and not that of any other place, is applied, and when the marriage is not opposed to that distinctive policy it will be upheld or condemned accordingly as it is valid or invalid by the *lex loci*, assuming that it is not contrary to the general principles of Christendom. The place of the domicile of the parties at the time of the marriage may be an important element in the application of this exception, since there may be a distinctive policy of the forum which would condemn a marriage, though celebrated elsewhere, between persons domiciled at the forum, but which would not condemn a similar marriage between persons not domiciled at the forum; but, upon the other hand, the fact that the parties were not at the time domiciled at the forum is not conclusive that the distinctive public policy of the forum does not condemn the marriage, when the question of its validity arises in the forum. In some of the cases the decisions condemning marriages celebrated elsewhere between persons domiciled at the forum are apparently referred to the principle that the *lex domicilii*, and not the *lex loci*, governs with respect to matrimonial capacity; but, as pointed out in III. a, *supra*, most of these decisions are, at least so far as their facts are concerned, explainable upon the theory that the marriage in question was contrary to the distinctive public policy of the forum. When that is the case, it is, of course, immaterial for practical purposes whether the *lex domicilii* or the *lex loci* be regarded as the general doctrine, since, even if the latter be adopted as such, it will not apply to the particular case. When, however, the marriage is not contrary to the distinctive public policy of the forum, it may be of vital importance whether the *lex loci* or the *lex domicilii* is adopted as the test of matrimonial capacity, and it is apparent that cases of this kind are entitled to greater weight upon the question whether the *lex loci* or the *lex domicilii* governs, than cases in which it was not necessary to choose between the two. When due attention is paid to this distinction, it is believed that the weight of authority, in America at least, will be found to establish the *lex loci* rather than the *lex domicilii* as the general test of matrimonial capacity, subject to the exceptions referred to. G. H. P.

NEW YORK COURT OF APPEALS.

J. Seaver PAGE, *Respt.*,

v.

Ralph L. SHAINWALD, *Appt.*

(169 N. Y. 246.)

1. The exercise of an option which

NOTE.—As to how far the law of holidays extends to matters other than those relating to negotiable paper, see note to *Merchants' Nat.* 57 L. R. A.

matures on a holiday cannot be lawfully made on the succeeding day, where the statutes make no provision for the suspension of general business on that day.

2. The nonexercise of an option at the appointed time is not waived by a reply, by the one who offered it, to a belated

Bank v. Jaffray (Neb.) 19 L. R. A. 316; also *Whipple v. Hill* (Neb.) 20 L. R. A. 313; and *State v. Thomas* (Ohio) 48 L. R. A. 459.

demand that he comply with his offer, asking time to consider, and a subsequent offer of a compromise, which is rejected.

(December 31, 1901.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, reversing an order of a Trial Term for New York County setting aside a verdict in favor of plaintiff and granting a new trial in an action brought to recover for alleged breach of contract to purchase certain corporate stock. *Reversed.*

Statement by **Parker, Ch. J.:**

Prior to September 3, 1895, the defendant, an officer of the Hoffman Machine Company, tried to persuade the plaintiff to purchase stock in that company; but, his efforts proving unsuccessful, he finally said to plaintiff: "Page, I want you to be in that company. I know it is a good thing. I am so anxious to have you that I will guarantee you against loss if you will take stock in that company and subscribe. I will do further, in fact. I will give you a bonus of my own shares in addition." On these conditions plaintiff consented to purchase stock of the par value of \$5,000, whereupon defendant delivered to him this writing, which was in accord with their oral agreement:

New York, Sept. 3d, 1895.

J. Seaver Page, Esq.,
City.

My dear Mr. Page:—

In consideration of your having subscribed \$5,000 to the proposed Hoffman Machine Co., I hereby agree, if requested so to do by you on the 1st day of January, 1897, within ten days thereafter, to pay to you the amount paid by you upon such subscription, upon condition of your assigning and transferring to me all the shares of stock and rights and privileges you have received or are entitled to receive by virtue of said subscription, and also the stock of such company, viz., \$1,000 par value which I have agreed to deliver to you out of my own personal holdings when issued.

Very truly yours,
Ralph L. Shainwald.

On November 5, 1896, this agreement was extended to the 1st day of January, 1898, so that thereafter the agreement between the parties was that the defendant agreed, if requested by the plaintiff on the 1st day of January, 1898, to pay the amount provided for in the original agreement. The plaintiff did not tender the stock to defendant and make a demand of him on the 1st day of January, 1898, nor did he until the 3d day of January, and one of his claims upon the trial and upon this review is that, New Year's Day being a holiday, it was not necessary for him to make the demand on that day, and that in the year 1898 the succeeding day was Sunday, and hence his demand on the 3d was in time. On the 3d day of January plaintiff called upon the defendant 57 L. R. A.

at his office, and tendered to him the stock which he held under the agreement, and at the same time handed to him a letter, which read as follows:

New York, January 3, 1898.

Ralph L. Shainwald, Esq.

Dear Sir:—

In accordance with your agreement with me, as set forth in your letters to me bearing date, respectively, September 3d, 1895, and November 5th, 1896, I do hereby tender you an assignment and transfer to you of all the shares of stock, rights, and privileges which I have received, or which I would be entitled to receive, by virtue of my subscription to the stock of the Hoffman Machine Company, together with \$1,000 par value of stock of the Hoffman Machine Company, which you delivered to me out of your personal holdings, and I hereby respectfully demand the return and payment to me of the sum which I have subscribed and paid for all of such stock, namely, the sum of \$5,000, and this tender and demand is made as of the present date, and as of the 1st day of January, 1898, as provided for in our contract.

Very respectfully,
J. Seaver Page.

The defendant read the letter and then said, "Page, now I intend to do what is fair and just in this matter, and you must give me a little time to consider it." The next day the defendant wrote to plaintiff a letter reading as follows:

New York, January 4th, 1898.

J. Seaver Page, Esq.
City.

Dear Sir:—

I return herewith the shares you left in my office yesterday, since I do not wish to be the custodian of property belonging to you.

Yours very truly,
Ralph L. Shainwald.

To this letter the plaintiff made the following reply:

101 Fulton Street, January 5, '98.

My Dear Mr. Shainwald:—

I have received your favor returning me the stock of the Hoffman Machine Co. I am sorry you have taken this position, as I do not think it is a tenable one. I should very much prefer to come to some amicable decision with you before I am compelled to proceed further.

Yours truly,
J. Seaver Page.

Some time during that month the defendant called upon the plaintiff, and in a conversation with him offered to give him his note for \$2,500, an offer prompted, as the defendant says, by his belief at the time that the stock investment was still good for 50 cents on a dollar.

Mr. John S. Davenport, with **Mr. Felix Jellenik**, for appellant:

There was no evidence of anything

amounting to a waiver, and it was error to admit or consider it.

Armstrong v. Agricultural Ins. Co. 130 N. Y. 560, 29 N. E. 991.

Taking time to consider action upon a belated offer, before accepting, is not a waiver of its lateness.

Fries v. Rider, 24 N. Y. 367, 82 Am. Dec. 308; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410; *Armstrong v. Agricultural Ins. Co.* 130 N. Y. 560, 29 N. E. 991; *Devens v. Mechanics' & T. Ins. Co.* 83 N. Y. 168; *Trippe v. Providence Fund Soc.* 140 N. Y. 23, 22 L. R. A. 432, 35 N. E. 316; *Benninghoff v. Agricultural Ins. Co.* 93 N. Y. 495; *Kelley v. Upton*, 5 Duer, 336.

The fact that January 1st was a holiday did not extend plaintiff's option beyond that day.

Walton v. Stafford, 162 N. Y. 558, 57 N. E. 92; *J. Russell Mfg. Co. v. New Haven S. B. Co.* 50 N. Y. 121; *Richardson v. Goddard*, 23 How. 28, 16 L. ed. 412; *Brooklyn Oil Refinery v. Brown*, 38 How. Pr. 414.

The notice after January 1st was a nullity, time being of the essence of this contract.

Duffy v. O'Donovan, 46 N. Y. 223; *Fries v. Rider*, 24 N. Y. 367, 82 Am. Dec. 308; *Rutty v. Consolidated Fruit Jar Co.* 52 Hun, 492, 6 N. Y. Supp. 23; *Pope v. Terre Haute Car & Mfg. Co.* 107 N. Y. 61, 13 N. E. 592; *Britton v. Phillips*, 24 How. Pr. 111; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543, 37 Am. Rep. 594.

Messrs. John M. Bowers and James W. Gerard, for respondent:

Even if the tender of the stock and the demand made on January 3, 1898, were not a strict performance according to the contract, the defendant has waived his right to object to such tender and demand.

Trippe v. Providence Fund Soc. 140 N. Y. 23, 22 L. R. A. 432, 35 N. E. 316; *Brink v. Hanover F. Ins. Co.* 80 N. Y. 108; *Kiernan v. Dutchess County Mut. Ins. Co.* 150 N. Y. 194, 44 N. E. 698; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 419; *Webb v. Hughes*, L. R. 10 Eq. 281.

The tender of the stock by the plaintiff, and his demand from the defendant of the \$5,000 paid, on the 3d day of January, 1898, was valid and was sufficient to bind the defendant.

Lucia v. Omel, 46 App. Div. 200, 61 N. Y. Supp. 659; *Spalding v. Bernhard*, 76 Wis. 368, 7 L. R. A. 423, 44 N. W. 643; *Richardson v. Goddard*, 23 How. 43, 16 L. ed. 417; *Myers v. The Unionist*, 48 Fed. 315; *Disney v. Furness*, 79 Fed. 814; *Campbell v. International Life Assur. Soc.* 4 Bosw. 319; *Salter v. Burt*, 20 Wend. 205, 32 Am. Dec. 530; *Acery v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240; *Sands v. Lyon*, 18 Conn. 18; *Duchemin v. Kendall*, 149 Mass. 171, 3 L. R. A. 784, 21 N. E. 242.

The agreement by which the defendant gave to the plaintiff an extension of his time to make a tender of the stock and a demand for repayment of the \$5,000, to January 1, 1898, was valid and binding upon the defendant.

57 L. R. A.

Clark v. Dales, 20 Barb. 64; *Burt v. Saaton*, 1 Hun, 553; *Grange v. Palmer*, 56 Hun, 481, 10 N. Y. Supp. 201; *Schmidt v. Couperthwait*, 66 How. Pr. 480; *Routledge v. Worthington Co.* 119 N. Y. 597, 23 N. E. 1111.

Parker, Ch. J., delivered the opinion of the court:

The legal effect of the agreement between the plaintiff and the defendant was to require the defendant, if requested so to do by the plaintiff on the 1st day of January, 1898, to take plaintiff's stock in the Hoffman Machine Company at the price named therein. The plaintiff failed to tender his stock and make the request on the day named, but did so on the 3d of January. As the 1st day of January was a holiday, and the 2d came on Sunday, the plaintiff insists that his tender and request were in time. But the difficulty with his contention is that legal holidays have not been placed on the same basis as Sunday by the statute. Indeed, in only two respects has the legislature attempted to interfere with the ordinary course of business, whether public or private, on a holiday other than Sunday. The first act provides that a negotiable instrument maturing on a holiday is payable on the next succeeding business day (Laws 1887, chap. 280), and the second that holidays shall be considered as Sunday for all purposes whatsoever, as regards the transaction of business in the public offices of the state or of the counties of the state (Laws 1897, chap. 614, § 1). If the legislature had omitted the limitation of the preceding statute to the transaction of business in the public offices of the state or counties of the state, thus providing that holidays should be considered as Sunday for all purposes whatsoever, the plaintiff's contention would be well founded. But in the present state of the statutes we are of the opinion that upon holidays other than Sunday all transactions may be carried on as on any other day, with the exceptions above noted. And so we said, in effect, in *Walton v. Stafford*, 162 N. Y. 558, 57 N. E. 92. It is undoubtedly true that the state of the law on this subject is likely to prove embarrassing to many, such for instance as those who find themselves obliged to tender a considerable sum of money on a day which is just enough of a holiday to allow the banks to close, from which he must obtain the money to make a tender, but not enough of a holiday to avoid the necessity of a tender if he would not breach his contract. But such faults, if faults they be, in our business law, can be corrected only by the legislature.

The plaintiff's further contention is that he is entitled to recover because the defendant waived his right to object that such tender and demand was not made on the proper day, and in that respect the appellate division seems to have agreed with him. We are unable to concur in that view. The plaintiff's right to require the defendant to take and pay for his stock was lost when he allowed January 1st, 1898, to pass by with-

out tendering to him that stock, and demanding the payment of the agreed price. Thereafter the contract was at an end, and the situation was precisely the same as if there had never been one. Either party had a right, of course, to undertake negotiations to revive the old contract or make a new one, but such a purpose could only be accomplished by a meeting of minds in agreement as to what the new contract should be, whether on the basis of the old or on entirely different lines. Now, the parties did not come to any agreement, and about this fact they do not differ. Two days after the contract had ceased to have life, the plaintiff made a demand in writing, and tendered the stock, but the defendant replied, "You must give me a little time to consider it," and the next day he returned the stock, as was his legal right. A little later the defendant offered to give the plaintiff his note for \$2,500, as he explained, on the condition that the plaintiff would take the risk as to the rest of his investment, which he thought the stock might prove to be worth. The plaintiff did not accept this offer, and so their conferences ended without the making of a different agreement from the old or the renewing of its life, and in such case the plaintiff must fail to recover, because he has no contract to enforce. The doctrine of waiver, often applied in cases of forfeiture, has no place in this discussion, for there was nothing to forfeit January 3d, when the plaintiff tendered the stock. The contract upon which he was apparently relying was dead, and had been for two days, and, whether he realized it or not, the plaintiff was in fact a suitor for the enjoyment of a second option. The defendant refused to accord it to him, and there the matter must end, so far as the courts are concerned, for it was the defendant's legal right to refuse.

The judgment of the Appellate Division should be reversed, and the order of the trial court affirmed, with costs to abide the event.

Gray, O'Brien, Haight, Landon, Cullen, and Werner, JJ., concur.

John F. REILLY, Appt.,
v.

SICILIAN ASPHALT PAVING COMPANY, Resp't.

(170 N. Y. 40.)

A judgment for plaintiff in an action for injury to his vehicle through negligent obstruction of a highway is no bar to another action for injury to his person arising out of the same accident.

(February 25, 1902.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme

NOTE.—As to whether injuries both to person and to property constitute but one, or more than one, cause of action, see *King v. Chicago, M. & St. P. R. Co.* (Minn.) 50 L. R. A. 161, and note.

57 L. R. A.

Court, First Department, affirming a judgment of a Trial Term for New York County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. E. T. Talliaferro, with Mr. John Mulholland, for appellant:

It does not follow that, because the injury to property and the injury to the person resulted from the same cause, separate actions cannot be brought. They are separate claims and separate causes of action, and so recognized in the statutes.

Mulligan v. Knickerbocker Ice Co. 109 N. Y. 657, 16 N. E. 684; *Brunsdon v. Humphrey*, L. R. 14 Q. B. Div. 141.

A judgment is a bar only to a suit for such claims as might have been litigated under the pleadings and issues as made.

Burack v. Post, 12 Barb. 168; *Cackley v. Smith*, 47 Kan. 642, 28 Pac. 617; *Thurst v. West*, 31 N. Y. 210; *Royce v. Burt*, 42 Barb. 655; *Laurence v. Hunt*, 10 Wend. 84, 25 Am. Dec. 539; *Burwell v. Knight*, 51 Barb. 267.

The joinder of causes of action arising out of the same transaction is, under the Code of Civil Procedure, permissive only, and not mandatory; and all that the courts do to limit litigation is to consolidate actions in a proper case when motion is made.

Code Civ. Proc. § 484, subd. 9; *Sullivan v. New York, N. H. & H. R. Co.* 1 N. Y. Civ. Proc. Rep. 285; *Seymour v. Lorillard*, 8 N. Y. Civ. Proc. Rep. 90; *Perry v. Dickerson*, 85 N. Y. 352, 39 Am. Rep. 663.

Messrs. Herbert C. Smyth and Edwin A. Jones, for respondent:

There cannot be two actions and two recoveries against the same defendant by the same plaintiff, arising out of one act of negligence.

Sperry's Case, 5 Coke, 61; *Nathans v. Hope*, 77 N. Y. 420; *Secor v. Sturges*, 16 N. Y. 548; *Law v. McDonald*, 62 How. Pr. 340.

The injury to person and the injury to property are not separate causes of action.

Hoice v. Peckham, 6 How. Pr. 229; *Paret v. New York Elev. R. Co.* 28 Jones & S. 441, 18 N. Y. Supp. 580; *McAndrews v. Lake Shore & M. S. R. Co.* 70 Hun. 46, 23 N. Y. Supp. 1074; *Rockwell v. Brown*, 36 N. Y. 207; *Farrington v. Payne*, 15 Johns. 432; *Jew v. Jacob*, 19 Hun. 105; *Lawton v. Hudson*, 19 App. Div. 522, 46 N. Y. Supp. 617; *Buhler v. Hubbell*, 32 N. Y. S. R. 342, 343, 10 N. Y. Supp. 254; *Phillips v. Berick*, 16 Johns. 136, 8 Am. Dec. 299; *Hopf v. Myers*, 42 Barb. 270; *Cahoon v. Bank of Utica*, 7 N. Y. 486; *Huntington Trustees v. Nicoll*, 3 Johns. 566; *Miller v. Covert*, 1 Wend. 487; *Smith v. Jones*, 15 Johns. 229; *Polley v. Wikisson*, 5 N. Y. Civ. Proc. Rep. 140; *Burdick v. Cameron*, 10 App. Div. 589, 42 N. Y. Supp. 78; *Porter v. Cobb*, 22 Hun. 278; *Bancroft v. Winspear*, 44 Barb. 209; *Law v. McDonald*, 62 How. Pr. 340; *Draper v. Stouvenel*, 38 N. Y. 219; *Mills v. Garrison*, 3 Keyes, 40; *Trask v. Hartford & N. H. R. Co.* 2 Allen, 331; *Sullivan v. Baxter*, 150

Mass. 261, 22 N. E. 895; *Braithwaite v. Hall*, 168 Mass. 39, 46 N. E. 398; *Von Fragstein v. Windler*, 2 Mo. App. 598, Appx.; *Beonio v. Southern P. R. Co.* 86 Cal. 415, 24 Pac. 1093; *King v. Chicago, M. & St. P. R. Co.* 80 Minn. 83, 50 L. R. A. 161, 82 N. W. 1113; *Burritt v. Belfy*, 47 Conn. 323, 36 Am. Rep. 79; *Stevens v. Tuttle*, 104 Mass. 328; *International & G. N. R. Co. v. Geiselman*, 12 Tex. Civ. App. 123, 34 S. W. 658; *Schive v. Fausold*, 137 Pa. 82, 20 Atl. 403; *Galveston, H. & S. A. R. Co. v. Dowe*, 70 Tex. 5, 7 S. W. 368; *St. Louis S. W. R. Co. v. Moss*, 9 Tex. Civ. App. 6, 28 S. W. 1038; *O'Neal v. Brown*, 21 Ala. 482; *Herriter v. Porter*, 23 Cal. 385; *McCaffrey v. Carter*, 125 Mass. 330; *Bates v. Quattlebom*, 2 Nott & McC. 205; *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821; *Binicker v. Hannibal & St. J. R. Co.* 83 Mo. 680.

The appellate division opinion in the case at bar has been cited several times since, and the doctrine therein laid down has been adopted in a number of instances, so that the law principle involved has been deemed settled for several years.

Doyle v. American Wringer Co. 60 App. Div. 525, 69 N. Y. Supp. 952; *Freeland v. Brooklyn Heights R. Co.* 54 App. Div. 90, 46 N. Y. Supp. 321; *Munson v. New York C. & H. R. R. Co.* 32 Misc. 285, 65 N. Y. Supp. 548; *Galligan v. Sun Printing & Pub. Assn.* 25 Misc. 355, 54 N. Y. Supp. 471; *King v. Chicago, M. & St. P. R. Co.* 80 Minn. 83, 50 L. R. A. 161, 82 N. W. 1113.

Cullem, J., delivered the opinion of the court:

The appellant claimed that while driving in Central Park, in the city of New York, both his person and his vehicle were injured in consequence of collision with a gravel heap placed on the road through the negligence of the defendant. Thereupon he brought an action against the defendant in the court of common pleas to recover damages for the injury to his person. Subsequently he brought another action in one of the district courts in the city of New York to recover for the injury to his vehicle. In this last action he obtained judgment, which was paid by the defendant. Thereafter the defendant set up by supplemental answer the judgment in the district court suit, and its satisfaction, as a bar to the further maintenance of the action in the common pleas. On the trial of the case in the supreme court, to which, under the Constitution, the action was transferred, it was held that the plaintiff's right of action was merged in the judgment recovered in the district court, and his complaint was dismissed. The judgment entered upon this direction was affirmed by the appellate division, and an appeal has been taken to this court by allowance.

The rule is that a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon. *Scoor v. Sturgis*, 16 N. Y. 548; *Nathans v. Hope*, 77 N. Y. 420. As to this principle there is no dispute. Therefore the

question presented by this appeal is whether, from the defendant's negligence, and the injury occasioned thereby to the plaintiff in his person and his property, there arose a single cause of action, or two causes of action,—one for the injury to his person, and the other for injury to his property. The question is not determined by the Code of Civil Procedure, for, though in § 484 it prescribes what separate causes of action may be joined in the same complaint, it nowhere assumes to define what is a single cause of action. Nor is there any controlling decision of this court on the point. In *Mulligan v. Knickerbocker Ice Co.* (affirmed without opinion) 109 N. Y. 657, 16 N. E. 684, the question discussed in the opinion of the learned court below, and necessarily involved in the decision of this court, was the effect of a release which the plaintiff asserted was intended to cover only the injuries to his property, but was fraudulently prepared so as to embrace his whole cause of action. The case is doubtless authority for the proposition that a voluntary settlement between the parties of part of a claim does not satisfy or discharge the whole claim. But the principle that the parties may, by voluntary agreement, sever or split up a single cause of action, though a plaintiff cannot of his own volition do the same, seems to be generally recognized even in those jurisdictions where the rule is held most firmly that a single tort gives rise but to a single cause of action. *O'Beirne v. Lloyd*, 43 N. Y. 248; *Bliss v. New York C. & H. R. R. Co.* 160 Mass. 447, 36 N. E. 65.

The question now before us has been the subject of conflicting decisions in different jurisdictions. In England it has been held by the court of appeal (Lord Coleridge, Ch. J., dissenting) that damages to the person and to property, though occasioned by the same wrongful act, give rise to different causes of action (*Brunsdon v. Humphrey*, L. R. 14 Q. B. Div. 141), while in Massachusetts, Minnesota, and Missouri the contrary doctrine has been declared (*Doran v. Cohen*, 147 Mass. 342, 17 N. E. 647; *King v. Chicago, M. & St. P. R. Co.* 80 Minn. 83, 50 L. R. A. 161, 82 N. W. 1113; *Von Fragstein v. Windler*, 2 Mo. App. 598). The argument of those courts which maintain that an injury to person and property creates but a single cause of action is that, as the defendant's wrongful act was single, the cause of action must be single, and that the different injuries occasioned by it are merely items of damage proceeding from the same wrong; while that of the English court is that the negligent act of the defendant in itself constitutes no cause of action, and becomes an actionable wrong only out of the damage which it causes. "One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person." *Brunsdon v. Humphrey*, L. R. 14 Q. B. Div. 141. I doubt whether either argument is conclusive. If, where one person was driving the vehicle of another, both the driver

and the vehicle were injured, there can be no doubt that two causes of action would arise,—one in favor of the person injured, and the other in favor of the owner of the injured property. On the other hand, if both the horse and the vehicle, being the property of the same person, were injured, there would be but a single cause of action for the damage to both. If, while injury to the horse and vehicle of a person gives rise to but a single cause of action, injury to the vehicle and its owner gives rise to two causes of action, it must be because there is an essential difference between an injury to the person and an injury to property, that makes it impracticable, or at least very inconvenient in the administration of justice, to blend the two. We think there is such a distinction. Different periods of limitation apply. The plaintiff's action for personal injuries is barred by the lapse of three years; that for injury to the property not till the lapse of six years. The plaintiff cannot assign his right of action for the injury to his person, and it would abate and be lost by his death before a recovery of a verdict, and, if the defendant were a natural person, also by his death before that time. On the other hand, the right of action for injury to property is assignable, and would survive the death of either party. It may be seized by creditors on a bill in equity (*Hudson v. Piets*, 11 Paige, 180), and would pass to an assignee in bankruptcy. Possibly the difficulties arising from the difference in the periods of limitation and the difference in the rule of survival between a personal injury and a property injury might be obviated in practice by holding the statute a bar to that portion of the damages, a claim for which would have been outlawed had it been a separate cause of action, and by permitting, in case of death, the action to be revived so far as it relates to property. We do not see, however, how it would be practicable to deal with a case where the right of action for injury to the property had passed to an assignee in bankruptcy, or to a receiver on a creditors' bill, without treating it as an independent cause of action. Though, as we have already said, § 484 of the Code does not expressly determine the point in issue, still, it is not without much force in the argument that the two injuries constitute separate causes of action. Under the old Code of Procedure, at the time of its original enactment injuries to person and injuries to property were separately classified as causes of action, and it was not permitted to join those of one class with those of another. Code Proc. § 167. By an amendment in 1852, injuries to persons and property were put in the same class. But by § 484 of the Code of Civil Procedure they are again placed in distinct classes, and cannot be united. If the plaintiff's cause of action is single, into what class does it fall? Is it for an injury to the person, which may be united with other causes of action for personal injuries, or is it for injury to property, which may be joined with claims of 57 L. R. A.

the same nature, or is it *sui generis*, a non-descript which must stand alone?

While some of the difficulties in the joinder of a claim for injury to the person and one for injury to the property in one cause of action are created by our statutory enactments, the history of the common law shows that the distinction between torts to the person and torts to property has always obtained. Lord Justice Bowen, in the *Brunsdon Case*, has pointed out that there is no authority in the books for the proposition that a recovery for trespass to the person is a bar to an action for trespass to goods, or *vice versa*. It is true that at common law the necessity of bringing two suits could, at the election of the plaintiff, be obviated in some cases,—as, for instance, by declaring for trespass on the plaintiff's close, and alleging in aggravation thereof an assault upon his person. See *Waterman, Trespass*, 205, 406. Still, in such a case there would be but a single cause of action, to wit, the trespass upon the close; and, if the defendant justified this trespass, it would be a complete defense to the action; the personal assault being merely a matter of aggravation. *Carpenter v. Barber*, 44 Vt. 441. Therefore, for reason of the great difference between the rules of law applicable to injuries of the person and those relating to injuries to property, we conclude that an injury to person and one to property, though resulting from the same tortious act, constitute different causes of action.

The judgment appealed from should be reversed, and a new trial granted; costs to abide the event.

Parker, Ch. J., Gray, O'Brien, Martin, Vann, and Werner, JJ., concur.

PEOPLE of the State of New York, Appt.,
v.

John S. BIESECKER, Resp't.

(169 N. Y. 53.)

The legislature cannot prohibit the sale of dairy products containing a preservative other than salt, sugar, or spirituous liquors in specified cases, or the sale of preservatives for such use, when the use of preservatives is not declared to be an adulteration, and the statute is not aimed at adulteration generally, regardless of whether or not their effect is to render the products unwholesome.

(December 10, 1901.)

A PPEAL by complainant from a judgment of the Appellate Division of the

NOTE.—For other cases in this series as to ordinances or statutes regulating the sale of dairy products, see *State v. Dupaquier* (La.) 26 L. R. A. 162; *Deems v. Baltimore* (Md.) 26 L. R. A. 541; *State v. Nelson* (Minn.) 34 L. R. A. 318; *State v. Broadbelt* (Md.) 45 L. R. A. 433; *State v. Schlenker* (Iowa) 51 L. R. A. 348; and *State v. Crescent Creamery Co.* (Minn.) 54 L. R. A. 467. See also the following case and footnote thereto.

Supreme Court, First Department, affirming a judgment of a Special Term for New York County which sustained a demurrer to the complaint in an action brought to recover the penalty for violation of a statute against the use of preservatives in dairy products. *Affirmed.*

The facts are stated in the opinion.

Messrs. Samuel S. Slater and John C. Davies, Attorney General, for appellant:
The prohibition against the sale of dairy products containing a preservative is constitutional if enacted to protect the public health or to prevent fraud.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006.

We may own our property absolutely, and yet it is subject to the proper exercise of the police power.

New York Health Dept. v. Trinity Church, 145 N. Y. 32, 27 L. R. A. 710, 39 N. E. 833; *People v. King*, 110 N. Y. 423, 1 L. R. A. 293, 18 N. E. 245; *People v. Girard*, 145 N. Y. 105, 39 N. E. 823; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 123, 43 L. R. A. 264, 51 N. E. 1006; *Colon v. Lisk*, 153 N. Y. 196, 47 N. E. 302.

The prohibition against the sale of dairy products containing a preservative is for the protection of the public health. Any dairy product containing a preservative is harmful to the public health.

People v. Cipperly, 37 Hun, 324.

The prohibition of the sale of a dairy product containing a preservative was enacted to prevent deception. Even if all preservatives are harmless, their sale can be prohibited to prevent fraud.

People v. Girard, 145 N. Y. 105, 39 N. E. 823.

Messrs. Edward Lauterbach, Henry L. Scheuerman, and Herbert R. Limburger, for respondent:

Section 27 of the agricultural law is unconstitutional. The act in question deprives persons of their "life, liberty, and property without due process of law" within the meaning of the constitutional provision.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

Even if the legislature, under the guise of a health law, attempts to interfere with personal liberty and the exercise of a lawful calling, the act by which it attempts to do so cannot be sustained as constitutional unless it is apparent on the face thereof that it has relation to the public health, and that the provisions of the act are appropriate and adapted to that end.

The prohibition of the sale of beneficial preservatives which have been in use for many years in this state cannot in any way benefit the public health. The term "preservative" itself signifies something having a preserving quality and beneficial effect; preservation is the antithesis of decay.

People v. Gillson, 109 N. Y. 389, 17 N. E. 343; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29.

57 L. R. A.

The legislature has no right to prohibit this defendant from exercising the lawful calling of manufacturing or selling preservatives, a business in which thousands have been engaged for years past.

People ex rel. Tyroler v. Warden of City Prison, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006; *Dorsey v. State*, 38 Tex. Crim. Rep. 527, 40 L. R. A. 201, 44 S. W. 514; *Helena v. Dwyer*, 64 Ark. 424, 39 L. R. A. 266, 42 S. W. 1071; *People ex rel. Mosley v. Pease*, 30 Chicago Legal News, 277; *People v. Buffalo Fish Co.* 30 Misc. 130, 62 N. Y. Supp. 543.

In view of the existence of a provision of law prohibiting adulteration and the introduction of unwholesome or adulterated substances into food and dairy products, it cannot be claimed that the statute under consideration in the case at bar was intended or necessary to prevent adulteration.

People v. Hills, 64 App. Div. 584, 72 N. Y. Supp. 340.

Oullen, J., delivered the opinion of the court:

This action is brought to recover a penalty for the violation of § 27 of the agricultural law (Laws 1893, chap. 338), as amended by chapter 534 of the Laws of 1900. The provisions of that section which it is alleged the defendant violated are as follows: "No person shall sell, offer or expose for sale, any butter or other dairy products containing a preservative, but this shall not be construed to prohibit the use of salt in butter or cheese, or spirituous liquors in club or other fancy cheese or sugar in condensed milk. No person or persons, firm, association, or corporation shall induce or attempt to induce any person or persons to violate any of the provisions of the agricultural law. Any person, firm, association, or corporation selling, offering, or advertising for sale any substance, preparation, or matter for use in violation of the provisions of the agricultural law shall be guilty of a violation of this act." The complaint merely follows the statutes, and alleges that the defendant advertised for sale a preservative call "preservaline" for use with butter, "which was neither salt used in butter or cheese, sugar to be used in milk, nor liquor to be used in club or fancy cheese," with intent that the said preservaline should be used in butter to be offered and exposed for sale. The defendant demurred to the complaint, claiming that the statutory enactment quoted was unconstitutional and void, and in this contention he has been upheld by the special term and the appellate division.

We think the disposition of this case by the courts below was correct. It is not possible to define accurately the limits of the police power, the exercise of which is vested in the legislature; nor have the courts, as a rule, essayed that task, further than to state in very general terms the nature and object of such power. Still, the power has its limitations, and those limitations have been to a large extent determined by the

process of exclusion and inclusion, as the courts have upheld particular cases of legislation as valid exercise of the power, and in other cases have declared the legislation void. In *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29, a statute absolutely prohibiting the manufacture and sale of oleomargarine or any compound as a substitute for butter and cheese was held void. The statute, having been subsequently amended so as to prohibit the manufacture or sale of any article so compounded as to imitate butter, was upheld in *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277, as valid legislation to prevent fraud on purchasers and consumers. In *People v. Kilber*, 106 N. Y. 321, 12 N. E. 795, a statute defining what should be deemed unwholesome or adulterated milk, and prohibiting its sale, was held constitutional. In *People v. Girard*, 145 N. Y. 105, 39 N. E. 823, a statute forbidding the manufacture or sale of vinegar containing any artificial coloring matter was also held valid. From these cases the following propositions may be deduced: (1) That the legislature cannot forbid or wholly prevent the sale of a wholesome article of food. (2) That legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well-known article in common use, and thus imposing upon consumers or purchasers, is valid. (3) That, in the interest of public health, the legislature may declare articles of food not complying with a specified standard unwholesome, and forbid their sale. Though these principles, like most legal principles, are true only within limits, there would not seem much chance of conflict in their practical application, except between the first and last. In the first of the *Milk Cases* (*People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107, decided upon opinion of Learned, P. J., in 37 Hun, 319) it was held that the statutory declaration of what was wholesome milk was conclusive, and the defendant was not allowed to show in defense that the milk sold by him was in fact unadulterated and not unwholesome. The first *Oleomargarine Case* can be differentiated from this on the ground that the statute forbade its sale as a substitute to take the place of butter, and not as an unwholesome article of food. Still, that distinction is narrow, and I imagine that the sale and consumption of a well-known article of food, or a product conclusively shown to be wholesome, could not be forbidden by the legislature, even though it assumed to enact the law in the interest of public health. The limits of the police power must necessarily depend in many instances on the common knowledge of the times. An enactment of a standard of purity of an article of food, failing to comply with which the sale of the article is illegal, to be valid, must be within reasonable limits, and not of such a character as to practically prohibit the manufacture or sale of that which, as a matter of common knowledge, is good and wholesome. The statute before us cannot be justified as

57 L. R. A.

an exercise of power to prevent fraud or imposition on buyers and consumers. Doubtless the legislature could provide that, where butter contained any preservative except salt or sugar, the package should be clearly marked with a label stating such fact; and it might require any notice adapted to informing the public of the nature and treatment of the article offered for sale. This it has not done, but it has absolutely forbidden the sale. Nor is the legislation similar to that before the court in the *Vinegar Case*. In that case there was no prohibition of vinegar produced from other materials than cider. The forbidden thing was the use of artificial coloring matter, which was not a necessary ingredient of the article produced, but served the sole purpose of preventing the consumer distinguishing between the different kinds of vinegar. In the present case the object of the forbidden article used is not to practise any deception, but to prevent decay in a product which, without the presence of some foreign substance, naturally becomes unfit for use in a very short period. The effect, therefore, of the statute, is to prohibit the preservation of dairy products, except by salt in butter and cheese, and sugar in condensed milk, and their sale, no matter how harmless the ingredients used for that purpose may be, and no matter how efficiently they attain their purpose.

It is sought, however, to uphold this statute under the principle of the *Milk Cases*, on the theory that it is a legislative determination that preservatives other than salt and sugar are unwholesome adulterations of dairy products. As pointed out by the learned courts below, there is no legislative declaration to that effect. Passing, however, that consideration, there is a more serious difficulty in the way of such a course. If the statute had provided that the admixture of any substance with dairy products other than salt or sugar should be deemed an adulteration, and declared such dairy products when so adulterated unwholesome, the case would resemble the *Milk Case*, and the question would be presented whether such far-reaching restrictions could be upheld as reasonable regulations in favor of public health. As to that question we express no opinion. But this provision of the statute is not aimed at adulterations. I cannot find in the agricultural law any general prohibition against adulterations in butter and cheese, although there is an express provision to that effect in the case of milk. Section 26 seems to forbid the use of acids or other deleterious substances only in the case of imitation butter. Though, if I err in this, and the application of the section be general, the provision under review is unnecessary so far as public health is involved. Section 407 of the Penal Code forbids the sale of adulterated food only (except in certain specified cases) when made without disclosing or informing the purchaser of the adulteration. It will be seen, therefore, that the sale of adulterated butter or cheese is not necessarily an of-

fense, except so far as made such by the statutory enactment under review. That enactment does not make the introduction of a foreign substance an adulteration, nor an adulteration illegal, except in the case of a preservative. How, then, can it be said that the statute is intended to prevent adulteration, or the introduction of a foreign substance into butter or cheese, when the sole test of criminality under it is that the substance is introduced for the object or with the effect of preserving butter or cheese? If the foreign substance has not this effect, no matter how deleterious it may be, the use of it does not violate this provision. It is plain, therefore, that this statute is solely aimed at the preservation of dairy products by the use of other substances than salt, sugar, and spirituous liquor. Why the use of sugar is forbidden in milk, salt in butter and cheese, and particularly why that of liquor is permitted in club or fancy cheese, and forbidden in other cheese, it is difficult to understand on the theory that its object was the protection of the public health. The preservation of food and the arrest of its tendency to decay is certainly a proper and lawful object in itself. It is a work in which man has been engaged, to some extent, from earliest his-

tory. It is the subject of large industries in this country, and the products of those industries are generally used by the community, and are lawful objects of manufacture and sale. The industry has grown to an enormous extent. These are matters of common knowledge. There is doubtless in the prosecution of these industries danger of adulteration, and of the use of processes injurious to public health. The regulation of these subjects for the protection of the public health and the prevention of imposition on consumers is within the power of the legislature, and the propriety of its exercise cannot be questioned. But, while it may regulate, the legislature may not destroy, the industry; and that is not a valid regulation, which, in dealing with the means of preserving food, makes the preservation of food itself an unlawful act. Ingredients and processes may be prohibited as unwholesome or causing deception, but not solely because they preserve.

The judgment appealed from should be affirmed, with costs.

Parker, Ch. J., and Gray, O'Brien, Haight, Landon, and Werner, JJ., concur.

OHIO SUPREME COURT.

STATE of Ohio *ex rel.* F. S. MONNETT,
Attorney General,

v.

CAPITAL CITY DAIRY COMPANY.

(62 Ohio St. 350.)

1. The police power of the state is properly exercised in the prevention of deception in the sale of dairy products, and in the protection of the health of the people; and it is within the scope of this power to regulate the manufacture and sale of articles of food, even though the right to manufacture and sell such articles is a natural right guaranteed by the Constitution.

2. The acts of March 7, 1890 (87 Ohio Laws, p. 51), and of May 16, 1894 (91 Ohio Laws, p. 274), and of May 17, 1888 (83 Ohio Laws, p. 178), as amended March 21, 1887 (84 Ohio Laws, p. 182), and of March 20, 1884 (81 Ohio Laws, p. 67), the purpose of which acts is to prevent deception in the sale of dairy products and to preserve the public health, are a reasonable exercise of the police power, and do not contravene any section of the Constitution.

3. The mere fact that the criminal

laws of the state provide for the punishment, by fine, of those who offend against the above-recited sections, is not a bar to a proceeding in quo warranto to oust a corporation engaged in the manufacture of oleomargarine from the exercise of its right to be a corporation.

4. Where the manner of conducting a business which the state's charter gives power to a company to conduct as a corporation is in disregard and defiance of the laws of the state relating to that business, an abuse of the power results, and quo warranto may properly be invoked to stop the abuse, and, if the abuse be flagrant, to oust the corporation.

(April 10, 1900.)

APPLICATION for a writ of quo warranto to oust defendant from its corporate franchise for violating the statutes regulating the manufacture and sale of oleomargarine. *Judgment of ouster.*

The facts are stated in the opinion.

Messrs. F. S. Monnett, Attorney General, and E. B. Dillon for plaintiff.

Mr. Thomas Ewing Steele, for defendant.

The cases cited to the proposition that

*Headnotes by the Court.

NOTE.—For other cases in this series as to regulation of the sale of oleomargarine, see *State v. Marshall* (N. H.) 1 L. R. A. 51, and *note*; *Com. use of Allegheny County v. Miller* (Pa.) 6 L. R. A. 633, and *note*; *Com. use of Allegheny County v. Weiss* (Pa.) 11 L. R. A. 530, and *note*; *Re Gooch* (C. C. D. Minn.) 10 L. R. A. 830; *Com. v. Huntley* (Mass.) 15 L. R. A. 839; *Com. v. Paul* (Pa.) 30 L. R. A. 306; *Com. use of Philadelphia County v. Schollen*—57 L. R. A.

berger (Pa.) 22 L. R. A. 155; and *State v. Myers* (W. Va.) 35 L. R. A. 844.

For statute requiring imitation lard to be labeled, see *State v. Snow* (Iowa) 11 L. R. A. 355; and *State v. Hanson* (Minn.) 54 L. R. A. 468.

As to ordinances or statutes regulating the sale of dairy products generally, see the preceding case and *footnote* thereto.

these laws are not repugnant to any provision in our state or national Constitution (*Palmer v. State*, 39 Ohio St. 236, 48 Am. Rep. 429; *Butler v. Chambers*, 36 Minn. 69, 30 N. W. 308; *State ex rel. Weideman v. Horgan*, 55 Minn. 183, 56 N. W. 688; *McAllister v. State*, 72 Md. 390, 20 Atl. 143; *State v. Myers*, 42 W. Va. 822, 25 L. R. A. 844, 26 S. E. 539; *State, Waterbury, Prosecutor, v. Newton*, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604; *State v. Marshall*, 64 N. H. 549, 1 L. R. A. 51, 15 Atl. 210; *Cook v. State*, 110 Ala. 40, 20 So. 360; *People v. Arensburg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; *Com. v. Huntley*, 156 Mass. 236, 15 L. R. A. 839, 30 N. E. 1127; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Weller v. State*, 53 Ohio St. 77, 40 N. E. 1001; *State v. Ruedy*, 57 Ohio St. 224, 48 N. E. 944), stand for the following propositions:

1. "It is proper for the state to prohibit the manufacture or sale of any substance which may or might be used instead of butter."

2. "Assuming that the prohibition of apple sauce, currant jelly, or pulverized sugar is not included in the above, then it is held that the prohibition is still effective against any compound, however harmless or nutritious, which in general appearance resembles butter, whether such resemblance be intended or accidental."

3. "Oleomargine may be lawfully made, but it must not be colored in imitation of yellow butter made from unadulterated milk or cream."

The first and second of these propositions are no longer seriously defended.

People v. Marx, 99 N. Y. 386, 52 Am. Rep. 34, 2 N. E. 29; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768.

The only coloring matter the defendant is accused of using is derived from the harmless South American berry, annatto. Annatto, therefore, not being deleterious to public health, and there being of course many other coloring matters, including oleo oil and lactochrome, equally so, a statute forbidding the use of annatto or any other harmless coloring matter cannot be upheld as a sanitary regulation.

It is impossible to prevent oleomargarine from looking like, or appearing to be, butter in its natural state, unless it is purposely disfigured by coloration. If the product resembles butter, as it naturally must, the maker is guilty of violating the provisions of the act of 1890; and if he colors it to avoid such resemblance he is guilty of violating the act of 1894. There is no other way to avoid the resemblance inhibited by the act of 1890, except by changing the appearance of the product with coloring matter, and this by the letter of the law he is forbidden to do.

57 L. R. A.

1. The state may by appropriate legislation compel the maker or vendor of any article of food to properly label it by name and analysis, and sell it for what it really is.

2. It may ordinarily forbid the coating or polishing of such article with intent to make it appear something else than it really is, and thereby defraud.

3. It may not, however, dictate to any man what shall or shall not enter into the manufacture of any food that he may make and offer for sale, provided he uses only harmless ingredients therein, subject, perhaps, to the limitation that he must not intentionally defraud; e. g. a man has a perfect right to stamp the word "sterling" on a wagon or a law book, but he may be forbidden to engrave it on a silver plate, because it there implies a guarantee founded on the customs of trade.

Prior to the introduction of oleomargarine as an article of commerce, butter, except during certain portions of the year, was white. The makers of oleomargarine uniformly colored their product yellow, using as a rule a harmless, but expensive, vegetable coloring, annatto. Whatever the reason may be, people prefer that the substance they spread on their bread should be yellow. All creamery butter, and the vast majority of country butter, is artificially colored yellow, not in order to make the consumer believe that it is "summer dairy butter," but because the consumer desires his butter to be yellow, the same as he may desire his trousers black. It is no more tyrannical to compel clothing not all wool to be uniformly colored green, than to compel butter having a little less tributyrin than yellow dairy butter to be colored black or white.

Oleomargarine is an article of commerce—a food—made by churning together oleo oil (beef suet), neutral oil (leaf lard), and milk and cream in equal parts, with the addition of ordinary table salt, and with or without some harmless vegetable coloring matter. It is a necessary article of food, and enters into the diet of our people. It is equally as good and wholesome a food as butter. The vice in all reasoning which underlies the defense of the sumptuary laws against oleomargarine is found in the assumption that the product legislated against is an inferior article that no one would knowingly buy, and that it can only secure customers by pretending to be butter. If it is shown that oleomargarine is as good, healthful, and valuable as butter, we are able to lose the idea that one is a fraud upon the other, and realize that they are well-matched rivals struggling for commercial success. This view, once obtained, permits us to view the real purpose and aim of the sumptuary laws against oleomargarine.

Private property shall ever be held inviolate.

Ohio Const. art. 1, §§ 1, 2, 19.

This court has been vigilant in guarding the rights of the individual from usurpation by the state.

Palmer v. Tingle, 55 Ohio St. 423, 45 N.

E. 313; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 436; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *State v. Lake Erie Iron Co.* Cited in 55 Ohio St. 442, 45 N. E. 315; *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 29 L. R. A. 386, 41 N. E. 263.

Spear, J., delivered the opinion of the court:

The defendant is an Ohio corporation, chartered June 27, 1893, and thereby granted the right, privilege, and franchise of manufacturing, selling, and dealing in oleomargarine, and the materials and utensils employed in the manufacture, storage, and transportation thereof, and all things incident thereto. Its principal place of business is the city of Columbus. The complaint is that the defendant has continuously since about the time of its creation offended against the laws of the state, misused its corporate authority, franchises, and privileges, and assumed franchises and privileges not granted to it, and has assumed and exercised rights, privileges, and franchises specially inhibited by law, in these particulars, to wit: (1) It has manufactured and sold an article in imitation and semblance of natural butter, which article was made of animal and vegetable oils and compounds with milk or cream, or both, which was not in separate and distinct form, and in such manner as would advise consumers of its real character, and was not free from coloring matter or other ingredients causing it to look like and appear to be butter, which said article was not butter, but was an article made in imitation and semblance thereof. (2) It has manufactured, and has offered and exposed for sale, and has sold and delivered, and held in its possession with intent to sell and deliver, in quantities from 10,000 to 20,000 pounds daily, oleomargarine, containing coloring matter, namely, annatto, and other coloring matter to relator unknown. (3) It has manufactured and sold a substance purporting and appearing to be butter, and having the semblance of butter, but which was not butter, but was oleomargarine; and the parcels and rolls thereof were not distinctly and durably stamped or painted or marked in the true name thereof, in ordinary, bold-face capital letters. (4) It has refused and still refuses to deliver and furnish to the duly appointed, qualified, and acting inspector and agent of the dairy and food commissioner of the state any sample or quantity of oleomargarine manufactured by it, although duly demanded by him, and the value of the same for a 10-pound package thereof, or any other reasonable quantity thereof, was tendered it for the analysis thereof, and has refused and still refuses to permit said inspector and agent to enter its factory for any purpose whatsoever, and has refused and still refuses to permit him to examine or cause to be examined any of the products manufactured by it. And, further, that all of said viola-

tions of law have been made and done by the defendant with full knowledge of the said violations, and for the expressed purpose and intent of violating and evading said laws, for the purpose of deceiving the people of this and other states as to the real character of its said product, contrary to the act of March 7, 1890, entitled "An Act to Prevent Deception in the Sale of Dairy Products and Preserve the Public Health." Evidence in support of these charges was introduced on the part of the state. No evidence was offered by defendant. Without going into detail, it is sufficient to say that the evidence compels the conclusion that the acts charged have been committed by defendant, and that their frequency, and the conduct of the officers of the department in relation thereto, warrant the further conclusion that the acts were committed wilfully, and with the intent to disregard the provisions of statute, and to defy the officers of the state whose specific duty it is to enforce the law in this behalf, so that the natural results of all such acts are presumed to have been intended. Objection is offered to the competency of testimony as to acts of the defendant since the commencement of this proceeding. But, inasmuch as the matter of final judgment depends somewhat upon the discretion of the court, we regard this evidence competent as bearing upon the animus, purpose, knowledge, and intent of the defendant, and as calculated to aid the court in the exercise of a proper discretion respecting the character of the judgment to be entered.

The defense offered is twofold. First, that the acts, a violation of which is charged, are unconstitutional, as being an arbitrary and unauthorized attempt to interfere with the natural right to conduct a legitimate business, which is beneficial to the public, as well as profitable to its promoters; and, second, that this proceeding cannot be maintained, because, if the laws referred to be valid, their violation is punishable in a criminal proceeding, and a definite, adequate, penal sentence may follow a conviction in such proceeding. And, besides, the right to manufacture and vend oleomargarine is not a franchise, and its abuse, should the same be shown, is not the abuse or misuse of a franchise, and not the proper subject of a quo warranto proceeding; hence relator has mistaken his remedy, and his petition should be dismissed.

The statutes claimed to have been violated are the act of March 7, 1890, entitled "An Act to Prevent Deception in the Sale of Dairy Products and to Preserve the Public Health," annotated in Bates's Statutes as §§ 4200-13, 14, by which it is provided that:

"Sec. 4200-13. No person by himself or his agent, or his employee, shall render or manufacture for sale out of any animal or vegetable oils, not produced from unadulterated milk or cream from the same, any article in imitation or semblance of natural butter or cheese, produced from pure unadulterated milk or cream from the same,

nor compound with or add to milk, cream or butter, any acids or other deleterious substance, or animal fats, or animal or vegetable oils not produced from milk or cream, so as to produce any article or substance or any human food in imitation or semblance of natural butter or cheese, nor shall sell, keep for sale, or offer for sale, any article, substance, or compound made, manufactured, or produced in violation of the provisions of this section whether such article, substance, or compound shall be made or produced in this state or elsewhere.

"Sec. 4200-14. For the purpose of this act, the terms 'natural butter and cheese,' 'natural butter or cheese produced from pure unadulterated milk or cream from the same, butter and cheese, made from unadulterated milk or cream, butter or cheese, the product of the dairy,' and butter or cheese shall be understood to mean the products usually known by the terms 'butter and cheese' and which butter is manufactured exclusively from pure milk or cream or both, with salt and with or without any harmless coloring matter, and which cheese is manufactured exclusively from pure milk or cream or both, with salt and rennet and with or without any harmless coloring matter or sage. It is further provided that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character, free from any coloring matter, or other ingredient causing it to look like or to appear to be butter, as above defined."

Also, the act of May 16, 1894, having a like title (now § 4200-16), which reads: "No person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any oleomargarine which contains any methyl [methyl] orange, butter yellow, annatto, aniline dye, or any other coloring matter." Also, the 1st section of the act of May 17, 1886, as amended March 21, 1887, entitled "An Act . . . to Prevent Adulteration and Deception in the Sale of Dairy Products" (now § 4200-30), which provides "that no person shall sell, expose, or offer for sale or exchange, any substance purporting, appearing, or represented to be butter or cheese, or having the semblance of either butter or cheese, which substance is not made wholly from pure milk or cream, salt, and harmless coloring matter, unless it is done under its true name, and each vessel, package, roll, or parcel of such substance has distinctly and durably painted, stamped, stenciled, or marked thereon, the true name of such substance in ordinary bold-faced capital letters not less than five-line pica in size and also the name of each article or ingredient used or entering into the composition of such substance in ordinary bold-faced letters not [less] than pica in size, or sell or dispose of in any manner to another, any such substance without delivering with each amount sold or disposed of, a label on which is plainly or legibly printed in ordinary

bold-faced capital letters not less than five line pica in size, the true name of such substance, and also the name of such articles used and entering into the composition of such substance in ordinary bold-faced letters, not less than pica in size, if the same be not made wholly from pure milk or cream, salt and harmless coloring matter, and the words 'butter,' 'creamery' or 'dairy,' or any word or combination of words embracing the same shall not be placed on any vessel, package, roll, or parcel containing any imitation dairy product or substance not made wholly from pure milk or cream, salt, and harmless coloring matter." Also, § 4 of the act of March 20, 1884, entitled "An Act to Provide against the Adulteration of Food and Drugs" (now § 4200-7), which provides that "every person manufacturing, offering, or exposing for sale, or delivering to a purchaser any drug or article of food included in the provisions of this act, shall furnish to any person interested or demanding the same, who shall apply to him for the purpose, and shall tender him the value of the same, a sample sufficient for the analysis of any such drug or article of food which is in his possession."

It is not intended here to enter into a general dissertation respecting the origin or method of manufacture of oleomargarine, or its usefulness or healthfulness, when manufactured of pure and clean materials, and in a cleanly and wholesome manner. It is sufficient to say that it is not, within the meaning of these acts, butter, when made in any manner and of any ingredients; that in its natural state it is nearly white in color, while butter in its natural state is generally (although not always) yellow, but oleomargarine, when colored, can be made and is made to so nearly resemble butter as to be easily, and, when not distinctly marked, usually, mistaken for it, and that it may be and often is manufactured from such material and in such manner as to be deleterious to health. With this general statement, we proceed to consider serially the objections and defenses before stated.

1. The constitutionality of the several acts: What is their purpose and scope? At the outset it should be understood that the statutes do not undertake to prohibit the manufacture or sale of oleomargarine. On the other hand, their expressed purpose, gathered from text and title as well, is to regulate its manufacture and sale. In substance, they provide that no one shall manufacture for sale any article in imitation of butter, or any compound or substance or any human food in imitation or semblance of natural butter, which is not pure butter; that no one shall manufacture or offer or expose to sale any oleomargarine which contains any coloring matter; that no one shall sell any substance purporting, appearing, or represented to be butter, or having a semblance of butter, unless it be under its true name, and with proper mark designating such name; and that all persons dealing in food shall, upon proper application and tender of price, furnish a sample suitable for

analysis. Construed with that part of § 2 of the act of March 7, 1890, which provides that oleomargarine may be manufactured "in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from any coloring matter or other ingredient, causing it to look like, or to appear to be butter," it becomes entirely manifest that this legislation is regulation, not prohibition, so that we may leave out of consideration that portion of the argument which seeks to establish on the one hand, and deny on the other, a right in the state to directly prohibit its sale, or legislate so as to reach that result by indirection. The question, therefore, is, Do the sections of the statute quoted, or any of them, violate our bill of rights, which guarantees the right of acquiring and protecting property, or do they in any way violate the Constitution, as being subversive of the constitutional right to liberty, and the enjoyment of property? In other words, is it within the legislative competency to establish regulations for the prevention of fraud and deceit in the sale of articles of food? We are of opinion that the question is not an open one in Ohio. This court has held again and again that the police power of the state is properly exercised in the protection of the people in all matters concerning their health, and that it is within the scope of this power to regulate the manufacture and sale of articles of food, even though the right to so manufacture and sell is a natural right guaranteed by the Constitution. Conceding that where the pursuit rests upon natural right, and the product is not harmful, this power may not be exercised in a way which will result practically in inhibition, though under the guise of regulation, and in fostering the interests of a rival product, yet where the manufacture is conducted in such way as is calculated to deceive,—lead the buyer to suppose he is purchasing an article of food which is everywhere recognized as wholesome,—and especially where the article sought to be regulated may easily be manufactured so as to be harmful, and thus result in fraud upon and injury to the public, the police power is properly exercised in the regulation of the manufacture and sale of such article by such requirements as will tend to insure the public against fraud and injury. Its proper disposition is not forbidden. As stated in *Jordan v. Dayton*, 4 Ohio, 295, the owner has "power to manage his property or give direction to his labors at his pleasure, subject only to the paramount claims of society, which requires that his enjoyment may be modified by the exigencies of the community to which he belongs, and regulated by laws which render it subservient to the general welfare." These several statutes, framed to accomplish this end, entail no particular hardship, are reasonable in their requirements, and do not contravene any section of the Constitution. Nor is there any question whatever in regard to the power of the state to compel a sample for analysis of any article of food. It would be a

waste of space to argue the matter. We hold that in that particular, also, the statute is reasonable and just. *Jordan v. Dayton*, 4 Ohio, 295; *State v. Ruedy*, 57 Ohio St. 224, 48 N. E. 944. Other authorities covering the question are abundant, but it is not necessary to refer to them here. They will be found cited in the briefs of counsel. However, we call attention to a recent utterance of the Supreme Court of the United States in *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, which involved the right of the city to forbid the sale of cigarettes without a license (opinion by Mr. Justice Peckham): "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state; and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference. . . . It is not a valid objection to the ordinance that it partakes of both the character of a regulation, and also that of an excise or privilege tax. . . . So long as the state law authorizes both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution."

2. The remedy by criminal prosecution: It is enough to say of this objection that the remedy is not adequate. The object of the statute is to protect the public. In the nature of things, a small fine is not a sufficient deterrent to accomplish the desired end, especially in the case of a company possessed of ample means and conducting a large business. The difference between the price at which butter may be manufactured and sold, and that at which oleomargarine may be afforded, is so large that the temptation to impose upon the public is too great to be resisted. In addition to this, there are practical difficulties in obtaining convictions, which the experience of the dairy and food commissioner, as shown by his report (a public document), fully attests. *King v. Severn & W. R. Co.* 2 Barn. & Ald. 646; *People v. State Auditors*, 42 Mich. 422, 4 N. W. 274.

3. The right to manufacture and sell oleomargarine is not a franchise, and hence the proceeding of quo warranto not a proper remedy: It would seem a sufficient answer to this proposition to say that, if it be true, then the defendant has no franchise whatever. Its charter (the certificate of the secretary of state) gives it "the right, privilege, and franchise of manufacturing, selling, and dealing in oleomargarine," etc. This authority carries the implication that

the business must be conducted in conformity to the laws of the state. It could not have been the intent of the general assembly, in enacting laws permitting the formation of corporations, to give them power to override the state, although the conduct of the officers of the defendant would seem to imply that they have entertained a different opinion. The time has not yet arrived when the created is greater than the creator, and it still remains the duty of the courts to perform their office in the enforcement of the laws, no matter how ingenious the pretexts for their violation may be, nor the power of the violators in the commercial world.

In order to avoid misunderstanding, it may be well to here repeat what substantially appears elsewhere,—that there is no inhibition, under the laws of Ohio, of the manufacture or sale of oleomargarine. The re-

quisite simply is that it shall purport to be what it really is, and shall not be so manufactured and put up as to deceive the consumer. Bates's Anno. Stat. §§ 4200-14, distinctly provides "that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine, in a separate and distinct form, and in such manner as will advise the consumer of its real character. . . ."

In the present case the acts of the defendant have been persistent, defiant, and flagrant, and no other course is left to the court than to enter a judgment of ouster, and to appoint trustees to wind up the business of the concern. Judgment accordingly.

Affirmed by Supreme Court of United States January 6, 1902.

WEST VIRGINIA SUPREME COURT OF APPEALS.

E. E. SAMPLE, Admr., etc., of Charles Jennings Lyons, Deceased,
v.

CONSOLIDATED LIGHT & RAILWAY COMPANY, Plff. in Err.

(50 W. Va. 472.)

*1. A declaration by the motorman running on an electric car, made while the car was still on the body of one it had run down, that "I saw the child, but thought I could pass it;" or, "This is a terrible thing. I saw the child, but thought I could run past it,"—is admissible in evidence as a part of the *res gestæ* in an action for the injury.

2. A motorman in charge of an electric car moving in the public street, where he has reason to expect little children are playing, must exercise a high degree of watchfulness in the operation of the car.

(December 14, 1901.)

ERROR to the Circuit Court for Cabell County to review a judgment in favor of plaintiff in an action brought to recover for the alleged negligent killing of plaintiff's intestate. *Affirmed*.

The facts are stated in the opinion,

*Headnotes by McWHORTER, J.

NOTE.—As to the duty imposed on street railroads to avoid injuring children on the track, see *Wallace v. City & S. R. Co.* (Or.) 25 L. R. A. 663, and *note*, and the later cases of *Rack v. Chicago City R. Co.* (Ill.) 44 L. R. A. 127; *Consolidated Traction Co. v. Scott* (N. J. L.) 33 L. R. A. 123.

And as to how near the main transaction declarations must be in order to constitute part of the *res gestæ*, see *Ohio & M. R. Co. v. Stein* (Ind.) 19 L. R. A. 733, and *note*; and also *Peo-*

Messrs. Campbell, Holt, & Campbell, for plaintiff in error:

The negligence of a parent, causing or contributing to the death of his infant child, should bar any recovery for the parents' benefit.

Gunn v. Ohio River R. Co. 42 W. Va. 686, 36 L. R. A. 575, 26 S. E. 546; *Pierce, Railroads*, p. 338; *Bamberger v. Citizens' Street R. Co.* 95 Tenn. 18, 28 L. R. A. 486, 31 S. W. 163; *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206, 39 N. E. 484; *Chicago v. Hering*, 83 Ill. 204, 25 Am. Rep. 378; *Beach*, *Contrib. Neg.* § 131.

The declarations of employees are not admissible unless shown to be a part of the *res gestæ* of the accident, and to have been made in the course of their duties.

21 Am. & Eng. Enc. Law, p. 106; *Corder v. Talbot*, 14 W. Va. 277; *Luby v. Hudson River R. Co.* 17 N. Y. 131; *Hawker v. Baltimore & O. R. Co.* 15 W. Va. 639, 36 Am. Rep. 825; *Lane v. Bryant*, 9 Gray, 245, 69 Am. Dec. 282; *Williamson v. Cambridge R. Co.* 144 Mass. 148, 10 N. E. 790; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 30 L. ed. 299, 7 Sup. Ct. Rep. 118; 1 Greenl. Ev. 16th ed. § 184c.

Messrs. Rankin Wiley and Peyton & Perkinson, for defendant in error:

Though the parent is negligent, yet such

ple v. Hecker (Cal.) 30 L. R. A. 403; *Barker v. St. Louis, I. M. & S. R. Co.* (Mo.) 26 L. R. A. 843; *Robinson v. Superior Rapid Transit R. Co.* (Wis.) 34 L. R. A. 205; *Williams v. Great Northern R. Co.* (Minn.) 37 L. R. A. 199; *Tregon Pass. R. Co. v. Cooper* (N. J. L.) 38 L. R. A. 637; *State v. Bradneck* (Conn.) 43 L. R. A. 620; *Means v. Carolina C. R. Co.* (N. C.) 45 L. R. A. 164; *State v. Yanz* (Conn.) 54 L. R. A. 780; *Denver & R. G. R. Co. v. Roller* (C. C. App. 9th C.) 49 L. R. A. 77.

negligence will not bar a recovery where the injury was wanton, reckless, the result of the grossest negligence, or one that could have been prevented by any care.

1 Thomp. Neg. p. 271; *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. 455; *Roanoke v. Shull*, 97 Va. 426, 34 S. E. 34; *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 270, 13 S. E. 454; *Trumbo v. City Street Car Co.* 89 Va. 782, 17 S. E. 124; *Dicken v. Liverpool Salt & Coal Co.* 41 W. Va. 511, 23 S. E. 582; *Gunn v. Ohio River R. Co.* 42 W. Va. 677, 36 L. R. A. 575, 26 S. E. 546; *Bias v. Chesapeake & O. R. Co.* 46 W. Va. 349, 33 S. E. 240.

The duty of the motorman to keep a proper lookout, and the liability of the defendant in case of neglect in this important duty, are beyond question.

Gunn v. Ohio River R. Co. 42 W. Va. 676, 36 L. R. A. 575, 26 S. E. 546, 36 W. Va. 165, 14 S. E. 465, 37 W. Va. 421, 16 S. E. 628; *Bias v. Chesapeake & O. R. Co.* 46 W. Va. 349, 33 S. E. 240; *Couch v. Chesapeake & O. R. Co.* 45 W. Va. 51, 30 S. E. 147; *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. 455; *Dicken v. Liverpool Salt & Coal Co.* 41 W. Va. 517, 23 S. E. 582; *Felton v. Newport*, 44 C. C. A. 530, 105 Fed. 332.

The street-railway company has no superior or paramount right to the street, save the right of way on its own tracks.

Elliott, Roads & Streets, 1st ed. 581; *Laufer v. Bridgeport Traction Co.* 68 Conn. 475, 37 L. R. A. 533, 37 Atl. 379; *Camden, G. & W. R. Co. v. Preston*, 59 N. J. L. 264, 35 Atl. 1119.

The evidence of the *res gestæ* of a railway collision in which a brakeman is injured includes statements made to him a minute or two after the collision, while holding his injured foot and moaning with pain, after a vain attempt to walk, by an engineer who has walked about a car's length after stopping his engine, which is involved in the collision.

Ohio & M. R. Co. v. Stein, 133 Ind. 243, 19 L. R. A. 733, 31 N. E. 180, 32 N. E. 831; 2 Jones, Ev. § 347; 21 Am. & Eng. Enc. Law, p. 99; Greenl. Ev. 16th ed. § 162f; 14 Am. & Eng. Enc. Law, p. 914; Underhill, Ev. p. 75; *Hanna v. Hanna*, 3 Tex. Civ. App. 51, 21 S. W. 720; *Missouri P. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913; *Pennsylvania R. Co. v. Lyons*, 129 Pa. 113, 18 Atl. 759; *Jewell v. Jewell*, 1 How. 219, 11 L. ed. 108; *Travellers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 427; *Hill v. Com.* 2 Gratt. 595; *Livingston v. Com.* 14 Gratt. 592; *Kirby v. Com.* 77 Va. 681, 46 Am. Rep. 747; *Corder v. Talbott*, 14 W. Va. 277; *Haucker v. Baltimore & O. R. Co.* 15 W. Va. 628, 36 Am. Rep. 825; *Gunn v. Ohio River R. Co.* 36 W. Va. 165, 14 S. E. 465; *Robinson v. Superior Rapid Transit R. Co.* 94 Wis. 345, 34 L. R. A. 205, 68 N. W. 961; *Wabash Western R. Co. v. Brow*, 13 C. C. A. 222, 31 U. S. App. 192, 65 Fed. 941; *Missouri, K. & T. R. Co. v. Vance* (Tex. Civ. App.) 41 S. W. 167; *Houston, E. & W. T. R. Co. v. Nor-*

ris (Tex. Civ. App.) 41 S. W. 708; *Houston & T. C. R. Co. v. Weaver* (Tex. Civ. App.) 41 S. W. 846; *Yazoo & M. Valley R. Co. v. Jones*, 73 Miss. 229, 19 So. 91; *Wilson v. Southern P. Co.* 13 Utah, 352, 44 Pac. 1040; *Springfield Consol. R. Co. v. Welsch*, 155 Ill. 511, 40 N. E. 1034; *East St. Louis Connecting R. Co. v. Allen*, 54 Ill. App. 27; *Shafer v. Lacock*, 168 Pa. 497, 29 L. R. A. 254, 32 Atl. 44; *Nugent v. Breuchard*, 91 Hun, 12, 36 N. Y. Supp. 102.

McWhorter, J., delivered the opinion of the court:

The Consolidated Light & Railway Company on the 3d of October, 1899, being the owner and operating an electric street railway upon Third avenue, in the city of Huntington, on that day by one of its cars ran down and killed a child named Charles Jennings Lyons, two years and three months of age. On the 7th of October, 1899, E. E. Sample was appointed administrator of said child, and brought his action of trespass on the case against said company for the death of the child, laying his damages at \$10,000. Defendant demurred to the declaration, which demurrer was overruled, and the plea of the general issue entered, and a jury impaneled. Upon the trial of the case the jury returned a verdict in favor of plaintiff for \$4,000. The defendant, by counsel, moved the court to set aside said verdict, and grant it a new trial, upon the ground that said verdict is contrary to the law and the evidence, and because the same is excessive, evincing on the part of the jury prejudice, passion, partiality, and bias, which motion was overruled, and judgment entered upon said verdict. In the course of the trial the defendant tendered five bills of exceptions, which were signed, and saved to it, and made part of the record. The defendant obtained a writ of error assigning seven causes of error: First, in overruling the demurrer to plaintiff's declaration; second, that the verdict was contrary to the law and the evidence; third, that the verdict was excessive, and the court erred in not setting it aside; fourth, in modifying the defendant's instruction set out in first bill of exceptions; fifth, sixth, and seventh assignments relate to the admission of what is claimed to be improper testimony. Plaintiff in error assigns no cause of demurrer, and makes no mention of it in the brief of counsel for it, and the declaration seems to be sufficient.

It is claimed by plaintiff in error that the verdict of the jury is so excessive as to evince passion, bias, and prejudice, and therefore should be set aside. "Four thousand dollars was given by the jury for a male child of only two years and four months of age. Limit of \$10,000 in the eye of the law compensates for the most valuable life of mature manhood or womanhood, and certainly nearly one half of that sum is excessive for a mere babe, yet to be reared and conducted through the vicissitudes of

childhood, and educated and maintained." Counsel seems to take a purely commercial view of the matter. The law does not fix a commercial value either on children or adults. A calamity of this nature cannot be compensated for in dollars and cents. The highest privilege that is given one in this life is to "rear and conduct through the vicissitudes of childhood and educate and maintain" one's children. No greater source of happiness pertains to this life. Section 6, chap. 103, Code, relating to actions of this character, provides: "In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars." This statute puts no value upon any individual, young or old, but the matter is left wholly with the jury as to what shall be deemed a fair and just amount of damages to be ascertained, not to exceed the amount authorized by statute. There are many cases where verdicts similar to this have been sustained by the courts. In *Houghkirk v. Delaware & H. Canal Co.* 28 Hun, 407, the court refused to set aside as excessive a verdict for \$5,000, rendered for the death of a child six years of age. The court in that case in its opinion says that "the damages could be reviewed in this court. But the difficulty is, By what test are we to review them? If it is a matter of guesswork, the jury can guess as well as we. If we are to review them by the test of the evidence, then the difficulty is that there is no direct evidence proving the amount of loss." The statute has wisely left it with the jury to say what the damages shall be. In *Turner v. Norfolk & W. R. Co.* 40 W. Va. 875, 22 S. E. 83 (syl., point 5), it is held: "The action of the jury assessing damages in case of the death of a person by the wrongful act, neglect, or default of another is not reviewable, as no damages allowed by the jury within the limit fixed by the statute can be deemed excessive; their determination of this question being absolute and exclusive as to what damages are fair and just, unless the verdict evinces passion, prejudice, partiality, or corruption on the part of the jury." There is nothing in the record in case at bar to indicate in any way that the action of the jury was not fair and impartial, and void of all passion, prejudice, or corruption.

The fourth assignment is the improper modification by the court, as set out in bill of exception No. 3, of the defendant's instruction, as follows: "The court instructs the jury that if they find from the facts and circumstances of this case that Charles J. Lyons, the father of the child that was killed by the defendant's car on the 3d day of October, 1899, negligently permitted said child to escape into the street, where it was run over and killed, and such negligence was the proximate cause of its death, then the negligence of the father must be attributed to the child, and the verdict should be for the defendant." Upon plaintiff's objection

to said instruction the court added the following words: "Unless the jury further find that the motorman, Chas. Wade, was not exercising any care in looking out for persons upon or near the defendant's track; and that, if the said motorman had been in the exercise of such care, he could have discovered the child, and stopped the car in time to prevent the accident." Plaintiff in error insists that the modification should have carried the idea of wilful or wanton negligence on the part of defendant. The modification is sufficient, it seems to me, to carry with it the idea of criminal negligence if the jury can believe that the motorman was not exercising any care in looking out for persons upon and near the defendant's track. The expression contained in the modification is not "the use of ordinary care" or "reasonable care," but if he was not exercising any care. "A motorman in charge of an electric car moving in the public street, where he has reason to expect little children are playing, must exercise a high degree of watchfulness in the operation of his car." Black, Law & Pr. in Acci. Cases, p. 58, § 52; *Bergen County Traction Co. v. Heitman*, 61 N. J. L. 682, 40 Atl. 651, —where it is held: "That a child two years and three months old,—to whom contributory negligence cannot be imputed,—was suffered to roam unattended in the public street, cannot relieve a traction company from liability for its negligence in the management of its car, resulting in the child's death." *San Antonio Street R. Co. v. Mechler*, 87 Tex. 628, 30 S. W. 899. The question properly arises in this case, Was the defendant entitled, in any event, to an instruction on the question of contributory negligence on the part of the father? There is absolutely no evidence of contributory negligence unless the naked fact of the child being on the street alone could raise the presumption of negligence. On the other hand, all the evidence on that point tends to prove rather unusual care on the part of the parents, especially of the father. The child had been found unlatching the gate prior to this time. The parents had watched it, and, finding its mode of procedure to get out, the father had some month or two before the accident made special provisions for fastening the gate in a way that the child could not open it. In Thompson's new work on the Law of Negligence (vol. 1, § 324) it is said: "Small children have a right to light, air, and exercise, and the children of the poor cannot be constantly watched by their parents. From these considerations it follows that the mere fact that a child of tender years has been injured while at large and unattended on a public street or highway does not necessarily impute contributory negligence to its parents or guardian as matter of law, but is at most only prima facie evidence of negligence on their part subject to explanation. The question whether they have been negligent in allowing the child to be at large is generally a

question for the jury in view of the circumstances attending the particular case. Even in the case of a very young child,—in one case only two years of age,—if, notwithstanding the exercise of reasonable care on their part, having regard to the situation, the child escapes upon the public street, and is therein injured through the negligence of another, that other must pay for the damages." *Farris v. Cass Avenue & F. G. R. Co.* 80 Mo. 325. And section 325 of the same work cites numerous cases of the same character. And in *Gavin v. Chicago*, 97 Ill. 66, 37 Am. Rep. 99, where a child four years of age left its parents' house unattended, without their knowledge or consent, the father was absent, engaged in manual labor, and its mother was confined to her room by sickness. While thus absent, it received a personal injury. It appeared that as soon as the mother discovered its absence she made search for it. It also appeared that the family were dependent upon their daily labor for support. It was held that a verdict exonerating the parents of the child from negligence ought not to be disturbed. In *Chicago v. Heising*, 83 Ill. 204, 25 Am. Rep. 378, it is held: "The giving of an instruction slightly inaccurate, but which, under the facts of the case, could not have worked to the prejudice of the party complaining, or have misled the jury, will not justify the reversal of the judgment." We are unable to see under the circumstances of this case how the instruction in the form asked by defendant could possibly have changed the result. The child was too young to have any care for its safety, and its parents omitted no reasonable care for its protection. If the jury had found or conceived from the evidence any contributory negligence on the part of the father or parents under the instruction as offered by the defendant, the jury must have further found under the modification made by the court of said instruction that the motorman was exercising absolutely no care in looking out for persons upon or near the defendant's track, and they must have further found that, if he had been exercising ordinary care in that behalf, he could have discovered the child, and stopped the car in time to have prevented the accident.

The motorman's own testimony shows that the "child was about midway from the curbstone and the track," and "about 30 or 35 feet from the car," and "running towards the track at kind of angle with the way that the car was coming," when he first saw the child. Another witness for the defendant (Clyde Tanner) testifies that he was about 30 feet behind the car, on his bicycle, going the same way, and at about the same speed the car was going, and he saw the child step off the curbstone into the street, and run towards the track until it was run down by the car, while others evidently saw it before the motorman claims to have seen it; and he is the only witness who was examined whose duty it was to

keep an outlook, and see the movements of the child from the very moment it started towards the track. There is a good deal of conflict of testimony in regard to the relative positions of some of the parties that came onto the ground just at the time of the accident, which conflict of testimony was proper for the consideration of the jury. According to the testimony of the motorman, and admitting that he did everything that he could, from the time that he first saw the child, to stop the car, he did nothing until the child had run half the distance from the curbstone to the street-car track, when it was clearly his duty to have seen it when it left the curbstone, and to have begun at once to guard against the accident.

The defendant offered the following instruction: "The court also instructs the jury that in considering this case they must wholly disregard the evidence of Mrs. Caverlee so far as the same relates to the following statement which she attributed to Motorman Wade, 'I saw the child, but thought I could pass it.' Also wholly disregard the evidence of witness E. McClain as it relates to statement attributed by him to Motorman Wade, to wit: 'This is a terrible thing. I saw the child, but thought I could run past it,'"—set out in bill of exceptions No. 2. The defendant also filed bills of exceptions to the rulings of the court in permitting the plaintiff to ask the witnesses Mrs. Caverlee and E. McClain the questions eliciting the answers set out in the instruction to be asked and answered. The question is, Can the statement attributed to the motorman at the time and under the circumstances of the accident be treated as a part of the *res gestæ*? It is contended by plaintiff in error that it is not bound by the expressions of the motorman as stated by the witnesses, even if true; that the statements were simply the narrative of the past event, and not concurrent with the fact involved, and therefore could not be treated as part of the *res gestæ*, and could not have been admitted on any other ground. In 2 Jones, Ev. § 347, it is stated: "When declarations or acts accompany the fact in controversy, and tend to illustrate or explain it, they are treated, not as hearsay, but as original, evidence; in other words, as part of the *res gestæ*. Thus, conversations contemporaneous with the facts in controversy, and explaining such facts, are admissible." And authorities there cited. The rule is laid down in 21 Am. & Eng. Enc. Law, p. 99, as follows: "The rule is that evidence of words or acts may be admissible (notwithstanding the general rule against derivative evidence) on the ground that they form part of the *res gestæ*, provided that the act which they accompany is itself admissible in evidence, and that they reflect light on or qualify that act. But they must be so connected with the main fact under consideration as to illustrate its character, to further its object, or to form in con-

junction with it one continuous transaction. If declarations are made some time before the act, and stand alone by themselves, they are not within the rule, and are inadmissible. If they amount to no more than a mere narrative of the past occurrence, or of an isolated conversation held or an isolated act done at a later period, they are not admissible; but, if declarations of a past occurrence are made under such circumstances as will raise the reasonable presumption that they are the spontaneous utterances of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design, they will be admissible as part of the *res gestæ*." 1 Wharton, Ev. § 259, states the rule substantially the same way. 1 Greenl. Ev. 162g, says: "The willingness to receive these statements as an exception to the hearsay rule rests on the notion that the circumstances of the occasion so excite and control the mind of the speaker that his statements are natural and spontaneous, and therefore sincere and trustworthy;" and quotes *United States v. King*, 34 Fed. 314, where the court charged the jury that "the declarations of an individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, may be received in evidence, because they are supposed to be expressions involuntarily forced out of him by the particular event, and thus have an element of truthfulness they might otherwise not have." And in 14 Am. & Eng. Enc. Law, p. 914, it is said that, "while it is essential that the declaration should be contemporaneous with, or at least so connected with, the main fact in issue as to constitute a part of the transaction, and thus derive credit from the main fact or act itself, . . . still it is not necessary that a declaration, to be part of the *res gestæ*, should be precisely and astronomically contemporaneous and concurrent in point of time with the principal transaction, but rather that it be made voluntarily, unpremeditatedly, spontaneously, and under the immediate and unconscious influence of the principal transaction, and be made at such a time, whether contemporaneous and concurrent or not, and also under such circumstances and conditions, as to exclude the idea of deliberate intent and design." Underhill, Ev. § 57, says: "Though the majority of the American decisions, however, do not require that the act and the declarations should be precisely contemporaneous, provided they are otherwise connected, in many of the states the strict English doctrine is adhered to. Their unpremeditated and spontaneous character being the main ground for their reception, it is clear, on the whole, that, where any interval has elapsed between the act and the declaration, the likelihood that the declarant has taken advice, or considered what he should say, 57 L. R. A.

would have a bearing on their exclusion. . . . But where the declaration was made soon after the event with which it was connected, it is admissible, provided a period, however short, has not elapsed which would give an opportunity for deliberation." In *Springfield Consol. R. Co. v. Welsch*, 155 Ill. 511, 40 N. E. 1034, it is held: "A declaration by the motorman running an electric car, made while the car was still on the body of one it had run down, that the reason he did not stop was that he could not reverse the car, is admissible in evidence as part of the *res gestæ* in a suit for the injury." *Quincy Horse R. & Carrying Co. v. Gnuse*, 137 Ill. 264, 27 N. E. 190; *East St. Louis Connecting R. Co. v. Allen*, 54 Ill. App. 27; *Shafer v. Lacock*, 168 Pa. 497, 29 L. R. A. 254, 32 Atl. 44; *Nugent v. Brouhard*, 91 Hun, 12, 36 N. Y. Supp. 102; *Robinson v. Superior Rapid Transit R. Co.* 94 Wis. 345, 34 L. R. A. 205, 68 N. W. 961; *Missouri, K. & T. R. Co. v. Vance* (Tex. Civ. App.) 41 S. W. 167; *Houston, E. & W. T. R. Co. v. Norris* (Tex. Civ. App.) 41 S. W. 708; *Houston & T. C. R. Co. v. Weaver* (Tex. Civ. App.) 41 S. W. 846; *Yazoo & M. Valley R. Co. v. Jones*, 73 Miss. 229, 19 So. 91; *Wilson v. Southern P. Co.* 13 Utah, 352, 44 Pac. 1042; *Missouri P. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913; *Hanna v. Hanna*, 3 Tex. Civ. App. 51, 21 S. W. 720; *Pennsylvania R. Co. v. Lyons*, 129 Pa. 113, 18 Atl. 759; *Livingstone's Case*, 14 Gratt. 592; *Kirby's Case*, 77 Va. 681, 46 Am. Rep. 747. Plaintiff in error relies upon *Corder v. Talbott*, 14 W. Va. 277 (syl. point 3), where it is held: "When the declarations are merely a narrative of a past occurrence, though made ever so soon after the occurrence, they ought not to be received in evidence, they being in such case no part of the *res gestæ*." In that case Judge Green shows that the declaration there sought to be given in evidence was a declaration of the party in his own favor, and, as the judge says: "In the case before us we have seen there is no difficulty in saying that the fact, in connection with which the defendant's declarations were proposed to be admitted, was in no manner connected with the material fact at issue in the case; that is, whether the defendant had signed the bond. The defendant's declaration that he would not sign it is in no manner connected with the material fact at issue. It is a circumstance, as we have seen, in itself so unconnected, that it would not have been given in evidence as direct evidence on the trial of this issue; and it was only admissible as a collateral fact to contradict one of the plaintiff's witnesses. And therefore, they, being declarations of a party in his own favor, though a part of the *res gestæ*, of a collateral fact introduced into the case merely to contradict a witness of the other side, but in no way otherwise connected with the material fact or inquiry involved in the issue, were not admissible." And further he says: "These cases are readily

distinguishable from the ordinary case of a prisoner declaring immediately after the killing of a man how he committed the act. In such case a material part of the inquiry is, What were the prisoner's motives or feelings? And his declarations immediately afterwards tend to show these feelings, and for this reason they are admitted. They are, in such case, not a mere recital of a past occurrence. The act here was the refusal by the defendant to sign this bond. Such an act, in its very nature, cannot be illustrated, explained, or characterized by any declarations of the defendant." The case of *Luby v. Hudson River R. Co.* 17 N. Y. 131, is cited by plaintiff in error, and he quotes from the language of the court: "It [declaration] was not made at the time of the act, so as to give it quality and character. The alleged wrong was complete, and the driver, when he made the statement, was only endeavoring to account for what he had done." But he fails to quote the next sentence, which is, "He was manifestly excusing himself, and throwing the blame on his principals;" thus clearly showing that the court excluded it because the driver had had time to fix up a story to clear himself of blame and cast it upon his principals. It was not a declaration made, as in case at bar, which is clearly brought within the rule as laid down in the authorities cited as being a "spontaneous utterance of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design." The very nature of the declaration alleged to have been made by the motorman in the case at bar shows, if made, that it was true, because it was against himself, and, if uttered at all, must have been without thought or premeditation, and it was so soon after the accident (if it can be said at all to be after the accident) that he had not time to think what would be the effect of his expression. It was uttered while the thought was still fresh in his mind. "He thought he could run past it," but now finds that he was mistaken.

Plaintiff in error also cites *Hawker v. Baltimore & O. R. Co.* 15 W. Va. 628, 36 Am. Rep. 825, to show the approval by Judge Green of the said case of *Luby v. Hudson River R. Co.*, cited. We find in the same case, on page 638, 15 W. Va., 36 Am. Rep. 825, where Judge Green cites with approval the case of *Hanover R. Co. v. Coyle*, 35 Pa. 402, where a peddler's cart had been overthrown by a railroad car, and a suit instituted by him for the injury. The plaintiff was permitted by the court below to prove the declaration of the engineer at the time of the accident for the purpose of showing the train was behind time, and thus show carelessness and negligence as a part of the *res gestæ*. Judge Green says: "The supreme court say: 'The record shows no bill of exceptions to this evidence; but, if it did, we cannot say that the declara-

tion of the engineer was no part of the *res gestæ*. It was made at the time of the accident, in view of the goods strewn along the road by the breaking up of the boxes, and it seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declaration, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the transaction itself.'" This was a case in which the declarations of the engineer were made after the accident was complete, "in view of the goods strewn along the road by the breaking up of the boxes, and it seems to have grown directly out of and immediately after the happening of the fact," and, as it was against the engineer himself, showing his own negligence, the court admitted it in evidence against the company as a part of the transaction itself. It would be hard to conceive of a case more perfectly illustrating the facts and circumstances of the case at bar. The declarations of the motorman, if made, were made immediately after the happening of the accident, and while the child was yet under the car, mangled and crushed to death; the motorman, up to that time, not having sufficiently recovered himself to fabricate a story which would exonerate him from blame, and under the first impulse, feeling that the facts were patent to everyone, only stated what is almost certainly the truth, and which is the most plausible explanation of the transaction that could have been made. If he had seen that child starting from the curbstone to run towards the track as soon as others saw it, and as it was his duty to see it, he would undoubtedly have at once applied the forces for stopping the car, and must have succeeded before striking the child, because he admits in his testimony that it was half way from the curb to the track when he discovered it and began to stop the car, and even at that late time he was within a few feet of stopping it before the collision occurred. Plaintiff in error cites two Massachusetts cases,—*Lane v. Bryant*, 9 Gray, 245, 69 Am. Dec. 282, and *Williamson v. Cambridge R. Co.* 144 Mass. 148, 10 N. E. 790,—which come more nearly supporting his contention than any other cases he cites, but the great preponderance of authorities is against him. He referred to the case of *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 30 L. ed. 299, 7 Sup. Ct. Rep. 118, and quotes very largely from the opinion in that case written by Justice Harlan. It is there held: "The declaration of the engineer of the locomotive of a train, which meets with an accident, as to the speed at which the train was running when the accident happened, made between ten and thirty minutes after the accident occurred, is not admissible in evidence against the company in an action by a passenger on the train to recover damages for injuries caused by the

accident." It will be observed that these declarations excluded were made some time—from ten to thirty minutes—after the accident occurred, and even in that case Justice Field wrote a dissenting opinion, in which Chief Justice Waite, Justice Miller, and Justice Blatchford concurred, in which dissenting opinion they refer with approval to the case of *Hanover R. Co. v. Coyle*, 55 Pa. 402. This opinion was rendered in 1880. In 1897 Justice Harlan wrote the opinion in the case of *Peirce v. Van Dusen*, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693, in which it is held: "Where a railroad employee has been injured by the movement of cars about which he was at work, statements of the conductor of the train, made almost immediately, and while the cars were moving, or had just stopped, and while the injured man was bleeding from the injury at that moment received, describing his own part in bringing about the motion that effected the injury, are admissible, on the trial of an action for such injury, as part of the *res gestæ*."

It is seen there can be no fixed inflexible rule as to what declarations and assertions are a part of the *res gestæ* in every transaction, but the facts and circumstances must to a large extent control in each individual case. While the evidence to prove or tending to prove the declarations of the motorman as part of the *res gestæ* was clearly admissible under the circumstances of this case, the evidence is sufficient to sustain the verdict without it. The motorman saw the child, and vainly thought he could run past the point where the child would reach the track before it reached it, or he failed to see it in time to save it. If he had seen it from the moment it left the curbstone as it was seen by witness Clyde Tanner, who was riding on his bicycle behind the car, as was his duty to see it, he would have had good time to have stopped the car, and would have done so; but the child had run half the distance, according to the motorman's own testimony, before he saw it, and the fact that he at that late time only lacked a few feet of having the car stopped in time

57 L. R. A.

to have prevented the collision makes it clear that if he had seen it when he should have seen it—i. e., when it started from the curbstone—he would have had ample time to have stopped the car before the accident. One of a motorman's highest duties is to keep a proper lookout for persons, and especially for children, on and about the track. *Gunn v. Ohio River R. Co.* 42 W. Va. 676, 680, 681, 36 L. R. A. 575, 26 S. E. 546, of which case, syl., point 3, is as follows: "The engineer and fireman of a railroad train must keep a careful lookout on the track ahead to discover persons and animals upon it, and use ordinary care to avoid injury to them." This applies to railroad moving trains through the country. The required care is certainly no less in moving an electric car on the streets of a populous city, when children may be expected to be playing on the streets. *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. 455: "A railroad company running its cars through a populous street of a city on which many children live must omit nothing which can be done by the company and its agents to prevent injury to children on the street." And it is there further held (syl., point 3) that "a child two years and ten months old cannot be capable of contributory negligence, so as to relieve a railroad company from liability for its own negligence." In *Felton v. Newport*, 44 C. C. A. 530, 105 Fed. 332 (syl., point 3), it is held: "The mere fact that a lookout was maintained on an engine, as required by statute, and that he did not see a person on the track, does not exonerate the railroad company from liability for the killing of such person, but it must further appear that the lookout could not have seen him in the exercise of due care and watchfulness." The question in case at bar is, How is it possible for the motorman not to have seen the child until it was halfway across the street towards the track? and yet he says he did not sooner see it.

I see no error in the judgment, and the same is affirmed.

Petition for rehearing denied.

NORTH CAROLINA SUPREME COURT.

HUYETT-SMITH MANUFACTURING COMPANY, Appt.,

v.

Ralph GRAY, Admr., etc., of S. H. Gray,
Deceased.

(129 N. C. 438.)

The measure of damages for breach of warranty of the capacity of a kiln for drying lumber is not, when there is no kiln of the agreed capacity on the market, the difference between the value of the kiln sold and one of the required capacity, but is the difference between the value of the apparatus delivered and the contract price.

(December 20, 1901.)

NOTE.—Damages for breach of contract on sale of article that has no market price.

- I. Scope and purpose, 193.
- II. Breach by vendor.
 - a. General rules as to recovery, 193.
 - b. Measure of damages.
 1. In case of total absence of market, 195.
 2. When goods were obtainable at other markets, 197.
 3. When goods were obtainable at other times, 198.
 4. When purchased for special purpose.
 - (a) The general rule, 198.
 - (b) For resale, 198.
 - (c) To be sent to a market at another place, 200.
 - (d) For use, 201.
 5. Duty of vendee to avoid or reduce injury, 202.
- III. Breach by vendee.
 - a. Rule in the entire absence of a market, 204.
 - b. Rule where neighboring market may be reached, 205.
- IV. Determination as to existence or condition of market, 205.
- V. Damages measured by profits lost, 206.
- VI. Conclusion, 206.

I. Scope and purpose.

The general rule with reference to the measure of damages for breach of contract of sale, supported by a great number of cases, whether the breach was by the vendor or by the vendee, is that the injured party is entitled to recover the difference between the contract price of the article sold and the market value thereof at the time and place of delivery. This rule is based upon the theory that, if the breach was by the vendor, the vendee could go into the market and procure the goods to which he was entitled under the contract, suffering only to the extent that the market value exceeded the contract price, and if the breach was by the vendee, the vendor could go into the market and dispose of the goods the vendee had refused to take from him, so that he would be in the same position as though the goods had been received, except as to the difference between what he would have received under the contract and what he got in the market. See note, *Loss of profits of sale or purchase as damages*, to *Guetzkow Bros. Co. v. A. H. Andrews & Co. (Wis.)* 52 L. R. A. 209. This rule depends in all cases, however, on market value, and it is the intent and purpose of this note

APPEAL by plaintiff from a judgment of the Superior Court for Craven County in favor of defendant in an action brought to recover possession of a dry kiln. *Reversed.*

The facts are stated in the opinion.

Mr. W. D. McIver for appellant.

Messrs. Simmons & Ward and W. W. Clark, for appellees:

Huyett & S. Mfg. Co. v. Gray, 111 N. C. 87, 15 S. E. 939, 111 N. C. 92, 15 S. E. 940, 124 N. C. 322, 32 S. E. 718, and 126 N. C. 108, 35 S. E. 236, establish the legal right of the defendant to the damages found by the jury.

to show the rule applicable in cases of the same class in which there was no market value of the thing sold to compare with the contract price, and to show the changes and modifications in the general rule made necessary by such absence of market value.

II. Breach by vendor.

a. General rules as to recovery.

The rule applicable to sales of personal property, that where the article is one that can be bought in the market the proper measure of damages for breach of a contract to deliver is the difference between the contract price and the market price at the time and place of the breach, does not generally apply where the vendee cannot obtain the article purchased in the market. *Loescher v. Delsterberg*, 26 Ill. App. 521; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52; *McKay v. Riley*, 65 Cal. 623, 4 Pac. 667; *Benton v. Fay*, 64 Ill. 417; *Den Bleyker v. Gaston*, 97 Mich. 354, 56 N. W. 763; *Cobb v. Whitsett*, 51 Mo. App. 146; *McHose v. Fulmer*, 73 Pa. 385; *Davis v. Grand Rapids School-Furniture Co.* 41 W. Va. 717, 24 S. E. 630; *Cockburn v. Ashland Lumber Co.* 34 Wis. 619, 12 N. W. 49; *Halstead Lumber Co. v. Sutton*, 46 Kan. 192, 26 Pac. 444; *Carroll-Porter Boiler & Tank Co. v. Columbus Mach. Co.* 5 C. C. A. 190, 3 U. S. App. 631, 55 Fed. 451; *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473, 23 Week. Rep. 127, 43 L. J. Q. B. N. S. 211, 30 L. T. N. S. 871; *Trigg v. Clay*, 88 Va. 330, 13 S. E. 434.

That rule only applies when the article sold can be procured in the market, and has a market price. *Sternfels v. Clark*, 2 Hun. 122, Affirmed in 70 N. Y. 608.

And a statute providing that, for the purpose of estimating damages, the value of an instrument in writing or other property is deemed to be the price at which an equivalent thing could within a reasonable time thereafter be bought in the nearest market, is inapplicable as a means of estimating the value of property which in itself, or through an equivalent, has no market value. *Patterson v. Plummer*, 10 N. D. 95, 86 N. W. 111.

Nor can the ordinary rule that the sum recoverable for a breach of warranty of an article sold is the difference between the price contracted to be paid for the article as warranted and the market price of like articles at the time of the breach, be resorted to where the article is one which cannot be bought in the market. *Carroll-Porter Boiler & Tank Co. v. Columbus Mach. Co.* 5 C. C. A. 190, 3 U. S. App. 631, 55 Fed. 451.

Clark, J., delivered the opinion of the court:

This action began January 20, 1890, to recover possession of a "dry kiln hot blast apparatus," which plaintiff sold to defendant for the price of \$2,337, title retained till purchase money paid, and on which only \$400 has been paid. The case has been pending ever since, and four opinions herein have been heretofore written in this court. In the meantime the defendant has gone on using the machine, and the evidence in the last trial below is that the machinery is now only a lot of scrap iron worth \$100. That and the bill of costs (which doubtless is much more than \$100) and the replevin bond alone remain. The original defendant is dead, and is now represented by his administrator. It is necessary to review the former decisions herein. In

(1892) 111 N. C. 87, 15 S. E. 939, in plaintiff's appeal, it was held that the plaintiff was entitled to recover possession and damages for use and deterioration during detention by defendant, and that it was error to exclude evidence to show such damages. That was the only error declared, as in the defendant's appeal (111 N. C. 92, 93, 15 S. E. 940) it was held that there was no error in excluding defendant's counterclaim for cost of house he had built to shelter the machinery. This issue of damages for deterioration has been found in both trials since, and the deterioration assessed at \$1,400, which, as the value of the property when bought is assessed at \$1,500, bears out the above evidence of the "remains" being worth \$100. It has now become a useless issue, as delivery *in specie* is no longer possible. When the case was here again—

But if there is no market for an article sold where it is to be delivered, and it cannot be had there with the use of reasonable diligence, and the purchaser suffers damage because of the seller's failure to deliver, which is the proximate and natural consequence of such failure, such damage can be recovered. *Ramsey v. Tully*, 12 Ill. App. 463; *Parsons v. Sutton*, 66 N. Y. 92; *Halstead Lumber Co. v. Sutton*, 46 Kan. 102, 26 Pac. 444.

And in such case the recovery should be the actual loss sustained by the purchaser in not receiving the goods according to the contract. *Vickery v. McCormick*, 117 Ind. 594, 20 N. E. 495; *Dunkirk Hall Colliery Co. v. Lever*, L. R. 9 Ch. Div. 20, 41 L. T. N. S. 633, 39 L. T. N. S. 239, 26 Week. Rep. 841, Affirmed in 43 L. T. N. S. 706.

A market value, as signifying a price established by public sales, or sales in the way of ordinary business, as of merchandise, is not necessary to the assessment of damages or the appraisal of property that is the subject of a judicial valuation. Property is often the subject of such valuation, for which no proof of value in the market can be given, because it is not brought into the course of trade, and is not known in the market; and in such cases the real value is to be ascertained from such elements of value as are attainable. *Murray v. Stanton*, 99 Mass. 345.

Thus, breach of a contract of sale of lumber for the construction of an elevator, by reason of which the purchaser, being unable to procure other lumber, was compelled to keep his workmen idle because of having no lumber to work on, and was delayed in the construction of the building, or put to additional expense by reason of the nondelivery thereof, warrants a recovery that would compensate him for the loss so sustained. *Clark v. Koerner*, 22 Ky. L. Rep. 1668, 61 S. W. 30.

So, where one party purchased a quantity of chairs of another, and the latter refused to fill the contract, and the chairs were patented and could not be bought in the open market, and had been selected for their strength as well as style, and the party afterward succeeded in purchasing other chairs which were not so strong as those first purchased, and afterwards proved to be worth not more than half as much as those first contracted for, the purchaser is entitled to recover of the vendor the damages caused by the breach. *Davis v. Grand Rapids School-Furniture Co.* 41 W. Va. 717, 24 S. E. 630.

The above rule of recovery is especially applicable when the purchase was made for a

special purpose, which purpose was known to the vendor.

Thus, failure of a vendor to deliver a quantity of lumber for joists of extraordinary length, according to the contract, warrants a recovery of special damages, where the vendor knew when he entered into the contract that that character of lumber was not obtainable at the place of delivery, and that it required to be specially prepared, and that such preparing could only be done at a place far away from the place of delivery. *Shouse v. Nelswaanger*, 18 Mo. App. 236.

And one who gave to another a license to cut lumber on his lands, and agreed to furnish the latter, at a reasonable market price, all the provisions and logging supplies needed by him during the continuance of the contract, and afterwards refused to furnish such supplies, is liable if when he entered into the contract he knew that the other party would be unable to obtain such supply elsewhere, and that he could not carry on the undertaking without them, and knew when he ceased furnishing the same that the result would be to compel the other to abandon the enterprise, or to seriously embarrass him in the further execution thereof, in damages for such abandonment or embarrassment, as they must be deemed to have been contemplated as the direct and presumable result of his wrongful act. *Skagit R. & Lumber Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077.

So, where one party agrees to furnish another with certain stock and materials to be used in his business in time for an approaching state fair, with direct reference to the increased trade and business expected on that occasion, and fails to comply with the contract, and the other party is unable to supply himself at the place of delivery, which inability is known to the vendor, and the purchaser suffers loss in consequence, he is entitled to such damage as he can prove with reasonable certainty to have been the direct and natural result of the failure of the vendor to comply with his contract. *Richardson v. Chynoweth*, 26 Wis. 636.

And where a quantity of sewer brick was purchased for the purpose of building a sewer, the purpose being known to the vendor, and common brick would not answer, it is competent for the purchaser to prove, in an action for breach of the contract of sale, that upon the failure of the vendor to deliver the brick as agreed he endeavored to procure other sewer brick, but could find none in the market, and that, in consequence of the failure of the ven-

(1899) 124 N. C. 322, 32 S. E. 718—the jury found that the difference between the value of the machine sent and what it would have been worth if it had come up to contract was \$2,000. As \$400 had been paid on the \$2,337 purchase price, leaving \$1,937 unpaid, the judge gave judgment for \$63 in favor of defendant, who retained the machinery, which he had used for years. This was putting the worth of the machinery when bought at \$337, though on another issue the jury found it had depreciated in value \$1,400 since bought; the evidence for the defense being that at the time of the purchase it was worth \$1,500. The court held that the second issue should have been “the difference between the value of the machinery when delivered and the contract price.” The court had already said the same on the defendant’s appeal,—111 N. C.

92, 15 S. E. 940,—that this should be the abatement of the purchase price for breach of warranty. On this basis the defendant would be liable for \$1,500, less payment \$400,—i. e. \$1,100,—and interest, which is evidently, upon the evidence and all the findings, the just result, if defendant’s evidence is to be believed. If plaintiff’s is to be believed, there should be no abatement, and a judgment for the purchase price less payment made of \$400. On a rehearing—(1900) 126 N. C. 108, 35 S. E. 236—the court held that as an abstract proposition the defendant could show what such a machine as he had contracted for “could have been bought on the market,” else a buyer would lose the profit of a good bargain if he had bought at less than the market price; but further held that, inasmuch as the defendant in his answer had averred that the val-

or to deliver the brick, and his inability to obtain them elsewhere, he was hindered and delayed in finishing the sewer, to show the damages suffered by him. *Ramsey v. Tully*, 12 Ill. App. 463.

So, damages for breach of a contract to furnish machinery, which could not be procured in the market, to a projected limited partnership thereafter organized by the parties purchasing as general partners, but who notified the vendor that they had agreed to organize a limited partnership of which they were to be the sole members, and that they made the contract to enable them profitably to carry on business in their new organization, may include loss suffered from consequent inability successfully to establish and fit out the proposed business. *Abbott v. Hapgood*, 150 Mass. 248, 5 L. R. A. 586, 22 N. E. 907.

And where a manufacturer of flues for curing tobacco contracted with a tobacco raiser to deliver certain flues to him which he never sent, and the raiser tried to buy flues elsewhere, but could not do so, and then borrowed from a neighbor some old cast-off flues in bad condition, by the use of which his tobacco was injured, such injury is the necessary consequence of the breach, and the manufacturer is liable therefor; since it must be deemed common knowledge, in localities where tobacco is cultivated, that if it is not cut and cured in a certain time serious loss is the necessary consequence. *Neal v. Pender-Hyman Hardware Co.* 122 N. C. 104, 29 S. E. 96.

b. Measure of damages.

1. In case of total absence of market.

Since a purchaser is entitled to have the goods purchased, in case of breach of the contract by the vendor when there is a total absence of a market in which to obtain them he may, as a general rule, procure their production as economically as possible, and hold the vendor chargeable with the difference between the cost of production and the contract price.

The damages suffered from a breach of contract to sell and deliver an article is not what the article would be worth to the purchaser after he had procured it, but what it would cost him to procure it. *Barnes v. Seligman*, 55 Hun, 339, 8 N. Y. Supp. 834.

When goods cannot be bought in market, and there is no market within a reasonable distance, the measure of damages for breach by the vendor of a contract for the sale thereof is still the difference between the contract price and the higher value of the goods at the

place of delivery, and this must be ascertained by an investigation into what it would cost the purchaser, acting in good faith and with due diligence and reasonable prudence, to procure, in the condition required by the contract and delivered at the place therein named for delivery, the kind and quantity of goods contracted for, the investigation sometimes involving an inquiry into the cost of producing or manufacturing at or near the place of delivery of the article contracted for. *Paine v. Sherwood*, 21 Minn. 226.

Thus, in *Haskell v. Hunter*, 23 Mich. 305, it was held that the true test of proper compensation for a breach of contract to sell and deliver a quantity of pine flooring is what it would have cost the purchaser to procure at the point of delivery, and at the time or times when it was reasonable and proper for him to supply himself lumber of the kind and quality he was to receive under the contract; and, if it is impracticable to supply himself except at retail rates, he is entitled to recover at such rates from the vendor.

And in *Bush v. Fisher*, 85 Mo. App. 1, the measure of damages for breach of a contract for the sale and delivery of cord wood, where it had no market price at the place of delivery, was held to be the difference between the agreed price and its reasonable value at the place of delivery at the time it was to have been delivered.

So, the measure of damages for breach of a contract to deliver certain specified stock is the difference between the contract price and what it would cost to procure such stock, though such stock would be worthless in the hands of the purchaser so far as money value is concerned, and though the only method of procuring it would be by a payment of the face value thereof into the treasury of the company and causing it to be issued by the corporation in consideration of such payment. *Barnes v. Seligman*, 55 Hun, 339, 8 N. Y. Supp. 834.

And in case of breach of warranty of capacity of machinery sold which had been accepted by the vendee the rule of damages is the difference between the value of the machine received and what it would have cost the vendee to purchase such a machine as that described in the contract and warranty. *Huyett & S. Mfg. Co. v. Gray*, 126 N. C. 108, 35 S. E. 236.

It is to be observed that the element of no market value does not appear in the above case. But the rule was adopted on a rehearing granted in *Huyett & S. Mfg. Co. v. Gray*, 124 N. C. 322, 32 S. E. 718, slightly modifying the rule there laid down that the measure of dam-

ue of such a machine as he had contracted for was \$2,337, the error in the former decision was not detrimental, and dismissed the petition to rehear, though correcting the abstract proposition of law to conform to *Marsh v. McPherson*, 105 U. S. 709, 26 L. ed. 1139. When the case went back, the judge below allowed the defendant to amend his answer to allege that such a machine as he had contracted for would have been worth \$3,500. The jury evidently so found, as they assessed defendant's damages at \$2,000, assessing \$1,400 again as the deterioration, and the defendant's evidence being that the remains were worth \$100,—i. e. that the machine was worth \$1,500 when bought, on which only \$400 had been paid,—but that the machine such as he had contracted for would have been worth \$3,500. Deducting \$2,000 abatement for breach of warranty

from the balance of \$1,937 due on the purchase money, the defendant again recovered \$63 and costs, besides the free use of the machinery till worn out, and even keeps \$100 of scrap iron still left. But it appeared from defendant's evidence that there is no dry kiln in the market that would "dry 25,000 feet of North Carolina green sap pine with 80 horse power boiler and 60 pound pressure." The defendant thereupon asked the following instruction, which should have been given: "If the jury find that there was no apparatus on the market which had the capacity claimed for that in question, then what its value was would be speculative, and not a fair basis to estimate the damages; and in that case the measure of damages would be the difference in value between the apparatus as delivered and the contract price." In effect, under the ruling

ages for breach of warranty of capacity of a machine sold is the difference between the purchase price and the value of the machine when received. And the principal case, which is a subsequent appeal in the same action, first brings to light the fact that the machine was one for which there was no market value, and reinstates the rule of 124 N. C. 322, 32 S. E. 718, on the ground that, there being no market value of the machine, what its value would have been if as warranted, would be speculative, and not a proper basis for damages.

So, the damages to be assessed for breach of contract to deliver coal tar, from which the purchaser intended to manufacture oil and fuel and use and sell it, there being no general market for the coal tar, and therefore no fixed market price; and it appearing that the nearest point from which it could be procured was a city a long distance away, and that it was costly and inconvenient to transport, and would cost three times the contract price to bring it,—are the difference between the market value of the manufactured oil and fuel and the cost of the coal tar in its crude form, with the cost of manufacture added. *Equitable Gaslight Co. v. Baltimore Coal Tar & Mfg. Co.* 65 Md. 73, 3 Atl. 108.

In the above case *Grand Tower Min. Mfg. & Transp. Co. v. Phillips*, 23 Wall. 471, 23 L. ed. 71, *infra*, II. b. 2, was distinguished upon the ground that the commodity in that case was coal, and that the rule applied to such an article, which is constantly and easily transported, might work great injustice if applied to such an article as coal tar, which is costly and difficult to transport to any distance.

Likewise, where one party agrees to furnish another with timber required for the construction of three bridges at a specified time, place, and price, and fails to do so, knowing the use which is to be made of it, and a purchaser employs men and sends them into the adjacent woods to procure the necessary timber to supply the deficiency, if there is no other way of procuring the timber or if that way is the ordinary and usual way, or is the most reasonable and prudent way of obtaining the timber contracted for,—then the vendor is bound to make good to the purchaser the difference between the cost of the timber and the contract price; but if this is an unusual and extraordinary mode of procuring the timber, the vendor will not, in the absence of special circumstances, be liable for anything more than the difference between the contract price and the cost of the timber procured in the usual and ordinary way. *Paine v. Sherwood*, 21 Minn. 225. 57 L. R. A.

And where a granite company agreed to furnish to a contractor having a contract for the erection of a building with granite of such quality and color as would meet the approval of the architect, which was required to be dressed in a certain manner and to fit a particular place, and to be in compliance with certain specifications, and there was no open market for such stone dressed in that manner, and a part of the structure was completed with granite already furnished, and he failed and refused to furnish the rest; and there were only two quarries available at which to obtain the stone, answering the requirements; and, in order to do so, he opened one of the two quarries,—the expense which he necessarily incurred in doing so, the payment of additional freight, and the expense of dressing the stone, are all elements to be considered in determining the cost of completing the contract, and the question of damages, with which the subcontractor was chargeable for his breach of contract. *Gallagher v. Baird*, 54 App. Div. 398, 86 N. Y. Supp. 759, Affirmed in 170 N. Y. 566, 62 N. E. 1095.

Reasonable value of the article purchased, however, has been adopted in cases in which the circumstances were such that the cost of production could not be ascertained, or would not furnish an accurate and satisfactory measure of damages.

Thus, breach of an agreement on the part of a railroad company to give a person a pass over its road for himself and family for his lifetime warrants a recovery by him, against the company, of such damages as a pass for life for himself and family would be worth, approximating certainty as closely as the nature of the case will admit. *Erie & P. R. Co. v. Douthet*, 88 Pa. 243, 32 Am. Rep. 451.

And the burden of proof rests with the plaintiff in such a case, since he knows the number of his family and the customary number of trips made by himself and them. *Ibid.*

And the measure of damages in an action for breach of warranty and for fraudulent misrepresentations in a sale of coupons of mortgage bonds of a street railway company, and for concealment of material facts on the part of the vendor, is, in the absence of evidence as to their value, the price of the coupons paid by the purchaser, with interest. *South Covington & C. S. R. Co. v. Gest*, 34 Fed. 628.

And in an action for breach of a contract for the exchange of bonds, in which it appears that the bonds of which a delivery was refused had no market value, evidence that the bonds were secured by a mortgage on a railroad to trustees a part of which had been graded, which was

in our previous decisions, the issue should be only one,—simply, what was the value of the machinery when delivered? The defendant, having accepted and used the machinery, is, upon the evidence as heretofore uniformly given in his behalf, entitled to damages for breach of warranty by abating the purchase price down to the real value of the machinery when delivered, if the jury find there was a breach of warranty. The plaintiff's evidence has been that it was worth \$2,337; the defendant's that it was worth \$1,500. Whatever the jury find that it was, the agreed amount of payment,—\$400—should be deducted, and the plaintiff is entitled to a judgment for the difference, with interest and costs. Any other result would be a miscarriage of justice. The defendant is not entitled to speculative damages for an ideal machine which was not on

the market in 1889, and which, by his own evidence, is not on the market now. It could, therefore, have no market value. As the claim and delivery remedy is now out of the question, the issue as to deterioration has become useless. The above measure of damages has been laid down by us in all the previous decisions in this case, and the case must have gone off upon them but for the amendment allowing defendant to charge that he had contracted to buy a new machine worth \$3,500 of the manufacturers for \$2,337. This was an ideal valuation, as there was no such machine, and no market value for it. This his own evidence has established by showing that no machine of that description was then or is now made. If defendant insists on his damages being assessed in a separate issue, the court should give above instruction if there is evidence to

worth about the amount the bonds, is competent, on the question of the damages suffered, to prove the value of the bonds. *Murray v. Stanton*, 90 Mass. 345.

2. When goods were obtainable at other markets.

Where there is no market price for goods at a place where they are to be delivered by reason of the want of dealers or the want of the commodity, then the actual value at such place can be ascertained, for the purpose of determining the amount of damages for failure to deliver, by proof of the market value in other markets with the cost of transportation added or deducted as the case may be; such other markets to be at the nearest convenient point where goods of the quality and quantity can be bought or sold. *McDonald v. Unaka Timber Co.* 88 Tenn. 38, 12 S. W. 420; *Paine v. Sherwood*, 21 Minn. 225; *Furlong v. Polleys*, 30 Me. 491, 50 Am. Dec. 685; *Cobb v. Whitsett*, 51 Mo. App. 146; *Stevens v. Lyford*, 7 N. H. 360.

And this would be the measure of damages in such case, and not what it cost the purchaser to procure a supply of the goods at that place. *Furlong v. Polleys*, 30 Me. 491, 50 Am. Dec. 685.

In such case the goods may be bought in the nearest market or where they can be procured on the most advantageous terms, and the additional cost and expense be charged to the vendor, who failed to comply with his contract. *Vickery v. McCormick*, 117 Ind. 594, 20 N. E. 495.

Thus, the measure of damages where a vendor of a quantity of cotton fails and refuses to deliver to the purchaser the goods sold, and the price has not been paid, and it is practicable for the purchaser to obtain the goods elsewhere, is the excess of the cost of such goods over the contract price, together with such reasonable expense and loss as are necessarily incurred in procuring them. *McFadden v. Henderson*, 128 Ala. 221, 29 So. 640.

And proof that a purchaser of cotton, after being notified by the vendor of his refusal to deliver the cotton, went into the market and purchased the quantity contracted for as quickly and cheaply as possible at a loss of a designated amount per bale, is admissible in evidence, in an action for the breach, to show the amount of damages which should be allowed, where it appears that he could not purchase the cotton at the place of delivery. *Ibid*.

And evidence of the price of hay at a place 3 miles away from the place of delivery is admissible in an action for damage for breach of 57 L. R. A.

contract to deliver hay, there being no market for it at the place of delivery. *Delfendorf v. Gage*, 7 Barb. 18.

So, where a party contracts to deliver logs at a particular place and within a definite time, and no payment has been made, and there is no market value therefor at the time and place of delivery, their value at the nearest point which affords a market and at which sales are usually made should be ascertained in determining the amount of damages sustained by the breach. *Berry v. Dwinel*, 44 Me. 255.

And breach of a contract for the sale and delivery of a large quantity of white oak lumber of a certain grade and quality to be used in the construction of an insane asylum, where such lumber cannot be had in the market at the place where the asylum is to be built, warrants the purchaser in buying at the nearest market where it can be procured on advantageous terms, and in charging the additional cost and expense to the vendor. *Vickery v. McCormick*, 117 Ind. 594, 20 N. E. 495.

And, in the absence of an actual market for goods of a certain quantity and quality, such as lumber, at the place of delivery, the true value there may be ascertained, for the purpose of determining the amount of damages occasioned by nondelivery, by proof of the market value at the nearest point where such quantity and quality of goods could be bought and sold, and to which goods from the place of delivery were usually sent for the market, with a deduction for cost of transportation, though it appears that a limited number of sales of such goods in small quantities had been made at nearer places. *McDonald v. Unaka Timber Co.* 88 Tenn. 38, 12 S. W. 420.

And where, in an action for breach of contract for the sale and delivery of a quantity of spruce plank, there is no evidence of the value of such plank at the place of delivery, evidence is admissible as to its value at other places, not only in the neighborhood of the place of delivery, but also at distant places where there is a market for it, in connection with proof of the expense of transportation between such places and the place of delivery. *Wemple v. Stewart*, 22 Barb. 154.

So, the measure of damages for breach of contract for the sale of a large number of patent fruit jars by failure of the vendor to deliver a part of the jars contracted to be delivered, where the articles could not then be had in the market at the place of delivery, is the difference between the contract price and what they could be purchased for in the nearest market, together with the additional cost

that purport. If the jury find that the machine did not come up to the warranty, the defendant should pay for the real value at the time of purchase of the machine he bought, used, and wore out; and, if it is less than the contract price, it is for the jury to assess its value at date of purchase, and the court should deduct the admitted pay-

ment, and, as already said, render judgment for the balance, with interest from date when purchase money was due, without, of course, the attorney's fee of 10 per cent stipulated for in the contract (*Turner v. Boger*, 126 N. C. 300, 40 L. R. A. 590, 35 S. E. 592, and cases cited), and for costs.
Error.

of getting them to the place of delivery. *Capen v. De Stelger Glass Co.* 105 Ill. 185.

And breach of contract for the sale of a large quantity of coal to be delivered at stated times and in stated quantities, by a failure to deliver, warrants a recovery, where there was no market at which coal could be purchased at the place of delivery except that made by the vendor itself, of the price the purchaser would have had to pay for it in the quantities it was entitled to receive under the contract, at the nearest available market where it could be obtained, less the price stipulated for by the contract, with the addition of the increased expense of transportation and hauling. *Grand Tower Min. Mfg. & Transp. Co. v. Phillips*, 23 Wall. 471, 23 L. ed. 71.

In ascertaining the measure of damages for the nonperformance of a contract to deliver an article of merchandise at a fixed time and at a specified place, however, evidence of the value of the article at other places in the vicinity of the place of delivery is inadmissible where the evidence is clear and explicit as to the value thereof at the place of delivery; but when the evidence as to such value is not clear, evidence as to its value at other places may be resorted to, to ascertain the value at the place of delivery. *Gregory v. McDowell*, 8 Wend. 435.

And the price of coal at neighboring places where coal is distributed and sold, though it may afford a basis for estimating the profits which a purchaser of coal might have made had that stipulated for been delivered, cannot be adopted in an action for breach of the contract of sale as a guide to the actual damage sustained, so long as any more direct method is within reach. *Grand Tower Min. Mfg. & Transp. Co. v. Phillips*, 23 Wall. 471, 23 L. ed. 71.

3. When goods were obtainable at other times.

Where, in an action for breach by a vendor of a contract of sale, there had been no sales of the article in question at the exact time when the contract called for the delivery, it is proper to show the price of it immediately before and after that time. *Dana v. Fiedler*, 1 E. D. Smith, 463.

And where in an action for breach of a contract for the sale and delivery of logs and lumber it appears that the lumber had no market value, it is not reversible error to permit evidence as to what the logs and lumber agreed to be furnished by the contract were worth from the time of the failure to deliver to the time of the institution of the suit. *Pape v. Ferguson* (Ind.) 62 N. E. 712.

But the range of the market value of madder for the period of three months before and after the day when, by the contract in question, delivery was due, is properly excluded in an action for breach of contract for the delivery of a quantity of madder, though no sales were shown on the precise day of delivery, where sales were shown to have taken place within about two weeks of that time, as in such case the question is too broad. *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130, 1 E. D. Smith, 463.

57 L. R. A.

4. When purchased for special purpose.

(a) The general rule.

The rule that the measure of damages for breach of a contract of sale is the difference between the contract price and the market price at the time and place of delivery does not apply where a specific article is bought for a specific purpose known to the vendor at the time of sale, and such article cannot be had in the market, or has no ascertainable value. *Ramsey v. Tully*, 12 Ill. App. 463; *Benton v. Fay*, 64 Ill. 417; *Den Bleyker v. Gaston*, 97 Mich. 354, 56 N. W. 763.

Where parties contract for articles with reference to use or sale on some particular occasion, and by reason of want of time, or their situation in respect to the market, they would, on failure to receive them on the contract, be unable to supply themselves for that occasion, and the party contracting to supply them is advised of the special purpose of the thing, and damage naturally accrues from failure to complete it, the party breaking the contract is responsible for such damage as is the direct and natural result of his failure, though beyond the mere difference between the contract and market price. *Richardson v. Chynoweth*, 26 Wis. 656.

In such case the vendor will be held to have contracted with reference to the known purpose, not merely in respect to the kind and quality of the goods, but also in respect to the injury to result from a breach,—especially when it is evident that in case of the breach the vendee will be unable to obtain like goods in time to accomplish such purpose. *Stewart v. Power*, 12 Kan. 596.

(b) For resale.

Where the article sold cannot be obtained in the market or elsewhere so that the purchaser cannot supply himself with it from other sources, the measure of damages for breach of the contract to deliver it is the actual loss which he has sustained, and if he has made sale of the article to another, and by reason of the failure of his vendor to deliver he is prevented from filling his contract with his purchaser, his measure of damages is the difference between the price at which he sold and the price which he had agreed to pay. *Loescher v. Deisterberg*, 26 Ill. App. 521; *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487; *Trigg v. Clay*, 88 Va. 330, 13 S. E. 434; *Grébert-Borgnis v. Nugent*, L. R. 15 Q. B. Div. 85, 54 L. J. Q. B. N. S. 511; *Borries v. Hutchinson*, 18 C. B. N. S. 445, 34 L. J. C. P. N. S. 169, 11 Jur. N. S. 267, 11 L. T. N. S. 771, 13 Week. Rep. 386.

Unless the price in the subcontract is shown to be extravagant, or of an unusual and exceptional character. *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487.

Thus, the measure of damages for breach of a contract of sale of boiler tubes at an agreed price, upon the faith of which the purchaser contracted with a third party to sell the goods to him at an advanced price, where no other article of a similar kind could be procured in the market, is the amount he lost by reason of not being able to perform his agreement to

deliver the pipe to the third person at an advanced price. *McKay v. Riley*, 65 Cal. 623, 4 Pac. 667.

So, the damages for breach of a contract for the manufacture and delivery of plow fenders to be completed at a designated time, designed, to the knowledge of the vendor, for sale to farmers for use in cultivating crops during that season, may be based on the expected profits of a resale thereof, where such fenders were a new appliance which could not be found in the market, and the purchaser endeavored to make contracts with other factories to have the fenders manufactured after the failure of the vendor to comply with his agreement, but was unable to do so except at a considerable advance in price, and then too late for their proper advertisement to farmers. *Guenther v. Taylor*, 23 Ky. L. Rep. 536, 63 S. W. 439.

And the measure of damages for breach of a contract for the sale and delivery of a quantity of binding twine, where the purchaser was unable to purchase twine of the same character and description, and the vendor knew at the time of the purchase that it was made with a view to a resale, is the difference between the selling price plus the freight thereon to the place of resale, and the price for which it could have been sold by the purchaser at his place of business. *Bluegrass Cordage Co. v. Luthy & Co.* 98 Ky. 583, 33 S. W. 835.

And where a manufacturer of hats employed an agent in a city as sole agent for that place, and such agent ordered a large quantity of his hats, which were well known and worn exclusively by many persons, and the manufacturer afterwards revoked the agency and refused to send a part of the hats ordered, the jury, in an action for the breach, should take into consideration what the purchaser would have made had he sold all the hats, in connection with the probability as to how many of them he could sell, and how many he would have to carry over beyond the season, and the probability as to his losing some accounts, and the question whether his demand for such hats might have been supplied by hats of some other manufacture. *More v. Knox*, 52 App. Div. 145, 64 N. Y. Supp. 1101.

And evidence, in such case, as to the value of such hats at retail in the place where they were to be sold is admissible, where the only possible way by which the agent could fill his orders, if at all, was by purchasing such hats of another agent appointed in his place at retail prices, not to establish the measure of damages, but as a fact to be considered by the jury to enable them to ascertain in the best manner possible the value of the hats, and to adjust the damages for the breach. *Ibid.*

So, one who, having a French customer in Paris, contracted with another for a supply of skins of a particular shape and description, at specified prices, to enable him to fulfil his contract with the Paris customer, which corresponded substantially with the contract with the vendor, the vendor knowing all the terms of his contract with the Paris customer except the price, is entitled to recover of the vendor, upon breach thereof, there being no market for goods of the description contracted for, not only the amount of profits he would have made had he been able to fulfil his contract with the Paris customer, but also such damages as he was compelled to pay to the Paris customer for breach of his contract with him; and in estimating such damages the determination of the French court in which he was sued will be taken as determining the proper amount, in the absence of any showing that it was unreasonable. *Grébert-Borgnis v. 47 L. R. A.*

Nugent, L. R. 15 Q. B. Div. 85, 54 L. J. Q. B. N. S. 511.

In the above case *Borries v. Hutchinson*, 18 C. B. N. S. 445, 34 L. J. C. P. N. S. 169, 11 Jur. N. S. 267, 11 L. T. N. S. 771, 13 Week. Rep. 386, *supra*, was distinguished upon the ground that in that case the particulars of the penalties were not made known to the defendant, and therefore he was not held liable for them.

Extraordinary and unusual profits, however, lost by a purchaser of goods on account of the vendor's failure to comply with his agreement, cannot be recovered as damages for breach of the contract of sale, although the vendor had reason to know that there was no established market price for such goods, and knew that the goods were bought to fill a previous contract with a third person, if he did not know, and could not reasonably have been presumed to have in contemplation, a price which would yield such profit. *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 52 L. R. A. 209, 66 N. W. 119.

And the damages which a purchaser of caustic soda is entitled to recover for breach of a contract of sale, where the vendor knew at the time of the sale that the vendee bought it to sell again on the continent, but did not know that it was to be sold in Russia, although he learned it afterwards, there being no market for caustic soda, are the loss of profit on the sale which the vendee had contracted to make, together with the increased cost of freight and insurance in Russia, but do not include damages which he was compelled to pay to his vendee for the breach of a subcontract of sale made by him to a consumer of the article. *Borries v. Hutchinson*, 18 C. B. N. S. 445, 34 L. J. C. P. N. S. 169, 11 Jur. N. S. 267, 11 L. T. N. S. 771, 13 Week. Rep. 386.

And while one who, having a contract with a Russian railway company to deliver a quantity of wagons, with a penalty for failure or delay to do so, enters into a contract with another by which the latter is to furnish a quantity of wheels and axles, made according to tracings which are to be used in making the wagons, the manufacturer being informed of the contract with the Russian railway company, but not of the penalty therein contained, is entitled to recover of the manufacturer, where the manufacturer delays the completion of his work, and as such wheels and axles cannot be obtained in any market, and the purchaser is delayed and has to pay a penalty to the Russian company, a reasonable compensation for the loss of the use of the wagons during the period of delay,—he is not entitled to damages, as matter of right, for the amount of the penalties paid by him. *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473, 23 Week. Rep. 127, 43 L. J. Q. B. N. S. 211, 30 L. T. N. S. 871.

So, one who purchased a quantity of orange shellac from another, which goods were not procurable in the market, for the purpose of fulfilling a contract of resale, the vendor not knowing of the subcontract, but knowing that the purchase was made for the purpose of resale, is not entitled to recover, on failure of his vendor to perform his contract, thereby preventing him from performing his, for the loss of the profits on the subsale. *Thiol v. Henderson*, L. R. 8 Q. B. Div. 457.

In the above case *Borries v. Hutchinson*, 18 C. B. N. S. 445, 34 L. J. C. P. N. S. 169, 11 Jur. N. S. 267, 11 L. T. N. S. 771, 13 Week. Rep. 386, *supra*, was distinguished upon the ground that in that case the existence of the subcontract was known to the seller at the time of the sale, or, at all events, the fact was known

to the seller that the goods were purchased for a specific purpose, and that, delivery being required for that specific purpose, the buyer would incur loss by such nondelivery as would prevent his effecting that specific purpose.

The mere circumstance, however, that a vendor does not know the precise price specified in a contract between his vendee and another will not exonerate him from liability for the difference between the principal contract price and the subcontract price for breach of his contract, where the goods cannot be otherwise obtained. It is only requisite that the parties should have such knowledge of special circumstances affecting the question of damages, as that it may be fairly inferred that they contemplated a particular rule or standard for estimating them, and entered into the contract upon that basis. *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487.

And a reasonable and fair profit lost by a purchaser of goods may be recovered as damages, for the failure of the vendor to comply with his agreement, where he had reason to know that there was no established market price for such goods, and knew what the goods were bought for, although he did not know the price that was to be obtained by the vendee under his contract with a third person. *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 52 L. R. A. 209, 66 N. W. 119.

And one who agrees to make and deliver at his mill a specified quantity of steel caps for railway rails, knowing that the other party has a contract with a railway company for making rails, and that the steel caps are to be used and are necessary to enable him to perform his contract, both parties being aware that such caps cannot be procured elsewhere in season to enable the purchaser to fulfil his agreement, and that such caps have no market value when separated from the rest of the rail, is liable, on failure to perform his contract by not manufacturing and delivering a large number of the steel caps, for the difference between the subcontract price and the principal contract price. *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487.

So, the jury, in an action against a contractor for the removal of dead animals from a city for breach of a contract to sell and deliver the carcasses of all animals collected in the city for a specified period, to be delivered as rapidly as the health laws require, may take into consideration, for the purpose of measuring the damages, the amount of net profits which the evidence shows the plaintiff, who had a factory in which, by certain processes, he manufactured various portions of such carcasses into valuable and marketable commodities, would have made by his process with his machinery from the number of animals which the defendant had gathered, and which, under the contract, he had agreed to deliver. *Sternfels v. Clark*, 2 Hun, 122, Affirmed in 70 N. Y. 608.

And where a wine merchant, having a customer whose ship was about to sail, purchased a quantity of champagne from a wine broker for such customer for delivery on his ship, and the wine broker refused to deliver the wine, and champagne of that brand and quality was not obtainable in the market, so as to enable him to purchase a substitute, the rule of damages in the action against the wine broker for conversion is to ascertain the actual value of the goods at the time of the conversion by determining what the customer, who was solvent, had agreed to pay for them. *France v. Gaudet*, L. R. 6 Q. B. 199, 40 L. J. Q. B. N. S. 121, 19 Week. Rep. 622.

And one who had a contract to make a ma-

chine called a gunpowder pile driver, who made a contract with another for a part of the machine called a gun, the manufacturer being aware that the machine was wanted at a certain time, but failing to finish the gun until about a month later, when the person ordering the machine refused to accept it, is entitled to recover of the person from whom he ordered the gun the profits which he would have made upon his contract for the whole machine, together with the expenditure uselessly incurred by him in making other parts of it. *Hydraulic Engineering Co. v. McHaffie*, L. R. 4 Q. B. Div. 677, 27 Week. Rep. 221.

So, in *Stroud v. Austin*, 1 Cab. & El. 119, it was held that the price fixed on a subsale of goods by a purchaser is evidence of the value of the goods in an action for damages for non-delivery by the first vendor, where the same class of goods is not obtainable in the market at the place of delivery, and the amount by which such price on such subsale exceeds the contract price may be recovered as damages, although the vendor at the time of the contract had no notice of the subsale.

(c) *To be sent to a market at another place.*

Where goods sold have no market price at the place of delivery, but were purchased for the purpose of being sent to another place, the market price at the place to which they were to be sent, less the cost of transportation, is the measure of their value at the place of delivery, in an action for breach of contract for failure to deliver them. *Vanstone v. Hopkins*, 49 Mo. App. 386.

Thus, where timber of a certain kind is sold to be delivered at a designated place, the vendor knowing that it is to be transported by the purchaser from the place of delivery to another place at which there is a market therefor, there being no market at the place of delivery, the vendee, in case of failure of the vendor to deliver a part of the lumber sold, is entitled to recover according to the market value of the lumber at the place where it is intended to be sold, deducting the cost of transportation. *Hendrie v. Neelon*, 12 Ont. App. Rep. 41.

So, the same rule was applied to a breach of contract for the sale of a quantity of dressed poplar door framing, in *Campbellville Lumber Co. v. Bradlee*, 96 Ky. 494, 29 S. W. 313.

And where a purchaser of lumber purchased it for shipment to a specified market, he is entitled to have the benefit of the market price at that place in the estimate of his damages for breach by the vendor of the contract of sale, deducting the cost of transportation, whether he actually intended to sell it in that market or not; and the jury, in an action for the breach, should not be restricted in their consideration of the market price at that place, to the effect which it might have in throwing light upon the real state of the market at the place of delivery. *Cockburn v. Ashland Lumber Co.* 54 Wis. 619, 12 N. W. 49.

So, the value of cheese in a large city, and the cost of transportation there from a smaller place, though some distance away, is competent evidence in an action for damages for procuring the breach of a contract for the delivery of a large quantity of cheese at the smaller place, where the only market for cheese at that place was for the purpose of transportation and sale in the larger place. *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30.

And where a contract for the sale and delivery of a quantity of coal is broken by failure of the vendor to deliver it as stipulated, and there is no market price for coal at the place of delivery except that made by the vendor,

and the vendor knows that the coal is purchased to be used in another place, such place being the nearest market, the measure of damages for the breach is the difference between the market price in the latter place and the contract price, with the expense of transportation added. *Johnson v. Allen*, 78 Ala. 387, 56 Am. Rep. 34.

Likewise, the purchaser under a contract for the sale in Canton of a quantity of tea at designated prices, the same to be fresh, prime, and first chop, is entitled to recover, upon a breach of the contract by furnishing tea of inferior quality, under a rule by which the sales of the teas at the market where they were disposed of are compared with sales of other teas,—not as furnishing the amount, but the rate of the loss, and by applying this rate to the price of the article of the first quality at Canton. *Gilpins v. Consequa*, 3 Wash. C. C. 184, Fed. Cas. No. 5,452.

And breach of warranty in a contract of sale of goods known as scarlet cuttings, consisting of small pieces of scarlet cloth, in which dealings were carried on with the Chinese, and which were to be used in China, and which, in the condition in which they were delivered, were of no use or value to the vendee, warrants a recovery by him against the vendor, based upon the value they would have been to him in China. *Bridge v. Wain*, 1 Starkie, 504.

But the rule that the measure of damages for breach of contract to deliver goods at a stated place which were to be sent to another place is the difference between the value of the goods and the market price at the place to which they were to be sent, less the cost of transportation, is inapplicable in an action for the breach, where there is no evidence as to the cost of transportation from the place of delivery to the place where they were to be sent. *Vanstone v. Hopkins*, 49 Mo. App. 386.

(d) *For use.*

Whenever a thing is to be supplied for a specific personal use, which from its nature has no market value—as is commonly understood by that term, the measure of damages for breach of the contract would be the difference between the contract price and the price at which the purchaser might or did supply himself after the use of ordinary care to get it upon the cheapest and best terms he reasonably could. *Downey v. Hatter* (Tex. Civ. App.) 48 S. W. 32.

Thus, where in case of breach of contract to furnish iron columns and beams taken from an old building, which contract was not fulfilled, it appears that they were specially adapted to the plan of the purchaser for a new building, and he was compelled to supply the deficiency by means of other columns conforming to such plans, the cost of the substituted material might furnish the measure of his actual damages for the breach of contract, where no other like columns could be had, or where the failure to secure such columns hindered the purchaser in the erection of his proposed building; but this rule cannot be applied where, without any apparent cause, he abandoned the plan of erecting any building. *Warren v. A. B. Mayer Mfg. Co.* 161 Mo. 112, 61 S. W. 644.

And while evidence of the value of that character of iron at the time given by those acquainted with the market value thereof is the only feasible means of estimating the damages in an action for a breach of contract where there is a market value therefor, if there is none, the next best evidence would be its value, ascertained from persons whose experience in dealing in iron of that character would enable

them to state its value there as scrap iron, or as comparatively new iron designed for the same purpose. *Ibid.*

Where the vendee is unable to supply himself after the breach, and the product for the making of which the article purchased was intended suffers injury because of the failure to secure it, he will be entitled to recover the difference in value between the product as it was and as it should have been had the article purchased been received.

Thus, failure upon the part of a person to perform a contract to make and put in operation, on the plantation of the other party thereto, a sugar mill and steam engine, in time to take off the sugar crop thereon, where it may be inferred that it entered into the contemplation of the parties that the work was to be done for the purpose of taking off such crop, entitles the plantation owner to recover damages for his loss of crop and for extra wages paid in consequence of the delay, and for alterations and repairs in putting the mill and engine in operation. *Goodloe v. Rogers*, 9 La. Ann. 273, 61 Am. Dec. 205.

And one who contracts to sell and deliver to a farmer a threshing machine within a specified time, knowing it to be the farmer's practice to thresh wheat in the field and send it thence to market, who fails to deliver it at the specified time, but repeatedly assures the farmer that it shall be sent at once, after which the farmer, having unsuccessfully tried to hire another machine, is obliged to carry home and stack the wheat, which, while so stacked, is damaged by rain, and it is found necessary to kiln-dry it, and when dried and sent to market it sells for a less price,—is liable to the farmer with respect to the expense of stacking the wheat and the loss arising from its deterioration by the rain and the expense of drying it in the kiln, but not for damages with respect to the fall in the market price. *Smeed v. Foord*, 1 El. & El. 602, 28 L. J. Q. B. N. S. 178, 5 Jur. N. S. 291.

So, one who contracted with a butcher to furnish him for a specified time all the ice he might require for his ice box in which he kept fresh meat, understanding the use which was to be made of the ice, who stopped supplying ice during such period and refused longer to furnish it, by reason of which the butcher, without any fault or negligence on his part to procure the necessary ice elsewhere, lost a large quantity of meat, is liable, not only for the difference between the price agreed to be paid and the market value of the goods at the time the contract was broken, but also for the meat spoiled in consequence of the inability of the butcher to procure ice elsewhere. *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129.

And one who contracted with a city for a supply of water with which to water his plants and supply his boiler so as to heat his greenhouse, which supply of water was cut off on account of the negligent exposure of a water pipe connected with his greenhouse in the construction of a sewer, so that the water in the pipe froze, by reason of which his plants were destroyed, is entitled to recover from the city for their destruction, where he could not, by the use of reasonable diligence, obtain a supply of water or heat from other sources, and the city had due notice that if the water was suffered to remain cut off the plants would be destroyed. *Stock v. Boston*, 149 Mass. 410, 21 N. E. 871; *Watson v. Needham*, 161 Mass. 404, 24 L. R. A. 287, 37 N. E. 204.

And where one party agreed to sell and deliver to another a specified quantity of fertilizer at a stipulated price, knowing that it was intended for use on the purchaser's cotton crop

to be raised that year, and under repeated promises by the vendor to deliver the whole in due time the purchaser delayed making efforts to purchase elsewhere until too late to do so, and the vendor delivered part of the quantity ordered, which part was used upon a part of the purchaser's crop, all of which was cultivated in a farmer-like manner; and the portion upon which the fertilizer was used produced much more per acre than that adjoining,—the damages for breach of contract may be measured by the loss suffered from the depreciated production of cotton on the land upon which the purchaser intended to use the fertilizer, if that loss appears to be the natural and proximate consequence of the failure to deliver. *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52.

So, where a vendor fails to perform a contract of sale of an article designed for use by the vendee in his business, and an article of the same quantity cannot be procured in the market, he is entitled to recover damages, the measure of which would be the actual loss which the vendee sustains by not receiving the advance on the contract price upon any contract which he has himself made, in reliance upon the fulfillment of the contract by the vendor. *Culin v. Woodbury Glass Works*, 103 Pa. 220.

Thus, where a machine was sold with warranty as to its capacity, and it was not of the warranted capacity, and the vendor was aware of the fact that a machine such as he had undertaken to supply could not be procured in the market, and that the purchaser purchased this one for use in his business, and would make contracts involving its operation, and the purchaser lost a contract because of the defective capacity of the machine,—he is entitled to recover, for the breach, the difference between what it would have cost him to fulfil the contract and what he would have received if he had not been prevented from doing so. *Carroll-Porter Roller & Tank Co. v. Columbus Mach. Co.* 5 C. C. A. 190, 3 U. S. App. 631, 55 Fed. 451.

And where, in such case, the purchaser made a contract which he could not carry out because of the defective capacity of the machine, and he would be compelled either to abandon his contract or to acquire the use of a machine elsewhere; and where the character of the machine was such that he could not bring it to the work,—he would be entitled to take the work to the machine, and recover, for the breach, the difference between the sum he had to pay for taking the work to the machine and what it would have cost him to do the work himself had the machine been of the warranted capacity. *Ibid.*

So, where a manufacturer contracts for the purchase of a large quantity of iron, having heavy contracts for iron to be furnished shortly afterwards, and the vendor neglects and refuses to furnish it, by reason of which the manufacturer, in order to fulfil his contract, is obliged to get an inferior quality of iron, and, being inferior, loses one of his contracts for the sale and delivery of his goods,—the measure of damages for the breach is the actual loss which he sustains in his own manufacture by having to use an inferior article, or in not receiving the advance on his contract price upon any contracts which he has himself made in reliance upon the fulfilment of the contract by the vendor, his legitimate loss being the difference between the contract price he is to pay to his vendor and the price he is to receive. *McClouse v. Fulmer*, 73 Pa. 365.

And a subcontractor, who agrees with a contractor having a contract for the construction of a house, to furnish the trim and cabinet

work therefor; and who fails to perform his contract knowing that the contractor has a contract for such construction, and that the materials he is to furnish are for that particular house, and that they are not such as can be supplied in the market but have to be got out, fashioned, and formed in accordance with a special design,—is liable, for the breach, for any damage the contractor may suffer under his contract for the construction of the house, though he is not informed as to the time within which the contractor is bound to complete it. *Murdock v. Jones*, 3 App. Div. 221, 38 N. Y. Supp. 461.

So, where a person purchased of a manufacturer a planing machine, selecting it with reference to its weight and finish, the contract being that he was to have the identical machine he had selected, and erected a building and prepared it at a large expense for the especial purpose of accommodating such machine; and the manufacturer refused to send him the machine purchased, having notice of the preparation therefor, by reason of which some time was lost before a machine could be put in operation,—the purchaser should be allowed to show, in an action for the breach, what would have been a fair rent for the use of the building and machinery if in running order during the time they lay idle in consequence of the refusal to deliver the machine, not to exceed, however, a period reasonably necessary for supplying another machine of similar character, after being advised of the vendor's refusal to send the machine purchased. *Benton v. Fay*, 64 Ill. 417.

One who purchases an article from another for which there is no market, intending it for a special purpose, the vendor supposing it to be for another and a more obvious and usual purpose, can recover, as damages for the non-delivery of the contract, the loss which would have been sustained had the article been put to the ordinary and usual use, and not that which he would have suffered had it been put to the use intended. And where one agrees to sell and deliver the hull of a floating boom derrick to coal merchants, the usual use of such a hull being for storing coal, and that being the use which the vendor supposes will be made of it, he is entitled, in case of failure to deliver, only for the loss of use of the hull as a store, and not for the loss of its use for shipping coal direct from the collieries into barges by means of large hydraulic cranes and machinery placed therein, which is the use for which the purchase is made, the vendor knowing nothing of such use and no hull having ever been previously used in that way. *Cory v. Thames Iron Works & Ship Bldg. Co.* L. R. 3 Q. B. 181, 37 L. J. Q. B. N. S. 68, 17 L. T. N. S. 495, 16 Week. Rep. 457.

5. Duty of vendee to avoid or reduce injury.

Where, in case of nondelivery or delay in delivery of goods agreed to be sold and delivered, it is practicable for its purchaser to obtain such goods elsewhere to take the place of those due from the vendor, it is his duty to do so as expeditiously and cheaply as he reasonably can, and hold the vendor responsible, if he was at fault, for the excess of cost over the contract price, and such reasonable expense and loss as are necessarily incurred in procuring them; and it is no excuse that there are no such goods for sale at the place of delivery, if by making effort in a reasonable and business-like way, he can obtain them on reasonable terms elsewhere. *Watson v. Kirby*, 112 Ala. 436, 20 So. 624.

Thus, where a contract is made for a supply

of logs with which to keep the purchaser's mill running during the following sawing season, and the vendor fails to furnish the requisite quantity, the vendee cannot permit his mill to remain idle in order to recover full damages if he can obtain logs with which to run it from other sources; but the burden of proof is upon the vendor, in an action for damages for the breach, to show by a preponderance of evidence, that the vendee could have found other logs to manufacture at his mill. *Hopkins v. Sanford*, 41 Mich. 243, 2 N. W. 39.

And where a vendor of paper delayed its delivery beyond the time provided for in the contract, a purchaser was at liberty to refuse to take it; but if the vendor had the paper ready for delivery a few days after, and notified the purchaser, the purchaser cannot claim special damages on the ground that there was no market and he could not get the paper after it was thus ready for delivery. *Parsons v. Sutton*, 66 N. Y. 92.

Nor is one who, having a contract to repair a steam threshing engine, employs another to make a fire box for it, not informing him of his contract for the repair of the engine, entitled to recover, on the failure of the other to complete the fire box within the time specified, where the time between the time specified and that for the completion of the repairs to the engine was sufficient to have enabled him to get a fire box made elsewhere, damages which he was compelled to pay for failure to complete his contract for the repair of the engine. *Portman v. Middleton*, 4 C. B. N. S. 322, 27 L. J. C. P. N. S. 231, 4 Jur. N. S. 689.

But a purchaser of goods which cannot be obtained in the market at the place of delivery is not required, in order to recover special damages for breach of contract by the vendor, to go to other markets to procure such goods, in the absence of notice that the vendor would not perform his contract, since until such notice he is justified in relying on the contract with the vendor. *Shouse v. Nelsaanger*, 18 Mo. App. 236.

And where, in case of nondelivery or delay in the delivery of logs sold and agreed to be delivered for use in a mill, and which could not have been obtained elsewhere, the millowner had reason to expect early delivery and could not otherwise profitably employ his laborers, teams, etc., during the intervening period, he could reasonably keep such teams and laborers unemployed for a limited period at the cost of the party delaying the delivery. *Watson v. Kirby*, 112 Ala. 436, 20 So. 624.

And while it would have been the duty of one with whom another agreed to manufacture certain machines, which agreement was broken, to have supplied his want at some other factory and thus lightened the burden of the breach, had he known it in time, where he did not and could not learn that the other party would violate his contract until it was too late to make other arrangements proof as to the market value of the machines at the place at which the party was notified that they were intended for use is admissible in an action for the breach, as such intended use was an element of the injury sustained. *Alabama Iron Works v. Hurley*, 86 Ala. 217, 5 So. 418.

And evidence that a purchaser of lumber known as "deals" could have procured the deals to be manufactured at mills in other places is not admissible in an action for breach of contract for the sale of such lumber by the vendor, where there is no proof that the purchaser had notice that the vendor would not perform its contract, or that, after the time of the breach, he could have supplied himself at such place 57 L. R. A.

with deals of the grades and dimensions specified in the contract in season for the use he desired to make of them. *Cockburn v. Ashland Lumber Co.* 54 Wis. 619, 12 N. W. 49.

Nor can a vendee charge a vendor who fails to perform his contract of sale of an article not found in the market with special damages which he might have avoided or prevented by procuring a fair equivalent or substitute for the article sold.

And where one contracts to supply a thing which is not otherwise obtainable, and a fair equivalent or substitute may be had after the failure of the vendor to deliver according to his contract, and the purchaser has expended money beyond the contract price in procuring a substitute for the thing contracted for, the measure of damages for failure to deliver is the difference between the contract price and the cost of obtaining the best equivalent or substitute the purchaser can obtain on the occasion for the purpose. *Tribune Co. v. Bradshaw*, 20 Ill. App. 17.

Thus, special damages for breach of a contract to sell and deliver paper for a particular purpose will not be allowed on the ground that there was no market at the place of delivery, where it does not appear that the purchaser could not have found paper which would have substantially answered his purpose. *Parsons v. Sutton*, 66 N. Y. 92.

And the measure of damages for breach, by the vendor, of a contract of sale of a specified quantity of shirtings for which there was no market in the country, after which the purchaser procured other shirtings of a somewhat superior quality at an increase of price for which his vendee paid no advance in price, includes the difference between what the original vendee paid for the substituted shirtings, and the vendor's contract price, he having done the best he could to fulfil his contract. *Hinde v. Liddell*, L. R. 10 Q. B. 265, 23 Week. Rep. 650, 44 L. J. Q. B. N. S. 105, 32 L. T. N. S. 449.

And where a newspaper company sells the use of a page of its paper to another, and such other sells space to an advertiser for an advertisement, and the advertisement thus bargained for is omitted by the newspaper publisher, in determining the measure of damages for the breach the rule applicable to sales of personal property, that where the article is one that can be bought in the market the proper measure is the difference between the contract price and the market price at the time of the breach, should be applied if an advertisement of like character is readily obtainable in the market; and if no such advertisement could be obtained, so as to invoke the application of a different rule, it is for the advertiser to make out such fact by proof, and in the absence of such proof that measure will be applied. *Tribune Co. v. Bradshaw*, 20 Ill. App. 17.

The value of lumber of a particular grade cut into strips, however, ought not to be determined in an action for breach of contract to furnish such lumber, in which it appears that there was no market therefor, by taking as a substitute lumber of a lower grade and rejecting as waste all which does not conform to the required grade. *Den Bleyker v. Gaston*, 97 Mich. 354, 56 N. W. 763.

And the difference between the cost of strips of lumber of a different grade, substituted for those contracted to be supplied, and the contract price would be the measure of damages for a breach of contract to supply strips of lumber of a specified kind, where it appears that there was no market for such lumber, only so far as such substitution was actually and in good faith made. *Ibid.*

III. Breach by vendee.

a. Rule in the entire absence of a market.

In the entire absence of a market the measure of damages for breach of agreement to purchase goods by refusal of the vendee to receive them, especially where the goods sold have not yet been produced or manufactured, is, as a general rule, the difference between the contract price and cost of production or manufacture, that being what the vendor loses by being prevented from completing the contract.

Where an article is agreed to be delivered which has no market value an investigation into the constituent elements of the cost to the party who contracted to furnish it becomes necessary in an action for the breach of the contract, and that compared with the contract price affords the measure of damages. *Masterston v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38.

Thus, where lumber is contracted to be delivered, sawed according to order, and it is not sawed because of the purchaser's refusal to go on with the contract, the measure of damages is the difference between the contract price and the cost of manufacturing the lumber, including the cost of the timber and hauling the logs, loading the lumber on cars, and the freight thereon to the place of delivery. *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210.

So, the measure of damages for breach of an agreement by which one party was to manufacture a large quantity of phosphate between specified days, according to the other party's formula and under his superintendence, and deliver it to him when it was manufactured, by countermanding the order and refusing to furnish the formula and failing to supervise the work, as agreed, is the difference between the actual cost to the manufacturer per ton of such phosphate manufactured according to the formula of the purchaser, and as agreed in the contract, and the price per ton of such phosphate specified in such contract. *Eckenrode v. Chemical Co.* 55 Md. 51.

And the rule of damages in an action for breach of a contract by which one party sold and agreed to deliver a quantity of steel rails to another, to be rolled by it and drilled by it according to directions furnished by the latter, by refusal to furnish drilling directions and declining to take the rails, is the difference between the cost of doing the work, though the material had been already purchased, and the price to be paid for it. *Hinckley v. Pittsburgh Bessemer Steel Co.* 121 U. S. 265, 30 L. ed. 967, 7 Sup. Ct. Rep. 875.

Likewise, the measure of damages for breach of a contract for the sale of 50,000 cigarettes, by refusal on the part of the purchaser to accept the full quantity, where it appears that there was no market for cigarettes of that particular manufacture in such large quantities, is the difference between the contract price and the cost of production. *Kelso v. Marshall*, 24 App. Div. 128, 43 N. Y. Supp. 728.

And where a contract for the delivery of marble wrought in a particular manner so as to be fitted for use in the erection of a public building is broken by a refusal to receive the marble, operations upon the building having been suspended, and the marble as prepared having no ascertained market value, the measure of damages is the difference between what the performance would have cost the party who agreed to prepare it and the price which the purchaser had agreed to pay for it. *Masterston v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38.

And the difference between the contract price and the cost of production is the measure

of damages for breach of a contract to take a large quantity of an article like silicate of soda, which was manufactured in large quantities only to fill orders, and was perishable in its nature, so that large quantities of it could not be kept in stock, while the demand was limited, and it had no market price, although the manufacturer was able to effect some sales at a price less than that fixed by the broken contract. *Todd v. Gamble*, 148 N. Y. 382, 52 L. R. A. 224, 42 N. E. 982, Affirming 74 Hun, 569, 26 N. Y. Supp. 662.

Before damages will be permitted to be measured for breach of a contract of sale by refusal to receive the goods sold, however, by the difference between the cost of production and the contract price, the plaintiff must show that the article had no market value; and upon conflicting evidence this is a question of fact for the jury, and not one of law for the court. *Ibid.*

But an instruction in such an action that the usual measure of damages is the difference between the contract price and the cost of production is not a ground for reversal, where the attention of the court was not called to the fact that such a rule is only applicable where there is no market for the goods, and the jury found that there was no market, since in such case it will be regarded as a presentation of a mere abstract question of law which could not mislead the jury. *Ibid.*

Where it thus becomes necessary, in an action for a breach of a contract of sale, to go into an inquiry as to the actual cost of furnishing the thing sold at the place of delivery, the estimation should be made upon a substantial basis, and not left to rest upon the loose and speculative opinions of witnesses. The constituent elements of the cost should be ascertained from sound and reliable sources and from practical men having experience in the particular department of labor to which the contract relates; and the jury should scrutinize with care and watchfulness any speculative or conjectural account of the cost of furnishing the article that would result in an unequal bargain between the parties; and they should consider the risks and contingencies which are almost inseparable from the execution of contracts. *Masterston v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38.

And where a contract was made for the delivery of goods, involving expense in preparing them and transporting them to the place of delivery, and the contract was broken, and there were fluctuations in the value of the labor and materials between the day of the breach and the time when the contract was to have been fully performed, such fluctuations in price should not be taken into account in ascertaining the amount of damages, which should be governed by the state of things existing at the time the contract was broken. *Ibid.*

When, however, the article sold has been prepared and is ready for delivery at the time of the breach the measure of damages will be, either the difference between the contract price and what could be got for it, or the contract price itself.

Thus, the damages in an action for the repudiation of a contract for the delivery of a large quantity of ore by a refusal to receive a balance of the ore called for in the contract after it was ready for delivery, is measured by the amount of the best offer which could be there obtained for it, that amount to be taken from the contract price, where there was no open market for it at the time because the selling season for the product of mines for that year had passed. *Salem Iron Co. v. Lake Su-*

perior Consol. Iron Mines, 50 C. C. A. 213, 112 Fed. 239.

And where the subject-matter of the contract is a specific article, like lumber of a particular pattern to be manufactured by the vendor for the vendee, and the vendor has completed his contract and performed all that is required of him, his damages should be the contract price. *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210.

So, a manufacturer from whom a water wheel of a certain size and kind was ordered according to a specified measure and pattern for a stipulated price is entitled to recover, upon the refusal of the purchaser to accept it, the full amount of the contract price, and is not limited to the difference between the contract price and the market price of the article sold. *Bookwalter v. Clark*, 11 Biss. 126.

And the rule of damages in an action for the nonacceptance of property sold or contracted for, that the amount of the actual injury sustained by the vendor in consequence of such nonacceptance may be recovered, does not apply where the property is utterly worthless in his hands and not salable, as in cases where the articles contracted for were ones which the vendee had the exclusive right of making and vending under a patent. In such case the whole price agreed to be paid should be recovered. *Allen v. Jarvis*, 20 Conn. 38.

b. Rule where neighboring market may be reached.

Where, in case of breach of contract of sale, the place of delivery affords no market for the articles sold, and the vendee refuses to receive them, it is the duty of the vendor to send the goods to the nearest and most available market and there dispose of them in such a way as to produce the largest possible results, the difference between such results and the agreed price being the measure of damages for the breach. *Anderson v. Frank*, 45 Mo. App. 482; *Halliday v. Leah*, 85 Mo. App. 285.

The market value at the time and place of delivery of property contracted to be sold, which the purchaser refuses to receive, is to be ascertained, for the purpose of determining the damages suffered from the breach, in the absence of a market at the place of delivery, by proof of the market price at the nearest point where property of a like character could be bought and sold, with the additional cost of transportation. *White v. Matador Land & Cattle Co.* 75 Tex. 465, 12 S. W. 866; *McDonald v. Unaka Timber Co.* 88 Tenn. 38, 12 S. W. 420; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203.

Such proof is given, not for the purpose of establishing a market price at any other place, but for the purpose of showing the market price at the place of delivery. *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203.

Thus, refusal by a purchaser to receive a large quantity of poplar timber purchased warrants a recovery, where the purchaser had entire control of the market at the place of delivery, of the difference between the contract price of the timber at such place and the price of like timber in the nearest available market, less the additional cost of transporting such timber from such point to such available market. *Yellow Poplar Lumber Co. v. Chapman*, 20 C. C. A. 503, 42 U. S. App. 21, 74 Fed. 444.

And where logs being sent by the owner down a river to his mill are caught in the boom of another person part way down the river, and a part of them are converted to the use of the latter, who afterwards offers to pay for them, evidence as to the amount per thousand

which it would cost to drive them from the place where they are caught to the owner's mill, and of the value per thousand at the latter place, is admissible on the question of damages. *Saunders v. Clark*, 106 Mass. 831.

So, where a contract for the purchase of a number of hogs was broken by refusal of the purchaser to be at the place of delivery and receive them, and there was no market value for hogs on the day and at the place of delivery, it is competent, in an action for the breach, to show their actual value at that time and place, and testimony as to the market price of hogs at other places in the vicinity of the place of delivery is proper and admissible to show the value of the hogs at the time and place of delivery. *McCormick v. Hamilton*, 23 Gratt. 561.

But where goods are sold, and the purchaser refuses to receive them, and there are two available markets, one of which is the controlling market for that locality for goods of that kind, and the other is not so extensive but nearer by, it is proper for the vendor to send the goods to the controlling market rather than the less extensive one, since a sale in that market would furnish better evidence of the value of the goods at the place of delivery than a sale in the other market. *Anderson v. Frank*, 45 Mo. App. 482.

IV. Determination as to existence or condition of market.

When, in case of a breach of a contract of sale, the article sold is one of ordinary merchandise, it may be presumed, in determining the damages caused by the breach, that it is purchasable at the market price. *Stewart v. Power*, 12 Kan. 596.

And a safe not made to order, and which is of the dimensions and quality of safes of that number and description, manufactured for the general trade, must be treated as ordinary merchandise in an action for breach of contract by refusal of a purchaser to receive it, so that the measure of damages would be the difference between the contract price and its market value at the time and place of delivery and the expense incurred in attempting to comply with the contract, and any additional cost for extra ornamentation, and not the difference between the contract price and the cost of production. *Halliday v. Leah*, 85 Mo. App. 285.

So, the rule that when a purchaser of an article which cannot be obtained in the general market sells to a third party at a profit, the profit is the measure of damage between the original buyer and seller, on a failure to deliver, cannot be applied when the goods are shown by testimony to be obtainable in the market and to have some market value at the place of delivery, or where the terms of the contract of resale are not disclosed with completeness. *Low v. Craig*, 8 Pa. Super. Ct. 622.

And where, in an action for breach of contract to furnish a quantity of ties, it appears that the number of ties not delivered could not have been purchased for immediate delivery in the market at the place where they were to be delivered on the day of delivery, that fact does not of itself establish the fact that there was no market price for such ties at such time and place. *Jemmisson v. Gray*, 29 Iowa, 537.

And where, in an action for breach of a contract for the sale and delivery of logs and lumber the court finds the value of the logs and lumber at the time and place of delivery, that value will be taken as the basis upon which damages are to be estimated, though there is evidence that that particular kind of lumber

and logs had no particular market value and the value at the market where such lumber was usually sent for sale and the cost of transportation from the place of delivery is shown. *Wape v. Ferguson (Ind.)* 62 N. E. 712.

A merely nominal market price, however, furnishes no basis for ascertaining a purchaser's damage for breach of a contract of sale by the vendor. *Cockburn v. Ashland Lumber Co.* 54 Wis. 619, 12 N. W. 49.

And the breach of a contract to furnish oak lumber manufactured so as to be suitable for car construction purposes warrants the recovery of the difference between the cost of production and the contract price, though the lumber has a market value; as in such case the market value is not so general and certain as to furnish a true guide. *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210.

The stock in a bank with a capital limited by law to a certain amount is an article with restrictions on its production, for a breach of contract to deliver which the ordinary measure of damages for the conversion or refusal to deliver chattels of determinate value and unlimited production will not apply. In such case the vendee or person entitled to receive the stock must be placed in the same situation in which he would have been had he received the stock at the stipulated time, and should be allowed the difference between the consideration where it remained unpaid and the value of the stock, together with the difference between the interest on the consideration and the dividends on the stock. *Bank of Montgomery v. Reese*, 26 Pa. 143.

See also *Todd v. Gamble*, 148 N. Y. 382, 52 L. R. A. 225, 42 N. E. 982, *supra*, III. a.; *McDonald v. Unaka Timber Co.* 88 Tenn. 38, 12 S. W. 420, *supra*, II. b, 3.

To ascertain the existence of a market value for an article, however, for the purpose of determining the amount of damages to be awarded for a breach of contract of sale thereof, requires investigation of the actual condition of things, and does not warrant the consideration of the conjectural consequences of a state of things which did not exist. And an inquiry as to what effect the fulfillment of the contract in question involving a large transaction would have had on the market is too speculative to be permitted to affect the measure of damages for its breach.

Thus, an inquiry, in an action for breach of contract for the sale and delivery of a large quantity of madder by a refusal to deliver it, as to the market value of madder on the day when, by the contract, it should have been delivered in as large a quantity as that named in the contract, is not proper unless it is first shown that there was a market value for the article in such quantities. *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130, 1 E. D. Smith, 463.

And an inquiry as to the difference between the price of madder on sales as large as 150 tons, and on sales of 2, 3, or 5 tons, is properly excluded in an action for refusal to deliver 150 tons of madder sold, where no facts appear warranting the supposition that the plaintiff could have procured the quantity which the defendant had agreed to deliver by a single purchase. *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130.

And where the article sold consisted of 60,000 ties, the condition of the market and the scarcity or plenty in the market at the time of delivery, the demand and supply, and the actual state of the market, may be considered so far as they will aid in determining the market value of such ties at the time and place of delivery; but it is not proper to take into consideration what might have been the proba-

ble consequences resulting to the market had the purchaser gone into the market at the day of delivery to buy a large quantity of such ties to be delivered at once. *Jemmisson v. Gray*, 29 Iowa, 537.

V. Damages measured by profits lost.

See note, *Loss of profits of sale or purchase as damages*, to *Guetzkow Brothers Co. v. A. H. Andrews & Co. (Wis.)* 52 L. R. A. 209.

VI. Conclusion.

While damages for breach of a contract of sale or purchase are to be measured with reference to the market value of the thing sold whenever that is possible, the absence of a market in which it can be procured or sold does not defeat a recovery for the breach. The party injured is nevertheless entitled to reimbursement for the injury sustained, but the damages are to be measured by some other method.

This method depends upon the character of the thing purchased, the situation of the parties, and the purpose of the purchase, and is affected by all the varying circumstances of the cases in which the question arises.

As a general rule a total absence of any market in which the article in question could be either bought or sold warrants a recovery for breach of the contract of sale of the difference between the contract price and what it would cost the vendee to obtain it, though the reasonable value of the article is sometimes adopted as the measure when the cost of production cannot be accurately ascertained. If there is an available neighboring market, however, or if there was a market at some other not too remote time, that is to be resorted to, making allowance for cost of transportation or delay, in determining the measure of damages.

Where the article is purchased for a special purpose known to the vendor that purpose will generally control, a purchaser for the purpose of reselling being entitled, on breach by the vendor, to the difference between the contract price and the price to be obtained on the resale; and a purchaser for the purpose of using the article purchased being entitled to the difference between the contract price and what it would cost him to obtain it, or, if he could not obtain it, to the amount of loss suffered by him on the product of such intended use through failure to obtain it.

The vendee, however, must do all he can to avoid or reduce injury by way of trying to procure the thing purchased elsewhere, or to otherwise occupy himself or his machinery, or to procure an available substitute for that which he was to have; and while he is entitled to recover the necessary expense of so doing, he can only recover, in addition thereto, the difference between what he would have made had the article contracted for been supplied and what he was enabled to make without it.

When the breach is by the vendee the vendor is generally entitled to recover the difference between the contract price and the cost of manufacture or production where the breach occurred before the preparation of the article; if it occurred afterwards he is entitled, on surrender of the article or when it is useless in his hands, to the full contract price.

But he, too, must reduce damages as much as he can, and if a market at a place other than the place of delivery is available, or if he can otherwise dispose of the article sold, he can only recover the difference between the amount for which he could dispose of it and

the contract price, together with the cost of transportation.

It would seem that to constitute an absence of market for an article within the meaning of the above rules there must have been an absence of any substantial market where such articles were bought and sold generally. A mere nominal market furnishes no basis for an estimate of damages for a breach of contract.

F. H. B.

Elisha C. WILLIAMS

v.

Town of GREENVILLE, Appt.

(130 N. C. 93.)

The liability of a municipality to damages for permitting a drainage ditch to become obstructed and filled with filth and offal so that the water flows onto adjoining land and causes sickness in the family of its owner is limited to the injury to the property, and does not include the injury by sickness or death, nor by loss of time, increase of family expenses, nor by doctor's bills and medicines, resulting from the sickness.

(Douglas, J., dissents.)

(March 25, 1902.)

A PPEAL by defendant from a judgment of the Superior Court for Pitt County in favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused by the obstruction of a drain. *Reversed.*

The facts are stated in the opinion.

Messrs. Jarvis & Blow and *F. G. James*, for appellant:

The law very largely regards surface water as a common enemy which every proprietor may fight or get rid of as best he may.

2 Dill. Mun. Corp. 4th ed. ¶ 1039, p. 1318.

The municipality is not bound to protect from surface water those who may be so unfortunate as to own property below the level of the street; nor is the duty a perfect one to adopt a system or mode of drainage which will have this effect; and if one is adopted there is, in general, no liability except as to ministerial duties in connection therewith.

Id. ¶ 1042; Angell, Watercourses, 7th ed. p. 133; Gould, Waters, ed. 1883, §§ 269, 270, pp. 469, 470.

There is a broad distinction between one suing for injury to property or to person by some act of negligence of the municipality, and suing for alleged injury to health caused by the neglect of the city to observe

some sanitary law with reference to its drainage system.

Hughes v. Auburn, 161 N. Y. 96, 46 L. R. A. 636, 55 N. E. 389.

Messrs. Skinner & Whedbee and *A. M. Moore* for appellee.

Furches, Ch. J., delivered the opinion of the court:

The plaintiff is a resident and citizen of the town of Greenville and the defendant is a municipal corporation. The plaintiff is the owner of a house and lot in the defendant corporation, upon which he and family reside, and have done so for the last eight or ten years. The plaintiff alleges that it was the duty of the defendant to make such drains and sewers as were necessary to secure the health and comfort of all its inhabitants, but the defendant has utterly failed and neglected to perform and discharge its duty in this respect; that plaintiff's lot is situate on land much lower than that of a large portion of said town, and that defendant, before the plaintiff became the owner of his said lot, had cut an open ditch from the higher land through an adjacent lot into the street just below his lot, and made a culvert for the water to pass this street into a branch below, and the defendant had allowed this culvert to become so choked and out of repair that in time of heavy rains it would not carry the water that came down the ditch; that defendant had allowed the open ditch to become the depository of dead fowls and dead animals until it produced a stench, both disagreeable and unhealthy; that by reason of the improper construction of this ditch, and the obstruction to the flow of the water at the culvert, in times of heavy rains the water would overflow his entire lot; that this overflow water would at times remain upon his lot for a day or more, and when it would recede it would leave a scum upon his lot; that by reason of the negligence of the defendant—the overflow of this water—his home was made and became unhealthy, and two of his children became sick and died; that by reason of said sickness and deaths he suffered great pain and anguish of mind, that he lost much time in nursing them, that the expenses of his family were much increased, and he had large doctor's bills and drug bills to pay, to his damage \$10,000. The defendant answered, denying the material allegations of the complaint, and denying its liability to the plaintiff for any damage. There was much evidence introduced by the plaintiff tending to sustain the allegations of fact in the complaint, and by the defendant to rebut the same. There were many prayers for special instructions on the part of the defendant, which we will

NOTE.—For another case in this series denying the liability of a city for sickness and death resulting from negligent construction of sewer causing discharge of sewage in cellar, see *Hughes v. Auburn* (N. Y.) 46 L. R. A. 636.

As to liability of city for negligent construction of sewer generally, see *Nashville v. Comer*

(Tenn.) 7 L. R. A. 463, and *note*; *Seymour v. Cummins* (Ind.) 5 L. R. A. 126, and *note*; *Bulger v. Eden* (Me.) 9 L. R. A. 205; and *Upington v. New York* (N. Y.) 53 L. R. A. 550.

not state or consider here. The court submitted the following issues:

(1) Was the plaintiff damaged by the negligence of the town of Greenville in diverting water on his premises as alleged in the complaint?

A. Yes.

(2) If so, what is the amount of actual damage, outside of mental suffering, caused to him thereby?

A. \$333.

(3) If so, what amount of damage did he sustain from mental suffering resulting directly from such negligence?

No answer.

The entire charge of the court is not sent up, and we take it there was no objection to that part. But from that sent up it appears that he charged the jury on the first issue as follows: "If the town ponded water from a natural water course by obstructing the course, then it is the same as if the water was diverted. The law draws a distinction between water within banks—a natural water course—and surface water. If the town diverted water, as I have indicated,—cut the ditch where there was no natural drain,—then it was its duty to keep the ditch clear." And upon the second issue he charged as follows: "This is the actual amount paid out on account of the sickness and his loss of time incident thereto. If you answer the first issue 'Yes,' you will assess, for your answer to the second issue, the amount in your judgment the plaintiff actually paid out by reason of such sickness, and what he lost from his work by reason of such sickness; and in this connection you will consider what he paid the doctor, if anything, what he spent for such articles as drugs, medicines, stimulants, and other things in the sickness growing out of these conditions over and above his usual cost of living." The defendant excepted. There was no evidence that there was a natural water course flowing by the plaintiff's lot, or where the old ditch was cut, though it was along or near the natural flow of the surface water. And while it was shown that there were dead fowls and animals in the old ditch, there was no evidence that the defendant put them there, or knew that they were there, until they were removed.

We will not set out the special prayers for instruction not given by the court, as we put our opinion upon what we understand to be the law of liability of a municipality in cases like this. We say "municipality," because we understand the rule of liability as to such corporations to be quite different from the liability of individuals or private corporations. In actions for damages against a municipal corporation, where the act complained of was done in pursuance of its legislative or judicial powers, or in the exercise of its authorized police powers, the doctrine of *respondent superior* does not apply, except as to property rights. And such defendant is only liable for injuries caused

by neglect to perform some positive duty devolved upon it by reason of the incorporation,—such as keeping the public streets in repair, or damage to property, or when it receives a pecuniary benefit from it. The reason for this distinction, that it is liable for damage, seems to lie in the fact of ownership—vested rights—which no one has the right to invade, not even the government, unless it be for public purposes, and then only by paying the owner for it. This right to take property does not fall under the doctrine of police power, and the doctrine of *respondent superior* applies. This doctrine is sustained in the case of *Hughes v. Auburn*, 161 N. Y. 96, 46 L. R. A. 636, 55 N. E. 389. That case refers to *Allen v. Boston*, 159 Mass. 324, 34 N. E. 519, as not being in harmony with the doctrine held in *Hughes v. Auburn*. We have examined *Allen v. Boston*, and find expressions in the argument of the case that seem to be in conflict with the doctrine announced in *Hughes v. Auburn* and the principles announced by us in this case. But we find, upon examination, that the cases cited in *Allen v. Boston* are not authority for the statement that the plaintiff could recover for injury to his health, as against a municipality, for the reason that they were actions against private corporations which had no governmental or police powers, and where the doctrine of *respondent superior* applied. It seems to us that the learned court in *Allen v. Boston* lost sight of the governmental powers of the defendant and its right to exercise police powers, and that the doctrine of *respondent superior* did not prevail in that case. And we find the great weight of authority (indeed all we have been able to examine) sustains the views we have announced in this opinion, and none to the contrary,—unless it is *Allen v. Boston*. For the doctrine announced in this opinion, we cite 2 Dill. Mun. Corp. § 983, and the doctrine announced by this court in *Mollenhenny v. Wilmington*, 127 N. C. 146, 50 L. R. A. 470, 37 S. E. 187, and *Peterson v. Wilmington*, 130 N. C. 76, 56 L. R. A. 959, 40 S. E. 853; as to the right of the defendant to make the ditch, and its liability for the overflow of the water, we cite Gould, Waters, ed. 1883, §§ 269, 270; and as to police powers, Dill. Mun. Corp. § 141.

We are therefore of the opinion that the defendant may be held to answer in damages as for a trespass for any damages the plaintiff may have sustained to his property by reason of the wrongful action of the defendant, but not for any sickness that may have been caused to him or his family; nor can he recover damage for his time, the increase in expenses of his family, nor for doctor's bills or medicines that may have been caused by such sickness. And, as his honor instructed the jury that they should "assess" the defendant for the loss of time, the increased expenses of the family, the doctor's bills and medicines, which it seems from the findings of the jury were the only things upon which the jury based the verdict, there was error.

While the announcements in this opinion involve no new doctrine, we consider it an important decision, as it is probably the first time this doctrine has been so distinctly announced by this court.

We have examined the authorities cited for the plaintiff, and fail to see that they are in conflict with this opinion. They are cases between individuals, or against private corporations, where governmental rights and the doctrine of police power are not involved, which distinguishes them from this case.

Error. New trial.

Douglas, J., dissenting:

I must confess my inability to appreciate the distinctions drawn by the court. It is admitted that the plaintiff can recover for any damage done to his property, and it is difficult to imagine a much greater injury to a man's home than rendering it uninhabitable. I can readily see that it is not practical to award damages to the entire community for injuries to health, for two reasons: (1) The extreme difficulty of measuring such damages, and (2) because of the imminent danger of bankrupting the town. The latter is apparently the basic reason in *Hughes v. Auburn*, 161 N. Y. 96, 46 L. R. A. 636, 55 N. E. 389, the case relied upon by this court, and the only case cited tending to sustain its opinion. Even that case, decided by a divided court, gives, as one of its reasons, that the plaintiff's interest was not the owner of the property. In *Allen v. Boston*, 159 Mass. 324, 337, 34 N. E. 519, 520, the court says: "The defendant also argues that the only damage the plaintiff can recover, if any, would be the injury to his property, and that injury to his health or business was wrongly allowed to be included in the damages. Such damages were specially alleged, and are clearly recoverable." In the case at bar the damages are suffered by the owner of the property, are specially alleged and found, and can be easily and definitely computed, being the actual money paid out and the value of his time lost on account of the negligence of the defendant. This is clearly stated in his honor's charge. The opinion of the court also cites Dill. Mun. Corp. § 983. That section is not the one that applies to the case at bar. In § 980, which does apply, the learned author says: "For illustration, if a city neglects its ministerial duty to cause its sewers to be kept free from obstructions, to the injury of a person who has an interest in the performance of that duty, it is liable, as we shall see, to an action for the damages thereby occasioned." The italics are those of the author. The cases of *McIlhenny v. Wilmington*, 127 N. C. 146, 50 L. R. A. 470, 37 S. E. 187, relating to the misconduct of a policeman, and *Peterson v. Wilmington*, 130 N. C. 76, 40 S. E. 853, referring to the fire department, are equally devoid of application to the case at bar. In this case the injury was apparently caused by the active negligence of the defendant's officers and agents in diverting

water by means of a ditch, and then permitting this ditch to be obstructed, not only with sand, but with "dead cats, chickens, pigs, and other dead animals." This seems to me gross negligence which is clearly actionable. It is true the town authorities might be indicted either as at common law, for maintaining a public nuisance, or for neglect of duty under the Code. *State v. Hawkins*, 77 N. C. 494; *State v. Hatch*, 116 N. C. 1003, 21 S. E. 430; *State v. Dickson*, 124 N. C. 871, 32 S. E. 961. But there are very few private citizens, and especially those dependent upon their daily labor, willing to undergo the trouble, expense, and possible danger of antagonizing the governing body of a municipality. Moreover, such a course, while perhaps beneficial to the community, would not afford any personal compensation for the injuries received. As I see no error in the trial of the case, I must dissent from the opinion of the court.

Samuel A. CUTLER, *Appt.*,
v.

Christopher C. CUTLER *et al.*

(130 N. C. 1.)

1. Revocation of a will may be effected by adopting its mutilation by vermin as such.
2. When a will produced from the testator's custody is mutilated and the signature destroyed the burden is on proponents to account for the mutilation, and not on the caveators to show that the mutilation was purposely done.
3. An admission as to what an absent witness will testify to, made for the purpose of securing a speedy trial, is not admissible at a subsequent term when the presence of the witness has been secured.
4. A will is not void because the witnesses signed before the testator, if all parties were present at the time of the execution and the signatures were affixed by each in the presence of the others.

(February 18, 1902.)

APPEAL by contestant from a judgment of the Superior Court for Beaufort County in favor of proponents in an action to determine the validity of an alleged will of Nathan C. Cutler, deceased. *Reversed.*

The facts are stated in the opinion.

Mr. Charles F. Warren, for appellant:

The sequence and order of the acts necessary to make an attested will are: (1) That it shall be written in the testator's lifetime; (2) signed by him, or by some other person in his presence and by his direction; and (3) subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest.

NOTE.—As to what is sufficient to revoke a will generally, see *notes* to *Hawes v. Nicholas* (Tex.) 2 L. R. A. 863; *Riggs v. Palmer* (N. Y.) 5 L. R. A. on page 346; *Davis v. Fogle* (Ind.) 7 L. R. A. 485; and *Stewart v. Powell* (Ky.) 10 L. R. A. 57; also, in this series, *Gardiner v. Gardiner* (N. H.) 8 L. R. A. 383; *Miles's Appeal* (Conn.) 36 L. R. A. 176; and *Billington v. Jones* (Tenn.) 56 L. R. A. 654.

of the said estate, except as hereinafter provided.

N. C. Code, § 2136.

The signature by witnesses before the testator is not sufficient.

1 Jarman, Wills, 5th Am. ed. 254; *Olding's Goods*, 2 Curt. Eccl. Rep. 865; *Byrd's Goods*, 3 Curt. Eccl. Rep. 117; 1 Redf. Wills, 289; Theobald, Wills, 26; 29 Am. & Eng. Enc. Law, p. 209, note 2, p. 210, note 2; *Ragland v. Huntingdon*, 23 N. C. (1 Ired. L.) 561; *Re Cox*, 46 N. C. (1 Jones, L.) 321.

If the will was properly executed then it was afterwards revoked.

Bennett v. Sherrod, 25 N. C. (3 Ired. L.) 303, 40 Am. Dec. 410.

The will appeared to be mutilated by vermin, and the signature of the testator appeared to have been torn from the will. If torn, the slightest act of tearing, if done by the testator with the intention of revoking his will, amounts to a revocation.

White v. Casten, 46 N. C. (1 Jones, L.) 197; 1 Jarman, Wills, 286; 29 Am. & Eng. Enc. Law, p. 270.

If the mutilation was done entirely by vermin, still the testator could adopt and ratify such mutilation or destruction, and it would amount to a revocation of his will.

Pritchard, Wills & Administration, § 269; Underhill, Wills, 308.

Messrs. Small & McLean and B. B. Nicholson for appellees.

Furches, Ch. J., delivered the opinion of the court:

This is an action of *devisavit vel non* of the will of Nathan C. Cutler. It is not contended but what he at one time intended the paper writing offered for probate as his last will and testament; and while there are other exceptions to other matters, which will be considered, the principal question is as to whether it was revoked or not, and, as this is the main question, we will assume that it was properly executed, and consider the question of revocation first. There was a motion to nonsuit the plaintiff at the close of the evidence, and the whole evidence is sent up as a part of the case on appeal, including the script offered as the will, and the clerk is instructed in the case on appeal to attach and send this as a part of the record evidence in the case. This script is therefore legitimately before us as a part of the evidence, to be considered for whatever it may be worth. The script was written, and, we will say, executed some ten years or more before the death of Cutler, and, his children all having married and left him, he abandoned his home with the purpose of living among his children; and, without moving his household furniture, a few months before he died he rented to one James Asbury, who moved into his dwelling house. Asbury, according to his evidence, found this script in an unsealed envelope in an unlocked drawer of an old safe belonging to the testator, left by him in said house, in which there were other papers. He said nothing to the testator about finding the will. The will had been seen by others who

had been using the house for the purpose of storing grain, before the death of the testator, but they had not mentioned it to him. The script, as it comes to us, is badly mutilated. The name of the testator, if it was ever there,—and we take it that it was,—is entirely gone; and it is badly mutilated in other respects. Much of the work of mutilation was the work of moths or vermin, and it is contended by the propounders that it was all done by them. But it looks to us as if it had been torn where the signature of the testator should have been. These were all matters for the jury upon the evidence and proper instructions from the court. The paper itself showed the mutilations, and, as there was much evidence tending to show that the testator knew of the defaced condition of this paper long before his death, it was contended by the caveator that, if he did not tear the paper himself, there is abundant evidence showing that he accepted it as a destruction of his will, and that he intended to die intestate. And while it was not denied that there was evidence tending to show this to be the fact, the propounders contended that, unless the script had been defaced by the maker, or by someone for him in his presence and by his direction, the will was not revoked; that he could not ratify the obliteration or destruction of the will by the vermin if he wished to do so; that a will properly executed could only be revoked in the manner above stated or by making another will; and his honor, being of the opinion that the law was as contended by the propounders, so instructed the jury in substance. In this, we think, there was error. Revocation consists of two things,—the intention of the testator, and some outward act or symbol of destruction. A defacement, obliteration, or destruction, without the *animo revocandi*, is not sufficient. Neither is the intention—the *animo revocandi*—sufficient, without some act of obliteration or destruction is done. It seems to us that the court placed too strict a construction upon the statute. The will was in the possession of the testator, and it seems from the evidence that he knew of the obliteration, if he did not himself tear his name off the paper. He must have gotten this information by handling and inspecting the same, and, if so, it was done in his presence, or it was done and in his presence. And if he then had the *animo revocandi*, why was not this a compliance with the statute, and a revocation? We find it stated in Pritchard, Wills & Administration, § 267, that "every act of canceling . . . imports prima facie that it is done *animo revocandi*, . . . yet it is but a presumption, which may be repelled by accompanying [or subsequent] circumstances." And we find that this quotation is taken from the opinion of the court by Ruffin, Ch. J., in *Bethell v. Moore*, 19 N. C. (2 Dev. & B. L.) 311. We also see in Pritchard, Wills & Administration, § 269, the following: "But it has been held that the failure of the testator, after being informed of the loss or destruction of his will, to execute another, when he has

time and opportunity to do so, furnishes a presumption of intention to revoke the lost or destroyed will; but this presumption may be rebutted or explained away by proof of the declarations of the testator or other evidence." We find these views expressly stated in *Steele v. Price*, 5 B. Mon. 58. We are therefore led to the conclusion that, if the obliteration was entirely by vermin, the question of revocation *animo revocandi* should have been left to the jury to say, from all the evidence, whether Nathan C. Cutler intended said script to remain his will or not; and it was error in the court to take this question from the jury, and to instruct them in effect that, if this was so, it did not amount to a revocation of the will.

The court also instructed the jury that if the testator found the will in its mutilated condition, and, thinking that this was in law a revocation, and for that reason he said he had thrown it away or destroyed it, that would not amount to a revocation. The language of the witness Respass is that Cutler told him that he had destroyed the will. The language of the witness John B. Respass is as follows "I said to him: 'Your business is all fixed. I wrote your will.' He said: 'No; the will you wrote for me I have destroyed. There were such changes in my property that the will would not fit any way.'" He said nothing about his "opinion of the law," but simply, "I have destroyed" it. But we are unable to see what effect his opinion of the law would have had on the case if he had destroyed it. The question for the jury upon this evidence was, Had he destroyed it? Had he purposely torn his name from the will, and thereby destroyed it? If he had, it was no longer his will. But the court instructed the jury that, "if the jury should find that the will was properly executed by Nathan C. Cutler, then the burden of proof shifted to the caveators to show by the greater weight of the evidence that the will had been revoked." This was error. If there had been no evidence of erasure or destruction on the script itself,—if the paper had been perfect,—this charge would have been correct. But, where the name of the testator was gone,—torn off by the testator, as the caveator alleges, or destroyed by moths as the propounder contends,—the propounders did not establish it as the will of Nathan C. Cutler by proving that it was originally executed by him. This would not have been so in an action on a note or bond, and is not in this case. And the burden of proof did not change to the caveators at this stage, and place the burden upon them to explain and show how the testator's name came to be off the paper. The will had been in the possession of Cutler. When produced, it had upon it these marks of mutilation, the testator's name being gone. It devolved upon the propounders to account for this, and it was not Cutler's will until they did so to the satisfaction of the jury. When the will was produced without the name of Nathan C. Cutler, this was prima facie evidence of a revocation, and the law presumed that it had been revoked.

It is true this presumption might be repelled, but the burden of doing so was on the propounders. If this was not so, it would be to require the caveator to rebut the presumption that was in his favor. *Bethell v. Moore*, 19 N. C. (2 Dev. & B. L.) 311; *Steele v. Price*, 5 B. Mon. 58; *Pritchard, Wills & Administration*, §§ 267, 269; *Underhill, Wills*, § 225; *Theobald, Wills*, p. 45. There was error in this instruction.

Upon the trial of this case at July term, 1901, the propounders offered the following admission as a part of their evidence: "In the trial of this action the caveator, Samuel A. Cutler, admits the following facts: That John B. Respass, in the presence of the alleged testator, Nathan C. Cutler, signed the script propounded as his will as a subscribing witness thereto, at the request and in the presence of the said Nathan C. Cutler, who also signed it in the presence of the said witness, and declared it to be his last will." The caveator objected to this evidence, and C. F. Warren, Esq., made affidavit that he was the attorney of the caveator at February term, 1898; that when the case was called at that term the caveator announced his readiness for trial, and the propounders stated they were not ready for trial for the want of the testimony of John B. Respass, a subscribing witness to the will; when the caveator, for the purpose of getting a trial at that term, made the admission simply because the witness Respass was absent; that at that term the caveator did not know that said Respass knew any other facts material to the execution or revocation of the will; that before the case was called for trial at this term he, as the attorney of the caveator, had notified one of the attorneys for the propounders that Respass was then present, attending court as a witness, and that he should object to the introduction of said admission in evidence. This testimony of Mr. Warren was not disputed by the other side. But the court admitted this admission as evidence, and the caveator excepted. In this, we think, there was error. It is not like a solemn admission of a fact in an answer, or otherwise, where it is intended by the parties to be permanent, and in this respect differs from *Guy v. Manuel*, 89 N. C. 83. In this case it was made on account of the absence of Respass. At this trial Respass was present, and the reason for making it ceased, and the propounders were notified of the fact of his presence, and that its admission would be objected to. As the reason ceased, the admission should have ceased. The propounders lost nothing they had before the admission was made. But the admission itself says "in the trial of this action." The admission is in the singular,—in the trial,—and it was used in that trial. The point presented is a singular one, and we have found nothing like it in the practice, and have put what we think is a just construction upon it, and do not think it should have been admitted.

There is one other question presented by the record that should be passed upon, and

that is this: It seems that the witnesses signed the will before the testator, Cutler. But it was all done at the same time, and in the presence of each other; the witnesses seeing the testator's presence, and the testator seeing the witnesses' presence. It therefore differs from *Re Cox*, 46 N. C. (1 Jones L.) 321, where the witness signed the will at home, and not in the presence of the testator. In that case it was held to be an insufficient execution of the will; but it is there intimated that, had the witness signed in the presence of the testator, though be-

fore the testator, it would have been sufficient. It seems singular that the witnesses should have signed before the testator, as there was nothing at that time for them to attest. It was certainly awkward and illogical for them to do so, and can only be sustained by its being all a part of one and the same transaction. This exception of the caveator is not sustained, and there was no error in the ruling of the court upon this exception.

But for the errors pointed out in the opinion, *there must be a new trial*.

ALABAMA SUPREME COURT.

UNITED STATES FIDELITY & GUARANTY COMPANY, Appt.,
v.

T. T. CHARLES *et al.*

(.....Ala.)

1. A note given to reimburse a surety on a fidelity bond for what it has been compelled to pay because of the principal's embezzlement, on condition that the surety would not prosecute the principal for the defalcation, is void.
2. The proper measure of proof necessary to a verdict in civil cases is such as will reasonably satisfy the jury.
3. A jury is not bound to adopt the construction of a contract which will render it legal if it is equally capable of one which will render it illegal if other evidence in the case tends to show illegality.

(December 18, 1901.)

APPPEAL by plaintiff from a judgment of the Montgomery City Court in favor of defendants in an action brought to enforce certain promissory notes. *Affirmed*.

Plaintiff was surety for F. W. Caldwell, who was bookkeeper of the Standard Building & Loan Association. He was charged with embezzlement, and plaintiff as his surety paid the amount which it was claimed that he had embezzled. It thereupon took a note, with sureties, for the amount which it had paid, to enforce payment of which this action was brought.

Further facts appear in the opinion.

Messrs. Marks & Sayre for appellant.

Mr. Ray Rushton, for appellees:

Any contract, the consideration of which, or any part thereof, is an agreement to compound a felony, is illegal, and when the parties stand *in pari delicto* the law will not entertain any action in respect thereto, but leaves the parties where it finds them.

NOTE.—For other cases in this series as to right to enforce obligation given to prevent criminal prosecution, see *Loud v. Hamilton* (Tenn.) 45 L. R. A. 400, and *Jones v. Dannenberg* (Ga.) 52 L. R. A. 271.

As to invalidity of contract to prevent prosecution generally, see *Springfield F. & M. Ins. Co. v. Hull* (Ohio) 25 L. R. A. 37, and *Weber v. Shay* (Ohio) 37 L. R. A. 230.
57 L. R. A.

Wynne v. Whisenant, 37 Ala. 46; *Wells v. Thompson*, 50 Ala. 84; *Moog v. Strang*, 60 Ala. 98.

Contracts which are entire are not enforceable if any part of the transaction is illegal. Where the contract is divisible the part which is legal will be enforced notwithstanding the illegal part. The contract here is the note sued on, which is tainted with illegality, and, as it cannot be divided up, the court will not enforce any part of it.

Brown v. Brown, 34 Barb. 533; *Rose v. Truax*, 21 Barb. 361; *Goodwin v. Clark*, 65 Me. 280; *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. 299; *Schmueckle v. Waters*, 125 Ind. 205, 25 N. E. 281; *Prost v. More*, 40 Cal. 347; *Osgood v. Bauder*, 75 Iowa, 550, 1 L. R. A. 655, 39 N. W. 887; *Crawford v. Wick*, 18 Ohio St. 190, 98 Am. Dec. 103; *Filson v. Hines*, 5 Pa. 452, 47 Am. Dec. 422; *Wynne v. Whisenant*, 37 Ala. 46; *Pettit v. Pettit*, 32 Ala. 288; *Trist v. Child*, 21 Wall. 441, *sub nom.* *Burke v. Child*, 22 L. ed. 623.

Dowdell, J., delivered the opinion of the court:

The first and third pleas, to which demurrers were interposed by plaintiff and overruled by the court, set up the illegality of the consideration of the notes sued on. These pleas aver that the notes were given in consideration of an agreement and promise made by the payee not to prosecute the principal maker of said notes, *viz.*, one Caldwell, for the embezzlement by him of \$650 from the Standard Building & Loan Association of Montgomery, Alabama, in the employment of which company he was engaged as a bookkeeper. It is further shown by said pleas that the payee guaranty company was security upon the employment bond of said Caldwell at the time of said embezzlement by him, and as such surety paid to said building and loan association the said sum so embezzled. That there was an implied contract, under the law, on the part of Caldwell, to pay to the said guaranty company the amount so paid by it to the building and loan association for his said default, there can be no doubt, and that upon such implied contract a right of action existed and a recovery could be had by the guaranty company against said Caldwell is equally clear,

but that is not the contract here sued upon. The contract sued upon is an express contract made by said Caldwell, together with the defendants as his sureties, which is based upon a consideration which is, at least in part, illegal. It is contended by counsel for appellant that the only difference between the contract implied by law and the express contract sued upon is one of evidence. In this contention appellant's counsel is mistaken. The express contract, besides carrying with it the obligation of the defendants as sureties, also provides for a waiver of exemptions, neither of which existed in the implied contract. The plaintiff, in his action, relies wholly upon the express contract, and upon it he must stand or fall, without any regard to the implied contract which the law raised up between plaintiff and the principal debtor out of the circumstances of the default and embezzlement. It is a well-settled principle of law that a consideration in part illegal will avoid the entire contract. 1 Brickell's Dig. p. 382, § 116, and cases there cited. The fact that there was a contractual relation existing between Caldwell and the guaranty company, by virtue of the latter's suretyship upon a bond for the faithful performance of duty by Caldwell to his employer, the Standard Building & Loan Association, cannot vary the principle laid down in the authorities above cited, or purge the contract of the illegality of consideration. When the guaranty company paid the amount of the default to the loan company, it then occupied the same relation to the embezzler, as to an implied promise by him to refund, as existed between the embezzler and the loan company, from whom he embezzled the funds, before said guaranty company settled the defalcation. It is the promise, as an inducement to the contract sued upon, that the payee will abstain from criminal prosecution of the principal maker, that taints the consideration of the note; being

opposed to public policy and offensive to the law. *Moog v. Strung*, 69 Ala. 98; *Wynne v. Whisenant*, 37 Ala. 46; *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523. The case of *Bibb v. Hitchcock*, 49 Ala. 468, 20 Am. Rep. 288, is cited as an authority in support of the appellant's contention here, and as being directly in point. The facts in that case are not the same as the facts here, but in so far as any principle of law there stated, bearing upon the question here under consideration, is opposed to the views expressed by us above, we decline to follow it. Moreover, it may be suggested that what was said in *Bibb v. Hitchcock* relating to the consideration of the contract was unnecessary to the decision of that case, as the court very properly, for other reason there stated, held the bill to be without equity.

It has been several times decided by this court that the proper measure of proof necessary to a verdict in civil cases is that the jury shall be reasonably satisfied from the evidence. Charge No. 1 requested by the plaintiff was, in its tendency, misleading, in that it was calculated to impress upon the jury that a greater measure of proof was necessary than that laid down in the above rule. Charge No. 3 requested by the plaintiff, and which was refused, was likewise calculated to mislead. Besides, it excluded from consideration by the jury all the evidence in the case except that of the agreement between the plaintiff and the defendant. Although the agreement, if taken alone, should be equally capable of two constructions, one legal and the other criminal, the jury would not be bound, under the law, to adopt the former rather than the latter construction if other evidence in the case tended to show illegality in said agreement.

There appearing no error in the rulings of the court, the judgment of the court below is affirmed.

CALIFORNIA SUPREME COURT.

M. BLOCHMAN, *Respt.*,

v.

John D. SPRECKELS, *Appt.*

(135 Cal. 662.)

1. Insufficient finding upon certain issues in the case does not require reversal unless the finding of those issues in favor of appellant would entitle him to a judgment.
2. The cost of a street improvement cannot be assessed on abutting property where the contractor is required by the ordinance to sustain all loss or damage arising from the nature of the work to be done under the specifications.

(February 28, 1902.)

NOTE.—As to validity of guaranty of work or provision for repairs in contract for street improvement, see, in this series, *Portland v. Portland Bituminous Paving & Improv. Co.* (Or.) 44 L. R. A. 527, and note; *Robertson v. Omaha* (Neb.) 44 L. R. A. 534; *State ex rel.* 57 L. R. A.

APPEAL by defendant from a judgment of the Superior Court for San Diego County in favor of plaintiff in an action brought to quiet plaintiff's title to real estate which had been sold for nonpayment of a street-improvement assessment. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Titus & Shaw, for appellant:

One's property is not taken from him without due process of law if he is allowed a hearing at any time before the lien of the assessment thereon becomes final.

Re Madera Irrig. Dist. Bonds, 92 Cal. 324, 14 L. R. A. 755, 28 Pac. 272, 675; *Hagar v.*

Wilson v. Trenton (N. J. L.) 44 L. R. A. 540; *Seaboard Nat. Bank v. Woesten* (Mo.) 48 L. R. A. 279; *Barber Asphalt Paving Co. v. Hazel* (Md.) 48 L. R. A. 285; *Alameda Macadamizing Co. v. Pringle* (Cal.) 52 L. R. A. 264; and *Shank v. Smith* (Ind.) 55 L. R. A. 564.

Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

Frontage assessment is perhaps the most uniform and least objectionable mode of assessing the property that can be adopted.

Whiting v. Townsend, 57 Cal. 515; *Sheley v. Detroit*, 45 Mich. 431, 8 N. W. 52.

This method has been repeatedly upheld by the Supreme Court of the United States.

Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Parsons v. District of Columbia*, 170 U. S. 52, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

McKays. **L. L. Boone** and **Oscar A. Trippet**, for respondent:

A city may be liable for damages growing out of the grading of a street.

Conniff v. San Francisco, 67 Cal. 46, 7 Pac. 41; *Los Angeles Cemetery Asso. v. Los Angeles*, 103 Cal. 461, 37 Pac. 375; *Reardon v. San Francisco*, 66 Cal. 492, 56 Am. Rep. 509, 6 Pac. 317; *Eachus v. Los Angeles Consol. Electric R. Co.* 103 Cal. 614, 37 Pac. 750.

Hence the requirement that the contractor should hold the city harmless for any and all suits for damages was an additional burden which had a tendency to cause the contractor to make his bid higher than he otherwise would.

Brown v. Jenks, 98 Cal. 12, 32 Pac. 701; *McDonald v. Mezes*, 107 Cal. 494, 40 Pac. 808; *Hellman v. Shoulters*, 114 Cal. 158, 44 Pac. 915, 45 Pac. 1057.

The front footage assessment under the Vrooman act is violative of the Federal Constitution.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Loeb v. Columbia Twp.* 91 Fed. 37; *Fay v. Springfield*, 94 Fed. 409; *Charles v. Marion*, 98 Fed. 166; *Cowley v. Spokane*, 99 Fed. 840; *Hutcheson v. Storie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848; *Kersten v. Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 948, 1103; *Statc, Frevert, Prosecutor, v. Bayonne*, 63 N. J. L. 202, 42 Atl. 773; *Cohen v. Alameda*, 124 Cal. 506, 57 Pac. 377.

Chipman, C., filed the following opinion:

Defendant became the purchaser of certain lots belonging to plaintiff, in the city of Coronado, at a sale for nonpayment of interest on a bond issued to a contractor to represent the assessment against plaintiff's said lots for street work. The action is to restrain defendant from applying for a deed and to quiet plaintiff's title as against said sale. Plaintiff had judgment, from which, and from the order denying his motion for a new trial, defendant appeals.

The controversy grows out of the improvement of Orange avenue in said city, which improvement was made under the street improvement act of March 18, 1885, as amended in 1891 (Stat. 1891, p. 116). 57 L. R. A.

Appellant contends that there are no sufficient findings upon certain issues, namely:

(1) That no plans or specifications for said work were ever adopted; (2) that no bond was ever given by the contractors for the performance of their contract; (3) that Orange avenue has never been dedicated or accepted as a public highway. The court found that no plans for doing the work were ever adopted by the board prior to the passage of ordinance No. 39, and that it never adopted any specifications other than such as are contained in said ordinance and in the resolution of intention and the resolution ordering the work; and that no plans for doing said work were ever adopted by the board after the passage of said ordinance No. 39. The ordinance is set out in its entirety. The resolution of intention is fully set forth elsewhere in the findings, and the pleadings admit that there was a resolution ordering the work. As to the bond the finding is that "a bond purporting to be given as and for a bond for doing said work, by said contractors, for the performance of said contract, is in the words and figures following [then follows the bond]: that no other or different bond was ever given for said purpose." As to the dedication of Orange avenue the findings set forth all the facts connected with the attempted dedication, which included the map filed by the Coronado Beach Company, owners of the land over which the avenue ran; also a deed of dedication, duly recorded, with certain reservations. The rule is that, if all material issues are not found upon, a reversal will not be ordered unless the findings on those issues in favor of appellant would entitle him to a judgment. *Morrison v. Stone*, 103 Cal. 94, 37 Pac. 142; *Gould v. Adams*, 108 Cal. 365, 41 Pac. 408. If any one of the alleged defects in the proceedings is sufficient to support the judgment, the failure to find upon others is immaterial, and not ground for reversal. *Adams v. Helbing*, 107 Cal. 298, 40 Pac. 422. We think, however, that the probative facts are found from which the ultimate facts may be inferred or conclusions of law may be drawn.

In his complaint plaintiff sets forth several objections going to the validity of the assessment, some of which present important questions. The view we feel constrained to take on one of these objections renders it unnecessary to pass upon the others. The ordinance which authorized the work, and which became a part of the contract, inasmuch as the specifications adopted are to be there found, contained the following provisions: "The contractor shall keep good and sufficient guards around said improvements, by fence or otherwise, to prevent accident, and shall hang thereon lights, to burn from dusk until daylight; and the contractor shall hold the city harmless for any and all suits for damages, arising out of the construction of said improvements. The contractor shall, when required to do so by the superintendent of streets, remove

from the work any overseer, laborer, or other person, who shall refuse or neglect to obey the said superintendent in anything relating to the work, or who shall perform his work in a manner contrary to these specifications or be found incompetent or unfaithful. *All loss or damage arising from the nature of the work to be done under these specifications shall be sustained by the contractor.*" It may be that a fair construction of these provisions, except as to those in italics, would warrant our holding them to relate to damage during the progress of the work and before the city had accepted it; that the city was to be held harmless merely as to damages resulting from negligence or carelessness of the contractor in prosecuting the work which it was his duty and within his power to avoid. But as to the clause in italics it seems to us the purpose had a broader meaning, and looked to damage which might arise out of and subsequent to the completed work,—practically any damage for which the city would be liable which might originate in "the nature of the work to be done." The reasoning in *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701, and *Alameda Macadamizing Co. v. Pringle*, 130 Cal. 226, 52 L. R. A. 264, 62 Pac. 394, seems to apply with equal force here. The contractor in the first of these cases was to keep the street in repair for five years, and in the second case cited he was to guarantee the work for one year "from injury by ordinary use." The point decided was that the provision was not only unauthorized by the statute, but that it changed and might increase the burden of the property owner, for the reason that the contractor could not afford to do the work in the one case or give the guaranty in the other for nothing. "The contractor," it was said, "would charge a higher price for the work when he was forced to contract also for repairs." No one can say that a contractor would agree to stand behind the city, and hold it harmless from damage arising out of the work he had undertaken to do, without some compensation additional to the necessary cost of the material and labor to him, plus a reasonable profit. In thus agreeing he might subject himself to liabilities much greater than the cost of protecting the work, for one year, "from injury by ordinary use," or greater, even, than the cost of keeping "the street in repair for the period of five years." It was said in *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701: "Officers are provided and vested with the power and charged with the duty of seeing that such work is properly done. A bond cannot be substituted for the performance of this duty." The law does not authorize a municipality to escape its liability by shifting it to the shoulders of the contractor, and in attempting to do so it imposed conditions that would naturally tend to increase the cost of the work.

The judgment and order should be affirmed.

We concur: **Haynes, C.; Gray, C.**
57 L. R. A.

Per Curiam:

For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Rehearing denied, **Beatty, Ch. J.**, dissenting.

Margaret A. LATHROPE et al., Resp'ts.,

v.

P. H. FLOOD, Appt.

(135 Cal. 458.)

1. Damages for the death of the child cannot be allowed in an action by husband and wife for a physician's abandonment of the wife during her confinement.
2. A verdict for an entire sum to be awarded to a man and wife for injury to her by a physician's abandonment of her during confinement will be set aside if the court's instructions authorized a consideration of the fact of the child's death in fixing the damages.

(February 1, 1902.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiffs in an action brought to recover damages for injuries alleged to have resulted to the female plaintiff because of the negligent and unskillful treatment of her by defendant. *Reversed.*

An opinion was handed down in this case in Department 2, on February 20, 1901, in which the judgment of the lower court was affirmed, but a rehearing was granted before the court in banc and the department opinion superseded by the one published below, and the former opinion is therefore omitted.

The facts are sufficiently stated in the opinion of the court.

Mr. Garret W. McEnerney, for appellant:

The plaintiff in an action against a physician for malpractice must not only show want of proper skill, care, or diligence on the part of the defendant in the treatment of his patient, but he or she must also show that injuries were sustained by the plaintiff as the direct result of such want of skill, care, or diligence.

Craig v. Chambers, 17 Ohio St. 253; *Hancke v. Hooper*, 7 Car. & P. 81; *Lanphier v. Phipps*, 8 Car. & P. 475; *Ewing v. Goodc*, 78 Fed. 442; *Louisville & N. R. Co. v. East Tennessee, V. & G. R. Co.* 9 C. C. A. 314. 22 U. S. App. 102, 60 Fed. 993; *Ellis v. Great Western R. Co.* L. R. 9 C. P. 551.

There is no presumption of negligence or unskillfulness from a mere failure to cure.

Tefft v. Wilcox, 6 Kan. 46; *Piles v.*

NOTE.—For duty of physician to respond to call see, in this series, *Hurley v. Eddingfield* (Ind.) 53 L. R. A. 135.

As to right to recover damages for injury to unborn child, see *Hawkins v. Front Street Cable R. Co.* (Wash.) 16 L. R. A. 808; and *Allaire v. St. Luke's Hospital* (Ill.) 48 L. R. A. 225.

Hughes, 10 Iowa, 579; *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165.

The plaintiffs were not entitled even to nominal damages.

Sedgw. Damages, §§ 99, 100; *Stewart v. Sefton*, 108 Cal. 197, 41 Pac. 293.

The damages were excessive, and so excessive as to show unmistakably that they were due to prejudice or passion.

Sloane v. Southern California R. Co. 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320; *Morgan v. Southern P. Co.* 95 Cal. 510, 17 L. R. A. 71, 30 Pac. 603; *Lee v. Southern P. R. Co.* 101 Cal. 118, 35 Pac. 572.

If any damages could be recovered by reason of the death of the child, that would be a distinct cause of action, upon which special damage must be alleged.

Morgan v. Southern P. Co. 95 Cal. 516, 17 L. R. A. 71, 30 Pac. 603.

It is error to predicate instructions to a jury upon a fact or facts upon which there is no evidence.

Amann v. Lowell, 66 Cal. 307, 5 Pac. 363; *Whitman v. Steiger*, 46 Cal. 257; *Perkins v. Eckert*, 55 Cal. 400; *Hanks v. Naglee*, 54 Cal. 51.

Mental suffering is not an element of damage, except in so far as it may be considered as an aggravation of, or in connection with, physical injuries.

3 *Sutherland, Damages*, § 1245; *Sloane v. Southern California R. Co.* 111 Cal. 680, 32 L. R. A. 193, 44 Pac. 320.

The court instructed the jury that it was authorized to give damages for the death of the child, when there was no testimony whatever to justify a verdict that the defendant was in any degree responsible for its death.

Amann v. Lowell, 66 Cal. 307, 5 Pac. 363; *Whitman v. Steiger*, 46 Cal. 256; *Perkins v. Eckert*, 55 Cal. 400; *Hanks v. Naglee*, 54 Cal. 51.

Mr. Edgar D. Peixotto, for respondents:

The physician may withdraw from the case after due notice given, but cannot abandon it without, since this would constitute negligence of a grave character, and render him amenable for all injuries sustained by the patient in consequence thereof.

Ordronaux, Jurisprudence of Medicine, §§ 12-14, pp. 13-15; 1 *Witthaus & B. Medical Jurisp.* p. 28; *Dale v. Donaldson Lumber Co.* 48 Ark. 188, 2 S. W. 703; *Ritchey v. West*, 23 Ill. 385; *Barbour v. Martin*. 62 Me. 536; *Ballou v. Prescott*, 64 Me. 305; *Potter v. Virgil*, 67 Barb. 578; *Lawson v. Conway*, 37 W. Va. 159, 18 L. R. A. 627, 16 S. E. 504; *McCandless v. McWha*, 22 Pa. 261; *Du Bois v. Decker*, 130 N. Y. 325, 14 L. R. A. 429, 29 N. E. 313; *Carpenter v. Blake*, 75 N. Y. 12.

In actions for personal torts the law does not attempt to fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury.

Aldrich v. Palmer, 24 Cal. 513; *Boyce v. California Stage Co.* 25 Cal. 474; *McGlynn* 57 L. R. A.

v. Brodie, 31 Cal. 377; *Wheaton v. North Beach & M. R. Co.* 36 Cal. 590; *Morgan v. Southern P. Co.* 95 Cal. 508, 30 Pac. 601; *Lee v. Southern P. R. Co.* 101 Cal. 118, 35 Pac. 572; *Redfield v. Oakland Consol. Street R. Co.* 110 Cal. 286, 42 Pac. 822; *Houland v. Oakland Consol. Street R. Co.* 110 Cal. 523, 42 Pac. 983.

The jury had the right to consider the evidence concerning the bruising, maiming, and death of the child, and the consequent damage to the plaintiffs.

McKune v. Santa Clara Valley Mill & Lumber Co. 110 Cal. 480, 42 Pac. 980.

To be excessive the verdict at first blush must strike the mind of a man of ordinary, reasonable intelligence as being the outgrowth of passion or prejudice or corruption on the part of the jury.

Houland v. Oakland Consol. Street R. Co. 110 Cal. 523, 42 Pac. 983.

On rehearing.

The injury to and death of the child were pleaded in the complaint sufficiently to create the issue in the absence of demurrer.

The failure to demur or object by answer waived the point of misjoinder or want of special plea.

McKune v. Santa Clara Valley Mill & Lumber Co. 110 Cal. 480, 42 Pac. 980; *Kelly v. Murphy*, 70 Cal. 560, 12 Pac. 467; *Healy v. Visalia & T. R. Co.* 101 Cal. 585, 36 Pac. 125; *Clowdis v. Fresno Flume & Irrig. Co.* 118 Cal. 315, 50 Pac. 373; *Aoakian v. Noble*, 121 Cal. 216, 53 Pac. 559.

The injuries to the child, and the death thereof, and any resulting damage, were positively denied by the answer, thus aiding the complaint and making it an issue in the case.

Vanoe v. Anderson, 113 Cal. 532, 45 Pac. 816.

The failure to object to evidence is a waiver of the point.

People v. Smith, 121 Cal. 355, 53 Pac. 802; *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955; *Le Mesnager v. Hamilton*, 101 Cal. 532, 35 Pac. 1054.

The instruction given and upon which the reversal is predicated was made absolutely necessary by the instruction requested by defendant and given at the request of defendant.

Defendant is estopped from claiming this as error.

Ortega v. Cordero, 88 Cal. 221, 26 Pac. 80; *Horton v. Dominguez*, 68 Cal. 642, 10 Pac. 186; *Sprigg v. Barber*, 122 Cal. 573, 55 Pac. 419; *Lee v. Market Street R. Co.* 135 Cal. 293, 67 Pac. 765; *Morgan v. Southern P. Co.* 95 Cal. 510, 17 L. R. A. 71, 30 Pac. 603.

Mr. William S. Barnes also for respondents.

Harrison, J., delivered the opinion of the court:

The plaintiffs are husband and wife, and seek hereby to recover damages from the defendant for injuries sustained by the plaintiff Margaret by reason of the acts and conduct of the defendant towards her at the

time of her confinement. The defendant is a physician, and had been engaged by the wife to attend her upon that occasion. Upon being summoned to her residence therefor, he found the case to be somewhat complicated, and that it would be necessary to make use of instruments for the purpose of removing the child from the mother. Upon inserting the instruments for this purpose, the mother cried out from the pain caused thereby, and shrank or pulled herself away, so that the instruments came out. Upon inserting them again she again screamed and shrank away, whereupon the defendant said: "You quit your screaming. If you don't quit, I'll quit." She again screamed, and the instruments again came out; and the defendant thereupon wrapped up his instruments, saying, "I am going to quit," put on his overcoat, and left the room, without giving any directions to the wife or to the nurse who was with her, or saying anything further. After he had left the house the husband followed him and asked him to return, but, with considerable rudeness, he refused. In about an hour another physician was obtained, by whose aid the child was delivered. This physician was also compelled to make use of instruments for its delivery, and when the child was delivered it had certain marks or bruises upon its head, and lived only about fifteen minutes after its birth. In the complaint herein, after setting forth the foregoing facts, and alleging that the death of the child resulted from the said unskillful and negligent conduct of the defendant, the plaintiffs allege "that, by reason of the several premises, plaintiff Margaret A. Lathrope was injured in her health and constitution, and was weakened in body, and said plaintiff suffered great pain and mental anguish to the damage and detriment of plaintiffs in the sum of \$10,000." The case was tried by a jury, and a verdict of \$2,000 was rendered against the defendant. From the judgment entered thereon, and from an order denying a new trial, the defendant has appealed, and in support of his appeal contends that the court erred in giving to the jury certain instructions in regard to the damages which they might award. Upon this subject the court gave the following instruction: "In assessing damages the jury may also consider what, if any, connection defendant's conduct had with the death of the child of plaintiffs,—that being made an issue in this case; and if you believe from the evidence in the case that defendant's acts or omissions heretofore mentioned were the direct, proximate cause of the death of plaintiff's child, then you may consider this in assessing damages. Compensatory damages for the death of a minor

child include damages for the pecuniary loss proximately resulting from the death, but do not include damages for mental suffering from bereavement." The complaint does not charge any negligent or unskillful conduct on the part of the defendant in his treatment of the plaintiff Margaret prior to his abandonment of the case, nor was there any evidence at the trial that so long as he remained with her he was in any respect negligent or unskillful. The only ground of recovery against the defendant charged in the complaint is for the injury sustained by the wife in health and constitution, and for the pain and mental anguish suffered by her. No claim is made in the complaint, nor was there any evidence at the trial, of any damage sustained by reason of the death of the child, and the jury were instructed that they could not award damages for mental suffering arising from bereavement. Moreover, there was no evidence before the jury from which they could find that the death of the child was caused by negligence or want of skill on the part of the defendant in his efforts to effect its delivery. A claim for damages by reason of the death of the child should have been specially pleaded, and the right to recover such damages was in the husband alone. If such claim had been set forth in the complaint herein, the complaint would have been subject to demurrer for a misjoinder of parties plaintiff, as well as for misjoinder of causes of action. The case before the court did not, therefore, authorize any recovery for damages arising from the death of the child; and it was error for the court to instruct the jury that in assessing damages they could consider whether the defendant's conduct had any connection with its death, and could also consider his acts and omissions in causing its death. Such instruction was foreign to any issue in the case, and was misleading, and tended to divert the jury from a consideration of the only questions proper to be submitted to them. *Whitman v. Steiger*, 46 Cal. 256; *Hanks v. Naglee*, 54 Cal. 51, 35 Am. Rep. 67.

As the verdict is for an entire sum, and does not specify the amounts of the several items of damage which the court instructed the jury that it might consider in making up its verdict, it is impossible to determine the amount which would have been awarded in the absence of such instruction, and the verdict should therefore have been set aside.

The judgment and order denying a new trial are reversed.

We concur: **Beatty, Ch. J.; Garoutte, J.; Van Dyke, J.; Temple, J.; McFarland, J.**

CONNECTICUT SUPREME COURT OF ERRORS.

Matthew COLWELL
v.
City of WATERBURY, Appt.

(.....Conn.....)

1. The operation of a stone crushing machine to prepare material for constructing and repairing its highways is a governmental act of a municipality, so that it will be exempt from liability for injury to an employee through a defect in the machine, although the machine is located several miles from the place where the material is to be used.
2. That a part of the expense of a street improvement is to be paid by assessment upon property benefited does not make the duty of making it any less a governmental duty, within the rule exempting the municipality from liability for injuries caused by its performance, than if the entire expense were to be paid by general city tax.

(Hamersley, J., dissents.)

(March 5, 1902.)

A PPEAL by defendant from a judgment of the Superior Court for New Haven County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by **Hall, J.:**

The complaint alleged that defendant was the owner of a stone crusher used to crush stone for macadamizing the streets of the city of Waterbury, and that defendant also sold stone crushed by such crusher at a profit; that on the 12th of July, 1894, plaintiff was in the employ of the defendant, feeding stone into said crusher, when, by reason of a broken tooth in said crusher, and of the want of a proper covering for said crusher, which defects were known to the defendant's superintendent and foreman in charge of said machine, the latter of whom had promised the plaintiff that new teeth and a proper covering would be furnished for said machine, so as to make it safe, the plaintiff was injured by a stone thrown by said machine while he was feeding the same, which struck him in the right eye and wholly destroyed the sight thereof. As a second defense, the defendant alleged that at the time of the accident it was en-

gaged in the performance of a public duty imposed upon it by statute, in repairing certain highways within its limits by macadamizing them, which work was being done in accordance with the provisions of its charter under the superintendence of the street inspector, who had employed a foreman to take charge of the stone crusher and the crushing of the stone, which foreman, with authority from said inspector, had employed the plaintiff, who, at the time of the accident, was actually employed at such work in the town of Cheshire. The court having overruled the plaintiff's demurrer to this answer, these allegations were denied by the plaintiff's reply. Upon the trial it appeared that the stone crusher by reason of a defect in which the plaintiff was injured was owned by the defendant, and at the time of the accident was being used by the defendant in the town of Cheshire, 10 miles from Waterbury, in crushing stone to be transported by rail to Waterbury and by teams to a street which was being macadamized, and there used in macadamizing said street. The plaintiff, it appeared, was employed by the defendant's street inspector, called "Superintendent of Streets," who had the general superintendence of this work and the care and maintenance of streets, and was put to work on the stone crusher by the foreman, who, subject to the superintendent, had charge of the work of stone-crushing at Cheshire, and at the time he was injured was so employed in the work of crushing stone which the defendant intended to use, and did use, in the macadamizing of one of its streets. There seems to have been no evidence that the defendant, prior to the accident, ever sold the stone crushed by said machine, or used them for any other purpose than in macadamizing its streets. The defendant, in substance, requested the court to charge the jury that the city of Waterbury could not be held liable, by reason of any negligence on the part of its officers or servants who were in charge of the work of crushing the stone for the purpose of repairing its streets, because in doing said work the defendant was performing a public governmental duty imposed upon it by the state. The court charged the jury, in part, that the care and maintenance of its streets by the defendant was a governmental duty, and that, if the preparation of the stone used in the repair of the street was work done in the performance of such governmental duty, there could be no recovery; that "the crushing of stone intended to be used and subsequently used in macadamizing a street 10 miles away was not work done in the care and maintenance of the street. Such work is confined to the work done on the street itself, or in bringing to the street the necessary materials and instrumentalities used in the work; it has no relation to the manufacture of material or instrumentality, or the use of machinery for that purpose." It is provided by an act

NOTE.—As to liability of municipality for injury to employee, see also, in this series, *Pettingell v. Chelsea* (Mass.) 24 L. R. A. 428; *Rhobidas v. Concord* (N. H.) 51 L. R. A. 381; *Nicholson v. Detroit* (Mich.) 56 L. R. A. 801; and *Peterson v. Wilmington* (N. C.) 56 L. R. A. 959.

As to distinction between private and public functions of municipalities in respect to liability for negligence, see note to *Barron v. Detroit* (Mich.) 19 L. R. A. 452; also *Gibson v. Huntington* (W. Va.) 22 L. R. A. 561; and *Corning v. Saginaw* (Mich.) 40 L. R. A. 526.

57 L. R. A.

of legislature, made a public act, that the city of Waterbury shall be a highway district; that its court of common council shall have the sole and exclusive authority and control over all streets within the limits of the city, and the sole and exclusive power to lay out and make new streets, and to alter and repair streets, and the like power to order the paving, macadamizing, or otherwise improving any street or highway within the city, and that said court of common council, upon the execution of any order for the paving, macadamizing, or otherwise improving any such street, may assess a reasonable part of the expense thereof upon the persons whose property is especially benefited thereby. The act further provides for the appointment by the board of aldermen and the court of common council of a board of street commissioners, who are to have the general superintendence and control over the streets, and to cause the same to be kept in good condition and repair, and to execute all orders of said court in reference to the streets, etc., and who are empowered to employ, in the name and behalf of the city, a street inspector, a street surveyor, and such other persons as may be necessary for the performance of the duties imposed upon said board. 7 Special Laws, pp. 217-219.

Mr. Lucien F. Burpee, with Mr. John P. Kellogg, for appellant:

The manner in which the city shall proceed to obtain material necessary for the repair of its streets has not been specifically imposed upon it; that is, the law does not specifically impose upon the city the duty of crushing stone and using it for such purpose.

The decision of such questions has always been left to the discretion of the municipal authorities, and their determination is not to be interfered with by the courts, which have no jurisdiction to supervise or revise the act of municipal governing bodies, except for fraud or corruption, or similar serious cause.

Whitney v. New Haven, 58 Conn. 450, 20 Atl. 666.

The city, in providing for the maintenance of its streets, ought to consider which method will be most "convenient and economical," both to itself as a corporation and to the general public. In the absence of fraud the courts will not interfere.

Dibble v. New Haven, 56 Conn. 199, 14 Atl. 210.

The municipality is always exempt from liability in regard to any administrative matter, when the matter is connected with the performance of a governmental duty for the benefit of the public.

Jewett v. New Haven, 38 Conn. 389, 9 Am. Rep. 382; *Daly v. New Haven*, 69 Conn. 644, 38 Atl. 397.

The injury complained of in this case was occasioned by the negligence of the officers and servants of the defendant in caring for and maintaining the stone crusher which was used to prepare the stone required for

the care and maintenance of the streets. Being admittedly engaged in the performance of a governmental duty while it was caring for and maintaining its streets, and having undoubtedly the exclusive power to determine that it would perform that duty by covering the streets with crushed stone, and that it would use its own stone crusher for that purpose, it cannot be held liable for any accident occasioned by any neglect to properly care for the stone crusher.

Jewett v. New Haven, 38 Conn. 389, 9 Am. Rep. 382; *Mead v. New Haven*, 40 Conn. 74, 16 Am. Rep. 14; *Judge v. Meriden*, 38 Conn. 90; *Daly v. New Haven*, 69 Conn. 644, 38 Atl. 397.

In the absence of express statute therefor, municipal corporations are not more liable to action for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them, than in the case of a town house or public way.

2 Dill. Mun. Corp. 3d ed. p. 976, note 1; *Wild v. Paterson*, 47 N. J. L. 406, 1 Atl. 490; *Condict v. Jersey City*, 46 N. J. L. 157; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *Bates v. Rutland*, 62 Vt. 181, 9 L. R. A. 363, 20 Atl. 278; *Maxmilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Hughes v. Monroe County*, 147 N. Y. 49, 39 L. R. A. 33, 41 N. E. 407; *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, 30 L. R. A. 660, 42 N. E. 405; *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Barney v. Lowell*, 98 Mass. 570; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Howard v. Worcester*, 153 Mass. 426, 12 L. R. A. 160, 27 N. E. 11; *Wison v. Newport*, 13 R. I. 454, 43 Am. Rep. 35.

Whenever the state delegates powers and imposes duties which are to be exercised solely for the public good, it makes no difference, so far as the liability and responsibilities of the subordinate municipality are concerned, whether the action of the state is solicited by the municipality or not.

Jewett v. New Haven, 38 Conn. 389, 9 Am. Rep. 382; *Diamond Match Co. v. New Haven*, 55 Conn. 510, 13 Atl. 409.

Messrs. George H. Cowell and John O'Neill, for appellee:

There is no mode of determining if a duty is governmental except to inquire if all well-ordered governments exercise it, and if it is one whose exercise all citizens have a right to require.

Jewett v. New Haven, 38 Conn. 389, 9 Am. Rep. 382; *Young v. New Haven*, 39 Conn. 440; *Greenwood v. Westport*, 63 Conn. 594, 60 Fed. 560.

The rule that an action cannot be maintained against a municipality for neglect of a public duty unless given by statute is of limited application.

Greenwood v. Westport, 63 Conn. 596, 60 Fed. 560; *Jones v. New Haven*, 34 Conn. 13.

In view of the charter, it seems hardly debatable that the macadamizing of the streets of Waterbury was a special privilege asked for and granted by the legislature,

with power to compel persons benefited to pay for the same.

Jones v. New Haven, 34 Conn. 1; *Weed v. Greenwich*, 45 Conn. 170; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 28 Atl. 32; *Mootry v. Danbury*, 45 Conn. 550, 29 Am. Rep. 703; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Oliver v. Worcester*, 102 Mass. 500, 3 Am. Rep. 485; *Emery v. Lowell*, 104 Mass. 13; *Merrifield v. Worcester*, 110 Mass. 218, 14 Am. Rep. 592; *Murphy v. Lowell*, 124 Mass. 564.

The liability of municipal corporations for negligence is the same whether the particular work is constructed under a special privilege granted at the request of the corporation or in the performance of a public and governmental duty.

Judd v. Hartford, 72 Conn. 350, 44 Atl. 510; *Danbury & N. R. Co. v. Norwalk*, 37 Conn. 109; *Young v. New Haven*, 39 Conn. 440; *Mootry v. Danbury*, 45 Conn. 550, 29 Am. Rep. 703; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 28 Atl. 32; *Weed v. Greenwich*, 45 Conn. 170; *Thayer v. Boston*, 19 Pick. 511, 31 Am. Dec. 157; *Hildreth v. Lowell*, 11 Gray, 349; *Lee v. Sandy Hill*, 40 N. Y. 442; *Buffalo & H. Turnp. Co. v. Buffalo*, 58 N. Y. 639; *Sheldon v. Kalamazoo*, 24 Mich. 383; *Crossett v. Janesville*, 28 Wis. 421; *Soulard v. St. Louis*, 36 Mo. 546; *Allen v. Decatur*, 23 Ill. 332, 76 Am. Dec. 692; *Woodcock v. Calais*, 66 Me. 234; *Cumberland & O. Canal Corp. v. Portland*, 62 Me. 504; *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464; *Waldron v. Haverhill*, 143 Mass. 582, 10 N. E. 481; *Dogherty v. Braintree*, 148 Mass. 495, 20 N. E. 106; *Coots v. Detroit*, 75 Mich. 628, 5 L. R. A. 315, 43 N. W. 17; *Gas Light & Coke Co. v. St. Mary Abbot's* L. R. 15 Q. B. Div. 1; *Lafayette v. Allen*, 81 Ind. 166; *Clarissy v. Metropolitan Fire Department*, 7 Abb. Pr. N. S. 352; *Danbury & N. R. Co. v. Norwalk*, 37 Conn. 109; *Haucks v. Charlemont*, 107 Mass. 414; *Chicago v. McGraw*, 75 Ill. 566.

Municipal corporations are responsible in damages for all injuries occasioned by their negligence in the management or care of public property, irrespective of the question whether an income is derived from it.

Lyme Regis v. Henley, 3 Barn. & Ad. 77, 2 Clark & F. 331, 1 English Ruling Cases, 601; *Mersey Docks & Harbor Board v. Gibbs*, L. R. 1 H. L. Cas. 93, 11 H. L. Cas. 686; *Jones v. Bird*, 5 Barn. & Ald. 837; *Pollock, Torts*, pp. 51, 52.

There is a very clear distinction which is to be borne in mind in cases where governmental duties are imposed upon public officers, and where towns are authorized by the legislature to do the same duties. In the latter class of cases, the duty is imposed upon the town doing the work in question, and the town in town meeting, or by its selectmen, takes the entire charge of the work, selects its own agents, and does the work in the time and in the manner it 57 L. R. A.

pleases. In such a case the negligence of the servant is the negligence of the town, and the rule *respondet superior* applies.

Goddard v. Harpswell, 84 Me. 499, 30 Am. St. Rep. 373, valuable note, 376-413, 24 Atl. 958; *Lyme Regis v. Henley*, 2 Clark & F. 331, 1 English Ruling Cases, 621, note; *Deane v. Randolph*, 132 Mass. 475; *Anthony v. Adams*, 1 Met. 284; *Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431; *Emery v. Lowell*, 104 Mass. 13; *Merrifield v. Worcester*, 110 Mass. 218, 14 Am. Rep. 592; *Murphy v. Lowell*, 124 Mass. 564; *Sullivan v. Holyoke*, 135 Mass. 973; *Ehrgott v. New York*, 96 N. Y. 264, 18 Am. Rep. 622.

Hall, J., delivered the opinion of the court:

The injury to the plaintiff was caused by the operating of a defective stone crusher upon which he was at work. The alleged ground of liability is the negligence of the city, or that of its street inspector, in placing the plaintiff, as an employee of the city, at work upon such defective machine. If the city, or its street inspector, in operating the stone crusher, was engaged in the performance of a public governmental duty, the defendant, in the absence of any statute making it so, is not responsible in damages to the plaintiff for the injury caused by such act of negligence, either upon the theory that the city failed to perform its duty toward an employee, to provide him a reasonably safe place in which to work or reasonably safe instrumentalities with which to work, or upon the theory that the plaintiff, if not a servant of the city, was injured by the carelessness of the defendant's agent while the latter was performing the defendant's work. If the city was negligent in furnishing its workmen with defective machinery with which to perform a public service, it is exempt from liability for such negligence for the reason that, in all that either the city or the plaintiff did in the performance of such public duty, they acted as governmental agencies, and not in the exercise of any privilege or power for the immediate benefit of the municipality, and because, while so acting, although the city paid the plaintiff for his services, the relation between them was not the ordinary one of master and servant which exists between a city and its employees in the performance of strictly municipal duties. *Jones v. New Haven*, 34 Conn. 1-13; *Jewett v. New Haven*, 38 Conn. 368, 9 Am. Rep. 382; *Daly v. New Haven*, 69 Conn. 644-649, 38 Atl. 397; *Bartram v. Sharon*, 71 Conn. 686-692, 46 L. R. A. 144, 43 Atl. 143. On the other hand, if the street inspector, as an officer or agent of the city, and as the one having, by authority of the board of street commissioners, and in discharge of the duties imposed upon them by the city charter, the entire care and maintenance of the streets, was guilty of negligence in the performance of a public duty, in using a defective stone crusher, or in failing to provide a proper covering for it while it was in operation, the city of Waterbury is not liable for the con-

sequences of his negligence, since the street inspector was so far a public agent that as to such acts of negligence the rule *respondet superior* does not apply to the defendant. *Judge v. Meriden*, 38 Conn. 90-97; *Daly v. New Haven*, 69 Conn. 644-650, 38 Atl. 397. We had had occasion to state heretofore that the rule which thus exempts municipalities from liability when they or their servants are acting in the discharge of a public duty does not relieve them from responsibility for the negligent acts of their workmen which are not incident to and do not flow from the performance of the public work in which they are engaged, and in doing which acts such workmen are therefore not properly acting as agents of the law, nor from liability for the consequences of the particular acts which the municipality has directed to be performed, and which from their character, or the manner in which they are so ordered to be executed, will naturally work a direct injury to the property of others, or create a nuisance, or occasion a wanton injury to the property or rights of other persons. *Judd v. Hartford*, 72 Conn. 350, 44 Atl. 510; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 28 Atl. 32; *Mootry v. Danbury*, 45 Conn. 550-556, 29 Am. Rep. 703; *Weed v. Greenwich*, 45 Conn. 170-183; *Danbury & N. R. Co. v. Norwalk*, 37 Conn. 109-119. The trial court, while recognizing the rule of municipal immunity above stated, in effect instructed the jury that when the plaintiff was injured the defendant was not engaged in the performance of a governmental duty. That part of its charge was incorrect. In doing the work of constructing and repairing its highways, the city was clearly performing a governmental act. *Jones v. New Haven*, 34 Conn. 1-13. The acceptance by the city of a charter authorizing it to discharge such governmental duty neither created a contract between it and the state that such duty should be performed, nor rendered the discharge of such duty the exercise of a special privilege, for the nonperformance or negligent performance of which the city would become liable. *Hedison v. New Haven*, 37 Conn. 475-482, 9 Am. Rep. 342; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332. Macadamizing its streets was one of the ways by which the city might perform its duty of maintaining and repairing its highways (*New Haven v. Whitney*, 36 Conn. 373-376), and it was for the city to decide whether that was the best way of discharging that duty. *Hoyt v. Danbury*, 69 Conn. 341-352, 37 Atl. 1051; *Healey v. New Haven*, 47 Conn. 305-314.

It was within the taxing power of the legislature to provide that a reasonable part of the expense of such repairs should be borne by those whose property was especially benefited thereby (*New London v. Miller*, 60 Conn. 112-116, 22 Atl. 499), and the fact that a part of such expense might be so paid did not make the duty of repairing the streets any the less a governmental one than if the entire expense were to be paid by a general city tax.

The work of breaking, by means of a

stone crusher, the stone to be used in macadamizing the street, was a part of the work of macadamizing such street. It was necessary that the stone used in macadamizing should be broken into small pieces. If laborers had been employed to break the stones with hammers, upon the street to be macadamized, it would hardly be said they were not performing a part of the work of macadamizing the street. But to become part of the work of macadamizing it is not necessary that the labor should be performed upon the street to be repaired. Part of the work of macadamizing is necessarily performed elsewhere, as the carrying of the materials to the street. If the city could do the work of breaking the stone more economically and successfully at the quarry than upon the street, and by the use of a machine than by breaking them by hand, it had the right to do the work at Cheshire by means of a stone crusher, and the fact that it did so did not change the character of the work or of the duty which it was performing. Whether or not the stone crusher, either before or after the accident, had been used by the city for other purposes than in macadamizing its streets, was not decisive of the case. It was a question for the jury whether, at the time of the accident, either the city or its street inspector, or its other agents in charge of the work, were in fact engaged in operating the stone crusher for the purpose of macadamizing a city street, as claimed by the defendant. It seems to have been shown at the trial that when the plaintiff was injured the stone crusher was being operated to crush stone to be used, and which in fact were used, in macadamizing a certain street. For an injury sustained by the plaintiff under such circumstances the city has the same immunity from liability as from one suffered by its employee in operating a defective street roller or fire engine. Municipal corporations are not liable unless made so by statute for injuries occasioned by negligence in using or failing to keep in repair the fire engines owned by them. 2 Dill. Mun. Corp. 4th ed. p. 976, note 1; *Jewett v. New Haven*, 38 Conn. 368-361, 9 Am. Rep. 382.

A very similar case in many of its aspects to the one at bar is that of *Barney v. Lowell*, 98 Mass. 570, cited in *Jewett v. New Haven*, in which it was held that the city was not liable for an injury caused by the negligence of a teamster, engaged in carting stone from a stone crusher to repair a highway, and employed in that work by the superintendent of streets, who had charge of the repairing of the streets and the crushing of the stone for that purpose.

In the case of *Hughes v. Monroe County*, 147 N. Y. 49, 39 L. R. A. 33, 41 N. E. 407, it was held that the county was not liable for an injury sustained by one of its employees in operating a steam mangle in a laundry which the servants of the defendant had failed to keep in proper repair; and in *Wild v. Paterson*, 47 N. J. L. 406, 1 Atl. 490, that the defendant was not liable for an injury to a member of the fire department caused

by a defective brake of the steam fire engine which he was assisting in taking to a fire. In the latter case it was held that, since such employees of the corporation were mere instruments in the execution of its public duties, the fact that the plaintiff was a paid employee of the city would not create between them the ordinary relation of master and servant, so as to render the city liable for its failure to keep the engine in good repair.

For the reasons given we think the trial court erred in not charging the jury substantially as requested by the defendant, and in charging that the crushing of stone intended to be used and subsequently used in macadamizing a street was not work done in the care and maintenance of the street.

The allegations in the complaint of a promise by the defendant's foreman to furnish new teeth and a proper covering for the stone crusher were, as stated in plaintiff's brief, not intended as a statement of liability upon a contract, but of facts affecting the question of contributory negligence. As bearing upon that question, the court properly charged the jury that information of such promises, if given to the inspector of streets, was sufficient information to the city.

There is error, and a new trial is granted.

The other Judges concur, except **Hamersley, J.**, who dissents.

John C. BYXBEE *et al.*

v.

Charles N. BLAKE *et al.*

(.....Conn.....)

1. Holding over after the expiration of any month renders a tenant from month to month liable for the rent of the ensuing month, whether the tenancy was created by express agreement or by the mere acceptance for a long period of time of monthly rentals.
2. Keeping the keys for five days after the expiration of a monthly period, and remaining in possession of the leased property for the purpose of cleaning up the rubbish after the refusal of the landlord to accept the keys at the expiration of the month, render the tenant liable for another month's rent.
3. A tenant who has placed a manager in charge of his business on the leased property is bound by his acts in retaining possession after the expiration of

NOTE.—For a case in this series holding that the retention of one room in a leased building after expiration of lease, because of illness of a member of tenant's family, does not constitute holding over so as to render tenant liable for rent for new term, see *Herter v. Mullen* (N. Y.) 44 L. R. A. 703.

As to holding over by tenants generally, see *Rosenblatt v. Perkins* (Or.) 6 L. R. A. 257; *Goldrough v. Gable* (Ill.) 15 L. R. A. 294; and *Valentine v. Healey* (N. Y.) 43 L. R. A. 667.

57 L. R. A.

the term, so as to be chargeable with another term's rent.

(March 5, 1902.)

APPEAL by defendant Barrows from a judgment of the Meriden City Court in favor of plaintiffs in an action brought to recover rent alleged to be due and unpaid. *Affirmed.*

Statement by **Prentice, J.**:

The finding contains the following statement of facts pertinent to the decision: "(1) Some time in the year 1899 C. N. Blake, then a retail shoe dealer, doing business in Meriden under the name of C. N. Blake & Co., and occupying the store hereinafter referred to, made an assignment for the benefit of his creditors. (2) H. D. Barrows, of New London, bought of the trustee the stock of goods located in the store in Byxbee block, owned by the plaintiffs, which had been formerly leased by Blake, including in said purchase the goodwill of Blake's business. (3) Barrows continued the business in the same store under the name of C. N. Blake & Co. up to the time of this controversy, under the personal supervision and management of the said Blake. (4) The moneys received from the business were deposited in bank by Blake in the name of C. N. Blake & Co., and checks were drawn thereon monthly to the order of the plaintiffs for \$83.33, but no special contract was made by Barrows as to the duration of such tenancy. (5) Such checks for rent were given and paid up to and including the month of December, 1900. (6) In November, 1900, Barrows, in person and through Blake, notified the plaintiffs that he intended to change his location, but that, as his new store might not be completed in time, he doubted if he could be entirely ready to make his change by the end of that month, and tried to bargain for the use of the store by the day during the early part of December. (7) The plaintiffs declined to make such an arrangement, and notified Barrows that, if he occupied the store for any time after the last day of November, they should hold him responsible for the rent for the entire month of December. (8) After this notice the tenancy continued as before during the month of December. (9) In the latter part of December it was agreed between the parties that when he should quit the store the tenant might for a short time leave the gas fixtures attached thereto, with the hope of disposing of them to any succeeding tenant. (10) About 6 o'clock in the afternoon of the last day of December, 1900, Blake, acting for Barrows, notified the plaintiffs that the goods were nearly out of the store, and that they would all be out that evening, and asked what he should do with the keys. (11) The plaintiffs replied that they did not care what he did with them, as they could not and would not accept them. (12) They had previously said that they thought they could hold him responsible for the rent for the balance of the year, which would end in April, and their contention on that point had its influence in

determining them to refuse to accept the keys. (13) Blake told the plaintiffs that he would like to retain the keys a few days, and occupy the store for the purpose of cleaning it up and leaving it in good order. To this the plaintiffs made no reply. (14) Blake did retain the keys, remained in possession, cleared out the rubbish, removed several articles used as trade fixtures, which had been taken down and left in the store, and finally offered the keys to the plaintiffs on January 5th. On January 7th he took down the sign from the store front, which bore the words 'C. N. Blake & Co.,' and had been there before and since the purchase by Barrows. (15) The plaintiffs did not accept the keys, and Blake placed them on a window seat in the room where he found one of the plaintiffs, and left them there. . . . (20) No stock of goods remained in the store after December 31st, and no regular shoe business was carried on therein by the defendants after that date.

Messrs. H. A. Hull and W. F. M. Rogers, for appellant Barrows:

The plaintiffs, by their conduct, waived any further attempt upon the part of the defendant to tender the keys. On the night of December 31st Barrows's connection with the premises ceased. The personal request of Blake, for reasons of his own, without authority from Barrows, to retain the keys to clean up the store shows that Barrows was not in possession in January, and characterizes the possession, even by Blake, as not that of a tenant, but of a licensee and for the benefit of the plaintiffs. Occupancy under such circumstances is not tenancy.

Lewis v. Havens, 40 Conn. 363; 18 Am. & Eng. Enc. Law, 2d ed. p. 406.

Mr. George A. Fay, for appellees:

The defendants were tenants from month to month, viz., the lease was by parol,—a monthly rent reserved and time of termination not agreed upon.

Corbett v. Cochrane, 67 Conn. 571, 35 Atl. 509.

Whether the person in possession is tenant at will, at sufferance, or claiming under them, the legal consequence is the same. The person once a tenant, so long as he remains in the occupation of the land demised, must be deemed to continue in that character unless he has surrendered the possession to his landlord.

Camp v. Camp, 5 Conn. 301, 13 Am. Dec. 60.

After the expiration of a lease for a year, if the tenant holds over the law considers him responsible to his landlord, as on a hiring for another year, upon the same terms as before.

Bacon v. Brown, 9 Conn. 338; *Lockwood v. Lockwood*, 22 Conn. 431; *King v. Woodruff*, 23 Conn. 56, 60 Am. Dec. 625.

And the tenant does hold over, unless he surrenders the leased premises to the landlord within the term.

Bacon v. Brown, 9 Conn. 336; *Redpath v. Roberts*, 3 Esp. 225; *Harland v. Brom-*

ley, 1 Starkie, 455; *Camp v. Camp*, 5 Conn. 291, 13 Am. Dec. 60.

Where a tenant is in possession under a lease for an indefinite term, or under a general permission to occupy, and pays a periodical rent, a periodical tenancy is thereby created, the length of the recurring periods of which is to be determined by the character of the payments.

18 Am. & Eng. Enc. Law, 2d ed. pp. 193-201; *Hollis v. Burns*, 100 Pa. 206, 45 Am. Rep. 379.

Notice by a tenant that he does not intend to occupy after expiration of the present term does not relieve him of his liability as a tenant holding over.

Smith v. Bell, 44 Minn. 524, 47 N. W. 263; *Conway v. Starkweather*, 1 Denio, 114; *Haynes v. Aldrich*, 133 N. Y. 290, 31 N. E. 94.

To constitute a termination there must be a voluntary surrender by lessee and acceptance by lessor, or an entry, *animo clamandi*, for the purpose of taking possession.

Holly v. Brown, 14 Conn. 270.

Prentice, J., delivered the opinion of the court:

Whatever construction is put upon the somewhat meager facts contained in the finding in determining the nature of the defendant's tenancy, the result is the same as to the effect of a holding over after the end of any month. If it be held, as the plaintiffs claim, that the facts, involving, as they do, the payment and acceptance for more than a year of a monthly rental, raise an implied agreement for a tenancy for monthly periods, with no fixed time of termination, the defendant would, by holding over beyond the end of any month, become liable for an additional month's rent. *Bacon v. Brown*, 9 Conn. 334; *Miller v. Lampson*, 66 Conn. 432, 34 Atl. 79; *Anderson v. Prindle*, 23 Wend. 616; *Steffens v. Earl*, 40 N. J. L. 137, 29 Am. Rep. 214; *Hollis v. Burns*, 100 Pa. 208, 45 Am. Rep. 379; *Brewer v. Knapp*, 1 Pick. 332; *Blumenberg v. Myres*, 32 Cal. 93, 91 Am. Dec. 560; 18 Am. & Eng. Enc. Law, p. 405. If, on the other hand, it be held, as the defendant contends, that there was during the month of December a tenancy under an express agreement for that month, the result would be the same. *Stoppelkamp v. Mangeot*, 42 Cal. 316; *Brewer v. Knapp*, 1 Pick. 332; *Coffin v. Lunt*, 2 Pick. 70; *Bright v. McQuat*, 40 Ind. 527; *Taylor, Land. & T.* § 57. These results would follow quite apart from the operation of § 2967 of the General Statutes, which, therefore, need not be considered.

The only question left for consideration is whether or not the court erred in ruling that upon the facts the defendant held over after December 31st, up to which time he paid the rent. We think that no other conclusion could have been consistently reached. During the late afternoon of December 31st, Blake, who was the defendant's manager, notified the plaintiffs that the defendant's goods were nearly out of the store, and that they would all be out that evening, and asked what he should do with the keys. The plaintiffs replied that they did

not care what he did with them, as they could not and would not accept them. Blake then said that he would like to keep the keys a few days, and occupy the store for the purpose of cleaning it up and leaving it in good order. To this statement no reply was made. The keys were kept. There was no attempt to deliver or tender them until five days later. Meantime, Blake remained in possession, cleaned out the rubbish, and removed some articles used as trade fixtures. This having been done, Blake on January 5th offered the keys to the plaintiffs, which were not received. On the 7th the firm's sign was taken down. Subsequent history does not concern the result. After December 31st no stock of goods remained in the store, and no regular business was there carried on by the defendant. These facts clearly establish (1) that actual possession of the store was withheld from the plaintiffs until January 5th; (2) that no attempt to make formal delivery of possession was ever in fact made before that date; (3) that the plaintiffs never did or said anything which would amount to a waiver of the actual vacation of the premises; (4) that the continued possession was the same in outward appearance after as before December 31st, to wit, a possession directed and controlled by Blake; (5) that the plaintiffs never consented to any occupancy without payment of rent; (6) that the plaintiffs never accepted any tenant in substitution for the defendant. The only one of these conclusions calling for discussion is the first, and this needs little. The court has found it as a fact. He has found that Blake was in possession. Although there was no stock of goods remaining, and no regular business done, the store, clearly, was not vacated. Possession thereof was not surrendered to the landlord, within the meaning of the law or the doctrine of any case known to us. *Thomas v. Frost*, 29 Mich. 336; *Haynes v. Aldrich*, 133 N. Y. 287, 31 N. E. 94. The situation was not one where the tenant had simply failed to remove a few articles. It was one where there continued to be upon the premises the actual bodily presence of an occupant who was not in through or under the plaintiffs. This occupant was none other than the defendant's manager. If it had been the defendant instead of Blake, and the defendant had been present throughout the events of December 31st and the following days, doing and saying what Blake did and said, there would be little plausibility to a claim that he had, either in fact or legal effect, vacated the premises. In saying this we place no stress upon the failure to deliver up the keys. Possibly it might be said that that formality had been waived. There certainly had been no waiver of removal. Until there had been such removal, the defendant was in no position to take advantage of any advance refusal to receive the keys or acknowledge a surrender. He was bound, as a condition precedent to the exercise of any claim of surrender, to vacate. As long as he occupied, there was no escape, without

the consent of the landlord, from a holding over. We therefore have no need to inquire what would have been the result if he had, under the circumstances, not occupied.

We are thus brought to the only remaining question,—as to the effect of Blake's acts and occupancy. Were they, in legal effect, the acts and occupancy of the defendant? This question admits of only an affirmative answer. Blake was, and from the beginning had been, the manager of the defendant's business as conducted in the store in question. The defendant, after his purchase of the business, nowhere personally appears in the finding. Blake invariably acts for him. Blake was the defendant's representative in the removal of the business, the vacation of the store, and its surrender to the landlord. He was the defendant's representative in the interview of December 31st. This the defendant concedes, since he desires to avail himself of the benefit of Blake's acts down to a certain point. Then, forsooth, it is contended that Blake suddenly appeared in a new role, and from the moment when he asked to retain the keys assumed the character of a person acting for himself, and no longer represented his principal. Why he should be anxious to personally undertake a duty with respect to the premises which would naturally devolve upon his principal, is not suggested. What there is in the finding to support the contention, we fail to discover. There is no statement to that effect. There can arise no implication to that effect, unless it arise from the fact that the court, in its narrative of the facts, after setting out Blake's managerial relations, failed in its recital of his acts and words to qualify them in each separate instance by words expressive of his agency. The narrative in the finding follows the natural course. After giving a part of the conversation between Blake and the plaintiffs, the former's next act is given. Only a most strained construction, and one which leads to most unnatural consequences, can give any color at all to this claim to which the exigencies of the defendant necessarily drive him. These considerations take no account of the unfairness to the plaintiffs of such a construction. Dealing with the defendant's manager in a matter of the defendant's business which he had long conducted, they were justified in regarding Blake as acting, as he in fact was, for the defendant, and as having full authority to act in the matter in hand. He cannot be heard to say that Blake's authority extended only to a certain point. The jugglery of a change of character to the plaintiffs' harm without a word of warning to them, or ground for suspicion on their part, cannot be permitted. Clearly, Blake, throughout the whole matter in controversy, was, in legal effect, the defendant himself. Such being the case, the judgment of the court below, which was for the rent of the store for the month of January, was, upon the finding, justified.

There is no error.

The other Judges concur

DELAWARE SUPREME COURT.

JOHNSON FORGE COMPANY, *Plff. in Err.*,
v.

John LEONARD *et al.*

(.....Del.....)

1. The question whether or not a letter by a purchaser of scrap iron to be paid for as each 100 tons was delivered, stating that he would not remit until he had enough of the balance of the contract in his hands to know that he would receive the amount purchased, and that as soon as he had two or three cars above the 100 tons he would remit, amounts to a repudiation of the contract justifying a rescission on the part of the seller, is for the court.
2. An intention to repudiate the contract by a buyer of scrap iron who is to pay for each 100 tons as delivered, justifying a rescission by the seller, is shown where, after receiving 100 tons, he insists on having two or three car loads more delivered before remitting for the 100 tons.

(January 21, 1902.)

ERROR to the Superior Court for Newcastle County to review a judgment in favor of plaintiffs in an action brought to recover the value of certain iron delivered by plaintiffs to defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. Benjamin Nields and John P. Nields, for plaintiff in error:

The payment for the first instalment was not a condition precedent to delivery of the second instalment.

Mersey Steel & I. Co. v. Naylor, L. R. 9 App. Cas. 439.

Defendant's conduct in failing to pay for the first instalment was not a breach going to the whole consideration.

Id. 446.

Defendant's conduct in this case in failing to pay for the first instalment as agreed did not evince an intention to repudiate the contract.

Freeth v. Burr, L. R. 9 C. P. 213.

Where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent.

Boone v. Eyre, 1 H. Bl. 273, note; *Franklin v. Miller*, 4 Ad. & El. 599; *Simpson v. Crippin*, L. R. 8 Q. B. Div. 14; *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27.

It is a question of fact for the determination of a jury whether the words and conduct of the defendant amounted to a repudiation of its contract, justifying rescission on the part of the plaintiffs.

NOTE.—As to right to rescind or abandon contract because of other party's default, see, in this series, *Lake Shore & M. S. R. Co. v. Richards* (Ill.) 30 L. R. A. 83, and note; *Worthington v. Gwin* (Ala.) 43 L. R. A. 382; *Buffalo & L. Land Co. v. Bellevue Land & Improv. Co.* (N. Y.) 51 L. R. A. 951; and *Reid v. Mix* (Kan.) 55 L. R. A. 708.

57 L. R. A.

Freeth v. Burr, L. R. 9 C. P. 208; *Mersey Steel & I. Co. v. Naylor*, L. R. 9 Q. B. Div. 648, L. R. 9 App. Cas. 434; *Franklin v. Miller*, 4 Ad. & El. 599; *Simpson v. Crippin*, L. R. 8 Q. B. 14; *West v. Bechtel*, 125 Mich. 144, 51 L. R. A. 791, 84 N. W. 69; *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27; *Winchester v. Newton*, 2 Allen, 492; *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. 692; *Midland R. Co. v. Ontario Rolling Mills*, 10 Ont. App. Rep. 677; *Sale of Goods Act*, § 31, subsec. 10; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203.

Mr. Charles M. Curtis, for defendants in error:

The purchaser of goods to be delivered in instalments, and to be paid for as delivered, cannot claim further deliveries under the contract without paying for the part which has been delivered, and therefore he cannot require the vendor to tender the balance without paying for the part which he has received.

Walton v. Black, 5 Houst. (Del.) 149; *Cresswell Ranch & Cattle Co. v. Martindale*, 11 C. C. A. 33, 27 U. S. App. 277, 63 Fed. 84; *Florence Min. Co. v. Brown*, 124 U. S. 385, 31 L. ed. 424, 8 Sup. Ct. Rep. 531; *Palmer v. Breen*, 34 Minn. 39, 24 N. W. 322; *Robson v. Bohn*, 27 Minn. 334, 7 N. W. 357; *Reybold v. Voorhees*, 30 Pa. 116; *Rugg v. Moore*, 110 Pa. 236, 1 Atl. 320; *Easton v. Jones*, 193 Pa. 147, 44 Atl. 264; *Kokomo Strawboard Co. v. Inman*, 134 N. Y. 92, 31 N. E. 248; *Raabe v. Squier*, 148 N. Y. 81, 42 N. E. 516; *Stocksdale v. Schuyler*, 29 N. Y. S. R. 380, 8 N. Y. Supp. 813; *George H. Hess Co. v. Dawson*, 140 Ill. 138, 36 N. E. 557; *Branch v. Palmer*, 65 Ga. 210; *Erwin v. Harris*, 87 Ga. 334, 13 S. E. 513; *Stokes v. Baars*, 18 Fla. 656; *McGrath v. Gegner*, 77 Md. 331, 26 Atl. 502; *Duinel v. Howard*, 30 Me. 258; *Fletcher v. Cole*, 23 Vt. 114; *Landeche v. Sarpy*, 37 La. Ann. 835; *Mersey Steel & I. Co. v. Naylor*, L. R. 9 App. Cas. 442.

Where the contract intends that there shall be performance in distinct parcels at different times a breach in respect of any instalment, at the option of the other side, relieves him from any further performance.

Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12.

Where there is a contract for sale of a quantity of goods at a stipulated price, deliverable in parcels, and payable as delivered, or payable in instalments when a certain proportion or quantity shall have been delivered, and the buyer not only refuses to pay for the goods so delivered, but bases his refusal on such grounds as justify the inference that he repudiates the entire contract, or imposes new terms different from the original agreement, the vendor is relieved from making any subsequent delivery of the goods.

Benjamin, Sales, 6th Am. ed. p. 568, 7th ed. p. 589; *Withers v. Reynolds*, 2 Barn. & Ad. 882; *Stephenson v. Cady*, 117 Mass. 6;

Rugg v. Moore, 110 Pa. 236, 1 Atl. 320;
Curtis v. Gibney, 59 Md. 131, 61 Md. 192.

The conduct of the plaintiff in error evinced an intention no longer to be bound by the contract.

Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12.

Boyce, J., delivered the opinion of the court:

The plaintiffs brought their action of indebitatus assumpsit for the recovery of the value of the scrap iron delivered to the defendant under the following contract:

New York, Feb. 25, 1899.

Sold to Johnson Forge Co., Wilmington, Del., for account of Messrs. Jno. Leonard & Co., about three hundred (300) tons number one wrought scrap iron, delivered f. o. b. cars at the works of the buyer, provided the cars can make a delivery at their works. Price, fourteen and one-half (14.50) dollars per ton of 2,240 lbs. Cash payable on receipt of each one hundred (100) tons.

George H. Jones, Broker.

Accepted March 1, 1899.

Counsel for the buyer admits that, between the time of the execution of the said contract and the 29th day of June following, there were shipped to and accepted by it four cars of said iron, aggregating 100 tons or more. The correspondence shows that during this period seven cars were shipped, and that three of them were rejected because of quality, and afterwards returned or taken away. He alleges that the sellers were caught in a rapidly rising market, and that because of this it was to their interest to get rid of the contract, while for the same reason the buyer was naturally desirous of holding the sellers to their contract. The record is silent as to the evidence upon this point. On the 28th of June the sellers wrote to the buyer, requesting "check for our account as per contract," and on the following date the buyer replied: ". . . In regards to remitting, we will not remit for this lot until we get enough of the balance of the contract in our hands to know that we will receive the amount we have purchased. We will therefore thank you to rush forward the whole contract with the class of iron that is now here, and which will be satisfactory; and, as soon as we have two or three cars over and above the 100 tons upon which payment is to be made, we will remit you check." On the next day the sellers wrote: ". . . We would say that that is not our agreement. If you will look over your contract, you will find that you are to remit on receiving each 100 tons, and we want the check immediately for the 100 tons of scrap iron shipped you. If not sent immediately, we will put the matter in the hands of our attorney for collection." And they did not subsequently make any other shipments, or offer to make any; nor does it appear that they again wrote to the buyer relative to the breach. The buyer, however, 57 L. R. A.

on July 11th following, wrote: ". . . We are therefore willing and ready to pay your bill if we have an assurance you will complete your contract. If you will, therefore, send us one or two car loads of same quality as the last, as soon as it is received we will send you check for what has been delivered. . . . We are much in want of the scrap purchased of you, and request you to complete your contract at once, and you will receive payment as was originally understood,"—and again, on August 9th, wrote: ". . . Unless you commence shipping on the above quantity by the 15th inst., we will go into the market and purchase the above quantity at the very lowest price we are able to get it at, and will charge any difference in the price to your account, over and above our contract with you." The sellers brought their said action on the 15th day of September following. Counsel for the buyer admitted the sellers' right of action for the 100 tons of iron delivered and accepted, but denied their right to rescind the contract, and, by way of recoupment, set up a counterclaim to an amount exceeding the demand of the sellers, for the failure of the latter to deliver the remaining 200 tons of iron sold. He also conceded that the right to counterclaim depends upon the existence of a subsisting contract, and that if there had been a repudiation, in fact, of the contract at bar, and by reason thereof the contract had been rescinded, then the right to counterclaim did not exist. He contended that the default made in the payment for the said 100 tons received and accepted was not a breach of a condition precedent, nor was it such a breach as that it affected the whole of the consideration, and that therefore the sellers were not discharged from deliveries yet remaining due from them. He also alleged that it was a question of fact for the determination of the jury whether the words and conduct of the buyer amounted to a repudiation of its contract, justifying rescission on the part of the sellers. The sellers (regarding the conduct of the buyer as a repudiation of the contract, justifying their rescission), by their counsel, denied the right of the buyer to set up its counterclaim, and insisted that the question of repudiation involved in the case, as well as the character of the evidence produced to establish it, were matters of law for the court.

The defendant requested the court below to charge "that if the jury shall believe from the evidence that the acts and conduct of the defendant as shown in this case did not evince an intention no longer to be bound by, or do not show an intention wholly to abandon, the contract of February 25th, then the defendant is entitled to recoup, by way of counterclaim to plaintiffs' demand, such damages as it suffered by reason of the plaintiffs' failure to deliver 199 tons and 1,780 pounds of said iron under said contract. . . ." The court, in their charge to the jury, *inter alia*, said: "We decline so to charge, for the reason that it would be submitting to the jury, as a ques-

tion of fact, that which has already been decided as a question of law by the court in its rulings upon the admissibility of evidence upon that point. We have seen no reason to change our view in this respect.

This [defendant's letter of June 29th] was a demand that the plaintiffs should put into the hands of the defendant two or three cars over the 100 tons, by way of pledge or guaranty for the performance of the contract, as a new condition for the payment already due thereunder, and was insisting upon new terms, different from the original agreement, which was 'Cash payable on receipt of each one hundred tons.' Under this admitted state of facts, the court held, as a matter of law, that the plaintiffs were relieved from further delivery by such a refusal, under the circumstances."

There are three assignments of error, based substantially upon that part of the charge which we have quoted, and they present two distinct questions for our determination: (1) Whether the act and conduct of the defendant amounted to a repudiation of the contract, justifying a rescission; (2) whether the determination of that question is one of fact for the jury.

Before proceeding to consider these questions, it may not be inappropriate to determine the nature and character of the contract before us, for one among the several reasons which may be assigned for the conflict in the decisions touching contracts of this sort is the difficulty at times in determining the question of the divisibility of the promise in the particular case. Whether the contract is entire or severable is frequently a matter of interpretation, depending on the intention of the parties, to be gathered from their acts, under all the facts and circumstances of the particular transaction. The contract in this case is clearly an illustration of a contract of sale which is entire on one side, and apportionable on the other; i. e., a contract for the sale and delivery of a specific quantity of scrap iron (about 300 tons), without doubt to be delivered within a reasonable time, in carload lots, to be paid for in equal instalments of 100 tons. *Mersey Steel & I. Co. v. Naylor*, L. R. 9 App. Cas. 434; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12. And it is a divisible contract, in the sense that an action may be maintained for the recovery of the value of each 100 tons of the iron, upon the delivery and acceptance thereof, if payment should be neglected or refused; for where the seller delivers an agreed portion, which the buyer accepts, and payment thereof becomes immediately due, the right to recover is at once complete. *Pope v. Porter*, 102 N. Y. 360, 7 N. E. 304. Hence the effect of such a breach as has been shown in this case, if nothing else, was to confer a right of action upon the sellers for the instalment delivered. But whether the injured party should bring his action upon the contract for part performance, where his right of action has become complete by reason of the divisible character of the contract, or for the value

of a benefit conferred upon the defaulting party, where the breach of the latter clearly operates as a discharge of the contract, the right of recovery is distinguishable; for in the first instance the remedy of the injured party is upon the contract, while in the latter his right to recover is founded upon a promise imposed by law. The action brought in this case is of the latter kind. In contracts of the nature of the one before us, it is, indeed, often quite difficult to determine whether or not a particular breach of one of the provisions or series of items therein by one of the parties in the course of performance discharges the injured party; but, in the absence of express stipulations to the contrary, it seems to be quite generally maintained, at least by the better considered cases, that a breach which only deprives the injured party of a benefit of one of these subsidiary provisions or promises will not, as a rule, relieve him from such further performance as may be due from him under the contract, and he is left to redress his injury by an action for compensation in damages.

We come now to consider specifically the questions raised by the errors assigned, and we will first consider, not whether the act and conduct of the buyer showed an intention no longer to be bound by the contract, but whether the question of intention, whatever it was, was a matter of evidence for the jury. While, under the facts and circumstances of the particular case, the intention to be gathered from the acts and conduct of the party in default may be a question of fact for the jury, yet in this case we are clearly of the opinion that the interpretation and effect of the said letter of June 29th were questions of law for the court. Whether the effect of said letter amounted to a repudiation of the contract, justifying a rescission on the part of the sellers, presents a question, in view of the conflicting decisions in both this country and England, which is, at best, unsettled. Very much of the difficulty which has led to the want of harmony in the decisions seems to be the natural result of the failure to adopt any uniform rule of construction with reference to the relation which the subsidiary promises contained in this class of contracts bear to each other, and the consequent effect of a breach of one of them upon the whole contract. Some of the cases seem to have regarded these stipulations as independent of each other, while others have treated them as conditional. Other decisions have regarded time of performance and payment according to stipulation (particularly the latter) as severally entering into the essence of the contract, and cases exactly alike in all material facts have been decided differently for these and other constructional reasons. We have quite carefully examined many of the leading cases upon this question, and we do not deem it necessary or useful, for the purpose of this case, to attempt to distinguish or reconcile them. Indeed, as was said by Lindley, L. J., in the court of appeals, in the case of *Mersey*

Steel & I. Co. v. Naylor, L. R. 9 Q. B. Div. 668, in referring to certain cases, each case may be understood by itself, but there is very considerable difficulty in reconciling them. There is conspicuous authority for the rule that a breach of contract of this sort which does not go to the entire consideration will not sustain a rescission. By this rule, compensation in damages for a breach less pronounced in its character is substituted for the remedy afforded by rescission. And this was the position assumed by the learned counsel for the plaintiff in error, which he urged upon the attention of the court with much learning and ability. It seems to us, the courts may often by the force of such a rule create for the parties to the particular contract another, differing essentially from that which was originally intended; and, besides, the effect of the adoption of such a rule must be to negative the wholesome stimulus to observe the several subsidiary promises contained in these contracts, which lies in the remedy of rescission. While it is quite impossible to lay down any absolute rule for guidance in all cases of this character, under the varying facts and circumstances of the particular case, yet, in our opinion, the rule that will best promote the important commercial interests involved in contracts of this nature, and one that will work out the most beneficial results in accordance with reason and justice, is that if a default by one party in making particular payments or deliveries, except in cases of neglect, omission, or inadvertence, is accompanied with an announcement of intention not to perform the contract upon the agreed terms, or if, in the language of the court below, the default is accompanied with a deliberate demand, "insisting upon new terms different from the original agreement," the other party may treat the contract as being at an end. Anson, Contr. *283; *Withers v. Reynolds*, 2 Barn. & Ad. 882; *Stephenson v. Cady*, 117 Mass. 6; *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27. We may further add that nonpayment or nondelivery will not of itself ordinarily be sufficient to warrant a rescission. Yet, under the particular facts and circumstances of the case such a default may be evidence of an intention no longer to be bound by the agreed terms of the contract.

It is our opinion that the fair and reasonable import and legal effect of the refusal to pay for the iron, for the recovery of the value of which this action has been brought, accompanied, as it was, with the announcement that, "in regards to remitting, we will not remit you for this lot until we get enough of the balance of the contract in our hands to know that we will receive the amount we have purchased," evinced an intention no longer to be bound by the terms of the contract. It is true that in said letter the buyer further said, "We will therefore thank you to rush forward the whole contract with the class of iron that is now here, and which will be satisfactory;" but in ordinary contracts of this nature the par-

ty defaulting in the manner and to the extent which we have laid down may not escape the penalty of his act of repudiation, which the right of rescission inflicts, by manifesting at the time of the default a desire to have the injured party continue the performance notwithstanding such default. The intention of repudiation, under such circumstances, if in fact it exists, is none the less manifest because, perchance, the party in default may urge a continuance of performance.

It may be added to what has already been said that the plaintiff in error greatly relied on the cases of *Mersey Steel & I. Co. v. Naylor*, L. R. 9 App. Cas. 434, L. R. 9 Q. B. Div. 648, and *Freeth v. Burr*, L. R. 9 C. P. 208; while the defendants in error, in a like manner, relied upon *Withers v. Reynolds*, 2 Barn. & Ad. 882.

The facts in *Mersey Steel & I. Co. v. Naylor* were: Defendants agreed to purchase from the Mersey Steel & Iron Company a large quantity of steel booms, to be delivered in monthly instalments; payment to be made within three days after receipt of shipping documents. When about half of first instalment had been delivered, but before payment became due, a petition was presented to wind up the company. Defendants, being mistakenly advised by their solicitor, wrote expressing a doubt whether they could safely make payment to the company pending the petition, and asked the company to obtain an order of the court to sanction their doing so. The company replied: "What will be the result of the petition, we cannot say. . . . We must ask you to be good enough to observe your part of the contract, by remitting us promptly." Replying to another letter of similar import from the defendants, the company said: "We shall therefore consider your refusal to pay for the goods already delivered as a breach of contract on your part, and as relieving us from any further obligations on our part." A few days thereafter a winding-up order was made, and defendants' solicitor wrote to the liquidator that the defendants claimed damages for nondelivery, and were prepared to accept and pay for all further deliveries without deducting damages,—payments to be carried to a separate account without prejudice to claim for damages,—and suggested that his clients might consent to accept delivery now, and waive the damages. The liquidator refused to make further deliveries, and commenced an action to recover the price of what had been delivered. The defendants set up a counterclaim for damages. Held, reversing the decision of Lord Coleridge, Ch. J., that the plaintiffs were not entitled to rescind, and were liable for damages for nondelivery. It was held in the House of Lords that the refusal to pay in that case was not such as to bring it at all within the principle of *Freeth v. Burr* and *Withers v. Reynolds*. Indeed, the postponement of payment, under the circumstances of the case, was not regarded as a refusal to pay, but only as a "demur or delay,"

under a misapprehension as to the legal effect of the proceedings for winding up the company, pending those proceedings. And from the opinions expressed in that case, and the dissimilarity of the facts in this case from that, we may safely conclude that the refusal to pay in the case at bar, coupled with the buyer's demand, contained in its said letter of June 29th, takes it out of the case of *Mersey Steel & I. Co. v. Naylor*. Inasmuch, therefore, as it is quite manifest that this case does not come within the authority of *Mersey Steel & I. Co. v. Naylor*, it becomes necessary to inquire whether it comes within the principle of *Freeth v. Burr* and *Withers v. Reynolds*, or either of them; both of these cases having been recognized and approved in that case.

The facts in *Freeth v. Burr* were: Plaintiffs agreed to buy of the defendant 250 tons of pig iron; half to be delivered in two, remainder in four, weeks; payment net cash fourteen days after delivery of each parcel. The delivery of the first parcel, of about 125 tons, was not completed for nearly six months, after repeated demands by plaintiffs. Upon the defendant asking for check under contract, the plaintiffs refused to pay, claiming a set-off, but urged the delivery of the balance of the iron. The defendant treated the refusal as an abandonment of the contract, and, declining to make further deliveries, brought an action against the plaintiffs. The latter subsequently paid for the iron delivered, and brought an action against the defendant for refusing to deliver the balance under the contract. Held, that the refusal to pay was not, under the circumstances, sufficient to warrant a rescission of the contract on the part of the defendant. The facts in *Withers v. Reynolds* were: R. agreed to supply W. with straw, to be delivered at the premises of W., at a price per load; each load to be paid for on delivery. R. shipped straw for some time, and, when he asked for payment therefor, W. tendered part only, retaining the price of the last load, and said he would always keep the price of one load in hand. The seller refused to make other deliveries. The buyer sued for nondelivery. Held, that the plaintiff could not recover; Lord Tenterden, Ch. J., saying: "The only question is whether, upon the plaintiff's saying, 'I will not pay for the goods on delivery' (for that was the effect of his communication to the defendant), it was incumbent on the defendant to go on supplying straw; and he clearly was not obliged to do so." There is no mistaking the fact that the principle laid down in *Freeth v. Burr*, and affirmed in *Mersey Steel & I. Co. v. Naylor*, was as stated by Lord Coleridge himself in delivering his judgment in the former case: "The true question is whether the acts and conduct of the parties evince an intention no longer to be bound by the contract." This is undoubtedly the true test by which to determine the effect of the acts and conduct of the parties, when they do not manifestly amount to an express refusal to perform the contract upon the

agreed terms; the substance of the test being, as was said by Lord Chancellor Selborne in *Mersey Steel & I. Co. v. Naylor*, that, "you must look at the actual circumstances of the case, in order to see whether the one party to the contract is relieved from its further performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation,—to an absolute refusal to perform the contract. . . . And in this view of the case, we fully concur with the principle therein enunciated. We have the opinion of Lord Coleridge, Ch. J., in that case, that 'in *Withers v. Reynolds* there was an express refusal by the plaintiff to perform the contract,' and he quotes Patteson, J., as saying: "If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw. But the plaintiff here expressly refuses to pay for the loads as delivered. The defendant therefore is not liable for ceasing to perform his part of the contract." He further adds: "Wightman, J., certainly, and Crompton, J., by inference, in *Jonasohn v. Young*, 4 Best & S., at page 299, both uphold that case upon the principle on which I rely. The principle to be applied in these cases is whether the nondelivery or the nonpayment amounts to an abandonment of the contract or refusal to perform it on the part of the person so making default." And Denman, J., in the same case, said: "I am of opinion, upon the authority of *Withers v. Reynolds*, that the ruling was quite right. That case did not decide expressly that a mere failure of a single payment might not be evidence of a refusal to perform the contract. But in the words of Patteson, J., the conduct of the plaintiff, coupled with the nonpayment, amounted to an express refusal to perform the contract on his part." And in an earlier part of the same case, referring to *Withers v. Reynolds*, he said: "There the plaintiff did acts and said things which amounted to a declaration on his part that he did not mean to perform the contract." This last statement applies fittingly to the conduct of the buyer in the case at bar, and quite clearly expresses the meaning and effect of said letter of June 29th. The principle of *Freeth v. Burr* is a correct statement of the law for guidance in determining the character of the refusal to perform, and its effect upon the contract, when the intention to be gathered from the acts and conduct of the party in default is not manifest; and *Withers v. Reynolds* correctly states the law where the refusal to perform is coupled with conduct which amounts to an express refusal to perform the contract upon the agreed terms. The two cases are not in conflict, as thus distinguished, and when carefully considered they must be so distinguished.

We are not unmindful of the fact that it has been contended that the admitted breach in this case was no more than a refusal to pay for a single instalment of 100 tons, and that it was, unlike that in *Withers v. Rey-*

nolds, not prospective in its character. In our opinion, it does not change the effect of the refusal, whether it operates prospectively or not, if in fact it is coupled with a declaration of intention, amounting to an express refusal, not to be bound by the agreed terms of the contract. The refusal to pay, accompanied with such an announcement, was the controlling element in *Withers v. Reynolds*, such as we regard it in this case. And lastly we may say that the buyer

has his remedy for compensation in damages for a default, as well as the seller; and, each enjoying this right on equal terms, neither may seek special advantage, to the detriment, perhaps, of the other, by deliberately imposing new terms upon the contract.

The court below rightly found, as conclusions of law, under the facts of this case, that the buyer repudiated the said contract, entitling the sellers to rescind it, and *the judgment below is affirmed.*

GEORGIA SUPREME COURT.

Mayor, etc., of AMERICUS *et al.*, *Pliffs. in Err.*,

v.
R. J. PERRY *et al.*

(114 Ga. 871.)

*1. Under an act entitled "An Act to Amend, Revise, and Consolidate the Several Acts Granting Corporate Authority to the City of Americus, to Confer Additional Powers upon the Mayor and City Council of Americus, to Extend the Corporate Limits of Said City, and for Other Purposes" it was competent for the general assembly to provide for a board of police commissioners which should have the exclusive control of the police officers of the city; and a provision in the act to this effect, and also naming the first members of the board, prescribing the manner in which their successors should be chosen, and setting forth their duties and powers, was not subject to the objection that it contained matter different from what was expressed in the title of the act.

2. There is nothing in the Constitution of this state which guarantees to the people living within the limits of a municipal corporation the absolute right of local self-government. How far people so situated may be allowed to participate in the choice of officers who are to administer the affairs of the local government is a matter exclusively within the judgment and discretion of the general assembly.

3. The general assembly may take from a municipal corporation its charter power respecting the police and their appointment, and may by statute provide for a permanent police for the corporation, under the control of a board of police not elected by the people of the municipality, nor appointed or elected by the corporate authorities, but consisting of commissioners appointed in such other manner as the general assembly may direct.

4. The power to appoint public officers is not purely an executive function, but this power may be exercised by the general assembly, when not otherwise provided in the Constitution, either by naming a given person for the office, or provid-

ing the manner in which the officer shall be chosen; and the general assembly also has authority to provide for the appointment of a number of officers to discharge a given duty, and provide that vacancies in such number may be filled by those remaining in office, thus creating a self-perpetuating body.

5. If the mayor and council of the city of Americus have, under the present charter, any authority whatever to appoint a police force, such authority cannot be exercised unless the board of police commissioners fall or refuse to provide the city with an efficient police.

6. A court of equity will, at the instance of citizens and taxpayers of a municipal corporation, enjoin the authorities in charge of the affairs of such corporation from carrying into effect an *ultra vires* ordinance providing for the election of certain public officers, for the reason that if such officers are elected they will have an apparent demand against the municipality for compensation, which will have to be resisted at the expense of the taxpayers, or illegally paid out of the funds of the corporation.

7. The foregoing disposes of all of the questions raised by the demurrer, the answer, or otherwise, which requires any discussion. There was no sufficient cause shown for not granting the injunction prayed for, and the judge properly granted the same.

(March 11, 1902.)

ERROR to the Superior Court for Sumter County to review a judgment in favor of plaintiffs in an action to enjoin the enforcement of an ordinance abolishing the board of police commissioners. *Affirmed.*

The facts are stated in the opinion.

Messrs. Allen Fort & Son, James Taylor, and E. A. Hawkins, for plaintiffs in error:

The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circumstances, and when necessary to the protection of the rights of property.

Mechem, Pub. Off. §§ 984, 992, 993; 2 High, Inj. §§ 1236, 1243, 1312-1314; *Re Sawyer*, 124 U. S. 200, 210, 31 L. ed. 402,

*Headnotes by COBB, J.

NOTE.—For earlier cases in this series as to interference by legislature with right of city to local self-government, see *State ex rel. Bulkeley v. Williams* (Conn.) 48 L. R. A. 465, and *note*; *Newport v. Horton* (R. I.) 50 L. R. A. 57 L. R. A.

A. 330, and *note*; *People ex rel. Rodgers v. Coler* (N. Y.) 52 L. R. A. 814; *O'Connor v. Fond du Lac* (Wis.) 53 L. R. A. 831; *Com. ex rel. Elkin v. Molr* (Pa.) 53 L. R. A. 837; and *Redell v. Moores* (Neb.) 55 L. R. A. 740.

405, 8 Sup. Ct. Rep. 482; *Green v. Hills*, 30 L. R. A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852; *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 437; *State ex rel. Law v. Saxon*, 30 Fla. 668, 18 L. R. A. 721, 12 So. 218; *Gaines v. Thompson*, 7 Wall. 347, 19 L. ed. 62; *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45, 8 L. R. A. 175, 24 N. E. 24; *Dill. Mun. Corp.* 2d ed. §§ 58, 59, 245, 396, 727-738; *Moore v. Smedley*, 6 Johns. Ch. 28; *Harrison v. New Orleans*, 33 La. Ann. 222, 39 Am. Rep. 272; *Poyer v. Des Plaines*, 123 Ill. 111, 13 N. E. 819; *McWhorter v. Pensacola & A. R. Co.* 24 Fla. 417, 2 L. R. A. 505, 5 So. 129; *State ex rel. Hardwick v. Sicearingen*, 12 Ga. 23; *Hamrick v. Rouse*, 17 Ga. 56; *Semmes v. Columbus*, 19 Ga. 471; *Wells v. Atlanta*, 43 Ga. 67; *Danicilly v. Cabaniss*, 52 Ga. 212; *Gault v. Walters*, 53 Ga. 675; *Americus v. Eldridge*, 64 Ga. 524, 37 Am. Rep. 89; *Athens v. Camak*, 75 Ga. 429; *Atlanta v. Holliday*, 966 Ga. 546, 23 S. E. 509; *Burckhardt v. Atlanta*, 103 Ga. 303, 30 S. E. 32; *Trust Co. v. State*, 109 Ga. 736, 48 L. R. A. 520, 35 S. E. 323; *Macon v. Hughes*, 110 Ga. 796, 36 S. E. 247; *Atlanta v. Stein*, 111 Ga. 789, 51 L. R. A. 335, 36 S. E. 932; *Macon Consol. Street R. Co. v. Macon*, 112 Ga. 784, 38 S. E. 60.

The legislative intent was to confer upon the mayor and city council of Americus the usual powers granted to like corporations. The power conferred upon said mayor and city council includes full police power, the right to appoint police, prescribe their powers, and define their duties, etc. The effort to confer such power upon the board of police commissioners failed.

Americus Bd. of Public Edu. v. Barlow, 49 Ga. 233.

Section 45 of the city charter is unconstitutional, because violative of Const. art. 1, § 1, ¶ 1, Code, § 5698: "All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people, and at all times amenable to them." And it deprives the people of the municipality and the mayor and city council of Americus of the right of local self-government, as is guaranteed to them by art. 2, § 5, ¶¶ 1 and 2, of the Constitution.

Ga. Code, §§ 5734, 5735; *Dill. Mun. Corp. §§ 9 et seq.*; *Evansville v. State ex rel. Blend*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175; *Jameson v. Denny*, 118 Ind. 382, 4 L. R. A. 79, 21 N. E. 252; *Speed v. Crawford*, 3 Met. (Ky.) 207; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202. See also *State ex rel. Bulkeley v. Williams*, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 421; *Newport v. Horton*, 22 R. I. 196, 50 L. R. A. 330, 47 Atl. 312.

Injunction will not lie in such cases. No property right is involved. 57 L. R. A.

2 High, Inj. 3d ed. §§ 1243, 1244 et seq.; *Harrison v. New Orleans*, 33 La. Ann. 222, 39 Am. Rep. 272.

Section 45 of the charter, creating a police commission appointed by the legislature, with power delegated to them to elect their successors without reference to the rights of the people, and disfranchising the people of Americus, both directly and indirectly, is unconstitutional and void. There is nothing in the title which suggests the creation of such a constituted police commission, and it is not germane to the matter set forth in the title, and said section contains more than one subject-matter.

Ga. Code, § 5771; *Huff v. Markham*, 70 Ga. 284; *Blair v. State*, 90 Ga. 326, 17 S. E. 96; *Dempsey v. State*, 94 Ga. 768, 22 S. E. 57; *Whitendale v. Dixon*, 70 Ga. 721; *Americus Bd. of Public Edu. v. Barlow*, 49 Ga. 232.

The legislature has no constitutional authority to appoint municipal officers with power to elect their own successors in perpetuity. The appointment of local officers of this character is not a legislative function. The legislature's office is to make laws, and they have no appointive power except that which was expressly delegated in the Constitution, which this is not.

Lafayette, M. & B. R. Co. v. Geiger, 34 Ind. 197; *Wayman v. Southard*, 10 Wheat. 46, 6 L. ed. 263; *Hawkins v. The Governor*, 1 Ark. 570, 33 Am. Dec. 346; *Brown, Const. Law*, 524; *Greenough v. Greenough*, 11 Pa. 480, 51 Am. Dec. 567.

The police board as constituted in § 45 is unconstitutional because said § 45 deprives the people of Americus of the inherent right of local self-government in denying to said people the right to choose, either directly or indirectly, the police commission, and in placing over them an absolute despotism in perpetuity without responsibility to the people, either directly or indirectly.

Ga. Const. art. 1, § 1, ¶ 1; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 285, 72 N. W. 639; *Atty. Gen. v. ex rel. Blend*, 118 Ind. 427, 4 L. R. A. 93, 21 N. E. 267; *State ex rel. Jameson v. Denny*, 118 Ind. 382, 4 L. R. A. 79, 21 N. E. 252; *People ex rel. Townsend v. Porter*, 90 N. Y. 68.

The right of local self-government is a right that is alienable. It inheres in a Republican government, and our Constitution was framed with reference to it.

Rathbone v. Wirth, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15; *State ex rel. House v. Des Moines*, 103 Iowa, 76, 39 L. R. A. 285, 72 N. W. 639; *Atty. Gen. v. Detroit*, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887; *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L. R. A. 65, 21 N. E. 274; *People ex rel. Wood v. Draper*, 15 N. Y. 532; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Park Comrs. v. Detroit*, 28 Mich.

228, 15 Am. Rep. 202; *State v. Constantine*, 42 Ohio St. 437, 51 Am. Rep. 833.

Police commissioners are local or civil officers. They and their appointees have only local jurisdiction, and the police elected are paid by the city, and not by the state, no compensation being paid to the commissioners. Being local officers they should be elected either by the people of the city or their representatives, the mayor and city council, and the legislature has no power to deny them this right.

Bradshaw v. Omaha, 1 Neb. 16; *State ex rel. Howo v. Des Moines*, 103 Iowa, 76, 39 L. R. A. 285, 72 N. W. 639; *Pope v. Phifer*, 3 Heisk. 682; *State ex rel. Chouteau v. Leffingwell*, 54 Mo. 458; *Cornell v. People ex rel. Walsh*, 107 Ill. 372; *Lovington v. Wider*, 53 Ill. 302.

This right of local self-government, as it has been briefly termed, is held to be an established feature and incident of our political system, and it is not within the power of the legislature of the state to permanently fill by appointment the local offices established by law for purely local purposes.

Mechem, Pub. Off. § 123; *Pom. Const. Law*, 9th ed. §§ 151 et seq.; *Von Holst*, *Const. Law*, p. 331; *Barbour*, *Rights of Persons & Property*, p. 99; 2 *Kent*, *Com.* p. 1; *Cooley*, *Const. Lim.* 5th ed. p. 225; 1 *Dill. Mun. Corp.* 3d ed. § 9; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202.

A law may be within the inhibition of the Constitution as well by implication as by expression, and where it is the court should declare it unconstitutional.

Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Flint River S. B. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; *Boston v. Cummins*, 16 Ga. 102, 60 Am. Dec. 717; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77; *Parker v. Com.* 6 Pa. 511, 47 Am. Dec. 490; *State v. Constantine*, 42 Ohio St. 437, 51 Am. Rep. 833; *Maynard v. First Representative Dist.* 84 Mich. 228, 11 L. R. A. 332, 47 N. W. 756; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *West Point Water Power & Land Improv. Co. v. State ex rel. Moodie*, 49 Neb. 218, 66 N. W. 6.

The act in question is unreasonable, destructive of the inherent right of local self-government, is contrary to natural justice and equity, and is therefore unconstitutional and void, and should be so declared.

Pumpelly v. Owego, 45 How. Pr. 246; *Bradshaw v. Rodgers*, 20 Johns. 103; *Atkins v. Randolph*, 31 Vt. 238; *Louisville v. University of Louisville*, 15 B. Mon. 642; 2 *Kent*, *Com.* 275.

Messrs. J. H. Lumpkin, Lane & Maynard, W. F. Wallis, and Blalock & Cobb for defendants in error.
57 L. R. A.

Cobb, J., delivered the opinion of the court:

This was an application by Perry and others, as chairman and members of the board of police commissioners of the city of Americus, and as citizens and taxpayers of that city, on behalf of themselves and other citizens and taxpayers, to enjoin the mayor and council of the city of Americus, and Felder and others, the mayor, aldermen, and marshal of that city, from carrying into effect certain ordinances adopted by the mayor and council, which, if valid, had the effect of abolishing the board of police commissioners and the office of chief of police. The mayor and council, and the mayor and marshal individually, by demurrer and answer, showed for cause various reasons against the granting of the injunction. Three of the members of the council, being a minority of that body, filed an answer, which, in substance, set forth that they were opposed to the action of the council as set forth in the ordinances referred to in the petition; that they had never indorsed or acquiesced therein, and were not responsible for any attempt to put the same into execution. At the hearing the injunction prayed for was granted, and this judgment is assigned as error.

1. On November 11, 1889, an act was approved which had the following title: "An Act Entitled an Act to Amend, Revise, and Consolidate the Several Acts Granting Corporate Authority to the City of Americus; to Confer Additional Powers upon the Mayor and City Council of Americus; to Extend the Corporate Limits of Said City, and for Other Purposes." Acts 1889, p. 961; *Americus City Code* (1900) p. 2. The 45th section of this act provided, in substance, that there should be a board of police commissioners for the city of Americus, consisting of five named persons, two to hold office for six years, two for four years, and the last one named for two years; that at a meeting of such board in December, 1891, and each succeeding two years thereafter, those members of the board of commissioners then in office should elect a commissioner or commissioners to succeed those whose term or terms would then expire. The board was given power to fill vacancies in the same. Each member of the board was required to take an oath, which was set forth. The act then provided that "the board of commissioners thus elected and qualified shall have the exclusive power, and it shall be their duty, to appoint a chief of police and such other police officers and policemen as are, or may be, prescribed by city ordinance." The manner in which the board should conduct its business, and the method of keeping a record of its proceedings, were then set forth. It is declared that the police force of the city should consist of a chief of police, and such other officers and men as the city council shall by ordinance prescribe. The time when such police officers should be chosen, and the manner in which they should be qualified, and certain duties incumbent upon them, are set forth; and

the section authorizes the board of police commissioners to impose upon them such other duties as they shall see proper. The compensation of the policemen is to be such as shall be prescribed by ordinance, which shall not be increased or diminished during their terms of office; and the board of police commissioners is authorized to suspend or remove from office the officers and policemen elected by it, and in case of suspension the board is authorized to appoint officers to hold during the time that any officer is suspended. It is contended that this section of the city charter is void, for the reason that it contains matter different from what is expressed in the title of the act. We do not think the section is subject to this objection. The general purpose of the act, as indicated in the title, is to prescribe the conditions upon which the people of the city of Americus may be allowed, within the limits of that municipality, to exercise the powers of government. It is in effect, though not in words, an act to create a new charter for the city of Americus. Any matter relating to the subject of the local government to be authorized for the city of Americus is germane to the general purpose of the act as indicated in the title. Under this title the general assembly could confer upon the city authorities any power that the Constitution does not prohibit it from conferring upon a municipal corporation; it could also expressly refuse to confer powers which might have been exercised in the past by other municipal corporations, and could withdraw from the city authorities of Americus any power formerly exercised by them under the provisions of any charter previously granted. It is hard to conceive of a title which would be broader, so far as the affairs of a municipal corporation are concerned, than the title of the act under consideration. If the title had been, "An Act to Incorporate the City of Americus, and for Other Purposes," broad as such a title would be, it would hardly be broader than the one under consideration; and, as said above, the title is, in effect, one indicating a purpose to create a new charter for the city. It is said, however, that the title indicates that the purpose of the general assembly was to confer additional powers upon the city of Americus, and that the 45th section of the act really withdraws power formerly lodged with the corporate authorities. If the title did not have in it the words "for other purposes," there might be some plausibility, at least, in this contention; but the presence of the words just referred to, under the well-settled rule in this state, permits the general assembly to incorporate in the act legislation on any matter which is within the general purview of the act as indicated by the language of the title, although not referred to expressly therein. The general purview of the act under consideration is to amend, revise, and consolidate the several acts granting corporate authority to the city of Americus; and, under the right to amend and revise, the general assembly could take away any au-

thority which had been formerly conferred upon the authorities of the city. See, in this connection, *Macon v. Hughes*, 110 Ga. 795, 36 S. E. 247; *Welborne v. State*, 114 Ga. 793 (5), 40 S. E. 857.

2. It is contended that the section of the city charter above referred to is invalid for the reason that the general assembly had no authority to appoint municipal officers, and that the exercise of the right by the legislature in this instance deprived the citizens of Americus of local self-government. The sections of the Constitution relied upon as granting the right of local self-government are the following clauses in the Bill of Rights: "All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people, and at all times amenable to them." Civil Code, § 5698. "The people of this state have the inherent, sole and exclusive right of regulating their internal government, and the police thereof, and of altering and abolishing their Constitution whenever it may be necessary for their safety and happiness." Civil Code, § 5734. "The enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed." Civil Code, § 5735. The propriety of creating municipal corporations, what powers shall be conferred upon them when created, the manner in which such powers shall be exercised, and the officers through whom the functions of government in such corporation shall be exercised, are all questions left by the Constitution, with few limitations and restrictions, to the wisdom and discretion of the general assembly. There is nothing in the Constitution restricting the authority of the general assembly in reference to naming the number and prescribing the authority and mode of appointment of the officers who shall administer the affairs of a municipal corporation created by it. All of these matters are left absolutely to its judgment. Whether the affairs of a municipal government shall be lodged in officers elected by the people of the municipality, or by officers appointed by the governor, or appointed or otherwise chosen by the general assembly, either by election, or by naming them in the act creating the municipal corporation, is a matter left to be determined by the general assembly in each instance according to the particular needs and peculiar conditions of the locality declared to be a municipal corporation. See, in this connection, *Churchill v. Walker*, 68 Ga. 681. The general assembly may, if it sees proper, intrust a portion of the powers of a municipal government to officers elected by the people of the municipality, and provide that other powers of government shall be exercised by officers named by the general assembly in the act providing for the exercise of such powers. See, in this connection, *Americus Bd. of Public Edu. v. Barlow*, 49 Ga. 232, in which the act of 1873 (Acts 1873, p. 109).

which named certain persons to constitute the board of education of the city of Americus, was held to be valid. There is nothing in the provisions of the Constitution above quoted, nor in any part of the Constitution, which in express terms prohibits the general assembly from either naming the officers who are to have the control of the affairs of a municipal corporation, or from prescribing the manner in which such officers are to be appointed; nor is there anything requiring that all or a portion of such officers shall be elected by the people of the municipality, and chosen in no other way. Neither is there anything in the Constitution, when construed as a whole, which by implication would deprive the general assembly of the right to deal with the matter of the appointment of the officers of a municipality in any manner that it deems best for the interest of the locality incorporated. There is not in the Constitution of this state any express guaranty of local self-government for municipal corporations. There is nothing in the Constitution from which this right can be legitimately inferred. How far a community shall be allowed to control its own affairs is left to the judgment and discretion of the general assembly. The fact that municipal corporations, prior to the adoption of the Constitution of 1877, were given the right and were exercising the right to control their own affairs through officers chosen by them, would not prevent the general assembly from taking away this right; there being nothing in the Constitution which imperatively requires it to be construed as guaranteeing that this right of local self-government for municipal corporations shall exist absolutely in all cases. The right of the people of a municipal corporation to control its affairs is not an inherent right residing in the people, but is a right dependent for its existence upon legislative will, and how far they shall be given this right is a matter addressed solely to legislative discretion. See, in this connection, *Diamond v. Cain*, 21 La. Ann. 309; *State ex rel. Atwood v. Hunter*, 38 Kan. 578, 17 Pac. 177; *State ex rel. Atty. Gen. v. Covington*, 29 Ohio St. 102; *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 142, 19 N. E. 224; *Baltimore v. State ex rel. Bd. of Police*, 15 Md. 376, 74 Am. Dec. 572. We are aware that other courts of respectable standing have taken an entirely different view of this matter, and in some instances have held that the right of local self-government is an inherent right in the people of a municipality, and that the legislature cannot, in the absence of express authority in the Constitution, take away or impair this right in any material or substantial respect. See *Evansville v. State ex rel. Blend*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267, and cases cited; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15, and cases cited; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 78 N. W. 175, and cases cited; *State ex rel. Jameson v. Denny*, 118 Ind. 382, 4 L. R. A. 79, 21 N. E. 252. In some of the 57 L. R. A.

cases just referred to the ruling is based upon provisions in constitutions which expressly prohibit the legislature from interfering in the matter of the appointment of officers for municipal corporations; in others, language somewhat similar to the clause of our Constitution last above quoted is construed into a guaranty that the people of a municipal corporation should be permitted to exercise the same powers of local self-government which they were exercising at the time the Constitution was adopted; and in other cases, where there was nothing in the Constitution in relation to the subject, it was held that the right of local self-government was an inherent right, under American institutions, and that the right of the legislature to take it away would not be presumed unless there was in the Constitution a provision expressly authorizing the legislature to do so. We think the better view of this matter is that taken by Mitchell, J., in the dissenting opinion in the case of *State ex rel. Jameson v. Denny*, 118 Ind. 382, 4 L. R. A. 79, 21 N. E. 252, in the course of which he uses the following language: "The error which lies at the root of the argument by which the unconstitutionality of the acts here in question is attempted to be maintained, springs out of the fallacious assumption that the people of a city or town have any interest or inherent right whatever to municipal government, while every atom and vestige of right in those respects, under our system, are such, and only such, as the legislature confers. Upon this baseless assumption, which obliterates and confounds all distinctions between municipal regulation, a creation of legislation, and county and township government, which existed before legislatures were, and which is and always was common to every community in the state, the whole fabric of argument adverse to the constitutionality of these acts is built."

3. While the general assembly has authority to directly control the affairs of a municipal corporation, the legislative policy of this state has always been in favor of committing to local officers chosen by the people of the various municipalities all such powers of government as are in their nature purely local, and in the exercise of which persons residing at other places in the state are not directly, but only remotely, concerned. But there are some matters in connection with the management of a municipality in which the entire people of the state are more or less directly interested; and especially is this true in reference to any matter relating to the administration of public justice, and the preservation of the public tranquility, peace, and order. It has therefore not been unusual or uncommon for the general assembly either to take within its own control the administration of such affairs, through the medium of officers selected in other ways than by the voice of the people of the municipality, or to place such restrictions around the manner in which officers in charge of these affairs shall be chosen that the public peace and

good order will be subserved, although to some extent withdrawing from the people of the municipality the right to directly choose such officers. In *State ex rel. Atwood v. Hunter*, 38 Kan. 578, 17 Pac. 177, Johnston, J., says: "Whatever may be said regarding the policy of placing the police administration of cities in a board of police commissioners, who are chosen by state officers, rather than through the electors of the cities, there can be no doubt that the legislature has the power to do so. The Constitution imposes no limitations upon the legislature in respect to the agencies through which the police power of the state shall be exercised. It may be conferred upon the officers of local municipalities chosen by the people resident therein, or, if deemed expedient, it may be vested in officers or persons otherwise selected. Cities are but agencies of the state, created to aid in the conduct of public affairs. The functions of cities and their officers are prescribed by the legislature, and it rests in the sovereign discretion of that body to say how much of the police power shall be exerted by the municipality. Although such power is usually exercised by the local authorities, police administration is not in its nature exclusively local. The people of the whole state are interested in preserving peace and good order and preventing crime in every city and district of the state, and in protecting the property, health, and lives of all its citizens." Judge Dillon, in his work on *Municipal Corporations*, 4th ed. § 58, says: "The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern." And in § 60 the author says: "And it has been several times determined that the legislature may, unless specially restricted in the Constitution, take from a municipal corporation its charter powers respecting the police and their appointment, and by statute itself directly provide for a permanent police for the corporation, under the control of a board of police not appointed or elected by the corporate authorities, but consisting of commissioners named and appointed by the legislature. Police officers are in fact state or public officers, and not private or corporate officers."

4. It is contended that the general assembly had no right to appoint the police commissioners by naming them in the act, and that, if it had a right to so appoint them, it had no right to provide that the commissioners thus named should have the power to fill vacancies in their own number; thus making the board a self-perpetuating body. It is insisted that the power of appointment to office is an executive power, and not legislative, and that under our Constitution (Civ. Code, § 5720), which provides that the legislative, executive, and judicial departments of the government shall forever remain separate and distinct, and no person discharging the duties of one shall at the same time exercise the functions of the others, except as provided in the Constitu-

tion, the general assembly has no power to appoint officers for a municipal corporation; that power not being expressly given by the Constitution. While the Constitution declares that the three departments of government shall be separate and distinct, this separation is not, and from the nature of things, cannot, be total. See *Beall v. Beall*, 8 Ga. 212 (19). While the power to appoint public officers is in a great many instances lodged in some officer of the executive department, this is not now, and never has been, true in reference to all public officers. The history of this state will show that public officers have been chosen by the general assembly and also have been chosen by various judicial officers of the state. This court has, and always has had, the power to appoint its own officers, and a similar power is vested in the judges of many inferior tribunals. There is nothing in the legislative or judicial history of this state which would indicate that the power of appointment to office was to be treated as purely executive in its nature. An examination of the acts passed by the general assembly from the earliest history of the state down to the present time will show that in many instances the power to appoint officers has never been vested exclusively in the executive department, but has been from time to time vested in the judicial department, and has been exercised, directly or indirectly, by the legislative department; and there are many instances of legislation where powers apparently belonging to one department have been held properly exercisable by another department, for the reason, as stated in *Beall v. Beall*, that the separation of the three departments cannot, from the nature of things, be total. See, in this connection, *Wilson v. State*, 69 Ga. 224; *Johnson v. Jackson*, 99 Ga. 389, 27 S. E. 734; *Bowen v. Clifton*, 105 Ga. 459, 31 S. E. 147; *Phinizy v. Eve*, 108 Ga. 360, 33 S. E. 1007; *Baltimore v. State ex rel. Bd. of Police*, 15 Md. 376, 74 Am. Dec. 572; *Americus Bd. of Public Edu. v. Barlow*, 49 Ga. 232. If the general assembly may exercise the power to appoint an officer by providing the manner in which such officer shall be chosen, we see no good reason why it cannot exercise this power directly, by naming the officer in the act creating the office. The power to create the office and the power to provide for the filling of the office by appointment carry with them, not only the authority to name the person who shall be the officer, but also the power to provide how his successor shall be appointed; and the method of the selection of a successor to an officer whose duties are connected with the administration of the affairs of a municipal government is, like all other matters in relation to the affairs of such corporation, entirely within the control of the general assembly. If, in their judgment, in a particular case, the persons named by them as officers in charge of a particular duty are proper persons to be intrusted with the choice of their own successors, there is nothing in the Constitution of this state to pre-

vent the general assembly from so providing, although so doing has the effect of making the board of municipal officers thus created a self-perpetuating body. Whether this is wise or proper or expedient is to be determined by the general assembly according to the circumstances of each case. It is a matter with which the courts have no concern, and in which they cannot interfere.

5. It is said that, even if § 45 of the charter is a valid provision of law, still, under § 43, the mayor and council have authority to appoint a police force to assist the marshal in the discharge of his duties. *Americus City Code* (1900) pp. 17, 18, § 43, confers upon the mayor and council the usual corporate powers in reference to streets, sidewalks, drains, etc.; the power to regulate markets, to abate nuisances, to regulate the keeping of gunpowder and other combustibles, to provide places for the burial of the dead, to provide and regulate a city market, to make regulations in reference to danger or damage by fire, to protect the property and persons of the citizens, and to preserve peace and good order in the city. The section then provides that the authorities have power "for this purpose to appoint when necessary a police force to assist the marshal in the discharge of his duty; to prescribe the powers and define the duties of the officers appointed by the mayor and council of *Americus*, to fix their terms of office and compensation," etc. If the charter had not contained § 45, in reference to the board of police commissioners, the language of § 43 might be sufficient to give the mayor and council absolute control in regard to the matter of police; but the two provisions of the charter are to be construed together, and as, under § 45, the board of police commissioners is given exclusive control of the matter of police, the power of the mayor and council in reference to the police, if it exists at all under § 43, is subordinate to the authority of the board of police commissioners; and, so long as the board discharges the duties imposed upon it by the statute and proper ordinances of the city, the mayor and council have no control whatever over the police of the city under the provisions of § 43, for the simple reason that the right to exercise any authority under that section is conferred only whenever it becomes necessary, and the necessity for the exercise of this power can never arise so long as the board of police commissioners is discharging its duties, and the mayor and council are providing moneys which are necessary for such board to efficiently discharge the duties imposed upon it by law. Taking the charter as a whole, it was the intention and purpose, and evidently in the contemplation, of the general assembly, that the mayor and council and the board of police commissioners should co-operate with each other in a common purpose to preserve the peace and good order of the city by providing an efficient police force; and it was never for a moment contemplated that the limited authority given to the mayor and council in reference to the police force should ever be

used to obstruct the board of police commissioners in the discharge of its duty,—much less, to abrogate entirely the authority of that board. The mayor and council have a right, under the charter, to provide a police force for the city to assist the marshal whenever the necessity arises, but the mayor and council must not themselves bring about this necessity. The necessity for their action must arise from the fact that for some reason, independent of the action of the mayor and council, a condition of affairs has arisen where the board of police commissioners has failed or refused to discharge the duties imposed upon it, or a peculiar condition of affairs has arisen, where for the time being and temporarily the police force selected by the board of police commissioners is not adequate for the preservation of peace and order in the community. The charter does not contemplate that the mayor and council shall ever take such action as will render inefficient that department of the municipal government represented by the board of police commissioners. The mayor and council can exercise no power under § 43 of the charter except in that extreme case, that might, but probably will never, arise, where, after the mayor and council have done all that the charter requires in reference to the police and their compensation, the board of police commissioners fails or refuses to discharge the duties incumbent upon it. A cordial co-operation between the mayor and council and the board of police commissioners can have but one result, and that is an efficient police force in the city of *Americus*, and such co-operation and such a result were intended to be accomplished by the charter provisions. It was never for one moment contemplated by the general assembly that the mayor and council should impede or obstruct the board of police commissioners in the proper discharge of their duties, nor that, under the provisions of § 43 of the charter, the mayor and council should repeal § 45; and this is really what is attempted by the ordinances under review in this case.

6. It is said though that even if it be conceded that the action of the mayor and council is illegal, and they had no authority to pass the ordinances, a court of equity will not interfere in the matter, for the simple reason that the only question arising is as to who would be the lawful police officers of the city, and this is a matter that can be settled by a court of law by quo warranto or other legal proceeding. While equity will not enjoin the action of a municipal corporation while proceeding within the limits of its well-defined powers, it has jurisdiction to restrain acts in excess of this authority, and to enjoin acts which are *ultra vires*. The petition charges that the mayor and council have passed ordinances which, in effect, abolish the board of police commissioners altogether, and have by ordinance provided for a complete police force, headed by the marshal of the city, and that they are attempting to carry these ordinances into execution, and have up to the present time so far carried them into execution as that the

mayer has refused, and still refuses, to recognize the chief of police elected by the board of police commissioners as a police officer of the city. The ordinances, so far as they attempt to abolish the board of police commissioners, and to deprive it of the powers which the charter conferred upon it, are *ultra vires* and void; and there is nothing in the petition to show that the board of police commissioners is either failing or refusing to exercise the powers confided to it by the general assembly. On the other hand, it appears, not only from the answer, but from the petition itself, that the board is attempting to exercise those very powers, and would exercise them but for the obstructions placed in its way by the mayor and council. Under such circumstances, the mayor and council have no authority whatever to elect a police force, and the election of such officers would bring about the question as to whether the persons so elected were entitled to demand compensation from the city; and while, under the view we have taken of the case, such persons would have no right to receive compensation, the fact that they were elected and were attempting to discharge the duties of the offices for which they were chosen would result either in the money in the city treasury being illegally used in paying their claims, or in requiring the money of the municipality to be used in defeating their claims for compensation; and, to prevent this, any tax-

payer would have a right to appeal to a court of equity to enjoin the mayor and council from proceeding further to do any act which would have the effect to bring about either result. The plaintiffs bring their petition, not only as members of the board of police commissioners, but also in their capacity of citizens and taxpayers, and in this latter capacity they are entitled to be heard; the case made being one where the municipal authorities are going beyond their powers, and doing acts which, if carried into effect, would either result in a misappropriation of public funds, or entail upon the taxpayers of the city the expense of litigating with persons who might hold claims against the city under the invalid ordinances. See, in this connection, *Macon v. Hughes*, 110 Ga. 804, 36 S. E. 247, and cases cited; *Mitchell v. Lasseter*, 114 Ga. 275, 40 S. E. 287, and cases cited; 2 High, Inj. 3d ed. §§ 1236, 1241, 1243.

7. There are other questions raised by the demurrer and answer, but the above, we think, disposes of all such as are of a character which require discussion. No sufficient cause was shown, either by the demurrer or answer, why the injunction prayed for should not be granted, and the court did not err in granting the same.

Judgment affirmed.

All the Justices concurred, except Little, J., absent on account of sickness.

ILLINOIS SUPREME COURT.

Eliza J. ALDRICH, *Appt.*,

v.

METROPOLITAN WEST SIDE ELEVATED RAILROAD COMPANY.

(195 Ill. 456.)

The owner of an apartment house cannot recover damages from an electric elevated railroad company whose tracks cross the highway within 19 feet of his property where the injury differs from that suffered by the general public only in the proximity of the tracks even under a constitutional provision that private property shall not be damaged for public use without compensation.

(February 21, 1902.)

NOTE.—For other cases in this series as to damages for construction of elevated railroad in street, see *Newman v. Metropolitan Elev. R. Co.* (N. Y.) 7 L. R. A. 289; *Tallman v. Metropolitan Elev. R. Co.* (N. Y.) 8 L. R. A. 173, and note; *Kane v. New York Elev. R. Co.* (N. Y.) 11 L. R. A. 640; *Abendroth v. Manhattan R. Co.* (N. Y.) 11 L. R. A. 634, and note as to servitude of light and air; *Pappenheim v. Metropolitan Elev. R. Co.* (N. Y.) 13 L. R. A. 401; *Moore v. New York Elev. R. Co.* (N. Y.) 14 L. R. A. 731; *Somers v. Metropolitan Elev. R. Co.* (N. Y.) 14 L. R. A. 344; *Sperb v. Metropolitan Elev. R. Co.* (N. Y.) 20 L. R. A. 752, with note as to damages in lieu of injunction; and *Doane v. Lake Street Elev. R. Co.* (Ill.) 36 L. R. A. 97.
57 L. R. A.

A PPEAL by plaintiff from a judgment of the Circuit Court for Cook County in defendant's favor in an action brought to recover damages for injury to plaintiff's property which was alleged to have resulted from the construction and operation of defendant's road. *Affirmed.*

The facts are stated in the opinion.

Mr. Albert E. Dacy, with *Messrs. Pam, Calhoun, & Glennon* and Edwin B. Harts, for appellant:

For consequential damage resulting from the construction and operation of a railroad, which depreciates the value of property, no part of which has been taken under the power of eminent domain, and which is peculiar to it and different and in excess of that sustained by the public, a recovery can

As to right to construct elevated railroad in street, see *Koch v. North Ave. R. Co.* (Md.) 15 L. R. A. 377, and note; *Freiday v. Sioux City Rapid Transit Co.* (Iowa) 26 L. R. A. 246; and *Doane v. Lake Street Elev. R. Co.* (Ill.) 36 L. R. A. 97.

For elevated structures destroying street uses by abutting owners generally, see, in this series, *Selden v. Jacksonville* (Fla.) 14 L. R. A. 370; note to *Egerer v. New York C. & H. R. R. Co.* (N. Y.) 14 L. R. A. 381; *Spencer v. Metropolitan Street R. Co.* (Mo.) 22 L. R. A. 668; *Garrett v. Lake Roland Elev. R. Co.* (Md.) 24 L. R. A. 596; and *Pueblo v. Straut* (Colo.) 24 L. R. A. 392.

be had under the Constitution of 1870, even if there is no physical interference with the corpus; and all past, present, and future damages caused by the lawful operation of the road must be assessed in one proceeding.

Rigney v. Chicago, 102 Ill. 64; *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460; *Lake Erie & W. R. Co. v. Scott*, 132 Ill. 429, 8 L. R. A. 330, 24 N. E. 78; *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 31 N. E. 138; *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 226, 35 N. E. 750; *Chicago, P. & St. L. R. Co. v. Leah*, 152 Ill. 249, 38 N. E. 556; *Chicago Office Bldg. v. Lake Street Elev. R. Co.* 87 Ill. App. 594.

In an action brought by a property owner against a railroad company to recover damages for depreciating the market value of his property caused by the construction and operation of a railroad, the measure of damages, under the Constitution of 1870, is the difference in value of the property before and after the acts complained of, and if there is no difference he has sustained no damage for which he can expect compensation.

Dupuis v. Chicago & N. W. R. Co. 115 Ill. 97, 3 N. E. 720; *Metropolitan West Side Elev. R. Co. v. Stickney*, 150 Ill. 362, 26 L. R. A. 773, 37 N. E. 1098; *Chicago, P. & M. R. Co. v. Atterbury*, 156 Ill. 281, 40 N. E. 826; *Braun v. Metropolitan West Side Elev. R. Co.* 166 Ill. 434, 46 N. E. 974; *Metropolitan West Side Elev. R. Co. v. Springer*, 171 Ill. 170, 49 N. E. 416; *Cleveland, C. C. & St. L. R. Co. v. Pattison*, 67 Ill. App. 351.

Evidence of any interference with an abutting property owner's easements of light and air in a street is admissible in a suit of this character to aid the jury in determining whether or not the market value of the property has been depreciated by the construction and operation of the railroad.

Lewis, Em. Dom. 2d ed. pp. 170, 252; *Chicago Office Bldg. v. Lake Street Elev. R. Co.* 87 Ill. App. 594; *Lake Street Elev. R. Co. v. Brooke*, 90 Ill. App. 173; *Field v. Barling*, 149 Ill. 565, 24 L. R. A. 406, 37 N. E. 850; *Barrows v. Sycamore*, 150 Ill. 588, 25 L. R. A. 535, 37 N. E. 1096; *Metropolitan West Side Elev. R. Co. v. Springer*, 171 Ill. 170, 49 N. E. 416; *Kotz v. Illinois C. R. Co.* 188 Ill. 578, 59 N. E. 240.

Closely connected with the easement of light and air which an abutting property owner has in the street, is the right to an unobstructed view therein. Evidence of any interference with this right, caused by the construction and operation of a railroad, is properly admitted, in this kind of a suit, to aid the jury in determining whether or not the property has been depreciated by the construction and operation of the railroad.

Dill. Mun. Corp. 4th ed. § 734a, p. 889; *Barrows v. Sycamore*, 150 Ill. 588, 25 L. R. A. 535, 37 N. E. 1096; *Metropolitan West Side Elev. R. Co. v. Stickney*, 150 Ill. 362, 26 L. R. A. 773, 37 N. E. 1098; *Metropolitan West Side Elev. R. Co. v. Springer*, 171 Ill. 170, 49 N. E. 416; *Kotz v. Illinois C. R. Co.* 188 Ill. 578, 59 N. E. 240.

188 Ill. 578, 59 N. E. 240; *Jaynes v. Omaha Street R. Co.* 53 Neb. 631, 39 L. R. A. 751, 74 N. W. 67; *Wilson v. New York Elev. R. Co.* 9 Misc. 657, 30 N. Y. Supp. 547.

Evidence of the vibration of neighboring property caused by the operation of a railroad is admissible to aid the jury in determining whether or not the market value thereof has been depreciated by such operation. There can also be no doubt of the liability for all actual physical damage sustained, such as the cracking of walls.

St. Louis, V. & T. H. R. Co. v. Haller, 82 Ill. 208; *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 41; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460; *Wisconsin O. R. Co. v. Wicczorek*, 51 Ill. App. 498; *Lake Street Elev. R. Co. v. Brooks*, 90 Ill. App. 173; *Chicago Forge & Bolt Co. v. Major*, 30 Ill. App. 276; *Hyde Park Thomson-Houston Light Co. v. Porter*, 167 Ill. 276, 47 N. E. 206, 64 Ill. App. 152.

The courts of this state have sustained the admission of evidence of noise made by the operation of a railroad in suits brought by abutting property owners to recover damages for depreciating the value of their property, to assist the jury in determining whether or not the market value thereof has been affected by the construction and operation of the road.

Mix v. Lafayette, B. & M. R. Co. 67 Ill. 319; *St. Louis, V. & T. H. R. Co. v. Haller*, 82 Ill. 208; *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619; *Wisconsin C. R. Co. v. Wicczorek*, 51 Ill. App. 498; *Chicago, P. & M. R. Co. v. Moore*, 63 Ill. App. 163; *Curran v. McGrath*, 67 Ill. App. 566; *Chicago, P. & St. L. R. Co. v. Mix*, 137 Ill. 141, 27 N. E. 81; *Chicago, E. & L. S. R. Co. v. Darke*, 50 Ill. App. 280; *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 226, 35 N. E. 750; *Chicago, P. & St. L. R. Co. v. Leah*, 152 Ill. 249, 38 N. E. 556, 41 Ill. App. 584; *Metropolitan West Side Elev. R. Co. v. Springer*, 171 Ill. 170, 49 N. E. 416.

The courts of other states having constitutional provisions similar to those of Illinois hold that evidence of noise made by the ordinary operation of a railroad is admissible, as an aid in the determination of whether or not the market value of property has been decreased, where damages are sought to be recovered upon this theory.

First Baptist Church v. Schenectady & T. R. Co. 5 Barb. 79; *South Carolina R. Co. v. Steiner*, 44 Ga. 546; *Little Rock, M. R. & T. R. Co. v. Allen*, 41 Ark. 431; *Blue Earth County v. St. Paul & S. C. R. Co.* 28 Minn. 503, 11 N. W. 73; *Wilson v. Des Moines, O. & S. R. Co.* 67 Iowa, 509, 25 N. W. 754; *Columbus, H. V. & T. R. Co. v. Gardner*, 45 Ohio St. 309, 13 N. E. 69; *Weyer v. Chicago, W. & N. R. Co.* 68 Wis. 180, 31 N. W. 710; *Maysville & B. S. R. Co. v. Conner*, 16 Ky. L. Rep. 635, 29 S. W. 344; *Ft. Worth & N. O. R. Co. v. Pearce*, 75 Tex. 281, 12 S. W. 864; *Gainesville, H. & W. R. Co. v. Hall*, 78 Tex. 169, 9 L. R. A. 298, 14 S. W. 259; *Dennison & P. S. R. Co. v. Cummins* (Tex. Civ. App.) 42 S. W. 588; *Blakely v. Chicago, K.*

& N. R. Co. 25 Neb. 207, 40 N. W. 956; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364, 42 N. W. 93; *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb. 90, 60 N. Y. 326; *Brand v. Hammersmith & C. R. Co. L. R. 2 Q. B. 223*; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268, 10 N. E. 528; *Drucker v. Manhattan R. Co.* 106 N. Y. 157, 60 Am. Rep. 437, 12 N. E. 568; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 186, 19 N. E. 437; *Abendroth v. Manhattan R. Co.* 122 N. Y. 1, 11 L. R. A. 634, 25 N. E. 496; *Kane v. New York Elev. R. Co.* 125 N. Y. 164, 11 L. R. A. 640, 26 N. E. 278; *Sperb v. Metropolitan Elev. R. Co.* 61 Hun, 539, 18 N. Y. Supp. 392; *Golden v. Metropolitan Elev. R. Co.* 1 Misc. 142, 20 N. Y. Supp. 630; *American Bank Note Co. v. New York Elev. R. Co.* 129 N. Y. 252, 29 N. E. 302; *Messenger v. Manhattan R. Co.* 129 N. Y. 502, 29 N. E. 955; *Moore v. New York Elev. R. Co.* 130 N. Y. 523, 14 L. R. A. 731, 29 N. E. 997; *Mitchell v. Metropolitan Elev. R. Co.* 132 N. Y. 552, 30 N. E. 385; *Bischoff v. New York Elev. R. Co.* 138 N. Y. 257, 33 N. E. 1073.

The cases sustaining awards of damages for consequential injuries resulting from the construction and operation of a railroad have been decided upon the theory that the acts complained of are done in a careful and prudent manner, and are not the result of negligence.

Drucker v. Manhattan R. Co. 106 N. Y. 157, 60 Am. Rep. 437, 12 N. E. 568; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364, 42 N. W. 93; *Morton v. New York*, 140 N. Y. 207, 22 L. R. A. 241, 35 N. E. 490; *Cooper v. Randall*, 53 Ill. 24; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460; *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 31 N. E. 138; *Chicago, P. & St. L. R. Co. v. Leah*, 152 Ill. 249, 38 N. E. 556, 41 Ill. App. 584.

In the absence of satisfaction having been made by a railroad company for the servitude which it imposes upon neighboring property, the contention that it may, with impunity, do all acts upon land acquired by it under the power of eminent domain which an individual may exercise in relation to his property, without becoming liable to a neighboring property owner who is injured thereby, is unsound under the Illinois Constitution of 1870.

Lake Erie & W. R. Co. v. Scott, 132 Ill. 429, 8 L. R. A. 330, 24 N. E. 78; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364, 42 N. W. 93.

A uniform policy has always been invoked of clothing the private property owner with every protection which a broad interpretation would permit where his property has been taken or damaged for a public use.

Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392; *Toledo, W. & W. R. Co. v. Morrison*, 71 Ill. 616; *Rigney v. Chicago*, 102 Ill. 64.

Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally

the exclusion of all others; and doubtless this is substantially the sense in which it is used in the Constitution.

Rigney v. Chicago, 102 Ill. 64; *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 31 N. E. 138; *Illinois C. R. Co. v. Chicago*, 156 Ill. 98, 41 N. E. 45; *Illinois C. R. Co. v. Mattoon Highway Comrs.* 161 Ill. 247, 43 N. E. 1100.

If property consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed.

Lewis, Em. Dom. 2d ed. § 56, p. 58; *Rigney v. Chicago*, 102 Ill. 64; *Lake Erie & W. R. Co. v. Scott*, 132 Ill. 429, 8 L. R. A. 330, 24 N. E. 78; *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 31 N. E. 138; *Abendroth v. Manhattan R. Co.* 122 N. Y. 1, 11 L. R. A. 634, 25 N. E. 496; *Omaha v. Kramer*, 25 Neb. 489, 41 N. W. 295.

The maxim of the common law, *Sic utere tuo ut alienum non laedas*, applied to noise and vibration.

Bradley v. Gill, Lutw. 29; *King v. Pierce*, 2 Show. 327; *Ree v. Smith*, 1 Strange, 704; *Dawson v. Moore*, 7 Car. & P. 25; *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Buccleuch v. Metropolitan Bd. of Works*, L. R. 5 H. L. 418; *Fish v. Dodge*, 4 Denio, 311; *Dargan v. Waddill*, 31 N. C. (9 Ired. L.) 244, 49 Am. Dec. 421; *Whitney v. Bartholomew*, 21 Conn. 213; *Wesson v. Washburn Iron Co.* 13 Allen, 95, 90 Am. Dec. 181; *Morton v. New York*, 140 N. Y. 207, 22 L. R. A. 241, 35 N. E. 490; *Shano v. Fifth Ave. & H. Street Bridge Co.* 189 Pa. 245, 42 Atl. 128; *Soltan v. DeHeld*, 2 Sim. N. S. 133; *Crumph v. Lambert*, L. R. 3 Eq. 409; *Roskell v. Whitworth*, 19 Week. Rep. 804; *Gullick v. Tremlett*, 20 Week. Rep. 358; *Bail v. Ray*, L. R. 8 Ch. 467; *Broder v. Saillard*, L. R. 2 Ch. Div. 692; *Davidson v. Isham*, 9 N. J. Eq. 186; *Dennis v. Eckhardt*, 3 Grant, Cas. 390; *Bishop v. Banks*, 33 Conn. 118, 87 Am. Dec. 197; *Diitman v. Repp*, 50 Md. 516, 33 Am. Rep. 325; *Davis v. Sawyer*, 133 Mass. 289, 43 Am. Rep. 519; *Snyder v. Cabell*, 29 W. Va. 62, 1 S. E. 241; *Ladies' Decorative Art Club's Appeal*, 22 W. N. C. 75, 13 Atl. 537.

Mr. William W. Gurley, with Messrs. Addison L. Gardner and Francis W. Walker, for appellee:

Injuries to property arising out of and unavoidably incident to the operation, in a careful and skilful manner, of a railroad properly constructed are *damnum absque injuria*.

Lake Street Elev. R. Co. v. Brooks, 90 Ill. App. 173; *Illinois C. R. Co. v. Grabill*, 50 Ill. 241; *N. K. Fairbank Co. v. Nicolai*, 167 Ill. 242, 47 N. E. 360; *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 224, 35 L. R. A. 281, 45 N. E. 430; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25; *Chicago & W. I. R. Co. v. Cogswell*, 44 Ill. App. 388; *Ch.*

cago, *M. & St. P. R. Co. v. Hall*, 90 Ill. 42; *Rigney v. Chicago*, 102 Ill. 64; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598; *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511; *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795, 10 N. E. 395; *Chicago v. Burckey*, 158 Ill. 103, 29 L. R. A. 568, 42 N. E. 178; *Lake Erie & W. R. Co. v. Scott*, 132 Ill. 429, 8 L. R. A. 330, 24 N. E. 78; *Frazer v. Chicago*, 186 Ill. 480, 51 L. R. A. 306, 57 N. E. 1055; *Stone v. Fairbury, P. & N. W. R. Co.* 68 Ill. 394, 18 Am. Rep. 556; *Chicago, B. & Q. R. Co. v. McGinnis*, 79 Ill. 269; *State, Roebeling, Prosecurtrix v. Trenton Pass. R. Co.* 58 N. J. L. 666, 33 L. R. A. 129, 34 Atl. 1090; *Thompson v. Pennsylvania R. Co.* 51 N. J. L. 42, 15 Atl. 833; *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164; *Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558; *Louisville S. R. Co. v. Hooe*, 18 Ky. L. Rep. 521, 35 S. W. 266, 38 S. W. 131; *Randolph, Em. Dom.* § 154; *Peel v. Atlanta*, 85 Ga. 138, 8 L. R. A. 787, 11 S. E. 582; *Austin v. Augusta Terminal R. Co.* 108 Ga. 671, 47 L. R. A. 755, 34 S. E. 852; *Texas & S. R. Co. v. Meadows*, 73 Tex. 32, *sub nom. Trinity & S. R. Co. v. Meadows*, 3 L. R. A. 565, 11 S. W. 145; *Proprietors of Locks & Bridges v. Nashua & L. R. Corp.* 10 Cush. 385; *Presbrey v. Old Colony & N. R. Co.* 103 Mass. 1; *Rochette v. Chicago, M. & St. P. R. Co.* 32 Minn. 201, 20 N. W. 140; *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257; *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 26 S. E. 266; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 13 Atl. 690; *Gilbert v. Greeley, S. L. & P. R. Co.* 13 Colo. 501, 22 Pac. 814.

The Constitution of 1870 placed a public or quasi public corporation upon the same footing with relation to the use of its property as that of a private property owner, with respect to other property in the neighborhood. That is, its liability is the same, under the Constitution of 1870, as that of a private owner, at common law.

Rigney v. Chicago, 102 Ill. 64; *Randolph, Em. Dom.* § 154; *Texas & S. R. Co. v. Meadows*, 73 Tex. 32, *sub nom. Trinity & S. R. Co. v. Meadows*, 3 L. R. A. 565, 11 S. W. 145; *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 26 S. E. 266; *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257; *Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558; *Austin v. Augusta Terminal R. Co.* 108 Ga. 671, 47 L. R. A. 755, 34 S. E. 852; *Peel v. Atlanta*, 85 Ga. 138, 8 L. R. A. 787, 11 S. E. 582; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 13 Atl. 690.

Under the Constitution of 1870, there must be physical interference either with the land or some right growing out of or connected with the land, which the owner enjoys in connection with his property, and which gives to it an additional value.

Rigney v. Chicago, 102 Ill. 64; *Austin v. Augusta Terminal R. Co.* 108 Ga. 671, 47 L. R. A. 755, 34 S. E. 852.

Mere inconvenience in the use of property caused by the proximity of a public improve-

ment forms no basis of a recovery for damage, even though the property may be lessened in value.

Stone v. Fairbury, P. & N. W. R. Co. 68 Ill. 394, 18 Am. Rep. 556; *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 224, 35 L. R. A. 281, 45 N. E. 430; *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 42; *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473; *Gilbert v. Greeley, S. L. & P. R. Co.* 13 Colo. 501, 22 Pac. 814; *Proprietors of Locks & Canals v. Nashua & L. R. Corp.* 10 Cush. 385; *Presbrey v. Old Colony & N. R. Co.* 103 Mass. 1; *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257.

The noise necessary to the operation of a railroad is a mere inconvenience to persons, and is not an interference with a property right growing out of the land.

Stone v. Fairbury, P. & N. W. R. Co. 68 Ill. 394, 18 Am. Rep. 556; *Presbrey v. Old Colony & N. R. Co.* 103 Mass. 1; *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 42; *Austin v. Augusta Terminal R. Co.* 108 Ga. 671, 47 L. R. A. 755, 34 S. E. 852; *Proprietors of Locks & Canals v. Nashua & L. R. Corp.* 10 Cush. 385.

Where the damage is the same in kind, only differing in degree from that suffered by the general public, there can be no recovery by a private individual.

Rigney v. Chicago, 102 Ill. 64; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598; *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511; *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795, 10 N. E. 395; *Chicago v. Burckey*, 158 Ill. 103, 29 L. R. A. 568, 42 N. E. 178; *Gilbert v. Greeley, S. L. & P. R. Co.* 13 Colo. 501, 22 Pac. 814; *Rochette v. Chicago, M. & St. P. R. Co.* 32 Minn. 201, 20 N. W. 140; *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257.

Constitutional or statutory provisions of other states similar to the provisions of the Illinois Constitution, and decisions thereunder interpreting the meaning and effect of the words "damaged," "injured," or "injuriously affected," show that there is no liability in this case.

Colo. Const. 1876, art. 2, § 15; *Gilbert v. Greeley, S. L. & P. R. Co.* 13 Colo. 501, 22 Pac. 814; *Peel v. Atlanta*, 85 Ga. 138, 8 L. R. A. 787, 11 S. E. 582; *Austin v. Augusta Terminal R. Co.* 108 Ga. 671, 47 L. R. A. 755, 34 S. E. 852; *Louisville S. R. Co. v. Hooe*, 18 Ky. L. Rep. 521, 35 S. W. 266, 38 S. W. 131; *Proprietors of Locks & Canals v. Nashua & L. R. Corp.* 10 Cush. 385; *Presbrey v. Old Colony & N. R. Co.* 103 Mass. 1; *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257; *Omaha v. Kramer*, 25 Neb. 489, 41 N. W. 295; *Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 13 Atl. 690; *Texas & S. R. Co. v. Meadows*, 73 Tex. 32, *sub nom. Trinity & S. R. Co. v. Meadows*, 3 L. R. A. 565, 11 S. W. 145; *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 26 S. E. 266.

To authorize a recovery, it must be affirmatively shown by the parties seeking

to recover that the railroad was not properly constructed, and was not operated in a careful and skilful manner.

Lake Street Elev. R. Co. v. Brooks, 90 Ill. App. 173; *Louisville Southern R. Co. v. Hooc*, 18 Ky. L. Rep. 521, 35 S. W. 266, 38 S. W. 131.

The measure of damages in condemnation cases does not apply to suits brought to recover for consequential injuries.

Lewis, Em. Dom. 2d ed. §§ 471A, 236; *Randolph*, Em. Dom. §§ 136, 256; *Chicago, B. & Q. R. Co. v. McGinnis*, 79 Ill. 269; *Presbrey v. Old Colony & N. R. Co.* 103 Mass. 1.

Carter, J., delivered the opinion of the court:

This is an appeal by the plaintiff below from a judgment of the circuit court rendered in bar of her action and for costs. The question presented involves the construction of the 1st clause of § 13 of article 2 of the Constitution: "Private property shall not be taken or damaged for public use without just compensation." In 1888 the plaintiff, owning two lots fronting west on Ashland boulevard, in Chicago, erected thereon an expensive apartment building. In 1892 the defendant below obtained, by purchase and condemnation, a right of way running east and west through the same block, and located and thereafter constructed on such right of way north of plaintiff's premises its elevated railway, and has since 1895 run its cars on said railway, propelled by electricity, crossing Ashland boulevard 31 feet north of plaintiff's building. The road consists of four tracks on a steel structure elevated 14½ feet from the ground, over which 1,554 trains, of from three to five cars each, pass plaintiff's property and cross the boulevard daily. To recover damages to her property caused by the construction and operation of defendant's road the plaintiff brought this action, and as grounds of recovery alleged in the first count of her declaration that by the construction and operation of the road the street is darkened, the light cut off from her house, the view down the boulevard obstructed, and the entrance to the premises interfered with and rendered unsafe. The second count charges that on account of the darkening of the boulevard and the running of trains over it the premises are deprived of air, ventilation, and quiet, passage along the boulevard to and from the premises has been and is interrupted, and access thereto has been impaired, and the soil and buildings are disturbed, vibrated, shaken, and damaged, and trains are operated over the structure with great noise, caused by rumbling and squeaking of wheels, and other noises connected with the operation of an elevated railroad, so as continually to disturb and destroy the peace and quiet of the premises. The third count charges that the appellee is a railway corporation authorized by the laws of this state to take and damage private property necessary for the construction and operation of its road upon

making just compensation therefor, and that it has constructed and is operating its road within 19 feet of appellant's property, and has damaged it in the sum of \$20,000, but has made her no compensation, as required by the Constitution and laws of Illinois. To this declaration the appellee pleaded the general issue. Upon the trial the court excluded the evidence, and directed the jury to find defendant not guilty.

There was no charge or proof that the road was negligently constructed or operated, but only that by the construction and operation of the road so near to appellant's property, and across the public street there, her property was damaged for public use, within the meaning of the Constitution, for which no compensation has been made, and for which she is entitled to recover. The road was located and constructed by the company in accordance with lawful authority, and upon its own land or right of way, and not in any public street or alley, except where it crosses streets or alleys by authority lawfully granted. For the purposes of this case it must be assumed, from the record, that it was carefully constructed and carefully operated, and that by such construction and operation it did not injuriously affect the property of others, or the property in question of the plaintiff, any more than any such property would be affected in any case by the construction and operation of such a road so near to such property. Ashland boulevard, running north and south in front of plaintiff's property, was 100 feet wide, and had been paved and beautified as a residence street. Congress street runs east and west 50 feet south of plaintiff's premises, there being another building between plaintiff's and Congress street. The record shows that no unusual noise or vibration of plaintiff's property was caused by the company in the matter complained of. Access to her property from any public street or alley was not cut off or injuriously affected. In short, whatever damages were sustained by the plaintiff were such, and only such, as were common to the public generally.

In *Rigney v. Chicago*, 102 Ill. 64, this court allowed a recovery against the city for damages to the plaintiff's property caused by the construction of a viaduct, on the ground that it cut off access from the public street to plaintiff's property. In that case the court discussed the rule at common law, and said (p. 70): "It is a well-recognized principle that where a thing not *malum in se* is authorized to be done by a valid act of the legislature, and it is performed with due care and skill, in strict conformity with the provisions of the act, its performance cannot, by the common law, be made the ground of an action, however much one may be injured by it,"—citing cases. And further said, in substance, that under the Constitution of 1848, which prohibited the taking of private property for public use without just compensation, any actual physical invasion or direct physical injury to property in such cases was re-

garded as a taking. Then, after a further discussion of the question at issue in that case and a review of previous cases, it was further said (p. 80): "The question then recurs, What additional class of cases did the framers of the new Constitution intend to provide for which are not embraced in the old? While it is clear that the present Constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old Constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law does not and never has afforded any relief. For instance, the building of a jail, police station, or the like will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria*. So as to an obstruction in a public street,—if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present Constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law."

That case, ever since its decision, has been regarded as laying down the proper rule on the subject, and is, we think, conclusive of the case at bar. Here there has been no direct physical disturbance of any right, public or private, which the plaintiff enjoys in connection with her property, and which gives to it an additional value, whereby she has sustained a special damage in excess of that sustained by the public generally. The damages sued for are of the same kind and character as those sustained by the public generally in the ownership of property, which property may have been lessened in value by the construction and operation of the road. Noise, the obstruction of light and of view, are necessary incidents of the construction and operation of such roads, and if every property owner could recover in all such cases the making of public improvements would become practically impossible. This road is not constructed along the street in front of the plaintiff's property, thus injuring or destroying a public right which she enjoyed in connection

with her property, but, as before said, it is constructed on its own land or right of way. Therefore, what the rights of an abutter would be in such a case it is not necessary to consider. In *Illinois C. R. Co. v. Grabill*, 50 Ill. 241, in speaking of the annoyances of running engines, the escape of steam, etc., near the plaintiff's premises, this court said (p. 244): "Such consequences of the construction and use of railroads must be borne by all living near them, without complaint and without hope of redress, for they are inseparable from the purposes and objects of such structures, but that a recovery can and should be had for such damages as arise out of the careless and negligent acts of a railroad company in regard to any usual and necessary appurtenance to their road cannot be denied." *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 224, 35 L. R. A. 281, 45 N. E. 430. A railroad constructed and operated by authority of law cannot be a nuisance, and there was no right of action at common law for the depreciation in value of property so caused. The company is liable for negligent or wilful injury, as others are, but not for doing the things which the law authorizes it to do. Nor can we agree that the Constitution of 1870 gives, or was intended to give, a remedy for all incidental losses, or for the depreciation of the value of property, caused by the construction and operation of railroads in the vicinity; but, as said in the *Rigney Case*, it was intended only to restore a remedy which existed at common law, but which had been denied by legislation and the Constitution of 1848.

We are referred to *Chicago, P. & St. L. R. Co. v. Leah*, 152 Ill. 249, 38 N. E. 556, and *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 226, 35 N. E. 750, as announcing a different doctrine. There may be in the opinions in those cases some expressions which, considered alone and without reference to the cases there under consideration, might tend to support the views of counsel for appellant, but those decisions are in full accord with the *Rigney Case* and with this, and the *Rigney Case* was cited as authority in the *Leah Case*. In the latter case the premises of plaintiff had their front on a narrow street 20 feet in width, and the defendant's railroad crossed this street diagonally, opposite the plaintiff's premises, within 6½ feet thereof, and said street afforded the only approach to said premises. In that case it is clear that there was a direct physical disturbance of a public right which the plaintiff enjoyed in connection with his property, which right gave to it an additional value, and that he sustained special damages with respect to his property different from and in excess of that sustained by the public generally. While there may not have been a direct physical injury to the corpus of the property, there was such an injury to the owner's right of access to and use and enjoyment of the property which was not common to the public generally. So, too, in the *Darke Case*. While the road was not located in the pub-

lie street, but on the company's right of way, yet the gravamen of the action was that cinders, ashes, and smoke were thrown and blown onto the plaintiff's premises in a considerable amount, and that the value of her premises was depreciated by that cause. It cannot, therefore, be said that there was no direct physical injury to the property, or of a right which she enjoyed therein, which caused special damages to her which were not suffered by others of the public generally in the use of their property. In the case at bar the trains were run by electricity, and it is not contended that there were thrown or deposited on the plaintiff's property any cinders or other material substances, nor that there was any unusual noise or vibration or jarring of the earth. Whatever damage plaintiff may have suffered in depreciation of the value of her property was of the same kind and character as that suffered by the pub-

lic generally, and common to the owners of property in a large city, where noise, confusion, and the disturbance of quiet appear to be the necessary results of the activities of city life.

The proof admitted and that offered on the trial in this case would not sustain in full the allegations of the declaration, which in some of the counts stated a good cause of action, and what we have said is based upon the record as it stood on the trial of the case and as we have stated it to be. For example, there was no proof that entrance to plaintiff's premises from the street was interfered with or rendered unsafe.

The judgment will be affirmed.

Magruder, J., does not concur.

Petition for rehearing denied April 3, 1902.

IOWA SUPREME COURT.

City of DES MOINES

v.

KELLER, Appt.

(.....Iowa.....)

1. The title "An ordinance to Regulate Bicycles" is sufficient to cover a provision requiring the use of lamps by bicyclists using the streets of the city after dark.
2. An ordinance requiring bicycle riders to carry lamps is not unconstitutional because not applying to other silently running vehicles.
3. The equal privileges and immunities of a bicycle rider are not infringed by requiring him to carry a light after dark.
4. Authority to provide for the safety of its inhabitants will give a municipality power to require bicyclists using its streets after dark to carry lights.

(January 23, 1902.)

APPEAL by defendant from a judgment of the District Court for Polk County convicting him of violating an ordinance prohibiting the riding of bicycles after dark without carrying lights on them. *Affirmed.*

The facts are stated in the opinion.

Mr. H. E. Long for appellant.

Mr. M. H. Cohen for appellee.

Sherwin, J., delivered the opinion of the court:

On the 2d day of July, 1894, the following ordinance was passed by the city council of Des Moines: "An Ordinance to Regulate Bicycles. . . . § 290. Riding without Light. That it shall be unlawful for any person to ride any bicycle upon the streets after dark and before daylight without car-

rying or having a sufficient light to be easily seen the distance of at least one block. Any person found guilty of violating this ordinance shall be fined not less than \$1.00 nor more than \$20.00, and stand committed to jail until such fine and costs are paid."

The title of this ordinance is expressed with sufficient clearness, and is broad enough to cover the use of bicycles on the streets of the city. *Dill. Mun. Corp.* 3d ed. § 51; *Morford v. Unger*, 8 Iowa, 82; *State ex rel. Witter v. Forkner*, 94 Iowa, 1, 28 L. R. A. 206, 62 N. W. 772; *State v. Barge*, 82 Minn. 250, 53 L. R. A. 428, 84 N. W. 912, 1116.

Nor is the ordinance in conflict with and contrary to § 6 of article 1 of the Constitution of this state, because it applies only to bicycles, and not to riders or users of other silently running vehicles. It applies to all riders of bicycles, as a class, and is for this reason sufficient and reasonable. *Iowa R. Land Co. v. Soper*, 39 Iowa, 112; *Primghar State Bank v. Rerick*, 96 Iowa, 238, 64 N. W. 801. In the early history of bicycles, some of the courts were inclined to the view that they were such an innovation on the use of the highways that they were not entitled to the same protection as other vehicles. See *State v. Yopp*, 97 N. C. 477, 2 S. E. 458. But they are now generally treated as vehicles having a common right to the use of the streets and highways. See *Taylor v. Union Traction Co. (Pa.)* 47 L. R. A. 289, *note*. And they are subject to all just and reasonable requirements for the safety and convenience of other users of such streets and highways. That a municipal corporation has absolute control of its streets is generally conceded, and it is equally as true that it may enact such ordinances governing the use thereof as shall be necessary, in its judgment, to protect the public, providing they are reasonable; and if it does this without undue discrimination, and all

NOTE.—For extensive note as to bicycle law, including regulations requiring cyclists to carry bells and lamps, see *Taylor v. Union Traction Co. (Pa.)* 47 L. R. A. 289.

who are subject to the ordinance are treated alike, under similar circumstances and conditions, as to privileges conferred and liabilities imposed, equal protection of the laws is not denied. The noiseless, swift, and light character of a bicycle distinguishes it from all other vehicles used on the highways. In the night, on a paved street, it is as silent as death. It glides along without any of the noise made by horses drawing a carriage. Its approach is generally unheralded, and pedestrians who are called upon to cross a street are usually without warning of its proximity until a "swish" advises them that it has passed. That vehicles that are more dangerous to the public than others may be regulated by ordinance, we do not doubt; and a requirement that bicycle riders use lamps during the night is but a just and reasonable exercise of control over the public highways for the protection of others whose rights thereon are as great as theirs. Tricycles, quadricycles, and rubber-tired buggies are not of the same class as bicycles. *Wheeler v. Boone*, 108 Iowa, 235, 44 L. R. A. 821, 78 N. W. 909.

Nor do we think the ordinance in question inhibited by § 1 of article 14 of the Constitution of the United States. The privilege of using a public street is always to be regulated so as to protect the equal rights of others.

We are clearly of the opinion that the council had implied, if not direct, power to pass an ordinance regulating the use of its streets by vehicles before § 754 of the Code of 1897 was passed. Under § 482 of the Code of 1873, it had power to provide for the safety of its inhabitants, and it must be conceded that this is the only purpose of the ordinance in question.

The judgment is affirmed.

Rehearing denied.

STATE of Iowa *ex rel.* Win S. WHITE,
Appt.,
v.

W. H. BARKER *et al.*

John E. ROBSON, Intervener, Appt.

(.....Iowa.....)

1. A resident of a city and contributor to the support of its water-supply system is interested in the appointment of trustees for the system under a state statute, so as to be entitled to maintain quo warranto proceedings to test the validity of the appointment under a statute authorizing any citizen having an interest in the question to institute the proceeding upon refusal of the county attorney to do so.

NOTE.—For earlier cases in this series as to interference by legislature with right of municipality to local self-government, see *State ex rel. Bulkeley v. Williams* (Conn.) 48 L. R. A. 465, and *note*; *Newport v. Horton* (R. I.) 50 L. R. A. 330, and *note*; *O'Connor v. Fond du Lac* (Wis.) 53 L. R. A. 831; *Com. ex rel. Elkin* 57 L. R. A.

2. The superintendent of a municipal water-supply system has sufficient interest in the validity of a statute providing for the appointment of trustees and a new superintendent for the system to be entitled to maintain quo warranto proceedings to test its validity.

3. The written Constitution will be construed in the light of the right of municipal self-government.

4. The establishment and control of a water-supply system is a matter that pertains to the municipality, and the legislature cannot take the management of the system away from the appointees of the municipality, and vest it in persons for whose selection it provides.

5. The power of choosing the managers of a municipal water-supply system cannot be vested by the legislature in the judges of a court created by the Constitution.

(February 13, 1902.)

APPEAL by plaintiff and intervener from a judgment of the District Court for Woodbury County in favor of defendants in a quo warranto proceeding to test the validity of the appointment of defendants as trustees and officers of the waterworks system. *Reversed.*

Statement by Deemer, J.:

Quo warranto proceedings to test the validity of the appointment of defendants as a board of waterworks trustees, and of defendant Spaulding as superintendent of the waterworks system of the city of Sioux City, and to test the constitutionality of certain acts of the legislature authorizing the appointment of such officials by the district court of the county. The trial court dismissed the petitions, and the plaintiff and the intervener appeal.

Messrs. F. E. Gill, Quick & Carter, and Swan, Lawrence, & Swan, for appellants:

Quo warranto lies where the office or franchise is being usurped.

Cochran v. McCleary, 22 Iowa, 75; *Deamond v. McCarthy*, 17 Iowa, 525.

Quo warranto will lie against all of the defendants who claim that they were elected or appointed, to test their right to the office.

State ex rel. Perine v. Van Beek, 87 Iowa, 569, 19 L. R. A. 622, 54 N. W. 525; *State v. Simpkins*, 77 Iowa, 676, 42 N. W. 516; *State v. Minton*, 49 Iowa, 591; *State v. O'Brien*, 47 Ohio St. 464, 25 N. E. 121; *State v. Kearns*, 47 Ohio St. 566, 25 N. E. 1027; *Hughes v. Felton*, 11 Colo. 489, 19 Pac. 444; *Cochran v. McCleary*, 22 Iowa, 75.

Quo warranto lies in any case where the person against whom it is brought holds

v. Moir (Pa.) 53 L. R. A. 837; *Redell v. Moores* (Neb.) 55 L. R. A. 740; *State ex rel. Geake v. Fox* (Ind.) 56 L. R. A. 893; and *Americus v. Perry* (Ga.) *ante*, 230.

As to who may attack constitutionality of statute, see *Plumb v. Christie* (Ga.) 42 L. R. A. 181.

the office without authority of law, whether his original holding thereof was lawful or unlawful, and whether any person is or is not entitled to the same.

People ex rel. Swift v. Bingham, 82 Cal. 238, 22 Pac. 1039; *Osgood v. Jones*, 60 N. H. 543; *People v. Sweeting*, 2 Johns. 184; *Hyde v. Stat.*, 52 Miss. 665; *State ex rel. Lewis v. Young*, 4 Iowa, 561; *State ex rel. Rice v. Marshall County Judge*, 7 Iowa, 186.

Quo warranto lies where the statute under which he holds is alleged to be unconstitutional, and it is the proper form of action.

People ex rel. Atty. Gen. v. Holihan, 29 Mich. 116; *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128, 19 N. W. 112; *State ex rel. West v. Des Moines*, 96 Iowa, 521, 31 L. R. A. 186, 65 N. W. 818; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175; *State ex rel. Lewis v. Young*, 4 Iowa, 561; Iowa Code, § 4313; 2 Dill. Mun. Corp. 3d ed. § 895; *Cochran v. McCleary*, 22 Iowa, 75; *State v. Independent School Dist.* 29 Iowa, 284; *State v. Independent School Dist. No. 6*, 46 Iowa, 425.

The interest which one who is a citizen and a taxpayer has in the due administration of public affairs will entitle him to maintain the proceeding if its object is merely to oust a person unlawfully holding a public office.

People ex rel. Barton v. Londoner, 13 Colo. 303, 6 L. R. A. 444, 22 Pac. 764; *Churchill v. Walker*, 68 Ga. 681; *Com. ex rel. Yard v. Meeser*, 44 Pa. 341; *State ex rel. Waterbury v. Martin*, 46 Conn. 479; *State ex rel. Atty. Gen. v. Vail*, 53 Mo. 97; *State ex rel. Richards v. Hammer*, 42 N. J. L. 435.

Any citizen may be a relator.

State ex rel. Rice v. Marshall County Judge, 7 Iowa, 186; *State ex rel. Byers v. Bailey*, 7 Iowa, 396; *People ex rel. Case v. Collins*, 19 Wend. 56; *Brookman v. Creston*, 79 Iowa, 587, 44 N. W. 822; *People ex rel. Barton v. Londoner*, 13 Colo. 303, 6 L. R. A. 444, 22 Pac. 764; *Pike County v. People ex rel. Metz*, 11 Ill. 202; *Napier v. Poe*, 12 Ga. 170; *State ex rel. Richards v. Hammer*, 42 N. J. L. 435; *Taggart ex rel. Jackson v. James*, 73 Mich. 234, 41 N. W. 262; *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561, 51 N. W. 724, 83 Wis. 90, 17 L. R. A. 145, 53 N. W. 35; *Giddings v. Blacker*, 93 Mich. 1, 16 L. R. A. 402, 52 N. W. 944.

The law in question is a violation of art. 3, § 1, which requires that the government be divided into three separate departments.

Evansville v. State ex rel. Blend, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *State ex rel. Jameson v. Denny*, 118 Ind. 388, 4 L. R. A. 79, 21 N. E. 252; *Cooley, Const. Lim.* 6th ed. p. 104; *State ex rel. Hovey v. Noble*, 118 Ind. 350, 4 L. R. A. 101, 21 N. E. 244; *Case of Election Supers.* 114 Mass. 247, 19 Am. Rep. 341; *People ex rel. Nichols v. McKee*, 68 N. C. 429; *Heinlen v. Sullivan*, 64 Cal. 378, 1 Pac. 158; *Smith v. Myers*, 109 Ind. 1, 58 Am. Rep. 375, 9 N. E. 692; *Wright* 57 L. R. A.

v. Deftrees, 8 Ind. 208; *Butler v. State*, 97 Ind. 377.

Constitutional restraints are overstepped when one department of government attempts to exercise powers exclusively belonging to another.

People ex rel. Bolton v. Albertson, 55 N. Y. 50; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

Where business of cities is administered through different departments the power to appoint is an executive power.

Atty. Gen. v. Varnum, 167 Mass. 477, 46 N. E. 1; *State ex rel. Collett v. Gorby*, 122 Ind. 17, 23 N. E. 678; *State ex rel. Clark v. Haworth*, 122 Ind. 462, 7 L. R. A. 240, 23 N. E. 946; *Evansville v. State ex rel. Blend*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *State ex rel. Worrell v. Peele*, 121 Ind. 495, 22 N. E. 654.

An appointment to office is an executive, and not a judicial, function.

State ex rel. Coogan v. Barbour, 53 Conn. 85, 55 Am. Rep. 65, 22 Atl. 686; *Taylor v. Com.* 3 J. J. Marsh. 401; *Evansville v. State ex rel. Blend*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *State ex rel. Atty. Gen. v. Covington*, 29 Ohio St. 115; *State ex rel. Jameson v. Denny*, 118 Ind. 388, 4 L. R. A. 79, 21 N. E. 252; *State ex rel. Yancoy v. Hyde*, 121 Ind. 20, 22 N. E. 644; *Houseman v. Montgomery*, 58 Mich. 364, 25 N. W. 369; *Smith v. Strother*, 68 Cal. 194, 8 Pac. 852; *Norwalk Street R. Co.'s Appeal*, 69 Conn. 576, 39 L. R. A. 794, 37 Atl. 1080, 38 Atl. 708; *Steenerson v. Great Northern R. Co.* 60 Minn. 353, 72 N. W. 716; *State ex rel. Railroad & W. Commission v. Chicago, M. & St. P. R. Co.* 28 Minn. 298, 37 N. W. 782; *Foreman v. Hennepin County*, 64 Minn. 371, 67 N. W. 207; *State ex rel. Hahn v. Young*, 29 Minn. 474, 9 N. W. 737; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The appointment of the board of water-works trustees is a function that cannot be laid upon the courts, not being judicial; and the court has no power, except that given to it by the Constitution.

Houseman v. Montgomery, 58 Mich. 364, 25 N. W. 369; *Manistee v. Harley*, 79 Mich. 238, 44 N. W. 603; *People ex rel. Simmons v. Sanderson*, 30 Cal. 160; *Foreman v. Hennepin County*, 64 Minn. 371, 67 N. W. 207; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 49, 9 Am. Rep. 103; *Fleming v. Hull*, 73 Iowa, 598, 35 N. W. 673.

The power vested by the Constitution in the legislature cannot be delegated to the court.

McRae v. Grand Rapids, L. & D. R. Co. 93 Mich. 399, 17 L. R. A. 750, 53 N. W. 561.

The people have rights not named or guaranteed expressly in the Constitution.

State ex rel. Off v. Smith, 14 Wis. 501; *Opinion of the Justices*, 7 Mass. 523; *State ex rel. Perine v. Van Beek*, 87 Iowa, 577, 19 L. R. A. 622, 54 N. W. 525; *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 327; *United States v. Ball*,

163 U. S. 662, 673; 41 L. ed. 300, 304, 16 Sup. Ct. Rep. 1193; *Gandy v. State*, 13 Neb. 445, 14 N. W. 143; *Hanson v. Vernon*, 27 Iowa, 73, 1 Am. Rep. 215; Langdon, Col. History, pp. 24, 26; 1 Democracy in America, Bowen's ed. p. 101.

The right of local self-government is the right of the individual citizen; it does not belong to the state or towns, counties or cities, but to the individual, to the people.

State ex rel. Jameson v. Denny, 118 Ind. 382, 4 L. R. A. 79, 21 N. E. 252; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People ex rel. Bolton v. Albertson*, 55 N. Y. 57; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15.

The people have all governmental power, and they possess all the power and rights that have not been delegated.

Pom. Const. Law, 9th ed. §§ 151 et seq.; 1 Dill. Mun. Corp. 3d ed. § 9; Cooley, Const. Lim. 5th ed. 225; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *People ex rel. Townsend v. Porter*, 90 N. Y. 68.

The right of local self-government in towns and cities is vested in the people of the respective municipalities, and the legislature cannot appoint officers to administer municipal affairs, and hence cannot confer the power upon any other person, this power ending with the enactment of laws prescribing the manner of selection and the duties of the officers.

State ex rel. Jameson v. Denny, 118 Ind. 382, 4 L. R. A. 79, 21 N. E. 252; *Evansville v. State ex rel. Blend*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Atty. Gen. v. Detroit*, 29 Mich. 110; *People ex rel. Atty. Gen. v. Lothrop*, 24 Mich. 235; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175.

A municipal corporation, though a public and political institution, deriving its life and powers from the state, possesses a private and proprietary character, and, as such, may acquire and hold property by the same constitutional guaranties that extend over natural persons, and the restriction upon legislative action impairing the obligation of contracts preserves those made with it. Rights held by it in its last-named character are beyond legislative control and interference.

Dubuque v. Illinois C. R. Co. 39 Iowa, 56; *Milwaukee v. Milwaukee*, 12 Wis. 94; *State ex rel. Oshkosh Bd. of Edu. v. Haben*, 22 Wis. 660; *Aberdeen Female Academy v. Aberdeen*, 13 Smedes & M. 645; *Bowdoinham v. Richmond*, 6 Me. 112, 19 Am. Dec. 197; *Benson v. New York*, 10 Barb. 223; Dill. Mun. Corp. § 39.

There is an implied constitutional guar-
37 L. R. A.

anty to municipal corporations of the right of local self-government.

People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *State ex rel. Jameson v. Denny*, 118 Ind. 382, 4 L. R. A. 79, 21 N. E. 252; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175.

Before written constitutions the people possessed the power of local self-government. All the power which the people have delegated is what has passed from them by the formation of the Constitution.

Evansville v. State ex rel. Blend, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15; *State ex rel. Howe v. Des Moines*, 103 Iowa, 76, 39 L. R. A. 285, 72 N. W. 639.

Mr. R. J. Chase, for appellees:

The legislature may legislate on all subjects not prohibited by express words or necessary implication. The courts will not look to find what the Constitution authorizes, but what the Constitution prohibits.

Chicago, B. & Q. R. Co. v. Otos County, 16 Wall. 667, 21 L. ed. 375; *Pine Grove Twp. v. Talcott*, 19 Wall. 666, 22 L. ed. 227; Cooley, Const. Lim. p. 197; *Sawyer v. Dooley*, 21 Nev. 390, 32 Pac. 439; *Mercantiles' Union Barb Wire Co. v. Brown*, 64 Iowa, 276, 18 Am. Rep. 591, 20 N. W. 434; *McMillan v. Lee County Judge & Treasurer*, 6 Iowa, 391; *Boyd v. Ellis*, 11 Iowa, 97; *Morrison v. Springer*, 15 Iowa, 304; *Purcell v. Smidt*, 21 Iowa, 540; *Stewart v. Polk County*, 30 Iowa, 9, 1 Am. Rep. 238; *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 633; *State v. Hockett*, 70 Iowa, 442, 30 N. W. 742; *State ex rel. Witter v. Forkner*, 94 Iowa, 1, 28 L. R. A. 206, 62 N. W. 772; 3 Am. & Eng. Enc. Law, p. 689.

The Iowa legislature has unlimited power over the municipalities created by it.

Morford v. Unger, 8 Iowa, 82; *Merriam v. Moody*, 25 Iowa, 170; *State v. King*, 37 Iowa, 462; *Hanger v. Des Moines*, 52 Iowa, 194, 35 Am. Rep. 268, 2 N. W. 1105; *Taylor v. McFadden*, 84 Iowa, 268, 50 N. W. 1070.

The general law under which the city is organized expressly declares that it shall have such powers as are granted to it by law. This excludes the idea that it may possess powers not granted.

Nelden v. Clark, 20 Utah, 382, 59 Pac. 525.

The legislature has plenary power to create and confer upon other boards and agencies than the council the control and management of property held for the benefit of the public.

Philadelphia v. Fox, 64 Pa. 169; *People ex rel. Wood v. Draper*, 15 N. Y. 532; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15; *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248; *People ex rel. McLean v. Flagg*, 46 N. Y. 401; *State ex rel. Atty. Gen. v. Covington*, 29 Ohio St. 102; *Coyle v. Gray*, 7 Houst. (Del.) 44, 30 Atl. 728; *Montpelier v. East Montpelier*, 29

Vt. 21, 67 Am. Dec. 748; *Mt Hope Cemetery v. Boston*, 158 Mass. 509, 33 N. E. 695; *State ex rel. Herron v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; *Re Senate Bill*, 12 Colo. 188, 21 Pac. 482; *People ex rel. Fowler v. Brown*, 83 Ill. 95; *Columbus v. Columbus*, 82 Wis. 374, 16 L. R. A. 695, 52 N. W. 425; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *State ex rel. Atwood v. Hunter*, 38 Kan. 678, 17 Pac. 177; *Daley v. St. Paul*, 7 Minn. 390, Gil. 311; *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 142, 19 N. E. 224; *Baltimore v. State ex rel. Board of Police*, 15 Md. 376, 74 Am. Dec. 572; *Police Comrs. v. Louisville*, 3 Bush, 597; *Dunmore's Appeal*, 52 Pa. 374; *State ex rel. Simeral v. Seavey*, 22 Neb. 454, 35 N. W. 223; *Erskine v. Steele County*, 87 Fed. 630; *Esborg Cigar Co. v. Portland*, 34 Or. 282, 43 L. R. A. 435, 55 Pac. 961; *David v. Portland Water Committee*, 14 Or. 98, 12 Pac. 174; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Atty. Gen. v. Eau Claire*, 37 Wis. 435; *Sinking Fund Comrs. v. George*, 104 Ky. 260, 47 S. W. 779; *Covington v. Kentucky*, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 386; 6 Am. & Eng. Enc. Law, 2d ed. pp. 1009, 1027-1029, and notes; *Bridges v. Shallcross*, 6 W. Va. 573, *Ex parte Sims*, 40 Fla. 432, 25 So. 282; *State Prison v. Day*, 124 N. C. 362, 46 L. R. A. 295, 32 S. E. 748.

The supreme court of Iowa has heretofore considered the proposition that there is some limitation on legislative power not expressed in the Constitution, and it has decided against the existence of such power. It is *stare decisis* in this state.

Stewart v. Polk County, 30 Iowa, 10, 1 Am. Rep. 238; *McGregor & S. C. R. Co. v. Birdsall*, 30 Iowa, 255; *Bonnsfield v. Bidwell*, 32 Iowa, 149.

The provision requiring the district court to appoint the members of the board of trustees does not conflict with the Constitution.

The trustees are not "officers," but are mere "agents," representing the municipality within the powers conferred by the legislature.

Courts of equity, in their general jurisdiction, are peculiarly adapted to look after trust estates, and it is a maxim that no trust estate shall suffer for want of a trustee.

Montpelier v. East Montpelier, 29 Vt. 21, 67 Am. Dec. 748.

No case can be found where legislation of the character under discussion has been held to violate the provision dividing the powers of government into departments.

Philadelphia v. Fox, 64 Pa. 169; *Jackson County v. State ex rel. Brown*, 147 Ind. 476, 46 N. E. 908; *State ex rel. Atty. Gen. v. First Judicial Dist. Judges*, 21 Ohio St. 1; *Walker v. Cincinnati*, 21 Ohio St. 15, 8 Am. Rep. 24; *Montpelier v. East Montpelier*, 29 Vt. 21, 67 Am. Dec. 748; *Callen v. Junction City*, 43 Kan. 627, 17 L. R. A. 736, 23 Pac. 652; *Sawyer v. Dooley*, 21 Nev. 390, 32 Pac. 437; *Baltimore v. State ex rel. Board of Police*, 15 Md. 376, 74 Am. Dec. 572; *L. R. A.*

572; *Sinking Fund Comrs. v. George*, 104 Ky. 260, 47 S. W. 779; *People ex rel. Waterman v. Freeman*, 80 Cal. 233, 22 Pac. 173; *Stone v. Wilson*, 19 Ky. L. Rep. 126, 39 S. W. 49; *Re Bulger*, 45 Cal. 556; *Lewis v. Brandenburg*, 20 Ky. L. Rep. 1011, 47 S. W. 862, 48 S. W. 978; *Morton v. Woodford*, 99 Ky. 367, 35 S. W. 1112; *Bellingham Bay Improv. Co. v. New Whatcom*, 20 Wash. 53, 54 Pac. 774; *Cahill v. Perrine*, 20 Ky. L. Rep. 1454, 49 S. W. 344; 6 Am. & Eng. Enc. Law, 2d ed. pp. 1060-1064; *Story*, Const. p. 525; *People ex rel. Deneen v. Simon*, 176 Ill. 165, 44 L. R. A. 801, 52 N. E. 911; *Mo-Crea v. Roberts*, 89 Md. 238, 44 L. R. A. 485, 43 Atl. 40; *Santo v. State*, 2 Iowa, 220, 63 Am. Dec. 487; *Bryan v. Cattell*, 15 Iowa, 542; *Burlington v. Leebrick*, 43 Iowa, 255; *Ford v. North Des Moines*, 80 Iowa, 626, 45 N. W. 1031; *Taylor v. McFadden*, 84 Iowa, 267, 50 N. W. 1070.

The provisions of the Constitution prohibiting either of the departments from exercising any function appertaining to either of the others applies only to state officers.

Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487; *Sawyer v. Dooley*, 21 Nev. 390, 32 Pac. 437; *People ex rel. Atty. Gen. v. Provines*, 34 Cal. 520; *Staude v. San Francisco City & County Election Comrs.* 61 Cal. 313; *Baltimore v. State ex rel. Board of Police*, 15 Md. 376, 74 Am. Dec. 572.

The action of quo warranto is now considered as a civil remedy for a trial of the civil right.

19 Am. & Eng. Enc. Law, p. 662.

It is the universal practice in the United States when the application is, at the instance of a private relator, to test the right to an office or franchise, to exercise caution in granting leave.

19 Am. & Eng. Enc. Law, p. 665.

If there is no special injury to an individual, the state must move; otherwise, a private relator, whose rights are invaded in a manner not shared by the public generally, will be recognized by the court in its discretion.

19 Am. & Eng. Enc. Law, pp. 676, 677; *Miller v. Palermo*, 12 Kan. 14; *People ex rel. Byers v. Grand River Bridge Co.* 13 Colo. 11, 21 Pac. 898; *State ex rel. Kempf v. Boal*, 46 Mo. 528; *State ex rel. Worrell v. Peelle*, 121 Ind. 495, 22 N. E. 654; *State ex rel. Perine v. Van Beek*, 87 Iowa, 574, 19 L. R. A. 622, 54 N. W. 525.

Quo warranto will not lie for the purpose of declaring void, or annulling, a legislative act.

State ex rel. Buell v. Lyons, 31 Iowa, 432. No one can bring an action of this character except it be a claimant for the office.

State ex rel. Glenn v. Stein, 13 Neb. 529, 14 N. W. 481; *People ex rel. Hawes v. Walker*, 23 Barb. 304; *People ex rel. Crane v. Ryder*, 12 N. Y. 433; *Respublica v. Griffiths*, 2 Dall. 112, 1 L. ed. 311; *Com. v. Jones*, 12 Pa. 365; *Com. ex rel. McLaughlin v. Chuley*, 56 Pa. 270, 94 Am. Dec. 75; *State ex rel. Broatch v. Moores*, 58 Neb. 285, 78 N. W. 529.

Deemer, J., delivered the opinion of the court:

The 26th, 27th, and 28th general assemblies passed acts creating a board of waterworks trustees for cities of the first class, and authorizing the appointment of such board by the district court of the county in which such cities are located. *Vide*, §§ 742 and 750, inclusive, of the Code; Acts 27th Gen. Assem. chap. 23, and Acts 28th Gen. Assem. chap. 25. Sioux City is a city of the first class, and has owned and operated its waterworks system since the year 1885. In the year 1898 the then mayor made application to the district court of Woodbury county for the appointment of a board of trustees for the system, under the provisions of the acts of the legislature hitherto mentioned. Pursuant to this application, the four judges of the fourth judicial district, in which Woodbury county is situated, met in Sioux City, and appointed the defendants as trustees of the system. Defendant Spaulding refused to serve, and defendant Allison was appointed in his place. Three of the judges who participated in the conference and assisted in the selection of the trustees were and are nonresidents of Woodbury county, but the other was and is a resident of Sioux City. The persons so appointed filed bond in a sum fixed by the district court, and at once assumed control of the waterworks system, entered upon the discharge of their duties, and have since been in the exclusive possession, control, and management of the system. The relator is a resident citizen and taxpayer of the city of Sioux City, and a contributor to the support of the waterworks system. Intervener was, on the third Monday of March in the year 1899, appointed by the city council of the city of Sioux City to the office of superintendent of the waterworks system. He duly qualified as such, and he and the plaintiff, before the commencement of this proceeding, each made demand on the county attorney, to bring action to test the validity of the defendants' appointment, and the constitutionality of the acts under which the appointments were made. The city council also passed a resolution authorizing the commencement of the action. As the county attorney refused to bring the suit, the relator commenced it, and Robson, the superintendent appointed by the council, intervened, and asked the same relief as relator. Such, in brief, is a statement of the more important facts in the case, and the questions of law involved are so well stated by appellees' counsel that we use them as a basis for this opinion. They are as follows: "First. Has the legislature of Iowa the constitutional power to take away from the city council the control and management of the waterworks, and place such control and management in a board of trustees? Second. Assuming that the legislature has such power, are the acts of the legislature in question unconstitutional by reason of the manner of the execution of the power? In other words, Do the provisions placing the power of appointment of the members of the board

of trustees with the district court of Woodbury county infringe any provision of the Constitution? Third. Has Win S. White such an interest in the questions involved as will enable the court to render judgment in this case upon the merits thereof?"

As the third proposition involves a question of practice, it is perhaps well to settle that before proceeding with the merits of the case. Section 4316 of the Code, relating to quo warranto proceedings, reads as follows: "Sec. 4316. By Private Persons. If the county attorney, on demand, neglects or refuses to commence the same, any citizen of the state having an interest in the question may apply to the court in which the action is to be commenced, or to the judge thereof, for leave to do so, and, upon obtaining such leave may bring and prosecute the action to final judgment." It is admitted that the county attorney refused to bring the action, and the only question for decision on this branch of the case is, Has the relator such an interest in the question as that he may apply to the court for leave to do so? We think he has such interest. A private citizen and taxpayer is undoubtedly interested in the duties annexed to the several public officials who are authorized to levy taxes. This is not a contest over an office, as were many of the cases cited in appellees' brief, but a matter of public interest, in which relator has a special interest by reason of being a contributor to the funds. *State ex rel. West v. Des Moines*, 96 Iowa, 521, 31 L. R. A. 186, 65 N. W. 818; *Cochran v. McCleary*, 22 Iowa, 75; *State v. Independent School Dist.* 29 Iowa, 284; *State ex rel. Phillips v. Fidelity & Co. Co.* 77 Iowa, 648, 42 N. W. 509; *Ford v. North Des Moines*, 80 Iowa, 637, 45 N. W. 1031; *State ex rel. Byers v. Bailey*, 7 Iowa, 390; *Brockman v. Creston*, 79 Iowa, 587, 44 N. W. 822; *State ex rel. West v. Des Moines*, 96 Iowa, 521, 31 L. R. A. 186, 65 N. W. 818, is conclusive of the point. As we have said, if this were a contest over the right to hold office, relator should have shown that he was elected or appointed to that office; or, if it had been an action to dissolve the corporation, perhaps he could not have maintained the suit. But it is neither, and under our statute there seems to be no doubt of his right to sue. In any event, the intervener was entitled to maintain the action, because he had been appointed to the office of superintendent of the system pursuant to an ordinance adopted by the city. See, as further sustaining our conclusions on this point: *Darrow v. People*, 8 Colo. 417, 8 Pac. 661; *Churchill v. Walker*, 68 Ga. 691; *State ex rel. Waterbury v. Martin*, 46 Conn. 479; *Taggart ex rel. Jackson v. James*, 73 Mich. 234, 41 N. W. 262; *Com. ex rel. Yard v. Meeser*, 44 Pa. 341; *People ex rel. Barton v. Londoner*, 13 Colo. 303, 6 L. R. A. 444, 22 Pac. 764.

The other points presented involve constitutional questions that, to some extent at least, are new to the courts of this state. Preliminary to a discussion of the propositions involved, it is well to determine the

powers, duties and functions of a municipal corporation. Judge Dillon, in his masterly work on such corporations, gives an interesting and exhaustive history of their origin, growth, and development. Within the limits of a judicial opinion it is manifestly impossible to do more than state in the most general way some well-established historical facts regarding the development of municipalities. Man has ever been gregarious by nature, and, emerging from a state of barbarism, he naturally sought the society and fellowship of his kind. Rude gatherings and somewhat formless centers of population were the result, and from these were evolved better forms of organization and higher degrees of compactness, until even in remote antiquity great cities were established, which could only have been maintained by a system of municipal government, crude and incomplete at first, but certainly by no means contemptible. The storied splendors of the prehistoric cities of the old and new world are not wholly mythical. Indeed, the general trend has been from the unorganized to the organized; from the protoplasmic to the more complex and higher and more efficient forms of life. In the early Hellenic civilization the city was the state, governed in general by the whole body of free citizens, who met and discussed all questions of policy. The history of Rome is simply an account of the greatest municipal corporation the world has ever seen. The Roman republic took its origin from the city of the Tiber, and was but a development and extension of that city; and the empire erected on its foundations was remarkable for the power, influence, and wealth of the municipalities. During the dark ages the cities preserved what was left of knowledge, culture, and art. With the dawn of the Renaissance came Christianity and the feudal system, and the castle of the baron became the unit of government. The germ of the municipal corporation in England is to be traced to the "farmer commonwealths" of the early Teutons, and each "wick," "ham," "stead," or "tun," took its name from the kinsmen who dwelt together therein. "Each, judged by witness of the kinsfolk, made laws in the assembly of its freeman, chose leaders for its governance, and the men who were to follow headman or ealderman to hundred, court, or war." Green's Short History of English People, p. 15, § 2; *Id.* p. 93, § 6; Ang. & A. Priv. Corp. § 21. As to the growth of English guilds and boroughs, see Dill. Mun. Corp. chap. 1; 3 Hall. Middle Ages, chap. 8; and Green's History, chap. 4. Our own towns were established in accordance with the English principles of liberty, but they generally possess greater powers of local self-government than their English prototypes; and, as said by Cooley in his work on Constitutional Limitations (p. 223): "In contradistinction to those governments where power is concentrated in one man, or in one or more bodies of men, whose supervision and active control extends to all the objects of government within the territorial limits of

the state, the American system is one of complete decentralization, the primary and vital idea of which is that local affairs shall be managed by local authorities, and general affairs only by the central authority." See also De Toqueville on Democracy in America, tome 1, 64, 96, wherein it is said that municipal corporations form the principle of American liberty existing to this day. The history of New England towns is quite generally understood, and we need only cite the following cases for an epitome of their origin and powers: *Warren v. Charleston*, 2 Gray, 84; *Bloomfield v. Charter Oak Nat. Bank*, 121 U. S. 121, 30 L. ed. 923, 7 Sup. Ct. Rep. 865; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; Dill. Mun. Corp. §§ 28-30; and Local Constitutional History of the United States by George F. Howard (vol. 1, chap. 2). The result of all this discussion is a definition of the term as follows: "We may, therefore, define a municipal corporation in its historical and strict sense to be the incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper." Dill. Mun. Corp. § 20. The only fault with this definition, if there be any, is that it does not embrace the inhabitants as well as the territory, for the term embraces both the territory and its inhabitants. *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Galesburg v. Hawkinson*, 75 Ill. 156. Under our form of government the legislature creates municipal corporations, defines and limits their powers, enlarges or diminishes them at will, points out the agencies which are to execute them, and possesses such general supervision over them as it shall deem proper and needful for the public welfare. As to all matters of public concern, such as relate to the performance by the city of functions as an agent of the state, the legislature is unlimited in its power. *State ex rel. Hawes v. Mason*, 153 Mo. 23, 54 S. W. 524; *People ex rel. Drake v. Mahaney*, 13 Mich. 481. Neither the charter of a municipal corporation nor any legislative act regulating the use of property held by it for governmental purposes is a contract within the meaning of the constitutional inhibition of laws impairing the obligations of contracts, and where there is no constitutional restriction, either express or implied, upon the action of the legislature, it has absolute control to create, change, modify, or destroy such corporations at pleasure. *Covington v. Kentucky*, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *St. Louis v. Shields*, 52 Mo. 351; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699. But the legislative control of municipal corporations is not without limitations. This immunity

from unlimited legislative control has been expressly recognized by the Supreme Court of the United States in *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142, where it is said "that the municipality, being a mere agent of the state, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed, or revoked without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection." The dual capacity of such a corporation has long been recognized; in other words, it is in part a public agency of the state, and in part possessed of local franchises and rights, which pertain to it as a legal entity for its corporate advantage. The right of a municipal corporation to hold and manage property, to sue and to be sued, and to act generally as a private corporation in supplying local needs and conveniences, has been distinctly recognized by a long line of well-considered cases. *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 229, 15 Am. Rep. 202; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Wood v. Draper*, 15 N. Y. 561, as explained in *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *Glover, Mun. Corp.* pp. 1, 2, 4, 18, 19; *Dill. Mun. Corp.* 4th ed. 3a, 8a, 8d, 28; *St. Louis v. Dorr*, 145 Mo. 479, 42 L. R. A. 686, 41 S. W. 1094, 46 S. W. 976; *State ex rel. Jameson v. Denny*, 118 Ind. 382, 4 L. R. A. 79, 21 N. E. 252; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175; *Mount Hope Cemetery v. Boston*, 158 Mass. 509, 33 N. E. 695; *Elliott, Mun. Corp.* § 28; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Davock v. Moore*, 105 Mich. 120, 28 L. R. A. 783, 63 N. W. 424; *State ex rel. Atwood v. Hunter*, 38 Kan. 578, 17 Pac. 177; *State ex rel. Terre Haute v. Kolsem*, 130 Ind. 434, 14 L. R. A. 566, 29 N. E. 595; *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545. Some of the cases cited proceed on the theory that the legislature has no power, after creating a municipal corporation, to take away from it the right of local self-government. The argument is that the intention to preserve and perpetuate the ancient right of local self-government, which the law recognizes as of common-law origin, and having no less than common-law franchises, is apparent throughout the scope of most American constitutions. Some of the judges even go so far as to say "that, local self-government having always been a part of the English and American systems, we shall look for its recognition in any such instrument [constitution]; and, if not expressly recognized, it is still to be understood that all these instruments are framed with its present ex-

istence and anticipated continuance in view;" "that back of all constitutions are certain usages and maxims that have sprung from the habits of life, mode of thought, methods of trying facts, and mutual responsibility in neighborhood interests; precepts that have come from revolutions which overturned tyrannies; sentiments of manly independence and self-control, which impelled our ancestors to summon the local community to redress local evils, instead of relying upon King or legislature at a distance to do so; that form the living spirit of the lifeless skeleton known as the constitution; that gives it force and attraction, and that distinguishes it from the numberless so-called constitutions of Europe; and that this so-called living spirit should supply the interpretation of the words of the written charter." We are not to be understood as fully approving all that is said in some of the cases regarding the right of local self-government, nor do we mean to hold that there is an unwritten constitution complete and comprehensive in itself. All that we intend to announce is that written constitutions should be construed with reference to and in the light of well-recognized and fundamental principles lying back of all constitutions, and constituting the very warp and woof of these fabrics. A law may be within the inhibition of the Constitution as well by implication as by expression. *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272; *People ex rel. Ford v. Gillette*, 159 N. Y. 125, 53 N. E. 755; *Bailey v. Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 389, 44 Am. Dec. 593. But we will not elaborate this thought. Suffice it to say that we have already recognized the principles announced in *State ex rel. Howe v. Des Moines*, 103 Iowa, 76, 39 L. R. A. 285, 72 N. W. 639, wherein it was held, after referring with approval to many of the cases we have cited, that the legislature could not delegate the power of municipal taxation to a board not elected by and immediately responsible to the people to be affected thereby. This court, speaking through Kinne, J., said there was an implied limitation on the power of the legislature to delegate the power of taxation. Right of local self-government was also recognized in *State ex rel. Witter v. Forkner*, 94 Iowa, 1, 28 L. R. A. 206, 62 N. W. 772. Section 25 of article 1 of the Constitution provides that "this enumeration of rights shall not be construed to impair or deny others retained by the people." Some of the cases we have cited hold to the doctrine that the rights of the inhabitants of a municipal corporation to local self-government is one of the rights retained by the people. But we need not and do not go to this extent, except in so far as private and proprietary rights and interests are concerned, as will hereinafter appear. Municipal corporations are recognized by the Constitution, and certain limitations placed on the power of the legislature with reference thereto. Thus it is provided that "no corporation shall be created by special laws, but the general assembly

shall provide by general laws for the organization of all corporations hereafter to be created." Section 1, art. 8. Section 12 of the same article, authorizing the repeal or amendment of all laws relating to corporations, has no application to municipal corporations. *Ex parte Pritz*, 9 Iowa, 30. Section 30 of article 3 prohibits the passage of local or special laws for the incorporation of cities and towns. It thus appears that municipal corporations are recognized by our fundamental law, and that no special or local law relating thereto may be passed. We are also of opinion that there are other well-defined limits on the power of the legislature in dealing with such bodies. But we need not further elaborate on these points. Any other conclusion than the one we have reached would necessitate the overruling of the case in 103 Iowa, 76, 39 L. R. A. 285, 72 N. W. 639, and that we are not prepared to do.

2. There are other considerations, however, that lead to the same conclusion. We have already called attention to the dual nature of municipal corporations, and have discovered that with respect to private and proprietary rights and interests they are entitled to constitutional protection. It is quite clear that the establishment and control of waterworks for the benefit of the inhabitants of the city is a matter that pertains to the municipality, as distinguished from the state at large. *Dill. Mun. Corp.* § 58; *Mount Hope Cemetery v. Boston*, 158 Mass. 509, 33 N. E. 695; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *Kansas City v. Marsh Oil Co.* 140 Mo. 472, 41 S. W. 943. In *Peterson v. Society for Establishing Useful Manufactures*, 24 N. J. L. 385, it is held, in substance, that a municipal corporation exercising powers conferred not for public purposes, but for its private benefit and emolument, will be regarded *quod hæc* as a private corporation. See also *Montpelier v. East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748; *Atkins v. Randolph*, 31 Vt. 226; *Dartmouth College v. Woodward*, 4 Wheat. 694, 4 L. ed. 673; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140, 5 N. W. 275; *Helena Consol. Water Co. v. Steele*, 20 Mont. 1, 37 L. R. A. 412, 49 Pac. 382; *Newport v. Horton*, 22 R. I. 196, 50 L. R. A. 330, 47 Atl. 312; *Louisville v. University of Louisville*, 15 B. Mon. 642; *Milwaukee v. Milwaukee*, 12 Wis. 94. Having, then, a proprietary and private interest in its waterworks system, granted to it by the legislature, or incident to its power to acquire and hold property, the question recurs, May the management and control of this property be taken out of its hands by the legislature, and invested in trustees appointed by the district court; especially where, as in this case, the trustees so appointed are in no respect responsible to the appointing power, and are not required to make reports thereto? We think not. If the city were a mere private corporation, it would need no argument to show that the legislature could not take the management of its property out of the

hands of its officers and directors, and place it in the custody and control of officials, even if they be stockholders, selected by persons who had no interest in the corporate entity, and who were in no manner responsible to those interested in the welfare of the organization. Such divestiture of property, or, what is the same thing, of its management and control, would be unconstitutional and void. The same rules have been applied to property held by a municipal corporation in its private and proprietary capacity. See cases heretofore cited, and *Dill. Mun. Corp.* 4th ed. §§ 68, 68a, 69; *Orr v. Bracken County*, 81 Ky. 593; *Small v. Danville*, 51 Me. 359; *Western College of Homeopathic Medicine v. Cleveland*, 12 Ohio St. 375; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *De Voss v. Richmond*, 18 Gratt. 338, 98 Am. Dec. 647; *Niles Waterworks v. Niles*, 59 Mich. 311, 26 N. W. 525; *Anne Arundel County v. Duckett*, 20 Md. 468, 83 Am. Dec. 557, and cases heretofore cited. This view appears to us to be based on the soundest of reasons, and to be supported by the weight of authority. It is alone sufficient to dispose of the case, but there is another objection, even stronger than the ones we have been considering.

3. The division of the powers of government into three different departments—legislative, executive, and judicial—lies at the very foundation of our constitutional system. The fathers had in mind "Montesquieu's Dissertation on the Spirit of the Laws," in which he said: "There is no liberty if the power of judging be not separated from the legislative and executive powers when the legislative and executive powers are united in one body or person. There can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." He further said: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive, the judge might behave with all the violence of an oppressor." Recognizing the dangers to be feared from concentration of power, our constitution builders not only created the three departments, but specially provided in § 1, art. 3, that "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted." The act in question authorizes the district court to appoint trustees for the waterworks system, and, strangely enough, requires the concurrence of more than one judge, failing to recognize that the district court can only be presided over by one judge. The appointment is to be made for a going concern, and without regard to dissensions or contests regarding the control or management of the system; and the inquiry naturally arises, Is this a judicial function? If it is, then the judiciary may be authorized,

empowered, and required to select any or all municipal officers. In the further discussion of the question it must be borne in mind that the district court is created by the Constitution, and what is said has reference to a constitutional court. Courts which are not provided for by the Constitution may be authorized to discharge functions that are executive or legislative in character. Thus the county courts of this state, when they existed, not only were authorized to perform judicial functions, but executive and legislative as well. This is permissible under all the authorities. *Stone v. Wilson*, 19 Ky. L. Rep. 126, 39 S. W. 49; *State ex rel. Atty. Gen. v. First Judicial Dist. Judges*, 21 Ohio St. 1; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *Phinizy v. Ewe*, 108 Ga. 360, 33 S. E. 1007. But powers not in themselves judicial, and that are not to be exercised in the discharge of the functions of the judicial department, cannot be conferred on courts or judges designated by the Constitution as a part of the judicial department of the state. *Hoyburn's Case*, 2 Dall. 409, 1 L. ed. 436; *United States v. Ferreira*, 13 How. 40, 14 L. ed. 42; *United States v. Todd*, 13 How. 52, note, 14 L. ed. 47, note; *Case of Election Supers.* 114 Mass. 247, 19 Am. Rep. 341; *Norwalk Street R. Co.'s Appeal*, 69 Conn. 576, 39 L. R. A. 794, 37 Atl. 1080, 38 Atl. 708; *Housman v. Montgomery*, 58 Mich. 364, 25 N. W. 369; *Smith v. Strother*, 68 Cal. 194, 8 Pac. 852; *Sterens v. Truman*, 127 Cal. 155, 59 Pac. 397; *People ex rel. Nichols v. McKee*, 68 N. C. 429; *State ex rel. Coogan v. Barbour*, 53 Conn. 85, 55 Am. Rep. 65, 22 Atl. 686; *Taylor v. Com.* 3 J. J. Marsh. 401; *State ex rel. Hahn v. Young*, 29 Minn. 474, 9 N. W. 737; *McRae v. Grand Rapids, L. & D. R. Co.* 93 Mich. 399, 17 L. R. A. 750, 53 N. W. 561; *Muhlenburg County v. Morehead*, 20 Ky. L. Rep. 316, 46 S. W. 484; *State ex rel. Board of Transportation v. Sioux City, O. & W. R. Co.* 46 Neb. 682, 31 L. R. A. 47, 65 N. W. 766; *Ex parte Griffiths*, 118 Ind. 83, 3 L. R. A. 398, 20 N. E. 513; *Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72. Of course, the act itself need not be judicial in character. If the general power be judicial, or if the act itself be in aid of some judicial function, it is sufficient. Thus the exercise of judicial power may be essential in the discharge of executive functions. *Sawyer v. Dooley*, 21 Nev. 390, 32 Pac. 437; *People ex rel. Densen v. Simon*, 176 Ill. 165, 44 L. R. A. 803, 52 N. E. 910. And courts, in the discharge of their duties, may be required to exercise executive or administrative powers. They may be authorized to make contracts to keep court rooms in repair (*White County v. Gwin*, 136 Ind. 562, 22 L. R. A. 402, 36 N. E. 237); may appoint commissioners to apportion and assess damages for the opening of a highway (*Salem Turnp. & C. Bridge Corp. v. Essex County*, 100 Mass. 282; *Terre Haute v. Evansville & T. H. R. Co.* 149 Ind. 174, 37 L. R. A. 189, 46 N. E. 77; *Tuolumne County v. Stanislaus County*, 6 Cal. 440); may appoint jury commissioners (*State v. Kendle*, 57 L. R. A.

52 Ohio St. 346, 39 N. E. 947); may determine whether a municipal corporation shall be created, or adjoining territory annexed (*Burlington v. Leebrick*, 43 Iowa, 253; *Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. 813; *Winfield v. Linn*, 60 Kan. 859, 57 Pac. 549; *Ford v. North Des Moines*, 80 Iowa, 628, 45 N. W. 1031). But in each and all of these cases the powers are either judicial in character, or are to be exercised in the discharge of functions pertaining to the judicial department. If the matter is one requiring some judicial determination, it may be left to the court or to judges, although it is not involved in the determination of an actual case litigated in the ordinary manner. Thus the propriety and necessity of the construction of a bridge over railway tracks may be left to a judge for decision. *State v. New York, N. H. & H. R. Co.* 71 Conn. 43, 40 Atl. 925. So may the power to pass on a liquor license. *McCrea v. Roberts*, 89 Md. 238, 44 L. R. A. 405, 43 Atl. 39. Courts cannot fix railroad, telegraph, telephone, water, and other rates, although they may pass on the reasonableness thereof. *Steenerson v. Great Northern R. Co.* 69 Minn. 353, 72 N. W. 718; *State ex rel. Board of Transportation v. Sioux City, O. & W. R. Co.* 46 Neb. 682, 31 L. R. A. 47, 65 N. W. 766; *Nebraska Teleph. Co. v. State ex rel. Yeiser*, 55 Neb. 627, 45 L. R. A. 113, 76 N. W. 171; *State ex rel. Godard v. Johnson*, 61 Kan. 803, 49 L. R. A. 662, 60 Pac. 1068. Fixing rates in such instances is purely a legislative act, which cannot be delegated to a constitutional court. With a few dissenting voices, these seem to be the conclusions reached by the courts of the country, and they fully accord with our views. The appointment of trustees to manage and control a system of waterworks belonging to a municipal corporation in advance of litigation or of any dispute concerning their management or control is surely not a judicial function. It is more nearly administrative; but with the affairs of the corporation and the management of its property courts have nothing to do in advance of some dispute. If courts are to select city officials, they may also select those who are to administer the affairs of the county; and it is not going too far to say that they may also be authorized to select state officials. Such a union of power would, as said by Chancellor Kent in *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291, "result in tyranny." See also *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; 1 Bl. Com. 269. "That which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of future cases falling under its provisions." So wrote Judge Cooley in his invaluable work on Constitutional Limitations (108). Generally speaking, appointment to an office is an executive function. True, not every appointment is executive in character, for appointments may

be made by judicial officers in the discharge of their official duties, and the legislature may appoint the officers necessary to enable it to discharge its duties. But such appointments are necessary to enable them to properly discharge their duties, and to maintain their separate existence. These do not involve an encroachment on the function of any other branch. The appointments authorized by the act in question are in no manner connected with the discharge of judicial duties, and to our minds clearly fall within the prohibition of the article of the Constitution hitherto quoted. Much more might be said in support of the conclusion reached, but this opinion has already outgrown proper limits. Judges of courts created by the Constitution should not be burdened with executive or administrative duties. They should, as nearly as possible, be freed from everything not judicial in character. Respect for the position has materially lessened whenever judges have attempted to discharge duties of an executive character. The judge should have no favors to grant, no patronage to dispose of, and no friends to reward. The spoils system should have no place in the selection of judicial officers. The manifest purpose of the legislature in passing the act in question and placing the appointing power in the hands of the judiciary is a compliment that speaks loudly of the integrity, fairness, and independence of judicial officers; but, if they are put on a plane with other officials, who are compelled to, or who, at least, in many instances do, use their appointing power to further their own interests, will they not sacrifice their standing as judges, and defeat the very objects intended to be secured? Let us adhere to the traditions and history of the past; let the judge be supreme in his field, the legislator in his, and the executive remain where the Constitution placed him;

let the three co-ordinate departments of government be preserved intact; let neither trench upon the other; and our liberties will be preserved, and our rights duly maintained. Municipal reforms must come from within, and not from without. Good government can only be secured by the active co-operation of good citizens. Those who remain away from the primary and the election and refrain from voting are not only forgetful of their duties, but through neglect they suffer crime to flourish and corruption to reign supreme. They put themselves on a level with the worst elements by consenting to their practice, and in some instances profiting from them, and are morally, if not legally, responsible for existing conditions. The property-owning taxpaying classes, who suffer most, from a material point of view, under mismanagement and corruption, have the remedy in their own hands if they choose to exercise it. This remedy is not by placing all municipal affairs under the control of the judiciary, but by taking the same interest in the administration of local affairs that they manifest in the conduct of their private business. All the authorities seem to agree that legislative and judicial interference in purely municipal matters "has tended very greatly to lessen the sense of responsibility on the part of local officials and upon the part of communities themselves." Goodnow, *Mun. Problems*, pp. 38, 39. Seth Low's article on "Municipal Home Government" in 1 Bryce, *American Commonwealth*, chap. 52.

We have given the case the care and attention its importance demands, and, while fully recognizing the rule that an act of the legislature should not be declared unconstitutional unless plainly and clearly within its limitations, are nevertheless constrained to hold that the act cannot be sustained.

Reversed.

KENTUCKY COURT OF APPEALS.

J. W. REID, JR., Admr., etc., of J. W. Reid,
Sr., Deceased, *Appt.*,

v.

E. J. BENGEE.

(.....Ky.....)

The negligent placing of a will so that its existence is not known for several years after testator's death, and the laches of the devisees in not producing it, will not estop him from asserting his claim against one who has acquired a title from the heir at any time before the right to probate or register the will is barred.

(February 28, 1902.)

A PPEAL by defendant from a judgment of the Circuit Court for Clay County in favor of plaintiff in an action brought to foreclose a mortgage. *Reversed.*

The facts are stated in the opinion.

Mr. James D. Black, for appellant:

Appellee could not by the mortgage subject to the payment of her debt any interest in the land beyond the one-fourth interest therein given to the mortgagor under the will.

The judgment of the Clay county court admitting that will to record, and adjudging it to be the last will and testament of T. T. Reid, is conclusive. If his will is valid the

NOTE.—Effect of delay in probating wills.

I. Generally, 253.

II. Where the estate is sold or mortgaged by the heirs, 255.

III. Where the devisees are under disabilities, 257.

IV. Where the will is concealed, lost, or destroyed, 258.

V. Estoppel, 260.

57 L. R. A.

VI. Second wills and codicils, 261.

VII. Suspension of probate proceedings, 262.

VIII. Probate in solemn form and second probate, 262.

IX. Wills from other states, 263.

X. Statutory limitations, 264.

XI. Summary, 266.

I. Generally.

In many cases it has been held that wills

interest of his legatees and devisees becomes a vested property right.

Page, Willa, § 22.

The right to offer a will for probate is limited by the ten years' statute as the period of limitation for an action for relief not otherwise limited.

Allen v. Froman, 96 Ky. 313, 28 S. W. 497.

Mr. D. K. Rawlings for appellee.

White, J., delivered the opinion of the court:

In October, 1888, T. T. Reid died in Clay county, never having married or had issue. His only heir at law was J. W. Reid, Sr., his father, the mother having died prior to the death of T. T. Reid. After the death of T. T. Reid, his father, as heir at law, took possession of the real estate left by T. T.

should be admitted to probate although many years have elapsed since the death of the testator. In the absence of a statutory limitation, or any question of the rights of a purchaser for value, or estoppel, it seems that there is no well-defined limitation as to the time of probate. The English rule is stated to be that if a will is probated in common form—that is, in an *ex parte* proceeding—it may thereafter be probated in solemn form,—that is, on notice to those interested at any time within thirty years. There are a few cases in which it was held that wills may be probated after the lapse of the statutory period, as in cases of concealment, etc. There are cases, also, where the probate was refused without regard to the period of time only,—under circumstances of estoppel and the like.

In the following cases wills were probated where many years had elapsed after the death of the testator: *Re Myera*, 3 Dem. 193; *Tallafarro v. Tallafarro*, 4 Call (Va.) 93; sixty-three years, *Haddock v. Boston & M. R. Co.* 146 Mass. 155, 15 N. E. 495; forty-two years, *Davis v. Gaines*, 104 U. S. 386, 26 L. ed. 757; thirty-one years, *Deake's Appeal*, 80 Me. 57, 12 Atl. 790; twenty-nine years, *Fox v. Fee*, 167 N. Y. 44, 60 N. E. 281; twenty-three years, *Fatherree v. Lawrence*, 33 Miss. 585; over twenty years, *Bourne v. Greenleaf*, cited in 146 Mass. 157, 15 N. E. 495; nineteen years, *Cole v. Gourlay*, 79 N. Y. 527; eighteen years, *Carpenier v. Denoon*, 29 Ohio St. 379 (from probate in other state); fourteen years, *Waters v. Stickney*, 12 Allen, 1, 90 Am. Dec. 122 (codicil); thirteen years, *Walton v. Ambler*, 29 Neb. 626, 45 N. W. 931; twelve years, *Schultz v. Schultz*, 10 Gratt. 358, 60 Am. Dec. 335 (*dictum*, seventeen years); eleven years, *Ryan v. Texas & P. R. Co.* 64 Tex. 239; *Transue v. Brown*, 31 Pa. 92; ten years, *Camden Safe Deposit & T. Co. v. Ingham*, 40 N. J. Eq. 3; *Etheridge v. Corpwee*, 48 N. C. (3 Jones, L.) 14 (solemn form); *Reid v. Benos* (statutory limit); *Allen v. Froman*, 96 Ky. 313, 28 S. W. 497 (statutory limit); nine years, *Gray v. Maer*, 20 N. C. (3 Dev. & Batt. L.) 47 (reprobate); *Allen v. Allen*, 28 Kan. 18 (nine years on file; statutory limit three years); six years, *Doe ex dem. Pope v. Pickett*, 51 Ala. 584; five years, *Besanson v. Brownson*, 39 Mich. 388; four years, nine months, *Elwell v. Universalist General Convention*, 76 Tex. 514, 13 S. W. 552; four years limit by statute, *Fox v. Fee*, 167 N. Y. 44, 60 N. E. 281; one year, *Keith v. Proctor*, 114 Ala. 676, 21 So. 502.

And it has been said that a will may be probated at any time. *Shumway v. Holbrook*, 1 Pick. 115, 11 Am. Dec. 153; *Claggett v. Haw-*

Reid, containing probably 300 acres. In April, 1890, J. W. Reid, Sr., borrowed of appellee, E. J. Bengé, \$600, and to secure its repayment executed a mortgage on the tract of land that had formerly been owned by T. T. Reid, and which J. W. Reid, Sr., then thought he had inherited from his son T. T. Reid. This mortgage was properly executed, delivered, and put to record in the proper office. After the execution and delivery of this mortgage to appellee, the mortgagor, J. W. Reid, Sr., died, and administration was had on his estate by J. W. Reid, Jr. The appellee instituted this action to collect her debt of \$600 from the estate of J. W. Reid, Sr., and to enforce her mortgage lien on the tract of land. The administrator and heirs at law of J. W. Reid, Sr., were all made parties. To this action certain of the children of J. W. Reid, Sr.,

kina, 11 Md. 381; *Rebhan v. Mueller*, 114 Ill. 343, 55 Am. Rep. 869.

And that a will that was forty-three years old could be probated. *Marcy v. Marcy*, 6 Met. 360.

Or one that was over four years old. *Ochoa v. Miller*, 59 Tex. 462.

And it was said that in England a will could be probated in solemn form within thirty years. *Straub's Case*, 49 N. J. Eq. 264, 24 Atl. 569.

And it was said in *Stebbins v. Lathrop*, 4 Pick. 33, and *Foot v. Foote*, 61 Mich. 181, 28 N. W. 90, that the statute directs a will to be probated in thirty days.

And a statute requires a holographic will to be probated in six months. *George v. Greer*, 53 Miss. 495.

But a codicil over twenty years old was refused probate, in *Watson v. Turner*, 89 Ala. 225, 8 So. 20 (applying the statutory time for contesting wills).

And a will nineteen years old was held inadmissible to probate on the ground of estoppel in *Re Lyman*, 14 Misc. 357, 36 N. Y. Supp. 117.

So, where a will was fourteen years old. *Foote v. Foote*, 61 Mich. 181, 28 N. W. 90.

And a second will was denied probate after five years, in *Hardy v. Hardy*, 26 Ala. 524 (applying a statute).

A will was found among papers in the possession of one of the heirs and offered for probate sixty-three years after the death of the testator. It was held that it should be probated. *Haddock v. Boston & M. R. Co.* 146 Mass. 155, 15 N. E. 495. In this case the court said: "So long as one can produce the evidence necessary to obtain the probate of a will, we can see no legal reason why one who relies upon it should not be allowed to prove it as he would be permitted to prove a deed, however ancient, under which he claimed title. The fact that he could not offer in evidence a will not admitted to probate, as he might an ancient deed, would certainly afford no reason why its authenticity should not be established in the probate court by its regular course of procedure." In this case the question was only on the probate, and the objector claimed that the title to his real estate might be affected, but the case does not show how.

And in *Re Myers*, 3 Dem. 193, it was held that a will should be admitted to probate where it was offered more than thirty years after its execution, and proved by one attesting witness, the other being dead. The case does not show when the testatrix died.

In *Bourne v. Greenleaf*, cited in 1 Pick. 117, note, Mr. Justice Jackson, at the argument,

brothers and sisters of T. T. Reid, deceased, filed answer, being already parties hereto, and denied that at the date of the execution of the mortgage by J. W. Reid, Sr., to appellee, or at all, the said J. W. Reid, Sr., had title to the land, or that the same ever descended to him from his son T. T. Reid, their brother. They pleaded that at the regular term of the Clay county court in May, 1895, there was produced and probated the will of T. T. Reid, by which will the land mortgaged was devised to them in conjunction with their father, J. W. Reid, Sr.; that is to say, the father was devised one fourth the land, and the other three fourths to appellants, his brothers and sisters. Appellants therefore denied appellee's right to a lien upon the land, at least to the extent of their interest,—three fourths,—derived under the will of T. T. Reid. By reply the ex-

istence and probate of the will was formally denied. The only proof taken was that of appellee, who, if competent for any purpose, established the justness of her claim against J. W. Reid, Sr., which was never an issue, and her entire ignorance of the will of T. T. Reid until it was probated in 1895, more than five years after she had loaned the money to J. W. Reid, Sr., and accepted the mortgage as security. With this proof and the copy of the probated will and orders of the county court the case was submitted for final hearing. The court adjudged to appellee a lien on the whole of the land to satisfy her debt, and decreed a sale thereof, and to reverse that judgment this appeal is prosecuted.

It may be said at the outset that there is no pretense or plea that the devisees (appellants) were guilty of any fraud by sup-

said there was a case in the county of Essex, perhaps thirty years ago, where it was found that the widow of a testator must hold land under the will, which had not been proved. The will was therefore carried to the probate office, but, more than twenty years having elapsed since the death of the testator, the judge of probate refused to allow it; but upon an appeal the decision was reversed, as a will must be proved and allowed, in order to convey land. The names of the parties in this case are given in *Haddock v. Boston & M. R. Co.* 146 Mass. 155, 15 N. E. 495, where it was said: "It is a case to which some weight must be attached, as it brought into question directly the authority of the court of probate, and the appeal was to the full bench of the supreme court, which reversed the original decree. While no opinion appears to have been written, it could not but have been a carefully considered case, as it reversed the opinion of the judge of probate as to the extent of his jurisdiction."

And where a will was offered for probate eleven years after the death of the alleged testator and after the death of both of the subscribing witnesses, and on an issue of *deviseavit rei non* there was evidence of the handwriting of the subscribing witnesses and of the alleged testator, it was held that it was sufficient to admit the will to be read in evidence to the jury. *Transue v. Brown*, 31 Pa. 92. In this case the court does not discuss the question of limitation or delay, but says that "if rights have vested under the proceedings of the administrator, in selling or distributing the estate, this is not the proper time to protect them."

In *Marcy v. Marcy*, 6 Met. 360, 370, the question was whether there was sufficient evidence that a will which became operative forty-three years before had been admitted to probate so that it could be read in evidence. The court held that there was such evidence, adding: "On evidence like the present, it would be the duty of the probate court to establish the will, if, for want of form, the probate should have been considered so defective that the will had been rejected as evidence in its present state."

In *Shumway v. Holbrook*, 1 Pick. 115, 11 Am. Dec. 153, it was said: "If a will can be found, it may be proved in the probate office at any time, in order to establish a title to real estate. It differs from an administration of personal property, which cannot be originally granted upon the estate of any person after twenty years from his decease."

In *Clagett v. Hawkins*, 11 Md. 381, which was an application to revoke a will, it was 57 L. R. A.

said: "The proposition, that no lapse of time will exclude the inquiry whether certain papers constitute the will of a party, is supported by almost any number of authorities; that of *Finucane v. Gayfere*, 3 Phillim. Eccl. Rep 405, will suffice for this case."

In *Ochoa v. Miller*, 59 Tex. 462, it was said that if it is shown that a will has not been under the control of the party offering the same for probate, nor in its proper place of deposit, it may be probated after the lapse of four years if proper steps are taken and proper proof made. It was further said that no "letters testamentary could, however, issue." The statute requires that a will should be probated in four years.

II. Where the estate is sold or mortgaged by the heirs.

Under statutes protecting the rights of purchasers for value as against a subsequent probate of a will, such purchasers are protected if the will is not probated within the statutory time. It is held that a purchaser from a devisee may have the will probated after the statutory time where cause is shown for delay and his title is contested by the heirs; and a purchaser at a judicial sale under an order of the probate court, acquiring title through a will, was held not to be affected by the probate of a subsequent will, of which he had no notice. A party advancing money on a mortgage made by heirs is not protected until after the statutory time for probating the will has elapsed. There are quite a number of cases in which probate was allowed in order to make a link in a chain of title, where the probate did not occur for many years; but in most of these cases the question seems only to have been as to the right to have the will probated, whatever question might occur as to the rights of a purchaser being relegated, without notice, to a subsequent action.

In *REID V. BENGEL* it was held that in Kentucky a will may be probated at any time within ten years after the death of the testator. In this case the will was probated seven years after the testator's death. The heir had taken possession of the land, and had executed a mortgage thereon, but the devisees were ignorant of the execution of the will. It was held that they were not precluded by lapse of time from asserting their rights.

Where the testatrix died in 1871 it was held that, notwithstanding the expiration of four years from her death, her will might be probated in 1882 to establish a link in a chain of title, although no letters testamentary could is-

pressing the will, or in fact knew that such paper existed till long after the execution of appellee's mortgage. It seems to be conceded that all parties acted in good faith upon the facts as they knew them. The question, then, presented for our consideration, is: Is the equity of appellee, acquired under the mortgage executed by J. W. Reid, Sr., when all parties believed he was the legal owner by reason of being heir at law, and five years before the discovery of the will of T. T. Reid, superior to the legal title of the devisees under the will? It is conceded that no statute of limitation applies to bar appellants' right to recover, for it is well settled in this state that a will may be probated at any time within ten years after the death of the testator. *Allen v. Froman*, 96 Ky. 313, 28 S. W. 497. The will in the case at bar was probated seven

years after testator's death. There is no plea of fraud either in suppressing the will or in inducing the appellee to part with her money on the faith of the mortgage security by any of the appellants, at least with any knowledge or information of their rights in the land. As we understand the contention of counsel, his position is that by reason of the negligence of testator in so placing his will as not to be found for seven years after his death, though this may not have been actually intended, and by reason of laches of appellants, devisees thereunder, in not producing the will, the appellee has acquired an equitable claim superior to the legal title under the will. By § 16, chap. 113, Gen. Stat., in force at the death of T. T. Reid, it is provided that the will speaks as of the testator's death, unless a contrary intent appear by the will. *Alexander*

sue, where the will had not been in plaintiff's control, but had all the while been in the place of its appropriate custody, or under the control of the husband of the testatrix. *Ryan v. Texas & P. R. Co.* 64 Tex. 239. In this case the will was made so as to be available as a deed or will, and it had been recorded as a deed, but litigation arose over it and application for probate was made, but was dismissed under a compromise. The litigation was held sufficient excuse for the laches in plaintiff. Tex. Rev. Stat. art. 1828, provides that no will shall be admitted to probate after the lapse of four years from the death of the testator, unless the party applying for probate was not in default; and in no case shall letters testamentary be issued where the will is probated after four years from the death of the testator. The proponent of the will were purchasers from the devisee and desired to use the will in their chain of title in the contest with the heirs.

In the absence of statutory regulation, it was held that a will might be probated any time after the testator's death. *Rebham v. Mueller*, 114 Ill. 343, 55 Am. Rep. 869, 2 N. E. 75. In this case the testator died in 1870, and in 1883 the will was admitted to probate. Ill. Rev. Stat. 1874, chap. 148, § 12, requires any person who may have in his possession the last will of another, immediately upon the death of the testator, to deliver such will to the county court of the county, and imposes a fine for withholding a will, and punishment for willfully secreting one. It was held that the failure of the custodian to comply with this statute could not affect the rights of any person claiming under the will, or the jurisdiction of the probate court to probate the will within a reasonable time. It was also held that this statute did not fix a definite time within which a will shall be presented to court and admitted to probate, and that there was no statute which may be regarded as a limitation law barring the probate of a will after a specified time. The court said: "If a will is not produced, and letters of administration issue, acts done and rights accrued under such administration will be entitled to protection, so that no serious consequences can follow from the delay in probating a will."

A purchaser from heirs, when sued by the devisees to establish plaintiffs' title and recover their estates, demurred to the complaint on the ground that he was an innocent purchaser, under 2 Ind. Rev. Stat. 1879, p. 574, act May 31, 1852, § 17, providing that the title of any land purchased in good faith for a valuable consideration from heirs shall not be impaired by any devise, unless the will shall have been

proved and recorded within three years after the death of the testator, excepting in case of infancy, incompetency, or absence from the state, or concealment of the will. It was held that the question could not be settled by the demurrer where the complaint did not show that the plaintiffs were not within the exceptions. *Biggs v. McCarthy*, 86 Ind. 352 (44 Am. Rep. 320, omits this).

But purchasers for value and mortgagees were held entitled to successfully resist the probate of a will that was fifteen years old, where all the devisees had attained their majority more than three years prior to the probate of the will. The property was left to the devisees and the heirs of their body, and the will was offered for probate by grandchildren who were born ten years after the testator's death. It was held that purchasers were protected, under Conn. Stat. 209, t. 32, chap. 1, § 30, providing that a will shall not be probated more than ten years after the death of the testator, saving to infants three years after attaining their majority. *Goodman v. Russ*, 14 Conn. 210.

In *Davis v. Gaines*, 104 U. S. 386, 26 L. ed. 757, it was held that a sale of lands duly made by order of the probate court having jurisdiction, and the conveyance thereof by the executor of a will, duly admitted to probate while its functions were in full force, to a bona fide purchaser for value, vested the purchaser with a good and valid title which was not affected by the discovery of a later will, and its admission to probate and record. In this case the testator died in August, 1813, and the sale by the register of wills was made November 8, 1813, under a will dated May 20, 1811. The other will was executed July 13, 1813, and an action was brought in 1836 to establish the same as a lost will. It was probated January 18, 1855, and was recognized by the supreme court of Louisiana as the last will on December 17, 1855. La. act March 10, 1834, § 4, provided that all informalities of any public sale made by public officers shall, after five years from the sale, be prescribed against by those claiming under such sales, whether they be minors, married women, or parties interdicted.

Under N. Y. Rev. Stat. 749, § 3, providing that the title of a bona fide purchaser for a valuable consideration from the heirs shall not be impaired by a devise, unless the will shall have been duly proved or recorded within four years after the death of the testator, except where the will has been concealed by the heirs or some one of them, and except the devisee is a minor, it was held that the title of a bona

v. Waller, 6 Bush, 330. It was held as far back as 1827 in the case of *Re Payne's Will*, 4 T. R. Mon. 423, that the interest of a devisee vested the instant of testator's death, and was not lost by destruction of the will before probate. This case has never been questioned in this state, so far as we are informed. Applying that rule here, it is clear that at the death of T. T. Reid, in 1888, the appellants, devisees under his will, had a vested estate in his lands, as the will provided. To divest them of this title there must be either conveyance, prescription, or estoppel in some form. It is not pretended that there is a conveyance, or that their right to claim under the will is barred by any statute of limitation. An estoppel is defined by Bouvier to be "the preclusion of a person from asserting a fact by previous conduct inconsistent therewith on his own

part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question." Stephens defines "estoppel:" "A preclusion in law which prevents a man from alleging or denying a fact in consequence of his own previous act, allegation, or denial of a contrary tenor." Blackstone's definition is: "A special plea in bar, which happens where a man has done some act or executed some deed which precludes him from averring anything to the contrary." It is the foundation of the doctrine of estoppel that the party estopped has designedly so acted or spoken as to induce others to change their position injuriously to themselves; in other words, the doctrine of estoppel is founded on the fraud of the party who is held estopped. But, to be guilty of fraud, a person must knowingly

fide purchaser for value, in a proceeding to sell land of an infant heir, was not affected by the probate of a will more than four years from the death of the testator, although one of the heirs took the will from his mother's possession and kept it concealed for fifteen years. In this case the minor heir became of age more than five years prior to the probate, and it was held that the other exception in the statute did not apply. *Cole v. Gourlay*, 79 N. Y. 527. The testator died in 1836, and the will was probated in 1855.

And purchasers for value from the heirs at law and widow were held not to be affected by the probate of a will where the will was not probated for more than twenty-eight years. It was held that the saving clause in favor of minors did not apply to a child unborn at the time of the death of the testator, under N. Y. Code Civ. Proc. § 2628 (2 Rev. Stat. 59, § 18), providing that purchasers in good faith for a valuable consideration from the heirs of the owner shall not be affected by the will of the latter unless, four years after his death, the will is established; but if at the time of his death the devisee is within twenty-one years of age the limitation does not begin until after one year from the removal of the disability. The court said: "Certainly the exception is not intended to cover unborn children, especially before gestation." *Fox v. Fee*, 167 N. Y. 44, 60 N. E. 281.

In *Gilkinson v. Miller*, 74 Fed. 181, which was an action of ejectment, it was held that the purchaser was not a bona fide purchaser, under N. Y. Code Civ. Proc. § 2628, providing as above. In this case the testatrix died in 1876 leaving the property to plaintiff, an infant, and the will was offered for probate and a contest made by the heir at law, and probate was refused in 1878. The heir at law took possession and sold the same, in 1874, to the defendant, and paid to the infant devisee, on her becoming of age, \$1,000 for a release of all claims, which release was executed without knowledge that the decree of the surrogate court would affect her title. The purchaser had the title examined, and had notice of the probate proceedings. The court said: "The section of the Code in question cannot be construed to protect one who had actual notice of a will conveying the property away from the heir at law." The infant became of age in 1882, and the action to recover the land was brought thirteen years thereafter. The provision of the Code gives the devisee one year after becoming of age to probate the will, but this provision is not construed in the decision. 57 L. R. A.

In this case probate had been refused on the ground that the testatrix was incompetent.

East Riding registry act, 6 Anne, chap. 35, provides that a memorial of deeds, conveyances, and wills may be registered, and every deed or conveyance shall be fraudulent and void against any subsequent purchaser or mortgagee for a valuable consideration unless such memorial is registered; and that memorials of wills shall be registered within the space of six months after the death of the deviser or testatrix dying within Great Britain or within three years if the death occur beyond the seas. It was held that the title of a mortgagee for value was not affected by a will which was not discovered by the devisee until the expiration of six months after the death of the testator. *Chadwick v. Turner*, L. R. 1 Ch. App. 810, 85 L. J. Ch. N. S. 849, 12 Jur. N. S. 239, 14 L. T. N. S. 86, 14 Week. Rep. 491.

III. Where the devisees are under disabilities.

In some cases the disability of a devisee, as minority, and the like, is held to excuse delay in offering a will for probate. Where a statute provides a saving clause for minors they must bring themselves strictly within its provisions. A statutory exemption in favor of minors is held not to apply to infants not begotten at the time of the testator's death.

The probate of a will was suspended at the instance of the heir at law, and remained for many years unnoticed during the infancy of the legatees, but was afterwards proved. It was held that the legatees, notwithstanding some delay after majority, would be entitled to assert their rights, of which they were ignorant until the final probate of the will, against volunteers. *Taliaferro v. Taliaferro*, 4 Call (Va.) 93.

And where some of the heirs were under disabilities it was held that a second probate was properly ordered, on notice to all parties interested, nine years after a will had been probated. *Gray v. Maer*, 20 N. C. (3 Dev. & B. L.) 47.

In *Gaines v. New Orleans*, 6 Wall. 842, 15 L. ed. 950, where an infant attaining majority in 1826 brought suit in 1834 to establish a second lost will, the first having been probated in 1813, it was held that her rights were not affected by twenty years' prescription, although the second will was not admitted to probate until 1855.

In *Utheridge v. Corprew*, 48 N. C. (3 Jones, L.) 14, where a will had been probated in common form, and the heirs were under disabilities of coverture, absence beyond the seas, non-

do or say that which is inconsistent with honesty and truth, or, regardless of what the truth may be, induce a person to act. There can be no case found where any person was ever charged with fraud or held to be estopped where he was ignorant of the truth and did no act at all. In the case at bar the devisees under the will of T. T. Reid did nothing, said nothing, and at that time were in entire ignorance of the existence of a will, or that they had any rights in the property. In fact, if there was no will, which they then believed to be the truth, they knew that they had no right, title, or interest in the land. They knew that without a will the land descended to their father, J. W. Reid, Sr. There can be no act of appellants that could by any rule of law be held to estop them from claiming under the will of T. T. Reid. It may be said that a person may speak a falsehood or act a falsehood, but, if he does no act, and re-

mains silent, he cannot be charged with fraud or be estopped without he knew the truth when his nonaction or being silent is said to have induced another to act to his own injury. Likewise there can be no estoppel of appellants by reason of the act of the testator in not disclosing to some person the place where his will could be found. He was not called upon to publish the fact that he had made a will for the protection of appellee, for it was some two years after T. T. Reid's death that appellee had any claim of lien upon the land. Surely, a dead person cannot be charged with negligence, or be estopped, or create matters of estoppel by a failure to act after his death; yet this would be the effect of holding that appellants are chargeable with the fact that the will was not found before appellee's mortgage was executed by reason of some act or omission of T. T. Reid. There seems to be a dearth of authority on the exact ques-

residence, and lunacy, it was held that the lapse of ten years, in the absence of notice of the testator's death, would not bar an application by them for probate in solemn form. This in effect would be granting an opportunity to contest the will, as they claimed that the testator was incapacitated to make a valid will.

But an infant was held barred from asserting his rights under a will against a bona fide purchaser, where such infant had attained his majority more than five years prior to the probate, and N. Y. Rev. Stat. 749, § 3, protected a bona fide purchaser if the will was not proved in five years, except as against a minor. *Cole v. Gourlay*, 79 N. Y. 527.

And a clause saving the rights of minors, in N. Y. Code Civ. Proc. § 2628 (2 Rev. Stat. 59, § 18), providing four years for probating a will and protecting the rights of bona fide purchasers, was held not to include heirs not born at the time of the testator's death. *Fox v. Fee*, 167 N. Y. 44, 60 N. E. 281.

See *Gilkinson v. Miller*, 74 Fed. 131, subd. 11, for the same statute, where the devisee was not barred from her rights thirteen years after reaching majority.

The testatrix died in 1826. Her will gave the real estate to her four children to be equally divided between them and "to the heirs of their bodies forever." The devisees, being without issue, agreed on a division of the property, and not to probate the will. In 1836 a devisee had issue of his body born, and died in 1839. The will was offered for probate by the guardian of the children of this devisee in 1841, which was more than thirteen years after the death of the testator, and more than three years after all the devisees had attained their majority. It was held that the will could not be probated, under Conn. Stat. 209, t. 32, chap. 1, § 39, providing that no will shall be allowed to be probated by any court of probate after the expiration of ten years from the death of the testator, provided that where any minor is interested in the estate three years shall be allowed after his arrival at full age to prove the will. *Goodman v. Russ*, 14 Conn. 210.

IV. Where the will is concealed, lost, or destroyed.

Knowledge, by some of the devisees, of the existence of a will, where the will has been concealed, will not stop the running of a statute providing that the time a will has been concealed by the heirs is not to be taken into con-

sideration. The concealment must be one that leaves the devisees ignorant of their rights, and keeps the will from their knowledge. There must be some affirmative action in order to constitute concealment with the purpose to prevent its discovery. In actions for equitable relief to establish lost wills, twenty and thirty years have been held to be a bar, and, on the other hand, twenty years were held not to apply where a will was fraudulently concealed, and a ten-years statute barring a bill for relief was held not to bar an action to establish a lost will twenty years old.

A testator died in 1867, and the will, which had been found among worthless papers after the death of plaintiff's father, was probated in 1896. In 1869 it had been used in an action contesting a second will, and its existence was known to the testator's widow, the plaintiff's father, and all the other heirs. It was held that the title of a purchaser for a valuable consideration from the heirs and widow was not affected by its probate twenty-nine years after the testator's death, and that the concealment clause did not apply, under N. Y. Code Civ. Proc. § 2628 (2 Rev. Stat. 59, § 18), providing that purchasers in good faith for a valuable consideration from the heirs of the owner shall not be affected by a will of the latter unless within four years after his death the will is probated; but if the will is concealed by one or some of the heirs of the testator the limitation does not begin until one year from the delivery of the will to the devisee, representative, or surrogate. *Fox v. Fee*, 167 N. Y. 44, 60 N. E. 281.

In *Cole v. Gourlay*, 79 N. Y. 527, under a similar statute (N. Y. Rev. Stat. 749, § 3), it was held that the concealment clause in the statute did not affect the title of a bona fide purchaser where one of the heirs took the will and kept it concealed for fifteen years, and the claimant heir became of age more than five years prior to the probate. In this case the court said: "Certainly the statute cannot relate to a case where the devisees, or some of them, have knowledge or possession of the will, and it is taken from the possession of one by another clandestinely and secreted for a great length of time, or perhaps destroyed. The will was delivered to the widow, who was executrix and one of the devisees having a life estate, and remained in her possession for a number of years. It is fairly to be inferred that she had knowledge of the character of the instrument, and there can be no question that the

tion here presented. After diligent search learned counsel for appellee finds only one case that approaches the question, and after diligent search by us we have failed to add another. The case found is *Chadwick v. Turner*, L. R. 1 Ch. App. 310. There the court held, under a registration act, that after six months, there being no registration of a will, the devisee would take subject to a mortgage executed by the heir at law. The case cited, coming from such eminent authority, would have great weight with us if it did not depend entirely on an act requiring registration of wills. But that case is not authority in this state for the reason that here we have no law requiring wills to be registered or recorded within any given time. This court has held that a will may be probated at any time till the cause of action to probate is barred by the ten-year statute of limitation. There is no

statute requiring wills to be registered or recorded or probated, like there is of conveyances; and in the absence of such statute, and in the absence of fraud in suppression or destruction of wills, the devisees therein take the property when the will is probated, which, as we have said, may be at any time within ten years from the testator's death.

We conclude, therefore, that appellants have not been divested in any way of their legal title to the three fourths of the land devised by T. T. Reid, and, not having been divested, it is superior to appellee's mortgage; wherefore, for the reasons indicated, *the judgment is reversed*, and cause remanded for judgment, with decree of sale in favor of appellee, Benge, as against one fourth the land embraced in the mortgage only, and for proceedings consistent herewith.

son who purloined and concealed it about his person for fifteen years had such knowledge. The case was not one of concealment, within the statute, but of a will which was stolen from the person who was the proper custodian."

In *Goodman v. Russ*, 14 Conn. 210, it was held to be no fraud on infant grandchildren to suppress the probate of a will, where fifteen years elapsed after the death of the testatrix before the will was offered for and denied probate. The will gave the property to the children of the testatrix and to the heirs of their bodies, and the devisees had attained their majority more than three years prior to the probate. Conn. Stat. 209, t. 32, chap. 1, § 89, provided that no will shall be allowed to be probated by any court of probate after the expiration of ten years from the death of the testator, and gave to infants three years after majority to probate the same. It was held that grandchildren born after a division and sale had no rights, as they took by descent, and not by purchase, and they could not claim a probate as against purchasers for value. In this case the court said: "If the only persons interested in the establishment of this will were the surviving devisees on the one hand, and the heirs in tail on the other, this would certainly merit great consideration. But the appellants are bona fide creditors or purchasers, and are not charged with any knowledge whatever of the existence or concealment of the will."

In *Hunt v. Hamilton*, 9 Dana, 90, in a proceeding in equity after the lapse of thirty years to establish a will claimed to have been lost, it was said: "Even if the bill presented a case of which a court of equity could, without any doubt, take cognizance, still the long lapse of time, without any suggestion of inability to establish the will in the county court, or to proceed in equity sooner, would prima facie furnish a sufficient objection to the relief now sought by affording presumptions of law against the validity of the alleged will, or against any equitable right to invoke the chancellor's aid in investigating its authenticity, or in coercing a distribution of property so changeable and perishable as slaves and personalty, at so late a period."

In *Myers v. O'Hanlon*, 12 Rich. Eq. 196, the testator died in 1835, and six days thereafter his will was probated in common form. A bill was filed in 1857 to establish a later will executed a few days before the testator's death, and alleged to have been fraudulently destroyed by a son-in-law of the testator. The

plaintiff claimed as devisee under the lost will, and alleged want of notice until within four years before the filing of the bill. It was held that, as the court of ordinary had exclusive jurisdiction, the bill in equity to establish the lost will should be dismissed for want of jurisdiction, and was said that, if it had jurisdiction, the lapse of twenty years barred relief in equity, and was intimated that the evidence showed that the complainant had knowledge of the existence of the will more than four years prior to the institution of the suit. The statute of limitations is not stated, but is referred to, and evidently is the same as S. C. Gen. Stat. § 1870, subd. 2 (Acts 1839, chap. XI. p. 59, § 11), which provides that probate in common form shall be good unless some person interested shall give notice to the judge of probate within four years after probate that he requires it to be proved in due form of law, whereupon, after a due hearing, a judge of probate by his decree shall pronounce for the validity of the will.

But where the existence of a will was claimed to have been unknown for thirty-one years after the testator's death, it was held that Me. Rev. Stat. chap. 64, § 1, providing that after twenty years from the death of any person no probate of his will shall be originally granted, did not apply if the will had been fraudulently concealed. This was on the ground stated by the court, "that fraudulent concealment of a cause of action has long been considered a good replication to a statute bar in actions at law, as well as in suits in equity." It was further held that a statute taking effect after the case was set down for argument did not apply. This statute (chap. 108, Stat. 1887) provided that when an original last will is produced for probate, the time during which it has been lost, suppressed, concealed, or carried out of the state, shall not be taken as part of the limitation provided in the 1st section. The case was remanded to the probate court to try the question of fraudulent concealment. In this case the property claimed still remained in the family. *Denke's Appeal*, 80 Me. 50, 12 Atl. 790.

And where an action was brought to establish a lost will more than twenty years after the death of the testator, it was held that the action was not barred by 2 N. Y. Rev. Stat. 2d ed. 229, § 52, providing that bills for relief, in case of the existence of a trust, not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after. This section was held to apply to bills filed for relief exclusively,

and the bill in this case was held not to be within the spirit or letter of the statute. *Everitt v. Rveritt*, 41 Barb. 385, Affirmed Commission Appeals, 6 Alb. L. J. 197.

But see *Allen v. Froman*, 96 Ky. 313, 28 S. W. 497, subd. X.

Where a will was probated in 1813, and a suit to establish a lost second will was brought in 1834, and it was established in 1855, it was held that the title of the devisee was not barred by prescription. *Gaines v. New Orleans*, 6 Wall. 642, 18 L. ed. 950; *Gaines v. Hennen*, 24 How. 553, 16 L. ed. 770. In these cases the legatee attained majority in 1826, and brought the action in 1834. The ten-years statute of prescription was held not to bar the action, as the propounder of the will brought her suit within ten years after reaching majority, although the will was not finally established until forty-three years after the death of the testator.

In *Camden Safe Deposit & T. Co. v. Ingham*, 40 N. J. Eq. 3, where the will of a wife was not probated until ten years after her death, and after her husband's death, and the husband by a certificate on the will had consented to its execution, it was held that the will was a valid one, and that the failure of the husband to probate the will was a fraud on the wife and those entitled to the benefit of it, and that the husband and his individual estate was bound by the will. It was further held that the husband of the testatrix, concealing the will, was liable to account for trust money received by him that would have passed under her will.

And where a testator died in 1825, and the will was probated in the county court thirty-four years after his death, a suit was brought in the chancery court for an account, if the will was valid after the lapse of so many years, and if not, to establish the same as a lost or spoiled will, and charging that the will had been fraudulently concealed by the widow of the testator and her second husband up to the time of its probate. The defense was want of jurisdiction in a court of equity, and want of jurisdiction in the county court to probate the will after thirty-four years. It was held that the validity of the probate in the county court could not be attacked collaterally. The court said: "The fact that more than thirty years had elapsed since the death of the testator and before the paper was offered for probate can make no difference." *Townsend v. Townsend*, 4 Coldw. 70, 94 Am. Dec. 185. In this case it was said that whether or not Tenn. Code, § 2220, providing that all letters testamentary granted after the period of twenty years shall be void, could be successfully relied on as a bar to the issuance of letters testamentary, on an application in the county court to set aside the probate, or upon an issue of *deviseavit vel non* made and certified to the circuit court, "we do not feel called upon now to determine." It was further held that the court could not establish the will as a lost will where it had already been probated in the county court.

V. Estoppel.

A party by his conduct may estop himself from subsequently procuring probate of a will. Where a party is estopped his privies are also. But to constitute an estoppel it must be shown that there was no obstacle to the assertion of the right to have the will probated.

A second wife of a husband was held bound by the estoppel of her husband, and could not probate a second will nineteen years after the first, where he had probated the first will and recognized the rights thereunder. *Re Lyman*, 14 Misc. 352, 30 N. Y. Supp. 117. 57 L. R. A.

A testatrix died in 1867, the estate being a purchase-money note given by Ellisha Foote. The heirs, at a family meeting, in consideration of a claim for services rendered the testatrix, asserted by the maker, surrendered the note to him. He then cut his name off and took possession of the note. In 1883 the will was produced and probated by the maker of the note. He was appointed administrator with the will annexed, and asserted a claim for services against the estate. It was held that the failure for fourteen years to probate the will should bar the claim. The court, holding that it was not necessary to fully decide that question, said: "But it is very certain that justice to all parties interested in the provisions of a will requires that, under the statutes in this state as they now exist, a party holding the will, or one having knowledge of its existence, and under which he claims an interest in the legacies, must secure its probate within a reasonable time after he knows of the death of the testator; or, failing so to do, he may bar himself from making claim under its provisions to the benefits thereof; and we think a lapse of fourteen years after a knowledge of the death of the testator, under such circumstances (and as they appear in this record), an unreasonable time, and that such defense to the claim of the plaintiff sought to be enforced against the estate of Ellisha was a proper one to be made." *Foote v. Foote*, 61 Mich. 181, 28 N. W. 90.

And where a will of a wife gave the husband of the testatrix a life estate and remainder to his daughter, and six days thereafter another will was executed giving the husband an absolute estate in fee, and the husband probated the first will and recognized the daughter's title, it was held that his subsequent wife could not have the later will probated nineteen years afterwards, as he would have been estopped, and she was also. *Re Lyman*, 14 Misc. 352, 30 N. Y. Supp. 117. In this case the court said: "In the case at bar the will now propounded was never lost or mislaid, and was not discovered, because it was in the possession of Mr. Lyman, the sole beneficiary, or under his control, from the time of its execution until the day of his death, a period of almost nineteen years. If, therefore, Mr. Lyman would have been estopped, the present proponent, claiming no more rights than he had, is now subjected to the same principle of equity."

And a party who had acted upon a decree of probate in common form, and received interest under such will for several years, was held to be precluded from obtaining a probate in solemn form nine years after the former probate. *Hoffman v. Norris*, Prerog. Hil. Term 1805, 2 Phillim. Eccl. Rep. 224, n.

A will was offered for probate in 1833, and was recorded and filed, but no order was made probating the same. Twenty-three years afterwards it was offered and proved for probate, and it was held that the probate was properly allowed. *Fatheree v. Lawrence*, 33 Miss. 585. In this case the court said: "We do not think that the delay in the proceeding now before us raises any presumption against the validity of the will, or tends to destroy the presumptions in its favor arising from the evidence." The court further said: "The long continued possession of the appellants, adversely to the will, is said to raise a presumption against its validity. . . . But be that as it may (as there is no limit to the time for the probate of a will), before the fact of adverse possession could be held to create a presumption against the validity of the will, by reason of his acquiescence in the adverse title and so as to preclude him of the right to probate the will, it should be shown that there was no impediment."

ment to the assertion of his rights, and that his acquiescence was tantamount to a disclaimer under the will, with a full knowledge of its legal character."

VI. *Second wills and codicils.*

In regard to the question of the effect of delay in probating a will, the rule that applies to the probate of an original will applies to a second will or a codicil offered for probate. But there may be circumstances that make a difference,—as, where a purchaser under a probate proceeding on a former will is protected against any rights that may arise under the probate of a second will or codicil. This was held in one of the Gaines cases, in which a purchaser under the first will of Daniel Clark, of 1811, was held to have a good title as against the devisees under the will of 1813, which was not finally admitted to probate until 1855. There may be circumstances, also, of estoppel which would justify a refusal of probate, but ordinarily the probate is allowed, in the absence of statute, after many years have elapsed, and the question of estoppel or the rights of a purchaser are matters that are subsequent to probate. It is held in Alabama that, as a codicil is ordinarily a revocation of a will, the time within which the codicil should be presented for probate will be limited to the statutory time allowed for contesting the probate of a will.

In a controversy between a purchaser under a former will and a sale by order of the probate court and the heirs under a later will, it was held that a bona fide purchaser was not affected by the probate of a later will, and that the title of the purchaser, as against no advertisement or irregularities in regard to inventory, was cured by La. act March 10, 1834, § 4, providing that all informalities of any public sale made by public officers shall, after five years from the sale, be prescribed against by those claiming under such sales, whether they be minors, married women, or parties interdicted. *Davis v. Gaines*, 104 U. S. 386, 26 L. ed. 757.

In *Gaines v. New Orleans*, 6 Wall. 642, 18 L. ed. 950, where the same will was in controversy, it was held that the probate of the later will annulled the prior will, and that the power of executors, under the Code of 1813, terminated the year after they were appointed, and that the purchasers from the executors of the prior will had no title as against the heir under the second will; and, as to the statute of limitations, the rule laid down in *Gaines v. Hennen*, 24 How. 553, 16 L. ed. 770, was followed. In that case the defense was that the heir was barred by prescription of ten years against one claiming a vacant estate, twenty years to prescribe a title, and thirty years to bar the faculty of accepting a succession. It was held that there was no vacant succession, and the first ten years did not apply, and the prescription of twenty years did not exist, as Mrs. Gaines attained her majority only in June, 1826, and her suit for the probate of the will was instituted in 1834, and when her petition was dismissed in 1838 her first appeal was filed in the month afterwards. From that time there was a legal interruption to the prescription for twenty years.

In *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524, it was held that the Federal court had jurisdiction of an action in equity to annul the probate of a second will.

And where a will was executed in 1818 and probated in 1830, and subsequently, without setting such probate aside, in 1845, a will dated 1828 was offered for probate, it was said that the county court had jurisdiction to admit to probate the second will without setting aside 57 L. R. A.

the probate of the first. *Schultz v. Schultz*, 10 Gratt. 358, 60 Am. Dec. 835. The court does not discuss the question of laches or limitation, but the decision was on the ground of the conclusiveness of the action of the county court in refusing probate of the second will. The court said that, under 1 Va. Rev. Code, chap. 104, p. 578, act 1819, providing that when a will shall have been admitted to probate any person interested may within ten years contest its validity, such probate is forever binding, with a saving in favor of persons absent from the state. In this case it was held that complainants were within the saving in favor of persons absent from the state. The probate of the second will would be in effect a contest as to the validity of the first will.

In *Waters v. Stickney*, 12 Allen, 1, 90 Am. Dec. 122, a will was probated in 1851, and a codicil escaping attention was offered for probate in 1865. The codicil was written on the same sheet of paper on which the will was executed. It was held that it could be probated. The court said: "It has been directly adjudged by this court that a will may be proved even thirty years after the death of the testator, although original administration could not by statute be granted after twenty years. *Bourne v. Greenleaf*, Essex, 1802; Cited in 1 Pick. 117, note; 3 Dane, Abr. 452 (456); *Shumway v. Holbrook*, 1 Pick. 117, 11 Am. Dec. 153; *Marcy v. Marcy*, 6 Met. 370. . . .

The lapse of time since the death of the testator and the probate of the will should lead the court closely to scrutinize the evidence offered, but is no positive bar. If no will had yet been proved, the lapse of time would not prevent both will and codicil from being proved now. The fact that a will has been already proved affords no reason for imposing stricter limitations upon the proof of a codicil, whether the omission to prove it sooner has been occasioned by ignorance of its existence, by fraudulent suppression of it, or by an innocent but mistaken belief that it has been already proved."

In *Besancon v. Brownson*, 39 Mich. 388, a will made in 1858 in Louisiana was probated in Michigan in 1876. The testator died in 1871. This probate was held to be regular. In May, 1871, a writing purporting to be a later will was probated in Louisiana, five years before the probate of the first will in Michigan. In 1877, probate of the second will was made in Michigan, and the probate of the first will was set aside. On appeal this was held to be error, as the probate of the first will should have been allowed to stand and the second probated if it was proper to do so, and that if they conflicted it should be settled elsewhere. But it was further held that the probate of the second will was improper because obtained by a party not shown to be interested, under Mich. C. L. § 4343, authorizing the probate of a foreign probate by the executor or other person interested in such will. In this case the court said: "There is no statutory provision concerning the revocation of probate, or its effect on existing rights. Neither is there any statute providing for cases where a will claimed to be later in date than the one before probated is presented for probate, nor declaring the effect of probate of one will on a later one which was known to exist before the time of the first probate, but not then produced. The difficulties attending a case like the present, where the Louisiana probate of the second will was not made known when the Michigan probate of several years later was had of the first will, are very serious, and still further complicated by the transfer to the purchaser of the property given by the first will."

But in *Re Lyman*, 14 Misc. 352, 36 N. Y.

Supp. 117, it was held that a second will of a wife giving the husband an estate in fee could not be probated by a subsequent wife nineteen years after the probate of a will of his former wife which gave him a life estate, where he had acted on the first will.

In *Hardy v. Hardy*, 26 Ala. 524, the probate was denied of a second will, offered for probate five years after a previous will made by the same testator was probated. It was held that Ala. act 1808 (Clay's Dig. 598, § 15), providing that when any will has been admitted to probate it may be contested by any person interested within five years thereafter, applied, as the probate of a second will amounted to a revocation of the first.

So, where a will was admitted to probate it was held that a codicil containing inconsistent provisions would not be allowed after the expiration of the statutory period of five years for contesting the will. *Watson v. Turner*, 89 Ala. 225, 8 So. 20. In this case the codicil was presented for probate more than twenty years after the probate of the will. The delay seems to have been caused by a provision in the codicil to the effect that the testator wanted his will recorded at his death, and that the codicil should not be recorded until after the death of his wife. This provision was held to be insufficient excuse for any delay in probating the codicil.

For second wills, see *Myers v. O'Hanlon*, 12 Rich. Eq. 196, subd. IV.

VII. Suspension of probate proceedings.

It seems that the suspension of the probate of a will for several years after an attempt to probate the same will not deprive the legatees of their rights under the will.

Legatees who had been minors were held entitled to their rights, of which they were ignorant until the final probate, as against volunteers, where a probate was suspended for many years. *Taliaferro v. Taliaferro*, 4 Call (Va.) 93.

And under Tex. Rev. Stat. arts. 1827, 1828, providing that no will shall be probated after the lapse of four years from the death of the testator, unless it be shown by proof that the party applying for such probate was not in default in failing to present the same for probate within four years, it was held that a probate made four years and nine months after the death of the testator was valid. *Elwell v. Universalist General Convention*, 76 Tex. 514, 13 S. W. 552. In this case a party filed the will for probate in the county court within four months, and a motion to dismiss was made because he was not interested. He then filed an amendment setting up that the application was by him as trustee for the Universalists, whose name had been changed to Universalists General Convention. The will was probated in the county court, and an appeal was taken to the district court, and the Universalists General Convention made application as a party in that case, which was four years and nine months after the death of the testatrix. The court held that the Universalists General Convention was not in default in presenting the will for probate. The question in this case was as to whether the probate should be allowed.

A testator of a will deposited it, with the knowledge of a devisee, in the office of the probate judge of the county in which he lived, and immediately upon his death the executor inquired of the probate judge concerning the probate of the will. The judge, after opening and reading it, informed him that the will was the joint will of the husband and wife and 57 L. R. A.

could not be probated until the death of the wife. Six years thereafter the executor again asked the probate judge about the probating of the will, and received the same answer. The will was not admitted to probate until nine years after the death of the testator, during all which time it was in the possession of the probate judge. It was held that the estate devised was not within the provision of Kan. Comp. Laws 1879, chap. 117, § 29, providing that no will shall be effectual to pass real estate until probated or recorded by this act, and § 30, providing that no lands shall pass to any devisee in a will who shall know of the existence thereof and have the same in his power and control for three years, unless within that time he shall cause the same to be offered for probate; and by such neglect the estate devised shall descend to the heirs. *Allen v. Allen*, 28 Kan. 18. This was a contest, by an action of ejectment, between the devisee and an heir of the testator.

And a will was held to be properly allowed probate where it had been filed for probate and recorded, but no order had been made probating the same for twenty-three years. *Fatherree v. Lawrence*, 33 Miss. 585. In this case there was no question as to the genuineness of the instrument, but the objections were to the sufficiency of its execution, and lapse of time.

VIII. Probate in solemn form and second probate.

In England it seems the practice is for the executor to obtain probate of a will in an *ex parte* proceeding, and subsequently, on notice to all parties, the will may be probated in solemn form. The time within which this may be done is usually stated to be thirty years although some writers differ as to the time. The time may be limited to a much shorter period where the element of estoppel appears.

The lapse of ten years was held not to bar an application for probate in solemn form by heirs who were under disabilities. *Etheridge v. Corprew*, 48 N. C. (3 Jones, L.) 14.

In 4 Burn's Eccl. Law, 251, it was said: "Which difference of form in proving the will worketh this diversity of effect; namely, that the executor of the will proved in the absence of them which have interest, may be compelled to prove the same again in due form of law; and if the witnesses be dead in the mean time, it may endanger the whole testament, especially if ten years be not past since the probation, whereby necessary solemnities are presumed to have been observed; whereas, the testament being proved in form of law, the executor is not to be compelled to prove the same any more; and although all the witnesses afterwards be dead, the testament doth still retain its full force. *Swinburne, Wills*, 449. But probably this word 'ten' in figures may have been mistaken for thirty; for Dr. Godolphin says: 'The will being proved only in common form, it may be questioned at any time within thirty years next after, by common opinion, before it work prescription. *God. O. L.* 62.'

In *Straub's Case*, 49 N. J. Eq. 264, 24 Atl. 569, it was said that in the English ecclesiastical court "when a will is proved in common form the court, at any time within thirty years after probate, may require the executor of its own motion, or at the instance of the next of kin or other person interested, to prove the will in solemn form."

In *Townsend v. Bonner*, 1 Shannon, Cas. 197, it was held that where the will was probated in common form thirty-three years after the testator's death the probate could be set

aside upon petition in the county court, holding that the time for probating wills was limited to thirty years by the analogy of the common law applicable to this country. It was also held that wills made before the enactment of statutes prescribing the time within which wills may be probated were subject to the rule which existed independent of the statutes, that the executor of a will proved in common form may at any time within thirty years be compelled by a person having interest to prove it *per testes* in solemn form, and therefore the probate in common form could be set aside within the time limited for the probate of wills.

In *Gibson v. Lane*, 9 Yerg. 475, it was held that a probate in solemn form could be had after the lapse of eighteen years from the probate in common form. The court said: "The argument that the statute of limitations would protect those who might have acquired rights under the will proven in the ordinary form, and that, therefore, there could be no use in having an issue of *deviseavit vel non*, does not alter the rule of law. Upon the trial of this issue, the right of the property cannot be called in question; and if the persons who may be in possession are protected by the statute of limitations, the trial of the issue can do them no injury; but if they are not so protected, it is absolutely necessary that the contest relative to the will should be settled, for otherwise no suit could be brought against them. Then, inasmuch as the court could not know whether the statute of limitations would bar the proceedings for the recovery of the property, if the will be not set aside, and could not try this question upon proceedings instituted to test the validity of the will, we think the court erred in quashing the proceedings."

In *Merryweather v. Turner*, 3 Curt. Eccl. Rep. 802, it was held that next of kin were not barred by mere lapse of time, by acquiescence, or by the receipt of legacies, from requiring executors to prove a will in solemn form. But where a will had been declared well proved in a court of chancery after an order for an issue *deviseavit vel non* had been discharged on the petition of the heiress at law (also sole next of kin) and her husband, and an annuity bequeathed to her regularly received during fourteen years, it was held that the prayer of the heiress at law and her husband to call on the executors to prove that will in solemn form could not be granted.

In *Gray v. Maer*, 20 N. C. (3 Dev. & B. L.) 47, where a will was proved the day after it was executed, and it gave the entire estate and remainder to a party present at its execution who was not next of kin, and the next of kin resided at a distance, and some were under disabilities, it was held that a second probate was properly ordered nine years thereafter on notice to the parties interested. The effect of this would be simply to allow a contest over the probate of a will.

In *Townsend v. Townsend*, 4 Coldw. 70, 94 Am. Dec. 185, it was said that on proper application made out a will probated in the county court may "be set aside at any time within twenty years after the original probate is granted, and the will propounded for reprobate, and an issue of *deviseavit vel non* made up and tried in the circuit court."

In *Hoffman v. Norris*, Prerog. Hilary Term, 1805, 2 Phillim. Eccl. Rep. 224, note, where a brother sought to have his brother's executor probate a will in solemn form, it was held that, as he had acted upon the decree of common form and received interest for five years, and he did not offer to return what he had received, he could not obtain a probate in solemn form nine years after the former
57 L. R. A.

probate. In this case the court laid down the rule: "Where the opposing party has been in a situation which rendered it impossible or difficult for him to have proceeded earlier, if he has been absent from the country, a minor, or laboring under imbecility, he may be admitted. But without reason, and where there are such strong reasons as there are here to show that he was not in such a state of incapacity as to have prevented him; and further, that he could not be ignorant of all the circumstances relating to the deceased, from the suit in chancery soon after the probate was taken out,—the case is different."

S. C. Gen. Stat. § 1870, subd. 2 (Acts 1839, chap. XI. p. 59, § 11), providing that probate in common form shall be good unless some person interested shall give notice to the judge of probate within four years after probate that he requires it to be proved in due form of law, whereupon, after a due hearing, a judge of probate by his decree shall pronounce for the validity of the will, was said to be a bar to the probate of a second will twenty-two years after probate in common form, although it was alleged that the second will had been destroyed, and that the fraud had not been discovered within four years prior to this suit. *Myers v. O'Hanlon*, 12 Rich. Eq. 196.

IX. Wills from other states.

It seems that the question of delay in probating wills from other states or taking out ancillary letters does not appear to be considered, except in Ohio, where a statute was construed, and in Alabama. In the latter state it was held that a delay of one year to probate a will barred the executrix from obtaining letters testamentary, which were ordered to be issued to the administrator with the will annexed. Although the question of delay was not discussed in the cases generally, they are grouped to show the various periods of delay that existed in the cases. Otherwise they are not of much benefit as an authority as to the effect of delay.

The provision of 47 Ohio Laws, 32, act March 20, 1849, § 4, that the title of any purchaser of lands derived from heirs of a non-resident shall not be defeated by the production of the will of such nonresident, unless such will shall be admitted to probate and record in the county where the land is situated within two years from the death of the testator, was held not to apply where the will had been admitted to record in the state prior to the passage of the act. *Carpenter v. Denoon*, 29 Ohio St. 379. In this case the will had been probated in Virginia in 1828, and a copy probated and recorded in Clinton county, Ohio, in 1846, and recorded in Pickaway county, Ohio, in 1869, where the land in controversy was situated.

In the above case, it was said that a devise lapses by neglect to cause a known will to be offered for or admitted to probate, under Ohio act 1840, § 34 (act 1852, § 32), providing that "no lands, tenements, or hereditaments shall pass to any devisee in a will, who shall know of the existence thereof, and shall have the same in his power to control, for the term of three years, unless within that time he shall cause the same to be offered for or admitted to probate; and by such neglect the estate devised to such devisee shall descend to the heirs of the testator." But it was held that this act did not apply to neglect in causing a copy of a probated will to be recorded in the county where the devised property was situated where the will was probated in a court having jurisdiction; and it was held not to apply

where it was not shown that the legatees had knowledge of the existence of the will three years before the record was made in a county in Ohio where the realty was situated.

And under Ohio wills act 1840, § 28, providing that copies of wills, executed and proved according to the laws of any state relative to any property in this state, may be admitted to record in the court of common pleas of any county in this state where any such property may be situated, and such copies, so recorded, shall have the same validity as wills made in this state in conformity with the laws thereof, —it was held that where a will giving a life estate and remainder was admitted to record in Cuyahoga county, Ohio, in 1846, on a probate in Virginia in 1828, the rights of the remaindermen in property in Pickaway county, Ohio, were not affected by a conveyance from the life tenants in 1840. *Ibid.* In this case the court said: "It is true that provision is made for recording a copy of the will and the order of probate in other counties where lands devised by the will are situate; but the recording in such other counties is not made a condition upon which the estate of the devisee vests, nor does the failure to record such copy and order of probate in any case defeat the title of the devisee. The only cause for which the statute defeats the estate of a devisee under a domestic will is his own neglect to offer it for probate within three years after knowledge of its existence as prescribed in § 34, as above stated."

In *Keith v. Proctor*, 114 Ala. 676, 21 So. 502, a will had been probated in Tennessee, and a year thereafter the executrix probated it in Alabama, and applied for letters testamentary. It was held that delay and failure to tender a bond justified the court in refusing to grant the executrix letters, and it properly granted letters to an administrator with the will annexed. In this case the court said: "She permitted more than twelve months to elapse, during which she could have obtained letters testamentary upon applying for them. If there be an explanation, or excuse for the delay, offered, it lies in the fact that she was advised probate of the will in this state was unnecessary; if the fact be conceded, it is significant only that she did not intend to claim, or exercise in this state, the right to letters testamentary. Aggregating the facts, we are forced to the conclusion that she never intended taking probate of the will, or letters testamentary, in this state, subjecting herself and the estate and its administration to the proper tribunals of this state, until she was quickened by the grant of administration to the appellee; and that her conduct was a renunciation of the right to letters testamentary conferred by the laws of this state, a renunciation she was without capacity to retract. If this be not true, the statutes so carefully framed, and explicitly manifesting the policy of the state, to avoid vacuums in the administrations of estates, of prolonged, indefinite continuance, dependent on the diligence or the caprice of those who may have a privity of right, are vain." The court does not discuss the effect of delay on the matter of probate, but only on the matter of the right to letters. A further and potent reason for this decision was the failure of the executrix to give any bond when she applied for letters.

In *Besancon v. Brownson*, 39 Mich. 388, it was said that a probate of a second will should be granted without setting aside the probate of the first will. In this case the probate of the first will from another state was probated in Michigan five years after the testator's death, and six years after his death the probate of a later will was offered in Michigan. (See 57 L. R. A.

subd. VI., *Second wills and codicils*.) In this case the second will was a holographic will. The court said: "If the probate court was possessed of authority to probate the second will, we have no hesitation in saying there was no authority in this case to revoke the earlier probate."

In *Walton v. Ambler*, 29 Neb. 626, 45 N. W. 931, a will was probated in Iowa in 1874 and in Nebraska in 1887. It was claimed by a legatee that a contract of partition made in 1874 was not binding as to land in Nebraska, and that she could not make any conveyance until after probate. It was held that in order to show title in the legatees the will must have been probated in Nebraska, but that the want of such probate did not preclude the plaintiff from selling all her interest in the estate. Neb. Comp. Stat. chap. 23, §§ 144, 145, provides that when a copy of a will and the probate thereof, duly authenticated from another state, is produced to the probate court, notice of hearing shall be given in the same manner as in case of an original will presented for probate.

In *Doe ex dem. Pope v. Pickett*, 51 Ala. 584, in an action of ejectment, it was held that a will probated in Alabama in 1846 and probated in Georgia in 1840 was competent evidence of title. No question seems to have been made as to delay. In this case a transcript of the Georgia probate was recorded in Alabama in 1841, and regularly probated in Alabama in 1846. The probate in Georgia was defective, but the later probate supplied the deficiency.

X. Statutory limitations.

Ala. act 1806 (Clay's Dig. 1898, § 6), providing that any will that has been admitted to probate may be contested within five years, was held to limit the time for probating a second will. *Watson v. Turner*, 89 Ala. 225, 8 So. 20; *Hardy v. Hardy*, 26 Ala. 524.

Under Conn. Stat. 209, t. 32, chap. 1, § 39, which provides that a will shall not be probated more than ten years after the death of the testator, and saves to infants three years after attaining their majority, it was held that a will that was fifteen years old could not be probated after all the devisees had attained their majority more than three years prior to the offering for probate. *Goodman v. Russ*, 14 Conn. 210.

In *Harrell v. Hamilton*, 6 Ga. 37, where the testator died July 26, 1846, and on November 3 the will was offered for probate and a caveat was filed on the ground that under the act of 1755 all wills were required to be recorded within three months after the death of the testator, it was held that the act was inoperative because inconsistent with provisions of subsequent recording acts. It was further held that the will could not be admitted to record until it was proved to be the will of the testator, which is done before a court of ordinary, and frequently after the contest is made, through an appeal to the superior court, and the will is established. The court said that more than three months in most cases would lapse before the will could be proved and ordered to be entered of record.

Kan. Comp. Laws 1879, chap. 117, § 29, providing that no lands shall pass to any devisee in a will who shall have the same in his control for three years, unless within that time it shall be offered for probate, was held not to bar the probate of a will nine years old, where it was a joint will and the probate judge had informed the surviving husband that it could not be probated until the death of his wife. *Allen v. Allen*, 28 Kan. 18.

The case of *REID v. BERGE*, asserting that a

will may be probated at any time within ten years after the death of the testator, follows *Allen v. Froman*, 96 Ky. 313, 28 S. W. 497. In that case it was held that a lapse of ten years barred an action in the circuit court to admit to record a copy of a will executed in another state but not there probated, and that the action was barred by Ky. Gen. Stat. chap. 71, § 9, art. 3, providing that an action for relief not provided for in this or some other chapter can only be commenced within ten years next after the cause of action accrued. This interpretation of this statute seems to conflict with a case in New York holding that an action to establish a lost will more than twenty years after the death of the testator was not barred by 2 N. Y. Rev. Stat. 2d ed. 229, § 52, providing that bills for relief, in case of the existence of a trust, not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue. *Everitt v. Everitt*, 41 Barb. 385, Affirmed Commission Appeals, 6 Alb. L. J. 197. The actions for relief were similar, but the Kentucky cases were controlled by Gen. Stat. chap. 21, § 27, which provided that "the term 'action' when used in this revision shall be construed to include all proceedings in any court of this commonwealth." The result in the *Everitt* Case was reached by construing "bills for relief" in their strict, legal, and technical sense, and holding that there was a distinction to be found in the books upon equity pleadings between bills which pray for relief and those which do not pray for relief, and that the complaint praying that the will may be proved and its validity established to the end that it might be admitted to record did not seek to restrain the defendants from doing acts, nor to establish any rights, and, "in short, it asks no relief, in the technical sense of the word, against any of the defendants."

In *Allen v. Froman*, 96 Ky. 313, 28 S. W. 497, *supra*, a copy of a will from Alabama was offered for probate. The testator died in Alabama in 1868. The will was not probated in Alabama, but the copy was offered in Kentucky in 1890. The court said: "We can see no reason why a period of time should not be fixed for probating wills as well as for instituting or commencing any other action or proceeding for relief; for fraud may be perpetrated in the matter of probating wills by reason of the death of witnesses to the transaction, and innocent purchasers disturbed and deprived of property honestly acquired, by setting up false wills after a long lapse of time, as can occur in any other case. So, as held by this court in *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. 447, it has become legislative policy of this state to fix in every case a limit of time for beginning every action or proceeding for relief, and § 9, art. 3, was intended for that purpose. Probating and recording the will in question is necessary to enable appellee to maintain an action for recovery of the land from the heirs at law of George Coll, who, or their vendees, have been in actual possession and claiming it as their own since 1870; and to permit appellee, now thirty-nine years old, to institute and maintain this proceeding twenty-two years after death of George Coll, under whose will he claims, would, it seems to us, be contrary to the reason of the statute of limitation, as well as to the direct provision thereof."

N. Y. Rev. Stat. 749, § 3, and N. Y. Code Civ. Proc., § 2628, provides that purchasers in good faith shall not be affected by the probate of a will more than four years after the death of

the testator, and gives an exception to minors, or where the will had been concealed. It was held that a will nineteen years old could not be probated where the minor had reached majority more than five years prior to the probate. *Cole v. Gourlay*, 79 N. Y. 527.

And under this statute, in *Fox v. Fee*, 167 N. Y. 44, 60 N. E. 281, the saving clause in favor of infants was held not to apply to heirs begotten after the death of the testator. But see, on this statute, *Gilkinson v. Miller*, 74 Fed. 131, subd. II.

Me. Rev. Stat. chap. 164, § 1, limiting the probate to twenty years from the death of the testator, was held not to apply where the will had been fraudulently concealed. *Deake's Appeal*, 80 Me. 50, 12 Atl. 790.

Miss. Rev. Code 1871, § 2393, providing that after six months have elapsed from the time of speaking the pretended testamentary words no testimony shall be received unless such words, or the substance thereof, shall have been reduced to writing within six days after speaking the same, was held to mean that the will had to be reduced to writing within six days if not offered for probate within six months, but that if offered for probate within that time the six-days clause did not apply. *George v. Greer*, 53 Miss. 495.

Ohio Rev. Stat. § 5943, provides that no lands shall pass to any devisee in a will who shall know of the existence thereof and have the same in his power to control for the term of three years, unless within that time he shall cause the same to be offered for or admitted to probate; and by such neglect the estate devised to such devisee shall descend to the heirs of the testator. In *Williams v. Schatz*, 42 Ohio St. 47, a deed in the nature of a testamentary disposition was held void as a deed for want of delivery, and, referring to this section of the statute, the court said: "A will in Ohio is of no force until admitted to probate, and probate of this instrument is barred. (2 Swan & C. 1621, § 32, Rev. Stat. § 5943)." But it was held in *Blymeyers's Will*, *Goebel*, 14, that the failure, for three years, by the devisee to present the will for probate did not prevent its admission to probate, for then the question is whether it is the last will, and not what interest passes. This appears to be the proper interpretation of this statute.

Notwithstanding Tex. Rev. Stat. art. 1828, limiting the time to four years within which to probate a will, a will was probated eleven years after the testator's death to establish a chain of title where the plaintiff did not have control of the will. *Ryan v. Texas & P. R. Co.* 64 Tex. 239.

And under this statute a probate was allowed four years and nine months after the death of the testator, where an attempt was made to probate shortly after the death of the testator in behalf of the party interested, but who was not made a party to the record until four years and nine months after the death of the testator. *Elwell v. Universalist General Convention*, 76 Tex. 514, 13 S. W. 552.

The title of a mortgage for value was not affected by a will that was not discovered until six months after the death of the testator, under East Riding registry act, 6 Anne, chap. 35, providing for the registration of wills within six months after the death of the testator. *Chadwick v. Turner*, L. R. 1 Ch. App. 310, 35 L. J. Ch. N. S. 349, 12 Jur. N. S. 239, 14 L. T. N. S. 86, 14 Week. Rep. 491.

The English probate act 1857, § 30, authorizes rules for the regulation of practice. Rule 45, P. R., provides: "In every case where probate or administration is for the first time applied for after the lapse of three years from

the death of the deceased, the reason of the delay is to be certified to the registrars, and, should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit."

XI. Summary.

In the absence of statute and of intervening equities, it seems that the right to probate a will is not extinguished by lapse of time, although vaguely referred to in some cases as limited by thirty years. This period is that usually fixed by the English rule for probating a will in solemn form, *i. e.*, on notice to all parties. But in that case, as in all the others, the period may be cut down to a very limited time by estoppel. The probate is usually allowed in the absence of a prohibitory statute, leaving the devisees to obtain their rights in other actions for relief. In many of the states the time within which a will may be probated is fixed by statute. In *Allen v. Froman*, 96 Ky. 313, 28 S. W. 497, followed in *Reid v. Buxton*, where there was no specific statute, a general section providing that an action for relief not provided for can only be commenced within ten years was held to apply to the probate of a will. A similar statute was differently construed in *Everitt v. Everitt*, 41 Barb. 385, Affirmed Commission Appeal, 6 Alb. L. J. 197. The cases on the rights of a purchaser for value as against the devisee are mostly controlled by statute. It seems that there is no case clearly defining the rights of a purchaser in good faith for value after the lapse of a long period of time, in the absence of statute or of disability of devisees, unless it should be one where the element of estoppel occurred. Under statutes providing a short limitation there is generally an exception in favor of persons under disabilities, such as minors. Such a statute has been held not to apply to grandchildren not begotten at the time of the testator's death. Usually statutes limiting the time of probate make an exception in favor of wills that have been concealed. There seems to be no difference as to the effect of delay in probating a will, whether it be a first or second will, or a codicil. I. T.

CINCINNATI, NEW ORLEANS, & TEXAS
PACIFIC RAILWAY COMPANY'S RE-
CEIVER *et al.*, Appts.,
v.

William FINNELL'S ADMR.

(.....Ky.....)

1. Injury received by a young man seventeen years old while helping brakemen to load a piano, at their request, is within the rule which exempts the master from liability to one who is injured while helping his servants at their request, by reason of their negligence.
2. An action to recover damages for the death of a person cannot be removed from

NOTE.—As to assumption by volunteers of risks of service, see, in this series, *Evarts v. St. Paul, M. & M. R. Co.* (Minn.) 22 L. R. A. 663, and *note*, and *O'Donnell v. Maine C. R. Co.* (Me.) 25 L. R. A. 658.

As to duty to servant voluntarily doing work outside of scope of his employment, see *Stevens v. Chamberlin* (C. C. App. 1st C.) 51 L. R. A. 513.

L. R. A.

a state court into a Federal court when one of the defendants is a resident of the state.

(March 17, 1900.)

A PPEAL by defendants from a judgment of the Circuit Court for Grant County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Messrs. Simrall & Galois and A. G. De Jarnett for appellants.

Mr. W. W. Dickerson for appellee.

Hobson, J., delivered the opinion of the court:

Appellee filed this suit to recover for the loss of the life of his intestate by reason of the negligence of appellant's servants. The answer was substantially a traverse of the allegations of the petition, and at the conclusion of appellee's evidence, as well as on all the evidence, appellant asked a peremptory instruction to the jury to find for him, which was refused. The proof showed that appellee's intestate was seventeen years old, 6 feet high, and weighed about 140 pounds; that he was going to school at Corinth, Kentucky; that on a number of occasions he had been allowed by the crew of appellant's local freight train to ride on the train free, and assist them in loading and unloading freight; that on the day on which he was killed this train, after arriving at Corinth, unloaded the freight for that point; that in this freight was a box of matches, which took fire, and the conductor took the box out behind the depot to get at the fire and put it out; that while he was doing this the brakemen proceeded to put on the freight that was to be loaded at that point; that, among other things, a piano was to be loaded, and one of the brakemen requested the intestate and another boy, of about the same age, who was with him, a few feet away, to come and help them load the piano on the train. The piano was rolled to the door of the depot, which was about 4 feet above the platform, on the outside. Two of the brakemen got on one side of the piano, and the third brakeman and the two boys on the other side. They rolled the piano out of the door, with the intention of carrying it across the platform to the car; but when it left the door it either slipped from the two brakemen, or the weight was too heavy for them to carry, and fell to the platform, catching the intestate under it, and so mashing him that he died from his injuries a few days later. The conductor was not present, and knew nothing of what was going on until after the piano had fallen on the intestate; being out behind the depot, working on the box of matches.

The question in this case is whether the railroad company is responsible for the injury to the boy, received while voluntarily assisting the brakemen in discharging their duties. The rule on this subject is thus expressed in *Wood, Mast. & S.* § 455: "A person who voluntarily, and without any employment, undertakes to perform a serv-

ice for another, stands in the same relation as a servant for the time being, and is regarded as assuming all the risks incident to the business. And this is so even though the service is not wholly voluntary, but is induced by the request of a servant in the defendant's employ. Thus, where the plaintiff was sent by his master with a cart to the defendant's premises to get a load of cotton, and one of the defendant's servants requested him to assist in loading it, and while he was doing so he was injured by one of the defendant's servants negligently letting a bale fall upon him, it was held that an action could not be maintained; *Erle*, Ch. J., pertinently saying: "This is the case of one volunteering to associate himself with another's servants in the performance of the defendant's work, and this without the consent or knowledge even of the defendant." Such a person cannot stand in a better position than those with whom he associates himself, in respect to the master's liability." The same rule is laid down in 1 *Shearm. & Redf. Neg.* § 182; 1 *Lawson, Rights, Rem. & Pr.* § 325. In *Church v. Chicago, M. & St. P. R. Co.* (Minn.) 16 L. R. A. 861, the learned editor, citing a large number of authorities, thus well states the rule: "One who has no interest in the performance of the work which he undertakes, whether of his own volition, or at the suggestion of others engaged in the work, and merely to assist them in its performance, is a volunteer, and assumes all the risks of the employment, and cannot recover for injuries occasioned by an accident happening through the neglect of those with whom he is acting." There are a large number of cases supporting this rule. Thus, where the fireman of an engine asked a boy to put in the hose and turn in the water at a station, and the boy was killed while acting for the fireman, under circumstances not entitling the fireman to recover if he had been in the place of the boy, it was held that there could be no recovery. *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251. So, where a boy was hurt in coupling cars. *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 356. So, where the plaintiff was assisting the defendant's servants in delivering a fly wheel, and by their negligence the wheel was allowed to fall on him. *Wischam v. Rickards*, 136 Pa. 109, 10 L. R. A. 97, 20 Atl. 532. So where the plaintiff, at the request of the brakeman, undertook to help them operate the brakes

on the train. *Mayton v. Texas & P. R. Co.* 63 Tex. 77, 51 Am. Rep. 637; *Evarts v. St. Paul, M. & M. R. Co.* 56 Minn. 141, 22 L. R. A. 663, 57 N. W. 459. In notes to these cases numbers of other cases are collected. The same principles were announced by this court, except as to children too young to understand the danger, in *Kentucky C. R. Co. v. Gastineau*, 83 Ky. 119. Under these authorities, there can be no recovery for the injury to the intestate, unless the fact that he was an infant takes this case out of the rule. He was seventeen years of age, and well grown for his years. The danger from the fall of a piano was apparent, and there is nothing in the record to warrant the conclusion that he had not sufficient discretion to be held responsible for the consequences of his acts. The rule is that a minor in entering a service assumes, like the adult, the risks of that service, unless too young to appreciate the peril to which he is exposed. 1 *Shearm. & Redf. Neg.* § 218. In a note to this section are collected several cases in which this rule was applied to boys fifteen or sixteen years of age. In *Kelly v. Barber Asphalt Co.* 93 Ky. 363, 20 S. W. 271, this court sustained a peremptory instruction where the boy was in his seventeenth year. The brakemen had no authority to call in others to help them in their work, and while it was their duty not to place children, or suffer them to remain, in places of peril, where by reason of their inexperience they would reasonably be exposed to injury, and appellant would be answerable for negligence on the brakemen's part if they did so, this duty is the same as everyone owes to that character of persons on his premises, and the principle has no application where one who is substantially a young man undertakes to help another lift a piano. There is therefore nothing in the case to take it out of the general rule exempting the master from liability to one who is injured, while helping his servants at their request, by reason of their negligence; and the court should have instructed the jury to find for appellant.

There was no error in not removing the cause to the Federal court, one of the defendants being a resident of this state. *Chesapeake & O. R. Co. v. Dixon*, 104 Ky. 608, 47 S. W. 615. But for the reasons indicated the judgment is reversed, and the cause remanded, with directions to grant appellant a new trial, and for further proceedings not inconsistent with this opinion.

KANSAS SUPREME COURT.

C. L. MOSES *et al.*, Plffs. in Err.,

Mary TEETORS.

(.....Kan.....)

*T. took wheat to a public warehouse

*Headnote by CUNNINGHAM, J.

and elevator, and had it stored at owner's risk of fire, and agreed to pay a certain price for storage. The custom of the warehouseman was in such cases to commingle grain so deposited for storage with like quality belonging to him, and from such mass to sell from time to time and replenish with such other grain as should be brought to him for storage, or that he should

NOTE.—On the general question of the liability of warehousemen as bailees of grain deposited in the warehouse, see *Hall v. Pillsbury* (Minn.) 7 L. R. A. 529, and illustrative

buy. Of this custom T. was fully informed. The identical wheat so stored by T. was sold by the warehouseman. After this a fire consumed the warehouse with its contents, including enough wheat of the quality stored by T. to replace the same. Held, that she could not recover the value of her wheat from the warehouseman, he having at all times kept on hand sufficient in quantity and quality to replace all wheat stored with him.

(January 11, 1902.)

ERROR to the District Court for Barton County to review a judgment in favor of plaintiff in an action brought to recover the value of certain grain which had been delivered by plaintiff to defendants. *Reversed.*

The facts are stated in the opinion.

Mr. Elrick C. Cole, for plaintiffs in error:

The placing of the grain in a common mass with wheat belonging to defendants and others did not change the nature of this transaction from a bailment to a sale.

Sexton v. Graham, 53 Iowa, 181, 4 N. W. 1090; *Rice v. Nizon*, 97 Ind. 97, 49 Am. Rep. 430; *James v. Plank*, 48 Ohio St. 255, 26 N. E. 1107; *Ledyard v. Hibbard*, 48 Mich. 421, 42 Am. Rep. 474, 12 N. W. 637; *Baker v. Born*, 17 Ind. App. 422, 46 N. E. 930; *Nelson v. Brown*, 53 Iowa, 555, 5 N. W. 719.

Mr. William Osmond, for defendant in error:

Where there has been a complete change in the identity of the grain by substitution, so that no part of the original grain is left, the party depositing the grain may treat the transaction as a sale.

Where property is delivered to a party with the understanding that property of the same kind will be returned or the property paid for, as in the case of storage of grain in warehouse or elevator, the transaction is a sale, and not a bailment.

Chase v. Washburn, 1 Ohio St. 244, 59 Am. Dec. 623; *Rahilly v. Wilson*, 3 Dill. 420, Fed. Cas. No. 11,532; *Bailey v. Bensley*, 87 Ill. 556; *Loneragan v. Stewart*, 55 Ill. 44; *Lawson, Bailments*, § 8; *Jones, Bailment*, § 102; *Story, Bailments*, § 439; *Richardson v. Olmstead*, 74 Ill. 215; *Schouler, Pers. Prop.* 3d ed. § 46.

Cunningham, J., delivered the opinion of the court:

Moses Bros. Grain Company was, in October, 1898, engaged in the business of buying and selling, handling, and storing grain at Great Bend, Kansas, and for that purpose owned and operated an elevator and storage building at that place. In carrying on this business it was its custom, when grain was brought to it for storage, to mingle the

same with other grain of like quality belonging to the company and to other persons, and from such commingled mass to withdraw for sale such portions at such times as it might desire. Upon the grain stored by it it charged and received certain storage fees. In said month of October Mrs. Teetors, by her agent, one Wilson, brought to the elevator 1,012½ bushels of wheat, which was received by the company under the terms of written receipts, then given therefor, all of like form, one of which is in the following language:

Great Bend, Kansas, 10/18/98.

Load of ——— Test 56. Price per bu., .48. Sold to Moses Bros. Grain Co. Stored at owner's risk of fire. Ed. Moses.

These receipts were not issued in this form at the time the wheat was brought to the elevator, for Mr. Wilson did not then know whether he would sell or store it, but afterwards, in a few days, he concluded to store it, and then the tickets were taken to the company, and there was written across these tickets the words, "Stored at owner's risk of fire." The contract was one for storage, and not of sale. This wheat was not placed in a bin by itself, but was mingled with a common mass of grain of like quality in the elevator, as was the custom. Mr. Wilson well knew the custom of the grain company relative to storing grain, and its sale, and did not expect to receive back the identical wheat which he stored with the company, and we assume the fact to be that this identical wheat was sold by the grain company in its ordinary course of business. In the latter part of December, 1898, the company's elevator was burned, it then containing wheat of like quality as that stored by Mrs. Teetors, enough to have repaid her as well as others; and it fairly appears from the evidence that this had been the case all the while from the time she so deposited it up to the time of the fire. After the fire the grain company took the proper care of the injured grain, and tendered to Mrs. Teetors her share of the salvage thereof. This she refused, however, and brought her action against the company to recover for the full value of the 1,012½ bushels of wheat, which she alleged to be worth 60 cents per bushel. The court rendered judgment in her favor, and against the grain company, and it is now here seeking a reversal of this judgment.

It is agreed by the parties that the relation existing between Mrs. Teetors and the grain company was that of bailor and bailee, and that the mingling of Mrs. Teetors' wheat with that of the grain company did not change the character of the bail-

cases in note thereto. As the grain in the present case was explicitly stored "at owner's risk of fire," the decision holding that the sale of the specific grain that was deposited did not prevent the continuance of a bailment under which grain of equal amount in the common mass was held as that of the depositor, and subject to such risks, seems entirely consistent 57 L. R. A.

with the general trend of authorities like that of *Hall v. Pillsbury* (Minn.) 7 L. R. A. 529, holding that the bailment continues notwithstanding the removal of the identical grain first deposited and that the holders of receipts for grain so deposited are tenants in common of the mass of grain in the warehouse.

ment, or convert that bailment into a sale; and it is further admitted that in such mingling the respective owners were tenants in common of the entire mass, but it is claimed by Mrs. Teetors that the sale by the grain company of the identical wheat deposited by Mrs. Teetors had the legal effect to make the grain company liable to her for the full value of the wheat, if she should elect to require money rather than a return of wheat. This contention leads us to a consideration of the principles of bailment involved, as applied to elevators and warehousemen.

It is contended by the grain company that, inasmuch as Mrs. Teetors knew of their custom in the matter of selling grain, that custom must be read into the contract expressed by the receipts given, and make the contract to be that she was to receive, in satisfaction of her demand for the grain whenever it should be made, not the identical grain she had deposited, but any other grain of the same quality, and that in the meantime her ownership would be in the particular grain of the same quality found in the grain company's bins. In other words, that her ownership was a shifting and substituted one. In support of this theory, plaintiff in error cites many cases. In the case of *Rice v. Nixon*, 97 Ind. 97, 49 Am. Rep. 430, the defendant was a warehouseman, and it was his custom to receive wheat on deposit and to place it in a common bin with wheat bought by him, and to sell from such common mass as he chose, of which custom plaintiff had knowledge. Plaintiff's wheat was put into the bin in accordance with defendant's custom. From this common mass he sold from time to time. The warehouse and its contents were destroyed by fire without the negligence of the defendant, no demand having been made by the plaintiff for the return of the wheat prior to the fire. The facts of this case seem fairly parallel with the facts of the case at bar. The conclusion of law, as founded upon these facts, is stated in the syllabus as follows: "Where a warehouseman receives grain to be stored for the owner, and places it in a common bin with his own and that received from other depositors, and sells from this receptacle, retaining always sufficient to supply each owner, the contract continues one of bailment, and the warehouseman is not liable for a loss resulting from an accidental fire not attributable to his own wrong or negligence." In *James v. Plank*, 48 Ohio St. 255, 26 N. E. 1107, the law announced was that in cases of this kind, where the owner of grain deposited with a warehouseman knew of the custom among warehousemen to mingle wheat brought to them for storage with like wheat owned by the warehouseman, and that from such common mass the warehouseman had the right to take out of the contents for sale, and that he at all times kept on hand an amount sufficient to satisfy all depositors, such a transaction was but a bailment, and not a sale, and the warehouseman would not be liable to the owner of the

wheat if, under such circumstances, the wheat had been destroyed by fire without his negligence. The same doctrine is announced in *Sexton v. Graham*, 53 Iowa, 181, 4 N. W. 1090, which case was followed under similar circumstances in *Nelson v. Brown*, 53 Iowa, 555, 5 N. W. 719. The case of *Rice v. Nixon*, 97 Ind. 97, 49 Am. Rep. 430, has been cited and followed in a number of Indiana cases since, some of which are as follows: *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; *Morningstar v. Cunningham*, 110 Ind. 328, 59 Am. Rep. 211, 11 N. E. 593; *Woodward v. Semans*, 125 Ind. 330, 25 N. E. 444; *Drudge v. Leiter*, 18 Ind. App. 694, 49 N. E. 34. In this last case it is held, as applied to cases of this kind, in the absence of an agreement to the contrary, the usages of a particular business may be presumed to have entered into and formed a part of the contracts and understandings of persons engaged in such business and those who deal with them. In *Yockey v. Smith*, 181 Ill. 564, 54 N. E. 1048, oats and corn were deposited with one Harrington, who operated an elevator, buying, selling, and shipping grain on his own account, and receiving grain from farmers for storage in his elevator. The grain so stored was taken upon execution against Harrington, and the court held that the grain was not subject to be taken upon execution for Harrington's debts, for the grain so stored remained the property of the bailor, the bailee being charged with the duty to return in quality and quantity as they had received. This case cites with approval *German Nat. Bank v. Meadowcroft*, 95 Ill. 124, 35 Am. Rep. 137, where it was held that grain consigned to a public warehouse, and there stored in bins and mingled with other grain of like character and grade belonging to different persons, although its identity was lost, could be recovered in an action in trover; the warehouseman having refused to deliver to the owner the quantity and quality stored. We are cited by the defendant in error to several cases which, she contends, support her theory of the case. *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. Dec. 623, decided by the supreme court of Ohio in 1853, was a case where the defendant in error deposited with the warehouseman a quantity of wheat. The warehouse was subsequently destroyed by fire, and the bailee refused to pay for the wheat, and it was there held that, if the bailee shipped the wheat and appropriated the same to his own use, in violation of the terms of the bailment, upon the burning of his warehouse he would become liable to the bailor for the value of the property, and that, inasmuch as, under the facts of this case, it was found that the bailee had a right to return the specific article or pay its price at his option, he was in law a purchaser, and was answerable for the value of the grain to the bailor. This case would be one in point with the case at bar were it established that the grain company had the option to pay the price instead of returning the wheat upon demand to Mrs. Teetors. The same is

true of *Rahilly v. Wilson*, 3 Dill. 420, Fed. Cas. No. 11,532, a case decided in 1873. *Bailey v. Bensley*, 87 Ill. 556, is also cited. This case arose upon the claim of a grain buyer against a firm of commission merchants doing business in Chicago. We fail to see the applicability of this case to the case at bar. *Loneragan v. Stewart*, 55 Ill. 44, is a case in which the same principle which is announced in the case of *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. Dec. 623, is involved, and that case is cited and approved. *Richardson v. Olmstead*, 74 Ill. 213, is a case of the same character, and announces the same principle in the following language: "Where grain is received by a dealer into his warehouse, under a contract to pay the owner the market price on any day he may choose to call for it, and such grain is mixed with other grain in bins, from which shipments are being made every day, the dealer becomes the owner of the grain, and liable to pay for it whenever called on, and is not a mere bailee." This case also cites *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. Dec. 623, and *Loneragan v. Stewart*, 55 Ill. 44. We do not think that these cases, under their facts, are applicable to the case at bar, because it appears, from the fact that this wheat was stored at "owner's risk of fire," that both bailor and bailee recognized the fact that the title to the wheat remained in the bailor; for if by this transaction title had passed to the bailee, how could it be stored at owner's risk? Or what would have been the sense of this provision if they had contemplated that her ownership should end by the sale of this wheat by the grain company in the ordinary course of its business, which might occur the very day the wheat was stored, and had perhaps occurred before these words were written upon the receipts, which was some days after the wheat had been delivered? The term "owner" in the receipt clearly means Mrs. Teetors. And, more than this, one of the defendants testified that if a party who had stored wheat wished to withdraw the same the company would turn out the same quantity of wheat that had been stored. From all of the evidence it appears quite plain to us that the case was tried upon the theory that the title to the wheat remained in Mrs. Teetors. It is probable that both parties had an idea that the wheat would never be redelivered, but whether it should be or not would depend upon future and further negotiations. The general rule of bailment is well understood, that where a bailee for hire puts it beyond his power to return the identical property bailed he thereby becomes a debtor to the bailor in the amount of the value of the thing bailed, but in a contract such as the one in this case at bar conditions widely depart from those upon which the general rule is based. Here it was clearly understood,

57 L. R. A.

based in part upon the conversation had with Mr. Wilson and in part upon Mr. Wilson's knowledge of the general course of the grain business, that the identical wheat which Mrs. Teetors deposited in the warehouse might not, and probably never would be returned; that the grain company had a right to sell it, and that its contract to return would be fully discharged if, upon demand therefor, it turned over to Mrs. Teetors wheat of like quantity and amount. Every consideration of the case would compel to this understanding, for it must have been clear to Mr. Wilson that the grain company was not expecting to, nor, indeed, could not, provide separate bins or storage receptacles for each several lot of wheat. Warehouses and elevators are of great public utility. It is a matter of general knowledge that a great portion of the grain business of the country is transacted through and by them. This could not be done if it was required that the identical grain deposited by any owner should be returned upon demand, or, in default thereof, the warehouseman would be chargeable with the price thereof at the time the demand was made. But the rule that the warehouseman may discharge his obligation to the owner by delivering to him grain of like quality and amount when he shall demand it is fair and just, and in accordance with the terms of the understanding and agreement. This is not unjust to the owner. He may protect himself against loss by fire by procuring insurance, and he is protected from the creditors of the warehouseman, who may not take upon execution against him grain in store to such an extent that the owner may not obtain his own. In short the contract is one, to coin a term which seems fit, of substituted ownership, wherein, as soon as the identical grain which has been deposited by the owner is disposed of by the warehouseman, other grain of the same quality and quantity takes its place, and so on from time to time until the owner shall receive back his grain, or other arrangements are made for its disposition. This rule is just, equitable, and fair, permitting facility and ease in handling crops of grain, while it protects the interests of all parties. It seems that the court below took the view that as soon as the identical grain deposited by Mrs. Teetors with the grain company was disposed of by it there arose on its part a promise to pay for its value, and upon this theory rendered the judgment it did. As we have said, this is a correct general theory, but we do not think it applicable to the facts of this case.

The judgment of the court below will be reversed, and the case remanded for further proceedings in accordance with this opinion.

All the Justices concur.

LOUISIANA SUPREME COURT.

George MARKS *et al.*, *Appts.*,
v.
NEW ORLEANS COLD STORAGE COM-
PANY.

(107 La. 172.)

- *1. The undertaking of the cold storer being to preserve goods liable to undergo or actually undergoing deterioration through the development in them of insect life, it is not necessary, in order to recover against him for damage to goods, to prove more than that the goods, when delivered into his cold storage, were, according to the usual and ordinary test of commerce, sound.
 2. For the deterioration of the goods while in his cold storage he is responsible, notwithstanding that in the heading of the receipt issued for the goods there is printed a limited liability clause, to the effect that he is not responsible for "damage" to goods.
 3. Interested persons are by our law competent witnesses, and their testimony is binding on the court, unless overcome by counter testimony, or irreconcilable with the known facts of the case.
 4. The warehouseman has a right to hold possession of the goods stored with him until the amount due him for storage is paid.
 5. The amount due for storage on goods cannot be compensated by an unliquidated claim for damage suffered by the goods.
- On Rehearing.*
6. A cold storage company may by contract limit its liability to the extent that liability may be limited.
 7. The limited liability clause should be specific, and include in its terms all damages and acts for which the cold storer does not hold himself responsible.
 8. A paper admitted in evidence without objection will be taken as the commencement of proof of a particular fact.
 9. The holder of the receipt is entitled to delivery of the property stored upon tender of payment of charges on the property itself, and payment of charges on other property of owner cannot be required before delivery. There must be a tender made, in due form, of the charges.
 10. Storage is due on damaged goods for which the storer is made to pay.

(June 3, 1901.)

APPEAL by plaintiffs from a judgment of the Civil District Court for the Parish of Orleans in favor of defendant in an action brought to recover damages for injury to property while in defendant's storehouse. *Reversed.*

The facts are stated in the opinion.

Mr. W. S. Parkerson, for appellants:

*Headnotes by PROVOSTY, J.

NOTE.—As to liability of bailee for damage to goods received for cold storage, see *Allen v. Somers* (Conn.) 52 L. R. A. 106, and *note*. 57 L. R. A.

The depositary is bound to use the same diligence in preserving the deposit that he uses in preserving his own property.

Civil Code, art. 2937; *Schwartz v. Baer*, 21 La. Ann. 601; *Thomas v. Darden*, 22 La. Ann. 413.

In an employment requiring skill the failure to exercise that skill is gross carelessness.

Bussey v. Mississippi Valley Transp. Co. 24 La. Ann. 165, 13 Am. Rep. 120; *Hamilton v. Elstner*, 24 La. Ann. 455.

Messrs. McGloskey & Benedict for appellee.

Provosty, J., delivered the opinion of the court:

Having on hand large quantities of cowpeas, and June coming on, when cowpeas are in danger of being damaged by weevils in the climate of New Orleans, the plaintiffs separated the mixed peas from the straight clay peas, and put the latter, the more valuable, in the cold storage warehouse of the defendant company for preservation until the opening of the next season,—say, March following. The quantity thus stored was 13,028 sacks, and the transfer to the cold storage was effected between the 9th and the 18th of June. Afterwards (a few days more than a month afterwards), between the 19th and 30th of July, plaintiffs transferred to the same cold storage what they still had on hand of the mixed peas, namely, 2,099 sacks. In the course of the following season, plaintiffs withdrew the peas from the cold storage as the requirements of their trade demanded, until the defendant refused to make further deliveries, claiming the right to hold the peas for unpaid storage; and thereupon the plaintiffs immediately brought the present suit. This was in July, 1898,—a year after the peas had been stored. Plaintiffs allege that, of the peas withdrawn, 642 sacks were damaged, and had to be sold for \$433.19, instead of \$1,249.96, the regular price, and that defendant owes them the difference, *viz.*, \$816.77; the damage having come about through its fault. And they allege further that the defendant refuses to deliver to them the remainder of the 13,028 sacks of peas, namely, 1,250 sacks; that the same are damaged to such an extent as to have lost all value; that the damage came about through the fault of defendant; and that defendant owes the value, *viz.*, \$2,458.33. And plaintiffs allege further that, of the 2,099 sacks of peas, defendant still holds and refuses to deliver 1,360 sacks, and owes the value, \$616.05. Plaintiffs do not say that these 1,360 sacks are in any worse condition than they were when put in cold storage. The defendant denies that it has been in fault, avers its right to detain the cowpeas until payment of the amount due for storage, and claims in reconviction the amount thus due, namely, \$1,890.65. At the request of the plaintiffs the peas detained by defendant

were sold by the sheriff soon after the institution of this suit. The 1,250 sacks sold for \$431.72, and the 1,360 sacks for \$198.98.

The business of the defendant is to preserve perishable articles by means of cold air. Articles received by defendant for preservation are supposed to be liable to undergo or to be actually undergoing a process of deterioration through the development in them of insect life, and the undertaking of defendant, for which it is paid more than quadruple the price of ordinary warehousing, is to prevent or arrest this process. In order to recover against defendant, therefore, it is not necessary for plaintiffs to show that their goods were not affected by insect life when put in cold storage, or that the process of deterioration had not begun in said goods, but that said goods, by the usual and ordinary test of commerce, were classed as sound. The two plaintiffs and Mr. McMillan testify positively and emphatically that they tested every sack of the peas,—this test being made as the peas were being hauled to the cold storage,—and found the peas to be perfectly sound. The interest of these witnesses detracts from the weight of their testimony (Mr. McMillan has against the defendant a claim similar to that of the plaintiffs); but the witnesses are three in number; they are by our law competent witnesses; they are business men of this city; and, after all allowances have been made, their testimony is binding on the court. The supposition of these witnesses having been mistaken is excluded by the fact that they were large dealers in peas, entirely competent to test the peas, and by the further fact that the testing of the soundness of a pea is a very simple matter,—a sound pea being cold, and a weevily pea hot. The superintendent of the cold storage testified to the machinery of the cold storage having run perfectly while the peas were in cold storage, and a large number of dealers in different kinds of perishable articles who had goods in the cold storage during the time that the peas of the plaintiffs were there testified to their goods having been properly preserved; and we have no doubt at all that the machinery of the cold storage was properly run. The peas, then, having been sound when put in, and the machinery having run regularly, it must be that the damage to the peas occurred before the cold had penetrated sufficiently to arrest deterioration. If so, defendant is responsible; for it was its business to know what quantity of peas it could safely admit at one time into its cold storage. This responsibility of the defendant the superintendent of the cold storage, Mr. Scratchly, was alive to, for we find him cautious about letting in the peas too fast. "Saw Mr. Scratchly," says Mr. McMillan, "and asked him whether he couldn't take them a little more rapidly, as we wanted to get them in; and he said they were having a little difficulty with the temperature, keeping it down to where it should be, and he would only take in a certain amount a day, as he didn't want to endanger the temperature of the warehouse."

57 L. R. A.

We can explain the deterioration of the peas in no other way than by assuming that the superintendent was not cautious enough, and did "endanger" the temperature of his cold storage by letting in the peas too fast, or in too great quantities. The largest quantity the defendant had ever stored previously was from 6,000 to 7,000 sacks, whereas this time, in the brief space between the 9th and 18th of June, it undertook to accommodate 13,028 sacks for plaintiffs and 26,099 sacks for McMillan & Co. There is evidence that the peas were stored too much in a pile, and we must say this evidence is but very faintly contradicted by Mr. Scratchly. Of the 13,028 sacks of peas, 5,422 were transferred into the cold storage directly from the cars that had brought them from Tennessee, and 7,606 were transferred from the warehouse of Holmes & Co., in this city. The peas transferred from the cars came out of the cold storage all sound. Defendant argues that since all the peas from the cars came out sound, and the peas from the warehouse of Holmes & Co. came out damaged, it must be that not the cold storage, but the warehouse, is responsible for the damage. The argument, though possessing considerable force, is by no means conclusive. In the first place, not all the peas from the warehouse of Holmes & Co. came out of the cold storage damaged, but only some of them; 5,910 sacks came out sound,—a larger amount than the total quantity that came from the cars. The peas from the warehouse of Holmes & Co. which had been subjected for some time to the temperature of New Orleans, may have carried with them into the cold storage a greater quantity of heat than did the peas direct from Tennessee. Moreover, they may have been stored less advantageously.

The loss resulting to the plaintiffs from the deterioration of the 642 sacks of peas is not proved. As to these 642 sacks we must therefore nonsuit plaintiffs.

The defendant had a right to hold possession of the peas until the storage was paid. Civil Code, art. 2956. The storage could not be compensated by the plaintiffs' unliquidated claim for damages. Civil Code, art. 2209. Plaintiffs can therefore recover nothing for the 1,360 sacks that were in a damaged condition when put in the cold storage. It is not alleged that these 1,360 sacks deteriorated while in the warehouse of defendant. The only allegation is that defendant refused to deliver them up; and, since we have held that defendant properly so refused, we can allow the plaintiffs nothing on this demand.

The price for which the peas were sold belongs to plaintiffs, subject, however, to the pledge of the defendant to secure the amount due for storage. Of the 1,250 sacks, 1,054 were damaged. These were sold at 19½ cents per bushel. Had they been sound, they would have brought 36½ cents per bushel. Plaintiffs are entitled to recover from defendant the difference. There were 1,578 bushels, which, at 17 cents

per bushel, the difference between 19½ and 36½, amounts to \$268.26.

The sale made by the sheriff, having been made at the instance of the plaintiffs, was the act of the plaintiffs, for which the plaintiffs alone are responsible. This sale must be held to be the exact equivalent of a private sale made by the plaintiffs. As such, it measures the value of the peas at the time they were taken out of the cold storage and sold.

On the reconventional demand, defendant is entitled to judgment as prayed, with recognition of the depository's pledge on the price of the peas sold by the sheriff.

The defendant was sued on its general liability as a cold storer, and it answered by a general denial. It did not plead any special contract. But we find that in the heading of the receipts issued to the plaintiffs for the peas there is printed the following limited liability clause: "It is expressly understood and admitted that this company do not inspect or examine condition of goods in receiving same, and therefore are not responsible for contents or damage. It is also further understood that this company will not be responsible for variation in temperature that may arise by accident to machinery or other unforeseen causes. This company will make special contracts at increased rates above tariff when parties storing require guaranty of temperature. In this case goods will be inspected and examined at the expense and risk of storer. This company reserves in such special contracts that forty-eight hours' notice to the storer that machinery or building is disabled will terminate such contract and their responsibility under same. Not accountable for leakage, depreciation, or damage by rats." This clause is not specially insisted on in the brief, nor was it pressed in the argument; but, giving the defendant the full benefit of it, we do not think that it relieves defendant of its obligation, as cold storer, to preserve the goods in the condition in which they were when received.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be set aside, and that the plaintiffs have judgment against the defendant for the sum of \$268.26, with 5 per cent per annum interest from this day. It is further ordered, adjudged, and decreed that the price of the sale made by the sheriff in this suit belongs to the plaintiffs, but that the same is subject to the privilege in favor of the defendant hereinafter decreed. It is further ordered, adjudged, and decreed that the demand of the plaintiffs for \$816.97, difference in the price of the 642 sacks of peas sold as damaged, be rejected as in case of nonsuit. It is further ordered, adjudged, and decreed that the defendant have judgment against the plaintiffs for the sum of \$1,896.65, with 5 per cent per annum interest thereon from the 18th day of October, 1898, and that to secure this judgment the defendant have a depository's privilege on the price of the sale made by the sheriff in this suit. It is further ordered, adjudged, and decreed that

the defendant pay the costs of the main suit in the lower court and the costs of appeal, and that the plaintiffs pay the costs of the reconventional demand.

A rehearing having been granted, **Breaux, J.**, on February 17, 1902, handed down the following additional opinion:

Application was made for a rehearing on a number of grounds which we considered sufficient to reopen the case and hear further argument.

Plaintiffs contended that the loss resulting from the deterioration of peas was amply shown, and that our decree should be amended so as to allow them an amount equal to this loss; secondly, that defendant had no right to hold possession of the property stored until all the charges had been paid, for the reason that plaintiffs were always willing to pay storage on any goods which they would withdraw, and the \$1,290.59 admitted by plaintiffs in their petition to be due was for storage on the goods already withdrawn; that an amount claimed of \$606.06, and heretofore allowed, was never earned; the charge was for preservation of goods, which had not been earned; that the price fixed in the decree for the peas was too low; and that it should be increased to an amount equal to the value of sound peas at the time. Defendant made no application for a rehearing, but in argument at bar, through its learned counsel, contended that all the issues should be reconsidered, and the whole claim rejected. There was much said by defendant's counsel in argument which was persuasive, in view of the restricted liability stipulated in the contract of storage between plaintiffs and the defendant. Heretofore it was considered that throughout the trial the burden of proof was with plaintiffs, in view of this contract. None the less, after having considered the evidence, the court concluded that its weight was with plaintiffs, and rendered its decree accordingly.

We are impressed by the argument of defendant's counsel, made with force and clearness at bar, that our decision would perhaps prove somewhat of a hindrance to the cold storage industry. In consequence, as relates to storage, we are moved to go over the entire ground again. The evidence, as heretofore considered, led us, we think, to a correct conclusion, although the practical observation of witnesses who testified in this case did not entirely accord with entomological science. We will point out the difference between the two. Our conclusion is that, in the main, the difference is not considerable. Practically, it was thought by the witnesses that the insects by which the peas were destroyed were a part of the pea, coming spontaneously from it, and growing with it, and that when it reached the perfect condition it flew away, committing no further damage. We have found, after consulting several authorities, that entomology teaches that in the early spring the female weevil (*bruchus pisi*, the pea weevil of the naturalist) fastens its egg upon the newly

formed pod of the pea in a way that renders it difficult at first to find that the grain is attacked. The egg gives birth to a white larva, which feeds on the substance of the pea, and takes it life from it. The farinaceous substance of the grain is favorable to its growth, and it is while thus growing that the damage is done. When this larva passes into a perfect state the weevil bores through the pods, and, as a destroyer, commits no further damage, except in giving birth to eggs, which are inserted in the pea, as before mentioned. Cold storage will not destroy the weevil. It can only check its growth and development while in an embryo state. In winter the weevil finds shelter from the cold in the cracks of walls and other secluded places. It does not increase. The cold destroys many. In summer they invade the different cereals. They do not lay their eggs on the surface, but at some depth in the heaps of grain; a very minute dot on the surface of the pea being the only external evidence of the presence of a weevil larva. We infer that in this case the presence of the weevil or of its larva, and the extent of the damage, escaped the attention of the plaintiffs and the defendant. All agree that in cold air the weevil does not lay eggs, and the larva is harmless. But it takes a temperature of at least 10° centigrade to check their increase. Here cold storage becomes useful, and is, when the peas have been properly stored, some protection against damage by weevil. There are methods for destroying them that give rise to interesting study to the student of entomology. We are reminded by the necessity of some brevity that, although the subject is interesting, we must not pursue its study any further, and that we must limit our discussion to the work the cold storage undertakes when it receives peas on storage; and this, we think, we have done, by indicating the degree of temperature required to check the growth of insects of the weevil kind.

Our decision found that the heaps of peas were too large, and that the defendant did not sufficiently look after the ventilation of the cold air it controls. After a re-examination, we are not satisfied that an error has been committed. Defendant places great reliance upon the receipt it gave for the peas, and the limited liability clause printed therein. We understand that the defendant can limit its liability, and that those who sign the limited clause will be bound by its terms. But in this case oversight and negligence have been found, which are not covered by the limited liability clause of the receipt, and from which we do not understand, from the testimony, that it ever was the intention to relieve the defendant. Certainly the language used leads to such inference. One may stipulate waiver as extensive as he pleases, provided it does not contravene rules and laws enacted on grounds of public policy. The waiver must express the full extent intended. We take up for decision each item separately.

An exhibit identified by the letter A is 57 L. R. A.

annexed to the plaintiffs' petition, and clearly shows that the cowpeas for which it accounts were sold from April 8, 1898, to July 22, 1898, for \$433.19. This exhibit was offered in evidence contradictorily with defendant, who permitted it to be filed without objection. We think we are warranted in considering it to be properly before the court, and that it and other evidence show that plaintiffs are entitled to \$689.28 on item represented by Statement A. If sound, they would have brought, it appears, 90 cents per bushel,—\$1,122.47. They sold for \$433.19. The difference they would have brought if not weevily is \$689.28. In seeking to fix the value of these peas (not weevily when delivered to storage company), our attention was arrested by the testimony of a witness of the defendant who said that he in 1898 commenced selling peas at 90 cents. Mixed peas were sold for 75 cents per bushel; whip-poor-will at 85 cents. Another witness spoke of 80 cents as having been the selling price. True, plaintiffs' peas were of the better quality of clay peas, and worth from 10 cents to 25 cents more than the other. Taking the minimum of value of the ordinary and mixed peas and the minimum additional for the clay peas, we fix the price at 90 cents a bushel. It must be remarked that these peas were carried over by plaintiffs from the season of 1897 to be sold in 1898, when they were not as valuable, we infer from the testimony, as they were in 1897, and not as fresh as they were in the latter year.

The next ground of complaint is based on the refusal of the defendant to deliver the peas to plaintiffs before the storage was paid. Defendant held possession, and claims for storage while it held possession. Plaintiffs deny defendant's right to recover for this storage, because, as they aver, they offered to pay charges for storage, which they assert defendant refused to accept. Plaintiffs' contention is that separate negotiable warehouse receipts had been issued by the defendant for the peas; that defendant could not, in law, refuse to deliver the peas called for by one of the receipts, upon the ground that the storage on other peas which had been withdrawn on other receipts had not been paid. In other words, that it was not an advance made on the deposit, nor a claim arising from the deposit of the particular goods stored, which plaintiff wished to withdraw from storage. Plaintiffs say that they were willing to pay storage on the goods they desired to withdraw, but on none other, although, as we understand, there were other charges due. The statute (act No. 156 of 1886) is clear enough,—that on the presentation of a warehouse receipt properly indorsed, and the tender of charges upon the property represented by it, the holder of the receipt is entitled to the property it covers. While it is true that under the terms of this statute the holder of the receipt is entitled to delivery of the property upon the tender of payment of all charges on the particular property for which the receipt calls, yet there must be a tender in

order to enable the holder of the receipt to recover damages growing out of delay in not delivering the goods, when delivery was timely and properly asked. Here there was no tender made. There was an offer such as is usual in a business community during the course of business, as will be seen from the following, which is copied from the testimony:

Cross-examination:

Q. Did you tender them in cash the amount of money due on those peas?

A. No, sir; not in cash.

Q. Did you tender them anything?

A. No, sir.

Clearly, this being the fact as relates to tender, plaintiffs continued to owe storage on the property which they did not offer to withdraw by making the tender the statute requires.

Plaintiffs claim the amount of \$606.06 was for storage on the damaged goods. The complaint on this score is that plaintiffs were to pay four times the ordinary warehouse charges, and that, as defendant did not preserve the peas, it failed in performing its contract, and is, in consequence, not entitled to anything; that it should not recover compensation for failing to do that which it had bound itself to do. The defendant did not succeed in preserving the property, it is true, but at the same time it does not appear to us that there was such culpable negligence as renders it necessary to hold that it has lost all right to anything for the services it did render, although it failed. The property stored, although damaged, retained some of its value. Besides, defendant is condemned to pay its value; that is, to make up for the loss by paying the difference between sound and unsound peas. It should receive storage, on the theory that, if these peas had been sold in a sound state, defendant would have received storage.

Plaintiffs complain of the value of the peas as found by the court. The original opinion states (and this is not denied by plaintiffs) that it was at plaintiffs' request that the peas were sold at public auction.

The theory of the opinion was that plaintiffs had not complied with the statute cited *supra* with regard to tender, and that defendant was not alone at fault for the delays in disposing of the peas; that plaintiffs also had given them at least an implied assent, by not energetically demanding delivery of the property, and tendering the amount due thereon. We are not convinced that we should change that ruling, and recall all that has been heretofore held in that regard. Thirty-six and one-half cents remains as the price of sound peas. We have not found any good reason to increase the number of bushels from 1,578 to 2,108 bushels. The court concluded heretofore to adhere to the minimum number. We would not feel justified in changing the number unless it was manifest that an error had been committed. We do not change and increase the amount heretofore allowed for the peas sold by the sheriff, particularly, for the reason that the following, which appears of record, would not warrant an increase as relates to peas sold at sheriff's sale, far different from the other lots (we understand that this particular lot was weevily, to the knowledge of plaintiffs, when it was delivered to the cold storage warehouse): "It is admitted that this receipt calling for 2,029 sacks of peas on the reverse of which is written 730 sacks delivered by Marks and Rittner 1,569 sacks to the sheriff were stored in the warehouse as weevily peas on the date specified in the receipt." In view of this fact, we do not think that the price or the weight of the lot should be changed, for it may have been just as deficient in weight, as compared with sound peas, on the day it was delivered to the storage as on the day it was sold.

To conclude, then, plaintiffs are entitled to a judgment for \$691.59, as above stated, with 5 per cent interest from this date; and to this extent the original judgment is amended, and in other respects it is affirmed; making, with the amount allowed in our original judgment, the sum of \$959.85.

As amended, our original judgment is reinstated, and made the judgment of the court.

MARYLAND COURT OF APPEALS.

UNITED RAILWAYS & ELECTRIC COMPANY, App't.,

v.

Robert F. HARDESTY.

(.....Md.....)

1. A carrier is not obliged to honor a coupon from a commutation book of tickets intended for passage between des-

ignated points and which provide that they are not "good unless detached by the conductor," when it has been detached by the commuter and the book left with a member of his family, so that it is not present when he tenders the coupon in payment of fare.

2. A person on a street car does not acquire the right to be carried to his destination by the fact that the conductor rings up his fare on taking from him a valid coupon ticket.

NOTE.—For other cases in this series as to ejection of passenger for refusing to pay fare where invalid or defective ticket or transfer rejected, see *MacKay v. Ohio River R. Co.* (W. Va.) 9 L. R. A. 132; *Peabody v. Oregon R. & Nav. Co.* (Or.) 12 L. R. A. 823; *Kansas* 57 L. R. A.

City, M. & B. R. Co. v. Riley (Miss.) 13 L. R. A. 38; *Poulin v. Canadian P. R. Co.* (C. C. App. 6th C.) 17 L. R. A. 800; *Trezona v. Chicago G. W. R. Co.* (Iowa) 43 L. R. A. 136; and *Killey v. Chicago City R. Co.* (Ill.) 52 L. R. A. 626.

As to reasonableness of carrier's rules and

2. A second demand for fare need not be made by a street-car conductor before ejecting from the car a person who, in response to his first demand, tendered a worthless ticket, and was informed that it was insufficient.

(March 6, 1902.)

APPEAL by defendant from a judgment of the Baltimore City Court in favor of plaintiff in an action brought to recover damages for alleged wrongful ejection from defendant's car. *Reversed.*

The facts are stated in the opinion.

Mr. Fielder C. Slingluff, for appellant:

The ticket exhibited by the appellee was bought by his wife. She had no more right, under the contract she made with the railway company, to detach the tickets and give them to her husband, than she had to detach them and give them to her neighbors who did not have householders' tickets.

Western Maryland R. Co. v. Stocksedale, 83 Md. 253, 34 Atl. 880.

The public is interested in having the rules whereby conductors are to govern their actions certain and definite so that they may be enforced without confusion and without stopping the trains, and if the enforcement of a rule causes inconvenience to a passenger, who, by reason of mistake or otherwise, is without evidence as to his right to be a passenger, it is better that he should submit temporarily to the inconvenience than that the business of the road should be interrupted to the general annoyance of all who are on the train.

Hufford v. Grand Rapids & I. R. Co. 53 Mich. 118, 18 N. W. 580.

The regulation printed upon the ticket that the conductor only could detach the coupons was a proper regulation.

Norfolk & W. R. Co. v. Wysox, 82 Va. 250; *Boston & M. R. Co. v. Chipman*, 146 Mass. 107, 14 N. E. 940; *Downs v. New York & N. H. R. Co.* 36 Conn. 287, 4 Am. Rep. 77; *Louisville, N. & G. S. R. Co. v. Harris*, 9 Lea, 180; *DeLucas v. New Orleans & C. R. Co.* 38 La. Ann. 930; *Pennington v. Philadelphia, W. & B. R. Co.* 62 Md. 95.

Mr. George D. Penniman also for appellant.

Mr. Howard Bryant, for appellee:

If a conductor refuses to take tickets offered by a passenger, he must demand the fare, and the passenger must refuse to pay, before the conductor can legally eject the passenger.

Baltimore, C. & A. R. Co. v. Kirby, 88 Md. 409, 41 Atl. 777; *Philadelphia, W. & B. R. Co. v. Hoeslich*, 62 Md. 304, 50 Am. Rep. 223; *Western Maryland R. Co. v. Stocksedale*, 83 Md. 252, 34 Atl. 880.

McSherry, J., delivered the opinion of the court:

The single question raised on this record

is presented by the prayers for instructions to the jury. These are the facts: The appellee, Dr. Hardesty, lived, with his family, at West Arlington. His wife purchased in her own name what is called a "20-trip coupon book" which entitled the person named and those described therein to ride, subject to certain conditions, on the electric railway of the appellant between West Arlington and Baltimore. The coupon book was issued by the appellant company at a reduced rate. In consideration of the reduced rate, the purchaser agreed to comply with the reasonable regulations of the company. The coupon book declares that "each undetached coupon of this book will entitle Mrs. R. F. Hardesty, a householder, or member of her immediate family, or a servant therein, to ride" over specified lines of the appellant's railway, "between the points and in the direction named in the coupon, and in accordance with the conditions of the contract in back of book." It was further stipulated on the coupons that they would not be "good unless detached by the conductor." On December 24, 1890, Dr. Hardesty and his wife used this coupon ticket in going from West Arlington to Baltimore. After reaching Baltimore the doctor tore out of the book coupons for a return trip from Baltimore to West Arlington, and handed back the book to his wife. Later, on the same day, but not in company with his wife, he boarded a car going to his home. There is a flat conflict in the evidence as to what occurred when the conductor demanded from the appellee his fare; but, as the case is presented on the prayers of the defendant, the version given by the plaintiff and his witnesses must be accepted as correct. According to that version, when the conductor demanded the appellee's fare the latter handed him one of the previously detached coupons, which the conductor received, and then rang up the fare, but immediately said to the appellee, "You will have to show the book." The appellee replied, "I cannot show you the book," and the conductor answered, "You will have to show the book," and the appellee responded, "I cannot show it to you," and thereupon the conductor said, "I will have to put you off the car." The appellee then said, "You can put me off the car, I suppose, but I cannot show you the book." After some conversation with the motorman the conductor returned, and again asked the appellee, "Will you walk off the car?" and the appellee replied, "I won't walk off the car. You will have to put me off." The appellee testified that the conductor "then took hold of me and put me off the car." When the appellee got off the car he waited about fifteen minutes on the sidewalk for the next car, which he took, and upon which he paid his fare. The appellant asked that the case be taken from the jury on the ground that there was no

regulations as to fares, see *McGowen v. Morgan's L. & T. R. & S. S. Co. (La.)* 5 L. R. A. 817, and note; *Reese v. Pennsylvania R. Co. (Pa.)* 6 L. R. A. 529; *Northern C. R. Co. v. O'Conner (Md.)* 16 L. R. A. 449; *Faber v. Chi-*

cago G. W. R. Co. (Minn.) 36 L. R. A. 789; *Watson v. Louisville & N. R. Co. (Tenn.)* 49 L. R. A. 454; *Mills v. Missouri, K. & T. R. Co. (Tex.)* 55 L. R. A. 497; and *Southern R. Co. v. Wood (Ga.)* 55 L. R. A. 536.

57 L. R. A.

legally sufficient evidence to entitle the appellee to recover. This request was refused, and the jury returned a verdict for \$400, upon which judgment was entered in favor of the appellee, and from that judgment this appeal was taken.

It is clear and indisputable, we think, that the appellee had no right whatever to ride on the detached coupon. It was not an ordinary railway ticket. Under the specific terms of the contract embodied in the ticket, a detached coupon was wholly void. That was a regulation which the company had the power to make, and one to which the purchaser of the ticket expressly agreed. As a token of the holder's right to ride on the car, the detached coupon was of no more value than a slip of blank paper would have been. The holder of the coupon was bound to know this, and he was equally bound to know that the tender of a detached coupon, even if taken up by the conductor, was no more a payment of the car fare than the tender and acceptance of a counterfeit coin would have been. "The ticket," this court has said in speaking of a limited and reduced rate ticket, "is necessarily the conclusive evidence of the nature and extent of the passenger's right." *Western Maryland R. Co. v. Stocksedale*, 83 Md. 253, 34 Atl. 880. As the detached coupon was void by the very terms of the contract, it was no ticket; and as Dr. Hardesty had, therefore, presented no ticket at all, he obviously had no right to ride on the car unless he paid his fare. The fact that the conductor had rung up the void coupon, as though it had been a valid coupon, did not make it what it was not, and clearly did not give the passenger a right to be transported, when his right to be carried on the car depended altogether on his complying with the rules by paying his fare, and did not depend on the fact that the conductor had rung up the fare, as paid, when it had not in reality been paid. He was not, therefore, entitled to be carried as a passenger. If this be so, the conductor had the right to eject him from the car, unless before doing so he was obliged to demand from the appellee, and be refused, the payment of the fare in cash. This is the pivotal point of the case. On the part of the appellee it is insisted, and the effect of the instruction given in the trial court at the instance of the plaintiff is, that, before the conductor could rightfully expel the plaintiff from the car, he was bound to ask him to pay his fare in cash, and that not until after such a request had been made, and not until after the plaintiff had refused to comply with it, could the conductor eject the passenger. In other words, having once demanded the appellee's fare, and having received a worthless ticket instead of the fare, the conductor was legally bound to make a second demand before removing the passenger from the car. Is that contention legally sound?

When the appellee was told that his detached coupon was worthless unless he exhibited the book from which it had been taken (and this was a fact that the face of

the ticket disclosed), why was it any more the duty of the conductor to ask for the fare in cash, than it was the duty of the passenger to voluntarily tender it in cash? The passenger knew that he had no right to ride without paying in some way. It is a matter of common knowledge, of which the court will take judicial notice, and of which the public are bound to take notice, that railroad passenger trains are operated to carry passengers for hire. *Condron v. Chicago, M. & St. P. R. Co.* 28 L. R. A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522. There were but two ways in which he could pay,—either by ticket or in cash. When he tendered the one, and was informed that it was insufficient because detached, he knew just as well as the conductor knew that his right to remain on the car depended on his doing the only other thing he could do, *viz.*, paying his fare in cash. If he knew this,—and he was bound to know it, and therefore must be held to have known it,—what possible reason can be assigned for holding, as matter of law, that the company, through its conductor, was legally bound to ask the passenger to do precisely what the latter knew he was obliged to do? And how can the failure of the conductor to ask the passenger to pay a fare, which the passenger was well aware he was required to pay if he wished to remain on the car after he had refused to exhibit the book, relieve the passenger from the obligation to voluntarily pay the fare? The right of a carrier of persons to collect fares and to receive them does not depend on the fact that the conductor or other servant demands the fare. The right to collect and receive fare arises out of the circumstance that the passenger enters the conveyance for the purpose of being carried therein. By entering the conveyance for that purpose he agrees to pay the fare, and the duty to pay it is thereby imposed. Morally and legally he is as much bound to pay the fare when not demanded as he is when it is demanded of him, because the duty to pay has not its origin in the demand for payment; and a failure to demand it cannot, consequently, be treated as giving him a right to be transported gratuitously. This being so, the primary and continuing obligation is obviously on the passenger to pay the fare. The demand for it by the carrier is made with a twofold view, *viz.*: First, for the convenience of the passenger, to save him the annoyance of himself seeking the conductor to deliver the ticket or fare to the latter, and, secondly, for the protection of the company against individuals who would not scruple to ride without paying if they could evade making payment. But neither of these considerations can be converted into or treated as a requirement that when a demand has been once made for a fare, and has not been complied with, or, what is the same thing, has been complied with by the delivery of a worthless ticket, which the holder was bound to know was worthless, the conductor must make a new demand before the passenger can be expelled. None of the cases relied on by the appellee support the

cortention, as will be seen in a moment, and it has not been shown that the rules of the company require such a demand to be made.

Whilst the duty to pay the fare does not originate in or rest upon the demand for it, there can be no expulsion of a traveler for not paying until he has refused to pay, and there cannot be a refusal until there has been a demand of some kind. In the case at bar there was a demand; but there was no second demand, and the expulsion of the appellee without making a second demand is the sole basis upon which the case of the appellee must rest. Three cases have been cited by the appellee's counsel. They are *Baltimore, C. & A. R. Co. v. Kirby*, 88 Md. 409, 41 Atl. 777; *Western Maryland R. Co. v. Stocksdale*, 83 Md. 252, 34 Atl. 880; and *Philadelphia, W. & B. R. Co. v. Hoefflich*, 62 Md. 304, 50 Am. Rep. 223. In the first the plaintiff was riding in an express train on a ticket alleged not to be good on that train, but which was in fact good there. When he presented the ticket the conductor refused to accept it. Afterwards the conductor demanded the ticket, and when the passenger refused to surrender it the conductor demanded the fare, and this the passenger refused to pay, whereupon he was ejected from the train. This court said: "The jury should have been instructed that, although they should find that the conductor had refused the ticket in the front car, yet if he afterwards, and before ejecting the plaintiff, demanded the ticket or the payment of the fare, and that the plaintiff refused both demands, and that thereupon he ejected the plaintiff because he would do nothing, there could be no recovery." In the second case the plaintiff was traveling on an expired limited ticket. The conductor refused to accept it, and demanded the payment of the fare. Upon the plaintiff refusing to pay, he was expelled from the train. We said: "If the plaintiff was not entitled to travel on the ticket so offered by him, and refused to pay the fare when demanded, then his ejection from the train was lawful, and no damages therefor can be recovered in an action of tort." In both cases, as in a great many others that might have been cited, a demand for the payment of the fare in money had actually been made by the conductor, and it was made after he had refused to accept the previously tendered ticket; but in neither case was it held or intimated that such a demand was a necessary prerequisite to the expulsion of the passenger. No such proposition was involved. The language used in the two opinions, and just above quoted, had relation to the facts in evidence; but it does not purport to lay down, as a rule of law, that there was an obligation to make the second demand before ejecting the traveler. The third case was one in which the plaintiff, who had a ticket and had delivered it to the conductor, was accompanied by her sister, a child of eleven years of age, for whom the plaintiff had bought no ticket. When the conductor inquired as to the age of the child, and was informed by the plaintiff, he stated that the plaintiff would be 57 L. R. A.

required to pay half fare for her. This the plaintiff refused to do, and both she and the child were put off the train. That case bears no analogy to this. It was the ordinary case of a refusal to pay a fare when demanded. In nearly all the reported cases,—and they are very numerous indeed,—it will be found that there was in fact a demand by the conductor for the payment of the fare in money after he had refused to accept a worthless or expired ticket; and the decisions, as far as respects the right of recovery, turned, not upon the duty of the conductor to make such a demand before expelling the passenger, but upon the question as to whether the ticket which he had refused to accept was a valid ticket or not, and in no way do they even suggest (much less, determine) that it was necessary for him to make such a demand, or that it was any more obligatory, in law, for him to make a demand of that sort, before ejecting the traveler, than it was incumbent on the passenger to voluntarily tender the fare. The following cases, among others, may be consulted: *Baltimore & O. R. Co. v. Blocker*, 27 Md. 277; *McClure v. Philadelphia, W. & B. R. Co.* 34 Md. 532, 6 Am. Rep. 345; *Johnson v. Philadelphia, W. & B. R. Co.* 63 Md. 106; *Philadelphia, W. & B. R. Co. v. Rice*, 62 Md. xv, 64 Md. 63, 21 Atl. 97; *Boylan v. Hot Springs R. Co.* 132 U. S. 146, 33 L. ed. 290, 10 Sup. Ct. Rep. 50. And it will be found that the question involved on this appeal was neither suggested on the records, nor did it arise on the facts, and consequently it was not directly or incidentally decided.

A railroad company may eject from its accommodations all persons who refuse compliance with its reasonable regulations. 19 Am. & Eng. Enc. Law, 1st ed. p. 903. This has been so often announced by the courts that it may be said to have become axiomatic law. A condition printed on a reduced rate ticket to the effect that a coupon affixed thereto shall be invalid unless detached by the conductor is undoubtedly a reasonable regulation. 25 Am. & Eng. Enc. Law, 1st ed. p. 1090, and cases in notes 2-4. An attempt to use a previously detached coupon, and a refusal to exhibit the book from which it had been taken, clearly forfeit the right of the holder to proceed farther on the car. *Hibbard v. New York & E. R. Co.* 15 N. Y. 455. If his right to remain on the car is thus forfeited by his own act, it was lawful to eject him, and he could avoid expulsion only by paying or offering to pay his fare. Therefore, if he wished to remain in the car, the duty was on him to tender his fare to the conductor, in the absence of any rule of the company requiring the conductor to demand the fare. There is no evidence that there is such a rule. The case of *Texas P. R. Co. v. James*, 82 Tex. 306, 15 L. R. A. 347, 18 S. W. 589, throws some light on the question. James boarded a train of the railway. His ticket entitled him to ride to Atlanta. He fell asleep on the train and passed Atlanta. When the conductor went through the train after hav-

ing passed Atlanta, he asked James if he did not wish to get off at Atlanta, and, having been answered in the affirmative, he stopped the train to put him off. James testified that he told the conductor after looking out of the car window that "we were in Black Bayou bottom, $1\frac{1}{2}$ or 2 miles from Atlanta; . . . that I did not want to get off there. I asked the conductor to let me go on to the next station,"—but the conductor put him off. There was no evidence that the plaintiff offered to pay his fare to the next stopping place, and it nowhere appears in the report of the case that the conductor demanded fare from the plaintiff to the next station. The railroad company asked the court to charge the jury to the effect that it was not the duty of the company to carry the plaintiff to the next station unless he paid or offered to pay his fare to that point, and also that, unless the plaintiff tendered or offered to pay his fare to the next station, the conductor had the right to put him off. The trial court refused to charge the jury in the way thus requested, and on appeal the supreme court of Texas said: "We are of the opinion that this was error. The plaintiff's own neglect led to his being carried beyond his destination. He was not entitled to a free passage to the next station. He could have acquired that right by paying or offering to pay the fare. A formal tender was not necessary, nor even, perhaps, a specific offer to pay. But a mere willingness to pay, unaccompanied by word or act calculated to suggest to the conductor his desire to do so, was not, in our opinion, sufficient to place the conductor in the wrong in ejecting him from the train." The judgment in favor of James was reversed. If, as matter of law, the conductor was bound to demand the fare before expelling the plaintiff, the judgment would have been affirmed. See also *Norfolk & W. R. Co. v. Wysox*, 82 Va. 250; *Louisville, N. & G. S. R. Co. v. Harris*, 9 Lea, 180, 42 Am. Rep. 668; *De Lucas v. New Orleans & C. R. Co.* 38 La. Ann. 930.

But we need not prolong this judgment by further citations. If Dr. Hardesty had tendered the fare to the conductor, and had then been expelled, the company would have been answerable. He had ample opportunity to pay the fare, which it was his duty to pay when he declined to show the coupon book. His attempt to ride on a worthless ticket did not impose upon the conductor an obligation to make a second demand for the fare, but did require the holder of the ticket, if he wished to avoid being ejected, to himself make tender of payment. As the plaintiff was in the wrong throughout, he had no cause of action against the company, and the case should have been withdrawn from the jury. The prayer which the appellant presented, and which asked an instruction that the verdict should be for the defendant, ought to have been granted. There was error in rejecting it. Because of that error the judgment must be reversed, and, as upon the plaintiff's own showing, he is not en-

titled to recover, a new trial will not be awarded.

Judgment reversed, with costs above and below, without awarding a new trial.

Frank BEMBE, Appt.,

v.

COMMISSIONERS OF ANNE ARUNDEL COUNTY.

(94 Md. 321.)

One whose property is cut off from access to markets and from communication with his fellow men by neglect of the county commissioners to keep the highway leading to it in repair suffers a special injury which will entitle him to maintain an action against the commissioners.

(January 16, 1902.)

APPEAL by plaintiff from a judgment of the Circuit Court for Anne Arundel County in favor of defendants in an action brought to recover damages for failure to repair a road and bridge. *Reversed*.

The facts are stated in the opinion.

Mr. James M. Munroe, for appellant:

Where a statute confers powers upon a municipal corporation to be exercised for the public good, the exercise of the power is not discretionary, but imperative, and the words "power and authority" in such case mean "duty and obligation."

Baltimore v. Marriott, 9 Md. 160, 66 Am. Dec. 326; *Alleghany County Public School Comrs. v. Alleghany County*, 20 Md. 449; *Siford v. Morrison*, 63 Md. 15; *Rock Island County v. United States ex rel. State Bank*, 4 Wall. 435, 18 L. ed. 419.

The narr. not only expressly states that the "plaintiff suffers a distinct and peculiar loss, . . . and not a loss in common with the other citizens of the county," etc., but also alleges the specific facts which show that loss, and how it is peculiar and distinct from this common loss of the whole community, leaving the money value of his damage to be assessed by a jury.

Elliott, Roads & Streets, §§ 403, 686, pp. 413, 735; *Chesapeake & P. Teleph. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690.

The fact that plaintiff may secure a private way under the provisions of art. 25, §§ 100-117. of the Code, in no wise affects his remedy for the injury of which he here complains. Such dereliction of duty by the county commissioners as is alleged in the declaration in this case amounts to a "taking" of private property without compensation.

Evansville & C. R. Co. v. Dick, 9 Ind. 433;

NOTE.—As to abandonment of highway by nonuser or otherwise than by act of the public authorities, see, in this series, *Maire v. Kruse* (Wis.) 26 L. R. A. 449, and note; and *Baldwin v. Trimble* (Md.) 36 L. R. A. 489.

As to damage to property by discontinuing portion of street, see following case of *Cram v. Laconia* (N. H.), and footnote.

Elliott, Roads & Streets, § 204, p. 217, note 4; *Barnett v. Johnson*, 15 N. J. Eq. 481; *Indiana, B. & W. R. Co. v. Eberle*, 110 Ind. 642, 59 Am. Rep. 225, 11 N. E. 467; *Pennsylvania University v. Leawington*, 3 B. Mon. 25, 38 Am. Dec. 173; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598.

The courts have recognized a right in the adjoining owner distinct from his rights as a member of the general public, namely, the right of access to his premises, or, as it is called, the "easement of access."

Elliott, Roads & Streets, 2d ed. § 695, p. 749, note 4, § 703, p. 761.

A street once opened and dedicated to public uses by a municipality, especially where abutters have acquired lots and made improvements on the faith that the way will remain a street, cannot be abandoned and closed without compensation for the loss sustained by an abutting owner.

Elliott, Roads & Streets, §§ 23, 150, 871, pp. 23, 158, 955; *Indianapolis v. Croas*, 7 Ind. 9; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. 761; *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488, 46 S. W. 288; *McQuigg v. Cullins*, 56 Ohio St. 649, 47 N. E. 595.

Mr. E. C. Gamtt, for appellees:

If there is a discretionary power vested in the county commissioners to repair or not to repair a bridge on a public highway no action will lie for loss occasioned by such nonrepair.

The powers of the county commissioners are not merely ministerial. In some cases the board is clothed with quasi judicial authority and must exercise judgment and discretion.

Harford County v. Wise, 71 Md. 43, 18 Atl. 31.

The authority of the county commissioners to repair a county road, and the bridge forming part of the same, can only be exercised on the ground that the public convenience requires it. This is the spirit of the law. There is no power vested in the county commissioners to impose the whole public burden on a single person, under pretense of taxing him, nor by like reasoning can they impose by taxation a burden on the whole people for the benefit of one individual.

Talbot County v. Queen Anne County, 50 Md. 259; *Baltimore v. Marriott*, 9 Md. 160, 66 Am. Dec. 326.

McSherry, Ch. J., delivered the opinion of the court:

This suit was brought against the county commissioners of Anne Arundel county to recover damages alleged to have been sustained by the appellant in consequence of the nonrepair of a county road and a bridge forming part of that road. The declaration asserts that the bridge ran from the village of Eastport to the land of the plaintiff, and there connected with the public highway running along the shore of the Severn river: that the plaintiff, relying on the premises (that is, the existence of the road and bridge), laid out large sums of money in the

purchase and improvement of a considerable tract of land adjoining the highway, which highway, including, as a part, the bridge, was the only means of access that the plaintiff had from his property to markets, mills, churches, and stores, and generally to communicate with his fellow men for the transaction of his lawful business; that the highway was suffered and permitted by the defendant to become utterly impassable, and the bridge was negligently suffered and permitted to become and remain out of repair and broken down so that it cannot be used; that the situation of the land of the plaintiff is peculiar, and different from the situation of the land of other persons residing in the county, inasmuch as the land of other persons there residing is not cut off from access to a public highway as is the land of the plaintiff, whereby the plaintiff suffers a distinct and peculiar loss by reason of the action of the defendant, and does not suffer a loss in common with others; he being entirely shut up, and shut out from markets, mills, churches, stores, and generally prevented from communicating with his fellow men for the transaction of his business, and being thus shut up and shut out by reason of the nonrepair of the highway and the bridge. To the declaration, of which the substance has just been stated, the defendant demurred. The circuit court for Anne Arundel county sustained the demurrer, and, judgment being entered thereon for the defendant, the plaintiff took this appeal.

The question is, Do these facts constitute a good cause of action? There has been no formal closing of the highway. Under the Code the method by which the county commissioners may close a public thoroughfare is definitely prescribed; but there is no specific provision made for awarding damages to an abutting proprietor for the injury he may sustain, though, as to the closing of a street in Baltimore city, there is such a provision. Code Pub. Local Laws, art. 4, § 806; *Van Witsen v. Gutman*, 79 Md. 409, 24 L. R. A. 403, 29 Atl. 608. Whether a public road can be lawfully closed by the county commissioners without compensating individuals who may be injuriously affected by the discontinuance of the highway is a question not now involved, and therefore not calling for a decision. Nor is this action at all akin to those wherein attempts have been made, but unsuccessfully made, to hold municipal authorities answerable in damages for injuries inflicted by a change in the grade of a street or highway; and consequently with the principles applicable to that distinct class of cases we have no concern in this. The pending suit is founded on the alleged total obstruction of a public road, including, as a part thereof, a public bridge. Had the obstructions which are alleged to consist in a condition of negligent disrepair caused an injury to the person of the plaintiff whilst attempting with due care to use the road, there could be no doubt of his right to maintain an action therefor, and to recover compensation for the injury. And so, too, had his horse or his carriage

or other vehicle been in like manner injured, he could sustain a suit against the defendant. The books are full of adjudged cases on these subjects. The cases are familiar, and have been of frequent occurrence, and there is no need to pause for the purpose of alluding to them. The ground upon which such actions are supported is the negligence of the defendant in failing to keep the road or bridge in proper repair. The duty being upon the county to keep its roads and bridges in a safe condition for use by the public, and the county authorities having at their command the means and the money with which to maintain its roads and bridges in a condition of safety, the failure to perform the duty is actionable negligence, if injury results therefrom to one lawfully and with due care using the road or bridge. But the acts complained of in the declaration now under examination do not bring this case within the principle just announced, because this is not a suit for a personal injury or for an injury to personal property sustained whilst in actual use of the road, but it is a suit by an abutting proprietor for the maintenance of a public nuisance by the defendant, whereby the plaintiff was injured, not merely in being deprived of the ability to use the road at all, but in being deprived of access to and egress from his property. It is true that mere deprivation of the use of a highway because of its defective condition will furnish no ground of action. 15 Am. & Eng. Enc. Law, 2d ed. p. 463. But here the averment goes further, and alleges that the plaintiff has been shut in from the outside world by reason of the nonrepair of the highway.

Ordinarily and generally the remedy applicable to a public nuisance is by indictment, though a private action will lie at the suit of an individual who has sustained a special damage differing, not in degree, but in kind, from that to which the community has been subjected. *Crook v. Pitcher*, 61 Md. 510; *Caritee v. Baltimore*, 53 Md. 422; *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332. And the question is, Does this case, under the averments of the declaration, fall within this doctrine? We do not recall at the moment any precisely similar case in our own Reports; but the principles which ought to control the solution of the question are perfectly clear, and there can be no serious difficulty in their application to the facts as admitted by the demurrer. The case of *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332, will throw some light on the controversy now before us. That was a suit between two individuals. Wachter sued Houck to recover damages for the obstruction of a highway. The special damage alleged was that, by reason of the obstruction which Houck had erected, Wachter was obliged to go from his farm to his market town, to mills, and to the courthouse by a very circuitous route; and the question was whether that was such special damage as would support the action,—was it different in kind from the damage inflicted upon every other person who used the same public road? In 57 L. R. A.

the course of the judgment delivered by this court, it was said: "All the authorities agree that, to support the action, the damage must be different, not merely in degree, but different in kind, from that suffered in common; hence it has been well settled that though the plaintiff may suffer more inconvenience than others from the obstruction, by reason of his proximity to the highway, that will not entitle him to maintain the action." Proceeding, the court further said: "The special damage alleged is that having gone to Frederick City by the highway in question, as he was returning home, he met the obstruction, was withheld by the defendant from removing it, and in consequence was 'obliged to proceed to his farm by a very circuitous route.'" To show that such a damage was not special, and not sufficient to sustain the action, the court further said: "It is not averred that the highway which was obstructed was the only way to and from his farm, or that it was necessary to enable him to pass and repass from his farm to mills, market, etc. The averment is that it was the most direct and convenient route." A recovery was denied to Wachter because the damage of which he complained was of the same kind as that which other persons using the highway sustained by reason of the obstruction placed there by Houck. It would seem, from the line of reasoning pursued, that, if Wachter had had no other highway over which he could have passed from his farm to markets and other public places, he could have maintained the action, because in that event the damage caused him would have been wholly different in kind from that sustained by the public generally. This conclusion is fortified by the decision in *Gore v. Brubaker*, 55 Md. 87. That was an application by Gore for an injunction to restrain Brubaker from erecting obstructions on a strip of land alleged to be a public way contiguous to Gore's lot in the village of Uniontown, Carroll county. It was insisted that the obstructions, if erected, would deprive Gore of reasonable access to his buildings on his lot, and would thereby subject him to loss and damage. This court said: "If the allegations of the bill were true, and the plaintiff had done nothing to preclude him from invoking the aid of the court, there could be but little difficulty in affording him relief. For if, by reason of the obstructions complained of, in the public way or alley, the plaintiff had been obstructed or deprived of reasonable access to his buildings on his lot, and thereby subjected to loss and inconvenience, that would be such special and particular injury to the plaintiff as would entitle him to remedy from a court of equity. *Roman v. Strauss*, 10 Md. 89; *Georgetown v. Alexandria Canal Co.* 12 Pet. 98, 9 L. ed. 1015; *Irwin v. Dixon*, 9 How. 10, 13 L. ed. 25; *Cook v. Bath*, L. R. 6 Eq. 177; *Higbee v. Camden & A. R. Co.* 19 N. J. Eq. 278."

If an individual had caused the obstruction of the highway mentioned in the declaration now before us, he would assuredly be answerable in an action at the instance

of the plaintiff if the facts relied on in the *narr.* were shown to be true; and there is no reason why the county commissioners should not be liable, under the same state of facts, if the obstruction has resulted from their negligent or persistent refusal to make the highway fit for travel. The fact that the county commissioners have caused or are responsible for the continuance of the nuisance can be no reason for defeating the action, if it be otherwise maintainable; for public officials or municipal corporations have no more right to create or maintain a public nuisance than a private individual has. *Harford County v. Wise*, 71 Md. 52, 18 Atl. 31. And the liability of the one in such an instance is similar to that of the other. *Baltimore v. Brannan*, 14 Md. 227. Inasmuch, then, as the declaration distinctly alleges that the highway with the bridge in question was the only means by which the appellant had access to and egress from his farm and buildings, it shows on its face a special and particular injury inflicted on the plaintiff by reason of the nonrepair of the thoroughfare;

and it shows an injury differing in kind from that which other members of the community can suffer from the same cause. Of course, if the appellant (the plaintiff below) has any other way or road by which he can get to and from his premises, he cannot maintain this action, even though he is put to more inconvenience, or is required to travel a much greater distance, in using the other highway. As we are dealing exclusively with the case made by the declaration, we must confine our discussion to its legal sufficiency; and upon the case there stated we are of opinion, for the reasons we have assigned, that a good cause of action has been set forth. There was consequently error in sustaining the demurrer of the defendant, and the judgment entered in its favor must be reversed, and the record will be remanded so that pleas may be filed, and the cause may be brought to trial on its merits.

Judgment reversed, with costs above and below, and new trial awarded.

NEW HAMPSHIRE SUPREME COURT.

Edwin L. CRAM

v.

City of LACONIA.

(.....N. H.)

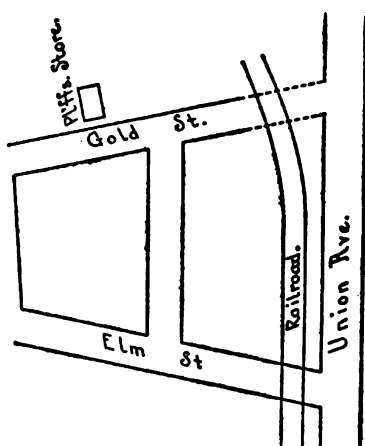
Damages for injury to a property by discontinuing a portion of the street on which it is situated, so that traffic is diverted from it, trade diminished, and its value lessened, although access to it still exists by a longer route, cannot be recovered under a statute providing for the payment of damages sustained by the discontinuance of a highway.

(September 6, 1901.)

EXCEPTIONS by defendant to rulings of the Belknap County Court made during the trial of an action brought to recover damages for injuries to plaintiff's business which were alleged to have resulted from the closing of a portion of a highway. *Sustained.*

Plaintiff had a place of business located on Gold street, at which he received much custom from persons living north of Gold street, who came from Union avenue across the railroad tracks. Defendant discontinued the portion of Gold street from Union avenue to the west side of the railroad tracks, thereby requiring plaintiff's customers to go

to Elm street and then back to Gold street to reach plaintiff's store. Plaintiff claimed that the result of this was that the customers in reaching plaintiff's store were compelled to pass other stores where goods similar to those sold by plaintiff were on sale, and that they made their purchases at those stores rather than make the extra journey to plaintiff's store, so that his trade fell off, and his property was rendered less desirable for business purposes and was reduced in value by reason of the discontinuance of the portion of the street.



NOTE.—As to liability of county commissioners for neglecting to repair road, by which access to property is cut off, see the preceding case of *Bembe v. Anne Arundel County*.

For other cases in this series as to injury to abutting owner by vacation of street or part thereof, see *Levee Dist. No. 9 v. Farmer* (Cal.) 23 L. R. A. 388; *Moffitt v. Brainard* (Iowa) 26 L. R. A. 821, and *note*; *Chicago v. Burcky* (Ill.) 29 L. R. A. 568; *Re Melon Street* (Pa.) 38 L. R. A. 275; and *note* to *Selden v. Jacksonville* (Fla.) 14 L. R. A. 370.

37 L. R. A.

Further facts appear in the opinion.

Mr. Stephen S. Jewett, for defendant: The legislature has power to vacate a street or highway, and this power it may delegate to municipal authorities.

Elliott, Roads & Streets, 661.

It is not necessary to award damages to persons whose land does not abut on the discontinued portion of a street or highway in order to make the proceedings valid.

Thompson v. Major, 58 N. H. 244.

In discontinuing a street, injury to the goodwill of the business of this plaintiff, or to any lessee under him, could not be considered on the question of damages.

Edmands v. Boston, 108 Mass. 535.

It could not have been the intention of the legislature to give damages upon discontinuance to any individual for inconveniences experienced by him in common with all the rest of the community.

Concord's Petition, 50 N. H. 531; *Dantzer v. Indianapolis Union R. Co.* 141 Ind. 604, 34 L. R. A. 789, 39 N. E. 223; *Candia v. Chandler*, 58 N. H. 129; *Currier v. Davis*, 68 N. H. 596, 41 Atl. 239.

The discontinuance of a part of a street in a city, by order of the mayor and aldermen, whereby the value of lands abutting on other parts of the street and on neighboring streets is lessened, is not a ground of action against the city by the owner of such lands, if still accessible by other public streets.

Smith v. Boston, 7 Cush. 254; *Castle v. Berkshire County*, 11 Gray, 25; *Davis v. Hampshire County*, 153 Mass. 218, 11 L. R. A. 750, 20 Atl. 848; *Hammond v. Worcester County*, 154 Mass. 509, 28 N. E. 902; *Nichols v. Richmond*, 162 Mass. 170, 38 N. E. 501; *Stanwood v. Malden*, 157 Mass. 17, 16 L. R. A. 591, 31 N. E. 702; *Coster v. Albany*, 43 N. Y. 399; *Kings County F. Ins. Co. v. Stevens*, 101 N. Y. 411, 5 N. E. 353; *McGee's Appeal*, 114 Pa. 470, 8 Atl. 237; *Fearing v. Irwin*, 55 N. Y. 486; *Buhl v. Ft. Street Union Depot Co.* 98 Mich. 596, 23 L. R. A. 392, 57 N. W. 829; *Chicago v. Burcky*, 158 Ill. 103, 29 L. R. A. 568, 42 N. E. 178; *Polack v. San Francisco Orphan Asylum*, 48 Cal. 490; *Secley v. Bishop*, 19 Conn. 134; *Lutterloh v. Cedar Keys*, 15 Fla. 306; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598; *East St. Louis v. O'Flynn*, 119 Ill. 206, 59 Am. Rep. 795, 10 N. E. 395; *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473; *Powell v. Bunger*, 91 Ind. 65; *Indiana, B. & W. R. Co. v. Eberle*, 110 Ind. 542, 59 Am. Rep. 225, 11 N. E. 467; *Ingram v. Chicago, D. & M. R. Co.* 38 Iowa, 669; *Barr v. Oskaloosa*, 45 Iowa, 275; *Helmer v. Atchison, T. & S. F. R. Co.* 28 Kan. 625; *Anne Arundel County v. Duckett*, 20 Md. 468, 83 Am. Dec. 557; *Houck v. Wachter*, 34 Md. 266, 6 Am. Rep. 332; *Kimball v. Homan*, 74 Mich. 699, 42 N. W. 167; *Dawson v. St. Paul F. & M. Ins. Co.* 15 Minn. 136, Gil. 102, 2 Am. Rep. 109; *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 297, 1 L. R. A. 493, 39 N. W. 629; *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257; *Wilson v. New York C. & H. R. R. Co.* 39 Hun, 651, 2 N. Y. Supp. 65; *People v. Kerr*, 27 N. Y. 188; *Hier v. New York, W. S. & B. R. Co.* 109 N. Y. 659, 17 N. E. 867; *Paul v. Carver*, 24 Pa. 211, 64 Am. Dec. 649; *Gerhard v. Seekonk River Bridge*, 15 R. I. 334, 5 Atl. 199, 57 L. R. A.

Messrs. Stone & Shannon, for plaintiff: The statute is certainly broad enough to include persons whose land does not abut upon the highway.

Concord's Petition, 50 N. H. 530.

If owners of land abutting upon a discontinued highway are entitled to damages, why should not the owners of land abutting upon that portion of the highway not discontinued but near to the discontinued portion be entitled to damages which have resulted as a direct and immediate consequence of such discontinuance.

Natick Gaslight Co. v. Natick, 175 Mass. 250, 56 N. E. 292; *Smith v. Boston*, 7 Cush. 254.

Remick, J., delivered the opinion of the court:

Highways are established, altered, and discontinued for the public good. *Underwood v. Bailey*, 56 N. H. 187, 59 N. H. 480. It must be presumed that the public good required the discontinuance in question. *Smith v. Boston*, 7 Cush. 254, 256. Public good involves, almost invariably, individual and sectional injury. In the make-up of society, there are such diverse and conflicting interests that it is impossible to so regulate governmental action as to confer universal benefit. The general welfare is all that is attainable. To secure this is the chief object of government, and to submit to it, however injurious, with or without compensation, according to circumstances, is the primary obligation of citizenship. For general injuries, or those which result indirectly from the mere operation of a public improvement, the law allows the citizen no compensation. These are part of the price he pays for the protection and privileges of government. It is only when the act of the public inflicts upon him some special, peculiar, and direct injury that he is entitled to damage. The principle underlying these observations is elementary, is not disputed, and controls the present case. If the plaintiff's damages are special, peculiar, and direct, he has a right of action to recover them. If general and indirect, the law affords him no remedy. The rule sounds simple enough, and is easily stated. The difficulty lies in its application,—in determining whether the plaintiff's damages are general or special. This is the sole question in the present case. To the solution of this question, the statute under which the petition is brought lends no aid. It simply provides that "the damages sustained . . . by the discontinuance of a highway . . . may be assessed," etc. Pub. Stat. chap. 72, § 4. Taken literally, the statute is broad enough to allow damages for all injuries, whether special or general. But it has been limited by construction, in accordance with the principle already stated. In *Concord's Petition*, 50 N. H. 530, the court held: "It could not have been the intention of the legislature to give damages, upon a discontinuance, to any individual for inconveniences experienced by him in common with all the rest of the community. If the inconveniences suffered . . .

differ only in degree, and not in kind, from those endured by the public generally, he cannot recover damages therefor. 'But if he suffers a peculiar and special damage, not common to the public,' and that damage is the direct consequence of the discontinuance, he may recover therefor under the statute." This construction was approved and followed in *Candia v. Chandler*, 58 N. H. 127-129, where the court again declared that only peculiar and special damages are recoverable under the statute. As a result of the construction placed upon it by these cases, the statute must be viewed as if it read: "Damages which are not common to the public, but are peculiar and special, and the direct result of the discontinuance, may be assessed," etc. While *Concord's Petition* and *Candia v. Chandler* thus serve to limit the general terms of the statute, and bring us back to the general principle stated at the outset, viz., that only special, peculiar, and direct damages are recoverable, they furnish no clear and definite rule by which to determine whether damages in a given case are general and consequential, or peculiar, special, and direct, and whether the plaintiff's injuries fall within the one class or the other. The almost stereotyped statement to be found in the cases, that for damages differing only in degree, and not in kind, from those endured by the public at large, there can be no recovery, while for peculiar and special damages, not common to the public, recovery may be had, is so general and indefinite that, without the aid of the cases applying, defining, and limiting it, it is, at best, a most perplexing guide, as is evidenced by its fruitfulness as a source of contention, and by the difficulty which courts have encountered in its application, — a difficulty they have often testified to (*Smith v. Boston*, 7 Cush. 254; *Davis v. Hampshire County*, 153 Mass. 218, 223, 11 L. R. A. 750, 26 N. E. 848; *Chicago v. Burcky*, 158 Ill. 103, 29 L. R. A. 568, 42 N. E. 178; *Heller v. Atchison, T. & S. F. R. Co.* 28 Kan. 625), and doubtless more often experienced.

No case has come to our attention in this jurisdiction where the court has made application of the rule to a claim for damages arising from a discontinuance of a highway. In *Concord's Petition*, 50 N. H. 530, the rule was stated, but the court expressly declined to make any application of it in the then stage of the case. So in *Candia v. Chandler*, 58 N. H. 127, there was a restatement of the rule, but no application of it to the specific facts. In neither case did the court undertake to decide whether the damages alleged were special or general, direct or consequential, recoverable or nonrecoverable. But while there has been in this jurisdiction no direct application of the rule in any case for damage arising from the discontinuance of a highway, there are cases in our Reports relating to the laying out of highways where the court has differentiated general and consequential from special and direct damages in a way to throw light upon the subject, and aid solution of the question before us. 57 L. R. A.

In *Re Mt. Washington Road Co.* 35 N. H. 134, damage was claimed, not only for injury done to the plaintiff's land by taking a portion of it for a highway to the summit of Mt. Washington, but also for injury to his livery business and property by diversion of travel from the plaintiff's bridle path. The court, by Perley, Ch. J., said: For damages "not caused by the taking of the land for the road, but by the change which the public improvement introduces into the course of business, . . . the public is not bound to make compensation. . . . The damages awarded to the landowner are limited to the direct injury done to the land. . . . If . . . the public improvement, by causing a change in the course of business, . . . should occasion a loss, . . . he must bear that loss in common with others who are in a like situation. The circumstance that the public may require some interest in his private property to accomplish the public object gives him no claim to indemnification for a loss not in any way caused by the taking of his property, but by the operation of the public improvement." These observations seem peculiarly applicable to the present case. Here, as there, the damage claimed is not for the taking of the plaintiff's land, or any direct invasion of his property, but, as distinctly appears from the case, for loss of business and depreciation of property resulting from a diversion of travel occasioned by a legitimate public improvement.

We are also helped to a correct understanding and application of the rule by the cases in this jurisdiction relating to the set-off of benefits where land was taken for highway purposes. The general rule on this subject is the same as the rule in respect to the allowance of damages, viz., that only special and peculiar benefits can be taken into consideration. Applying this rule, it has been repeatedly held in this state that benefits from improved facilities of communication, favorable diversion of travel, increased trade, and appreciation of property, resulting from the establishment of a new highway, cannot be set off against damages, because they are general and not special benefits. *Carpenter v. Landaff*, 42 N. H. 218; *Whitcher v. Benton*, 50 N. H. 25; *Adden v. White Mountains N. H. R. Co.* 55 N. H. 413, 419, 20 Am. Rep. 220; *Woodman v. Northwood*, 67 N. H. 307, 36 Atl. 255. If favorable diversion of travel, and consequent increase of trade and appreciation of property, resulting from the opening of a highway, are general benefits, why are not unfavorable diversion of travel, and consequent decrease of trade and depreciation of property, resulting from the discontinuance of a highway, general damages?

Following these analogies drawn from our own Reports, without other guidance, we should be brought to a conclusion adverse to the plaintiff. But the precise question here presented has been frequently before courts of highest authority in other jurisdictions, with like result. A case more frequently cited than any other is *Smith v. Boston*, 7 Cush. 254. Like the case at bar, it was a

petition, under a statute essentially like our own, for the assessment of damages occasioned to the plaintiff's property by the discontinuance of a portion of a certain street in the city of Boston. As in the case at bar, no part of the property in question abutted upon that portion of the street which was discontinued, and the property was still accessible by other public streets. The conclusion of the court is well stated in the syllabus, as follows: "The discontinuance of part of a street in a city [by order of the mayor and aldermen], whereby the value of land abutting on other parts of the street is lessened, is not a ground of action against the city by the owner of such lands, if the same are still accessible by other public streets." *Davis v. Hampshire County*, 153 Mass. 218, 11 L. R. A. 750, 26 N. E. 848, is also strongly in point. South street, in Northampton, was crossed by a certain railroad. The portion of the street occupied by the crossing was discontinued. Before the discontinuance, the street was a thoroughfare, with numerous intersecting streets. By the discontinuance, travel along the street from both directions was interrupted at the crossing. The petitioners' premises abutted upon the street, but at a point some distance from the part discontinued. The complaint was that the discontinuance cut off the direct route from the petitioners' premises to the principal business streets of Northampton, and made it necessary to resort to a circuitous route over other streets, to the serious and permanent injury of the plaintiffs' property. Certainly these facts present as good ground for relief as those in the case at bar, but the court said: "We are of opinion that the petitioners would not be entitled to recover damages for the diminished value of their lands; that being a loss not peculiar to themselves, but the same in kind as that which is suffered by others who owned lands situated upon the same street. . . . Although the doctrine may sometimes be rather harsh in its application to special cases, there are sound reasons on which it rests. The chief of these reasons are that to hold otherwise would be to encourage many trivial suits. that it would discourage public improvements if a whole neighborhood were to be allowed to recover damages for such injuries to their estates, and that the loss is of a kind which purchasers of land must be held to have contemplated as liable to occur, and to have made allowance for in the price which they paid." Other Massachusetts cases to the same effect might be reviewed, but it is sufficient to say that the doctrine announced by Chief Justice Shaw in *Smith v. Boston* has been steadfastly adhered to in that jurisdiction, after the fullest re-examination. The doctrine of that case has nowhere found abler exposition than in *Heller v. Atchison, T. & S. F. R. Co.* 28 Kan. 625. In that case the petitioner had bought land on an established street, and erected buildings which were occupied for business purposes. At the time of the purchase there was more travel

on that street than on any other street in that part of the city. Action was taken to discontinue a portion of the street, away from the plaintiff's property; and it was complained that the discontinuance would divert a large and increasing amount of travel from the plaintiff's property, and render it of no value for business purposes, and of small value for residence purposes. While the matter came up on a petition for injunction, the question in the present case was directly involved and fully considered. The following quotation from the opinion of Judge Brewer is peculiarly applicable: "Where a party owns a lot which abuts on that portion of the street vacated, so that access to the lot is shut off, it is clear that the lotowner is directly injured. . . . The closing up of access to the lot is the direct result of the vacating of the street, and he, by the loss of access to his lot, suffers an injury which is not common to the public; but in the case at bar access to the plaintiff's lots is in no manner interfered with. The full width of the street in front and on the side [of the lots] is free and undisturbed, and the only real complaint is that by the vacating of the street away from her lots the course of travel is changed. But this is only an indirect result. There is nothing to prevent travel coming by her lots if the travelers desire it. The way to the heart of the city by her lots is a little more remote than it was before, but still free passage is open to all who wish to pass thereby. No one is compelled to stay away. Access to the lots is the same that it was before, so that the injury is only the indirect result of the action complained of, and it is an injury which, if it exists at all, is sustained by all other lots along the street west of the parts vacated. Travel by those lots may be diminished, travel on streets south may be increased, and to that extent property on such southern streets may be benefited thereby. The same result would follow if some other avenue of approach to the city were specially improved. . . . But surely that thus the tendency of travel in front of her lots was diverted would give her no cause of action. The benefits which come and go from the changing currents of travel are not matters in respect to which any individual has any vested right, against the judgment of the public authorities." *Smith v. Boston*, 7 Cush. 254, and *Concord's Petition*, 50 N. H. 530, were cited in support of the foregoing views. Another case in point, and especially instructive, is *Dantzer v. Indianapolis Union R. Co.* 141 Ind. 604, 34 L. R. A. 769, 39 N. E. 223. In that case the court says, in substance, that, in addition to property in the soil of his lots, the abutter has a property right in the street,—that is to say, the appendant right of access, or easement of access, in front of his lots,—and that he should be allowed such damages as he suffers from obstruction of such right of access. "We think we may safely assert, however, that the obstruction of the easement of access need not always be upon the

immediate front of the lot whose owner is affected, but that if the obstruction, though remote, renders access to such lot impossible, or impairs it in a substantial manner, at the point where it abuts upon the street, the property right of the lotowner is invaded, and he may recover. To illustrate this proposition, if a street were fully obstructed on either side of one's lot, so that the lines of the lot could not be reached, access would be denied to the lotowner, though the street in front of his lot had upon it no obstructions. The property rights of the lotowner, as against the public, are coterminous with the lines of his lot, but that property right might be obstructed and its uses defeated by cutting off ingress and egress to and from such lines. . . . In such case there should be, and is, a remedy. . . . There can be no doubt, however, that the overwhelming weight of authority . . . is in favor of confining the award for such damages to those who are deprived, in whole or in part, of access to that section of the highway immediately abutting upon or in front of their own real estate." It was considered that depreciation in the value of property by the added inconvenience of access thereto, consequent on the vacation of a street at a point some distance therefrom, was an injury not different in kind, but only in degree, from that suffered by the community in general, and would not sustain a right of action for damages. *Coster v. Albany*, 43 N. Y. 399, was where a public bridge was removed, by reason of which it was made necessary, in order to reach the store of the plaintiff, to go over another bridge, at a much greater distance. It was held that no action could be maintained. The court said: "No part of the bridge was on the property of the plaintiffs. They had no interest or right in it as property. There is left to the plaintiffs an approach to their property by the State street bridge, though less near, less easy, less commodious. The damage to the plaintiffs' property from this cause is entirely indirect and remote." In *Buhl v. Ft. Street Union Depot Co.* 98 Mich. 596, 604, 23 L. R. A. 392, 395, 57 N. W. 829, 832, the court says: "A distinction may well be held to exist between the injury which results to an abutting owner, or another so situated that the means of ingress and egress to and from the premises are cut off by the discontinuance of a street, and one owning land upon another street, or on the same street at a distance from the part of the highway discontinued." It is further said, in effect, that the inconvenience caused to an abutting owner on a street by discontinuing another portion of the street, making travel to and from his premises less direct, is *damnum absque injuria*, being the same in kind that all the property suffers, and cannot be regarded as damages within the provisions of a statute providing for the payment of all damages consequent on the closing of streets. In *State, Kean, Prosecutrix, v. Elizabeth*, 54 N. J. L. 462, 24 Atl. 495, it was held that "a person owning lands upon

a part of a street not vacated is not deprived of any vested rights in property for which she is entitled to compensation by reason of said vacation."

In addition to the foregoing authorities to which special attention has been called, and to the same general effect, are *Castle v. Berkshire County*, 11 Gray, 26; *Hammond v. Worcester County*, 154 Mass. 509, 28 N. E. 902; *Stanwood v. Malden*, 157 Mass. 17, 16 L. R. A. 591, 31 N. E. 702; *Nichols v. Richmond*, 162 Mass. 170, 38 N. E. 501; *Clark v. Providence*, 10 R. I. 437; *Gerhard v. Seekonk River Bridge*, 15 R. I. 334, 5 Atl. 199; *Seeley v. Bishop*, 19 Conn. 128; *Fearing v. Irwin*, 55 N. Y. 486; *Kings County F. Ins. Co. v. Stevens*, 101 N. Y. 411, 5 N. E. 353; *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332; *Lutterloh v. Cedar Keys*, 15 Fla. 306; *Pearsall v. Eaton County*, 74 Mich. 558, 4 L. R. A. 193, 42 N. W. 77; *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 297, 1 L. R. A. 493, 39 N. W. 629; *Brakken v. Minneapolis & St. L. R. Co.* 29 Minn. 41, 11 N. W. 124; *Barr v. Oskaloosa*, 45 Iowa, 275; *Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. 743; *Whitsett v. Union Depot & R. Co.* 10 Colo. 243, 15 Pac. 339; *Polack v. San Francisco Orphan Asylum*, 48 Cal. 490.

Eminent text writers of highest authority have accepted, in one form or another, the view taken by these cases. In the text to *Elliott, Roads & Streets*, at page 663, the rule is thus stated: "Owners of land abutting upon neighboring streets, or upon other parts of the same street, are not, however, entitled to damages, notwithstanding the value of the lands may be lessened by its vacation or discontinuance." And in a note on page 664 the same author says: "We suppose that there is a right to compensation only where the easement of access is directly impaired." See also 2 Dill. Mun. Corp. 4th ed. § 666. But our attention has been called to several carefully considered cases, which would seem, in their reasoning and application, broad enough, if followed in this jurisdiction, to warrant a recovery in the present case. *Re Melon Street*, 182 Pa. 307, 38 L. R. A. 275, 38 Atl. 482; *Chicago v. Burcky*, 158 Ill. 103, 29 L. R. A. 568, 42 N. E. 178; *Chicago v. Baker*, 30 C. C. A. 364, 58 U. S. App. 569, 86 Fed. 753, 39 C. C. A. 318, 98 Fed. 830. In *Re Melon Street*, it appears that Melon street was a cross street connecting Ninth and Tenth streets, in the city of Philadelphia. The parts of Ninth and Melon streets at their junction were discontinued. The property damaged was on Melon street, but not on the part discontinued. Melon street, in front of the complainant's property, remained as before; and the complainant could still go to and from all parts of the city by way of the remaining portion of Melon street and Tenth street, but was compelled to go further to reach points to the eastward. In the superior court recovery was denied, but not without a vigorous dissenting opinion, which on appeal was approved and accepted. In both courts the

question was exhaustively considered, and, whatever view may be taken as to the correctness of the conclusions finally reached, it must be admitted that the case constitutes an important contribution to the legal discussion of the subject. Briefly stated, the conclusions of the court on appeal, in substance, were: That an abutter has a vested right, for the purpose of access to his property, not only to that portion of the street upon which his premises abut, with communication therefrom to the general system of streets, but also to the continuation of the remainder of the street, with all its connections, to the point where their continuance ceases to be of proximate and calculable advantage to his access, and becomes of only remote and incalculable advantage, and that it is for the jury to determine when this point is reached, and to give or deny damages accordingly. The court also held that while the discontinuance of a street anywhere within the limits suggested, impairing the means of ingress and egress, constitutes a peculiar and special injury, for which an action can be maintained, yet, in estimating damages, no account can be taken of the depreciation of the property in consequence of the diversion of travel, nor of the inconvenience to which the property owner is subjected, in having to go by a more circuitous route in some cases; these being regarded as general damages, differing only in degree, and not in kind, from those suffered by the public at large. *Chicago v. Burcky* and *Chicago v. Baker* give qualified support to the doctrine of *Re Melon Street*, so far as concerns the scope of the abutter's vested right, and unqualified support to the doctrine of that case as to the exclusion of inconvenience and diversion of travel as elements of damage. It is to be noted that, according to these decisions,—the most favorable to the plaintiff to be found anywhere,—he can recover nothing for depreciation of property resulting from diversion of travel, loss of trade, and inconvenience. As these, manifestly, are the elements of damage upon which the plaintiff's claim and the jury's award were based, there is but little left for the plaintiff, in any event. But *Re Melon Street*, as favorable to the plaintiff, does not commend itself to our judgment. The doctrine that the abutter is entitled to damages arising from discontinuance of any part of the street, interfering in any degree with any means of access, to his property, with no limit but the rule of remoteness, and this although the street in front of the abutter remains undisturbed, and he still has communication therefrom with the general system of streets, strikes us as unsound in principle, difficult of application, and opposed to the great weight of authority. To test the principle, suppose a street is 5 miles long; that at one end is the plaintiff's residence, and at the other is his place of business; that halfway between a short section of the street is discontinued, compelling the plaintiff at that point to make a circuit of a mile before coming back into the street again, and increasing by

about that much the distance to be traveled in going and coming. Here is a substantial interference with the means of access to both his place of business and his residence, in the broadest sense of the term, and substantial damage as well; yet all would admit that it is not such a discontinuance and not such an interference with the right of access as would entitle him to compensation. Bring the discontinuance and its enforced circuit within a mile, and yet closer,—within a half or a quarter of a mile, or even within 50 rods,—of the complainant's property, and everybody would still agree that it was not such an interference with the right of access as to afford ground for recovery. At what point, then, is the province of the jury to attach? When it attaches, by what rule are they to determine when impairment of access is proximate, and when it is not? Shall it be by rule of distance, or one depending upon the degree of impairment? Reflections like these satisfy us of the impracticability and practical impossibility of upholding the doctrine of *Re Melon Street*, and at the same time preserving anything like intelligent and systematic administration of justice with respect to this class of claims. And when to the difficulty and confusion from this source are added the confusion and difficulty which would inevitably follow from requiring the jury to so draw the line as to exclude damages from diversion of travel and inconvenience, and, finally, when we consider the multiplicity of suits of every degree of remoteness to which the public would be subjected by such a rule, in itself "an intolerable evil" (*Shaw v. Boston & A. R. Co.* 159 Mass. 597, 35 N. E. 92; *Quincy Canal v. Newcomb*, 7 Met. 276, 39 Am. Dec. 778),—we are convinced that the legislature did not intend to so enlarge the abutter's rights. The sounder and better doctrine, in every way, is that declared in *Smith v. Boston*, and the long line of cases following it, to which we have called attention, viz., that a discontinuance which leaves undisturbed the highway in front of the abutter's premises, and leaves him connection therefrom with the general system of streets, is not a destruction or impairment of any vested right, and furnishes no cause of action for damages. *Concord's Petition*, 50 N. H. 530, and *Candia v. Chandler*, 58 N. H. 127, when correctly understood, are in harmony with this latter view. To be sure, in *Concord's Petition*, the court says that the statute is "broad enough to include persons whose lines do not abut on the highway." But this language must be understood in the qualified sense in which the same view is expressed in *Smith v. Boston*, where the court says: "We do not mean to be understood as laying down a universal rule, that in no case can a man have damages for the discontinuance of a highway unless his land bounds upon it, although, as applicable to city streets, intersecting each other at short distances, it is an equitable rule. A man may have a farm, store, mill, or wharf, not bounding on a street, but communicating with it by a private way, so situated that

he has no access to his property but by the public way. If this is discontinued, he must lose the benefit of his estate, or open a way at his own expense, which might be a direct and tangible damage consequent upon the discontinuance of the public way; and we are not prepared to say that he would not have a claim for damages under the statute." And in *Dantzer v. Indianapolis Union R. Co.* 141 Ind. 604, 34 L. R. A. 769, 39 N. E. 223, where the court says: "We think we may safely assert, however, that the obstruction of the easement of access need not always be upon the immediate front of the lot whose owner is affected, but that if the obstruction, though remote, renders access to such lot impossible, or impairs it in a substantial manner at the point where it abuts upon the street, the property right of the lotowner is invaded, and he may recover." Undoubtedly the discontinuance of any part of the street, although away from the complainant's premises, which has the effect to destroy or impair the portion of the street upon which he abuts as a means of access, by cutting it off from communication with the system of streets, would be actionable,—not, however, because of the discontinuance of the street away from the plaintiff's premises, but because of the practical discontinuance of the part upon which he abuts, as an effect of the actual discontinuance of the part away. This involves no qualification or extension of the rule, but is merely upholding it in its integrity. That the language of the court in *Concord's Petition* was used in the limited sense expressed in *Smith v. Boston* appears probable from the fact that the circumstances in *Concord's Petition* brought the latter case squarely within the possible exception suggested and illustrated by Chief Justice Shaw, whose opinion in *Smith v. Boston* was evidently made the basis of the decision in *Concord's Petition*. And this probability finds confirmation in the qualified language employed by the court in *Concord's Petition* where they say: "All that the court now decide is that the commissioners were mistaken in supposing that in no possible event could they legally award damages to a man whose land 'did not come to the road.'" What the court says elsewhere in the opinion, excluding general, and limiting recovery to peculiar, special, and direct, damages, taking these terms in the sense in which they are employed in *Smith v. Boston* and other cases to the same effect, is inconsistent with an intention to allow general, indirect, and consequential damages, such as were allowed in the *Melon Street Case*, and cases following, and such as are claimed in the present case. What the court says in *Candia v. Chandler*, viz., that "the effect of the statute is to give to certain landowners vested rights in the continuation of a highway that has been laid out, that cannot be taken from them by a discontinuance of it, except upon the payment of such damages as are occasioned them thereby," must also be understood in the limited sense expressed in *Smith v. Boston* and *Dantzer v. Indianapolis Union R. Co.* 57 L. R. A.

This review of the authorities establishes that they are practically unanimous upon the following points: (1) That the right of recovery for damages from discontinuance of a highway is limited to such damages as are peculiar and special to the claimant; (2) that damages resulting from diversion of travel, and inconvenience from having to go by a more circuitous route, are not special, but general, damages, and not recoverable; (3) that the abutter has a certain vested right in the highway upon which he is located, as a means of access to his property, for the destruction or impairment of which he has a cause of action; and (4) that special damages are those only which destroy or impair this vested right. To this extent there would seem to be practical agreement. The conflict comes upon the question of the scope of this vested right, and upon this controverted point *Smith v. Boston* and the long line of cases to the same effect declare what is, believed to be the correct general principle, and the one most in accord with the analogies furnished by our own decisions, and with the overwhelming weight of authority. There are no special facts in this case to distinguish it. The street in front of the plaintiff's premises remains intact, and from this portion of the street the plaintiff still has free communication with the entire system of highways. The only complaint is that the distance required to be traveled to reach his property, in some directions, has been increased, and that travel in front of his premises has been thereby diverted, trade diminished, and the value of his property lessened. These facts bring the case squarely within the principle of the authorities. If the result is a hardship to the plaintiff, it is a hardship which is suffered by all of the numerous owners upon the portion of Gold street not discontinued. This fact alone has been held sufficient to make the plaintiff's damages "general," in the sense which excludes recovery. *Dantzer v. Indianapolis Union R. Co.* 141 Ind. 604, 34 L. R. A. 769, 39 N. E. 223; *Heller v. Atchison, T. & S. F. R. Co.* 28 Kan. 625; *Davis v. Hampshire County*, 153 Mass. 218, 11 L. R. A. 750, 26 N. E. 848. Furthermore, the hardship is in measure only, and slight measure at that, different from the hardship to which the plaintiff would be subjected were we to follow the cases most favorable to him, since even these deny to him compensation for depreciation of property from inconvenience and diversion of travel. *Chicago v. Baker*, 30 C. C. A. 364, 58 U. S. App. 569, 86 Fed. 753, 39 C. C. A. 318, 98 Fed. 830; *Chicago v. Spoor*, 190 Ill. 340, 60 N. E. 540; *Re Melon Street*, 182 Pa. 307, 38 L. R. A. 275, 38 Atl. 482. At most, it is a hardship resulting from the mere operation of a public improvement, involving no taking of property and no interference with vested rights. As such, it falls within that class of general injuries, referred to at the outset, to which the few are ever being subjected for the good of the many, and for which the law allows no com-

pensation but the privileges and protection of government, including the protection which the plaintiff, as a member of the public, has had in the past, and will hereafter have, from claims of a like character.

Exception sustained, verdict set aside, and judgment for the defendants.

Chase, J., did not sit. The others concurred.

MASSACHUSETTS SUPREME JUDICIAL COURT.

OLIVER DITSON COMPANY

v.

William H. BATES.

(.....Mass.....)

1. In an action, by one claiming title, for possession of property which defendant had purchased from a third person, a lease from plaintiff to such third person is admissible in evidence to show the nature of such person's right to possession of the property, and to rebut any presumption of agency on his part to sell it.
2. In the absence of any evidence of authority on the part of the lessee of a piano to sell the same in an action by the lessor to recover possession of it from one who purchased it from the lessee, the jury cannot be permitted to consider the question of such authority.
3. The fact that lessees of a piano have a retail store at which musical instruments are kept for sale, which is well known to the lessor, gives the lessees no right to sell the instrument.
4. No estoppel upon the owner of a piano who leases it to a retail dealer in musical instruments to claim it from one who purchased it from the dealer arises from the facts that the lease provided that it should be kept in the purchaser's house, and that the lessor failed to notify the purchaser of his claim to the instrument for a period of nearly two years, during which time the purchaser bought and paid for it believing it to belong to the lessee.

(May 21, 1902.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover for the conversion of a piano which resulted in a verdict in plaintiff's favor. *Overruled.*

J. Q. Beale conducted, at Rockland, Massachusetts, the business of a retail dealer in musical instruments under the name of J. Q. Beale & Son. Defendant, who had had dealings with Mr. Beale before, applied to him for a piano for use in his summer home at Marshfield. Beale said that he had not one, but would have one in a few days. Subsequently he told defendant that the piano would come to him from Boston. The piano was subsequently delivered in a case, having the name Oliver Ditson Company stamped on it. The piano was made by Jacobs, and had

been purchased by plaintiff some time previous. It appeared that Beale procured the piano from plaintiff under the following lease:

Boston, July 9, 1895.

I have this day Hired and Received of Oliver Ditson Company, One Piano Made by Jacobs, No. 11,088, for which I hereby agree to pay the sum of \$16 per quarter, and cartage or transportation . . . way . . . , said cartage amounting to. . . . This includes boxing.

Said piano to be located at No. [William H. Bates] Street, Brandt Rock, Town or City, Marshfield, Mass., and not to be removed therefrom without the consent in writing of Messrs. Oliver Ditson Company.

I promise to return said Piano in as good a condition as when received (reasonable wear and tear excepted) on demand. If not returned at the end of the first quarter, it is to be considered as held for any additional time until notice of ending this contract is given at a *pro rata* charge for quarterly rent.

And it is further agreed that the said Oliver Ditson Company, or their Agents, may at any time enter any dwelling or building where said property is situated, and examine the same, and if all the conditions or agreements on this instrument are not complied with, take possession of and remove said property, without being deemed guilty of any trespass in any manner whatever, or liable for any damages arising from said entry and taking.

Signature, J. Q. Beale & Son,
Residence, Rockland Music Store.

Place of Business,

Witness: A. T. Waterman.

The piano was placed in defendant's home without any notice to him of plaintiff's claim. Subsequently he bought and paid Beale for the piano. Something over two years after the receipt of the piano plaintiff laid claim to it, which resulted in this action.

The defendant asked the court to give the jury the following instructions:

"Second. If the jury find that the defendant made his entire arrangements for the piano with the retail dealers, J. Q. Beale & Son, and that the plaintiff shipped or delivered the piano to the defendant upon an order coming from said Beale & Son, and that the plaintiff, when it should have spoken, kept silent, and gave no notice to the defendant that the said Beale & Son were not authorized to contract with the defend-

NOTE.—As to right of purchaser of personal property from person who has it under an agreement which does not give him title thereto, see also, in this series, *Romeo v. Martucci* (Conn.) 47 L. R. A. 601, and *Woods v. Nichols* (R. I.) 48 L. R. A. 773.

57 L. R. A.

ant in relation to said property, and that while the plaintiff was thus silent the defendant purchased the piano from said Beale & Son, then the plaintiff is estopped from denying that the defendant acquired a good title to the piano, and the verdict should be for the defendant.

"Third. Whenever one of two innocent persons must suffer by the action of a third, the loss must be borne by the one whose behavior in the matter denoted to the other that such third person's acts were apparently trustworthy.

"Fourth. If the jury find that the plaintiff put the retail dealers J. Q. Beale & Son forward as general agent, or placed said Beale & Son in a position where the defendant was justified in the belief that Beale & Son's powers were general, then the jury may disregard any restrictions that the plaintiff privately imposed upon the agent's authority, or any private arrangement between the plaintiff and said Beale & Son that was not brought to the defendant's notice."

These instructions were refused. The jury returned a verdict in plaintiff's favor for \$140, and defendant brought the case into this court.

Mr. Walter B. Grant, for defendant:

The plaintiff's silence under the circumstances was an acquiescence in whatever contract Beale & Son might make with defendant; plaintiff agreed with Beale & Son that the piano should go into defendant's possession; it knew that Beale & Son, retail dealers, were going to make a contract with defendant, and it left the details entirely to Beale & Son; it knew that defendant knew that he was dealing with a piano dealer, and not with an ordinary lessee, and that defendant would have reasonable cause to believe that the dealer was authorized to convey a title, and it knew that defendant had no knowledge of any party but Beale & Son in the transaction. Attempting thus to control the property by a lease, not disclosed to defendant and which was early violated, and then keeping inactive and silent, was negligence on plaintiff's part and a fraud on the defendant. The plaintiff gave apparent control to Beale, and failed to act or speak seasonably.

The plaintiff should be estopped from taking advantage of its own negligence.

Tracy v. Lincoln, 145 Mass. 357, 14 N. E. 122; *Stiff v. Ashton*, 155 Mass. 133, 29 N. E. 203; *Pickard v. Sears*, 6 Ad. & El. 469; *Preston v. Mann*, 25 Conn. 118.

There is no distinction in principle, although the party who enables another to assume the credit of ownership may not be actually present when the act is done by which the third party is deceived.

Thompson v. Blanchard, 4 N. Y. 309.

An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped; it may arise, also, where there is a duty to speak, and the party upon whom the duty rests has an opportunity, and, knowing the circumstances requiring him to speak, keeps silent, and it is not necessary that the duty to speak 57 L. R. A.

should rest upon any agreement or legal obligation; it arises whenever principles of natural justice require the disclosure.

Thompson v. Simpson, 128 N. Y. 270, 28 N. E. 627; *Manufacturers' & T. Bank v. Hazard*, 30 N. Y. 226; *Continental Nat. Bank v. National Bank*, 50 N. Y. 575; *Anderson v. Armstead*, 69 Ill. 452; *Wilson v. Scott*, 13 Ky. L. Rep. 926; *Combes v. Chandler*, 33 Ohio St. 178.

Whenever one of two innocent persons must suffer by the action of a third, the loss must be borne by the one whose behavior in the matter denoted to the other that such third person's acts were apparently trustworthy.

Peake v. Thomas, 39 Mich. 584; *Hill v. Lowe*, 6 Mackey, 428; *Jeffers v. Gill*, 91 Pa. 290.

Mr. Clifton L. Bremer, for plaintiff:

The lease from the plaintiff to Beale was admissible, both for the purpose of tracing the piano from the plaintiff's to the defendant's possession, and also for the purpose of rebutting the estoppel, by showing that the relation between the plaintiff and Beale was not one of agency.

Boydton v. Loughton, 1 Allen, 509.

As the purchase of the piano occurred, by the defendant's own testimony, one year after the lease was made, nothing that the plaintiff did or neglected to do after that date (July, 1897) could act as an estoppel, as the defendant did not alter his condition in consequence of it.

Nickerson v. Darrow, 5 Allen, 419.

To create an estoppel by silence, there must be: (a) A duty to speak; (b) a knowledge of all the circumstances requiring that duty; (c) a design to have the silence acted upon; (d) a reliance by the other party upon the silence.

Collier v. Miller, 137 N. Y. 332, 33 N. E. 374; *Andrews v. Lyons*, 11 Allen, 349; *Plumer v. Lord*, 9 Allen, 455, 85 Am. Dec. 773; *Stiff v. Ashton*, 155 Mass. 130, 29 N. E. 203; *Lincoln v. Gay*, 164 Mass. 537, 42 N. E. 95; *Zuchtmann v. Roberts*, 109 Mass. 53, 12 Am. Rep. 663; *Sargent v. Metcalf*, 5 Gray, 306, 66 Am. Dec. 368.

In the present case the defendant did not offer evidence, or contend that the plaintiff had any reason to suspect Beale of contemplating a fraudulent sale of the piano. Consequently, it cannot be claimed that there was any intention on the plaintiff's part with regard to having its behavior acted upon, unless there is a presumption of law that all lessees are dishonest.

The facts calling for a duty and an estoppel in the closely analogous cases of conditional sales are very much stronger than in cases of leases like the present; but this court has uniformly held that there was no estoppel.

Burbank v. Crooker, 7 Gray, 158, 66 Am. Dec. 470; *Coggill v. Hartford & N. H. R. Co.* 3 Gray, 545.

Morton, J., delivered the opinion of the court:

This is an action of tort for the conversion

of a piano. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the admission of a written lease of the piano from the plaintiff to J. Q. Beale & Son, from one of whom the defendant afterwards bought it, and to the refusal of the presiding justice to give certain rulings that were asked for, and to certain instructions that were given by him.

1. The lease was clearly admissible, we think, to show the nature of the right of Beale & Son, and to rebut any presumption of agency on their part.

2. The defendant contends that the question of the authority of Beale & Son to make the sale should have been left to the jury, and that the silence of the plaintiff, and its delay in enforcing its rights, constituted a fraud on the defendant, and estop it to assert any title to the piano. We see no ground on which either branch of the contention can stand. There was no evidence of any authority from the plaintiff to Beale & Son to sell the piano, and the court rightly so ruled and instructed the jury. They were merely lessees of the piano, and the fact that they had a retail store and kept musical instruments for sale, and that this was known to the plaintiff, did not enlarge their authority, or give them any right to sell the piano. *Coggill v. Hartford & N. H. R. Co.* 3 Gray, 545; *Sargent v. Metcalf*, 5 Gray, 306, 66 Am. Dec. 368; *Burbank v. Crooker*, 7 Gray, 158, 66 Am. Dec. 470. Neither was there any evidence of estoppel for the jury to consider, and on this question, also, the ruling of the court was right. The plaintiff was not bound to inform the defendant of the arrangement between it and Beale & Son, and it did not know, and had no reason to know or believe, that the defendant intended to purchase the piano of Beale & Son, or that they intended to sell it. The defendant did not know of the existence of the lease, and therefore could not have been led in any way to make the purchase by the delay of the plaintiff in enforcing its rights, or by its silence. The grounds of an estoppel are entirely wanting.

3. What we have said disposes of the first and second requests. In regard to the other two it is enough to say that neither was applicable to the case before the court, and both were rightly refused.

Exceptions overruled.

Laura M. HOMANS

v.

BOSTON ELEVATED RAILWAY COMPANY.

(.....Mass.....)

A carrier is liable for nervous shock to a passenger resulting from a jar to the

nervous system which accompanies a blow to the person caused by being thrown from a seat through the carrier's negligence, and it is not necessary to show that the shock is the consequence of the blow.

(February 27, 1902.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for injuries alleged to have been caused by defendant's negligence. *Overruled.*

The facts are stated in the opinion.

Messrs. F. H. Cooney and A. I. Peckham, for defendant:

There can be no recovery for fright, terror, alarm, anxiety, or distress of mind, or for such physical injuries as may be caused by such mental disturbances, where there is no injury to the person from without.

Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L. R. A. 512, 47 N. E. 88, 172 Mass. 488, 43 L. R. A. 832, 52 N. E. 747.

The burden of compensating claimants in these prolific days of accident cases will be found still sufficiently onerous if they are restricted in their claims to injuries, real or imaginary, caused or produced by physical injury susceptible of proof or disproof,—something that can be seen or felt.

Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354; *Haile v. Texas & P. R. Co.* 23 L. R. A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 559; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666, 23 Atl. 340; *Braun v. Craven*, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. 657; *Johnson v. Wells, F. & Co.* 6 Nev. 224, 3 Am. Rep. 245.

Mr. Marcellus Coggan, for plaintiff:

The defendant's negligence is the legal cause of the physical illness and nervous affections consequent on the fright, terror, and mental distress of the plaintiff, just as much as where the plaintiff, by movements induced by fright caused by defendant's careless act, does herself some physical injury.

Gannon v. New York, N. H. & H. R. Co. 173 Mass. 40, 43 L. R. A. 833, 52 N. E. 1075.

Recovery should be allowed for mere mental fright, terror, and distress where there is no physical contact. The injury is real, not fanciful, and it is caused by defendant's wrongful act; and in a case like the present, anyhow, it is a natural and probable result of a nature that a reasonable man would foresee.

Wadsworth v. Western U. Teleg. Co. 86 Tenn. 695, 8 S. W. 574; *Reese v. Western U. Teleg. Co.* 123 Ind. 294, 7 L. R. A. 583, 24 N. E. 163; *Francis v. Western U. Teleg. Co.* 58 Minn. 252, 25 L. R. A. 406, 59 N. W. 1078; *Western U. Teleg. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490; *Bell v. Great Northern*

NOTE. — For conflicting authorities as to right of action for damages resulting from shock or fright, see note to *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* (Pa.) 14 L. R. A. 666.

57 L. R. A.

For cases in this series denying the right, see *Haile v. Texas & P. R. Co.* (C. C. App. 5th C.) 23 L. R. A. 774; *Mitchell v. Rochester R. Co.* (N. Y.) 34 L. R. A. 781; *Spade v. Lynn & B. R. Co.* (Mass) 38 L. R. A. 512; *Braun v.*

R. Co. Ir. L. R. 26 C. L. 428; Purcell v. St. Paul City R. Co. 48 Minn. 134, 16 L. R. A. 203, 50 N. W. 1034.

The real reason for refusing damages sustained from mere fright probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule.

Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L. R. A. 512, 47 N. E. 88; *White v. Sander*, 168 Mass. 296, 47 N. E. 90.

The amount of physical injury should be only so much as is required by the necessity which gave rise to the rule.

Consequences of the defendant's conduct which would not of themselves constitute a cause of action may at times enhance the damages if the conduct has some other consequence for which an action lies.

Spado v. Lynn & B. R. Co. 172 Mass. 490, 43 L. R. A. 832, 52 N. E. 747.

An injury to the nerve tissues is as much a physical injury as a broken bone, and often more serious in its effects upon the physical health. Mental distress and agony form an element in the damages.

Warren v. Boston & M. R. Co. 163 Mass. 484, 40 N. E. 895; *Canning v. Williamstown*, 1 Cush. 451; *Morgan v. Curley*, 142 Mass. 107, 7 N. E. 726; *Phillips v. Hoyle*, 4 Gray, 568; *Nourse v. Packard*, 138 Mass. 307.

Holmes, Ch. J., delivered the opinion of the court:

This is an action for personal injuries. The plaintiff was in one of the defendant's cars and was thrown against a seat, receiving a slight blow, in consequence of a collision for which the defendant was to blame. She afterwards had a good deal of suffering of a hysterical nature, and the question before us on the exceptions concerns the rule of liability for the nervous shock. It was decided in *Spade v. Lynn & B. R. Co.* 172 Mass. 488, 43 L. R. A. 832, 52 N. E. 747, that, if the defendant was a wrongdoer, it must answer for the actual consequences of the battery to the plaintiff as she was, although she might be abnormally nervous. It also was decided, however, that if a nervous shock was due to causes for which the defendant was not answerable, such as the behavior of a drunken man whom it was engaged in removing, it could not be held for the shock notwithstanding its liability for a battery happening at the same time. The defendant by various requests tried to press the latter principle so far as to require the plaintiff to prove that the nervous shock was the consequence of the battery, whereas the judge allowed her to recover for a shock ending in paralysis if it resulted

Craven (Ill.) 42 L. R. A. 199; *Spade v. Lynn & B. R. Co. (Mass.)* 43 L. R. A. 832; and *Smith v. Postal Teleg. Cable Co. (Mass.)* 47 L. R. A. 323.

For cases sustaining the right, see *Sloane v. Southern California R. Co. (Cal.)* 32 L. R. A. 193; *Mack v. South Bound R. Co. (S. C.)* 40 L. R. A. 679; *Gulf, C. & S. F. R. Co. v. Hayter (Tex.)* 47 L. R. A. 325; and *Denver & R. G. R. Co. v. Roller (C. C. App. 9th C.)* 49 L. R. A. 77.

57 L. R. A.

from a jar to her nervous system which accompanied the blow to her person. It was understood, of course, that the jar was due to the same cause as the blow, and both to the defendant's fault.

We are of opinion that the judge was right, and that further refining would be wrong. As has been explained repeatedly, it is an arbitrary exception, based upon a notion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone. *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 288, 38 L. R. A. 512, 47 N. E. 88; *Smith v. Postal Teleg. Cable Co.* 174 Mass. 576, 47 L. R. A. 323, 55 N. E. 380. But when there has been a battery, and the nervous shock results from the same wrongful management as the battery, it is at least equally impracticable to go further and to inquire whether the shock comes through the battery or along with it. Even were it otherwise, recognizing as we must the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think that when the reality of the cause is guaranteed by proof of a substantial battery of the person there is no occasion to press further the exception to general rules. The difference between this case and the *Spade Case* in its second presentation is that in the latter the defendant's wrong, if any, began with the battery, and it was not responsible for the previous sources of fear, whereas here the defendant was responsible for the trouble throughout. The decisions, although not explicit, favor the conclusions to which we have come. *Canning v. Williamstown*, 1 Cush. 451; *Warren v. Boston & M. R. Co.* 163 Mass. 484, 487, 40 N. E. 895.

Exceptions overruled.

William A. EARLE
v.

COMMONWEALTH of Massachusetts.

(.....Mass.....)

1. A statute requiring payment of damages for injuries to a business through the taking of property for public use is not unconstitutional on the ground that taxes cannot be levied for such purposes.
2. A doctor having an office in, and a practice extending throughout, a town in which land is taken for a public purpose, is within the protection of a statute

NOTE.—The allowance of damages for injury to a doctor's practice by the taking of property for public use is in the above case based on a statutory provision that is somewhat exceptional. As the statute expressly provided for compensation for damage to business of an individual owning an established business on land in a certain town, the case is easily distinguishable from those which deny compensation for loss of profits or diminished value of personal property caused by the removal of a business made necessary by condemnation of real property, as instances of which, see *Becker v. Philadelphia & R. T. R. Co. (Pa.)* 35 L. R. A. 583; and *Philadelphia Ball Club v. Philadelphia (Pa.)* 46 L. R. A. 724.

providing for compensation to any individual owning an established business on land within the town, which is injured by the taking.

3. The damage for injury to one "owning a business on land within a town" by the taking of property for public use for which a statute requires compensation to be made is not limited to the decrease in market value of the business.

(March 1, 1902.)

RESERVATION by the Supreme Judicial Court for Worcester County for the opinion of the full bench of questions arising upon a report of damages to be awarded plaintiff for injuries to his business arising from the condemnation of property in the town where it was located. *Answers favorable to plaintiff returned.*

The facts are stated in the opinion.

Mr. Robert M. Morse, for petitioner:

While the state may not be sued in a state court without its consent (*Troy & G. R. Co. v. Com.* 127 Mass. 43), yet there are numerous precedents, such as the takings of the metropolitan sewerage commission, and in the law restricting the height of buildings near the state house (see *Parker v. Com.* 178 Mass. 199, 59 N. E. 634), for statutory provisions authorizing such suits.

The question, for what the statute gives compensation, is a matter of construction.

Lincoln v. Com. 164 Mass. 368, 41 N. E. 489.

The petitioner's claim is within the statute.

The essential point is that he should have an established business on land in West Boylston.

Nelson v. Boston & M. R. Co. 155 Mass. 356, 29 N. E. 586.

The destruction of business is not a taking of property, and the decisions as to the measure of damages, made in the case of takings, are not applicable here.

Sawyer v. Metropolitan Water Board, 178 Mass. 267, 59 N. E. 658.

The rule of damages in this case is substantially the same as if the petitioner were suing a railway or municipal corporation for a physical injury which affected his capacity to practise his profession, as in *Nelson v. Boston & M. R. Co.* 155 Mass. 356, 29 N. E. 586.

Braithwaite v. Hall, 168 Mass. 38, 46 N. E. 398; *Murdock v. New York & B. Dispatch Exp. Co.* 167 Mass. 549, 46 N. E. 57; *Lake Shore & M. S. R. Co. v. Frantz*, 127 Pa. 297, 4 L. R. A. 389, 18 Atl. 22; *Copson v. New York, N. H. & H. R. Co.* 171 Mass. 233, 50 N. E. 613; *Rooney v. New York, N. H. & H. R. Co.* 173 Mass. 222, 53 N. E. 435.

Messrs. James Mott Hallowell and Arthur W. DeGoosh, for the Commonwealth:

The plaintiff did not own an established business on land in the town of West Boylston.

Ex parte Breull, L. R. 16 Ch. Div. 484.

The provision under which this case arises is unconstitutional.

57 L. R. A.

The legislature would not have the right to levy taxes except for public purposes.

Citizens' Sav. & L. Asso. v. Topeka, 26 Wall. 655, 22 L. ed. 455; *Dill. Mun. Corp.* 4th ed. § 153; *Cooley*, Const. Lim. 6th ed. p. 264, note.

The legislature cannot raise money by taxation to make a gift to an individual for his private use.

Hooper v. Emery, 14 Me. 375; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Feldman v. Charleston*, 23 S. C. 57, 55 Am. Rep. 6; *Opinion of the Justices*, 58 Me. 590; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Cole v. La Grange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; *Mather v. Ottawa*, 114 Ill. 659, 3 N. E. 216; *Jenkins v. Andover*, 103 Mass. 94; *State ex rel. Griffith v. Osawkee Twp.* 14 Kan. 418, 19 Am. Rep. 99; *Opinion of the Justices*, 155 Mass. 598, 15 L. R. A. 809, 30 N. E. 1142; *Freeland v. Hastings*, 10 Allen, 570; *Kingman v. Brockton*, 163 Mass. 255, 11 L. R. A. 123, 26 N. E. 998; *Lowell v. Oliver*, 8 Allen, 247; *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *People ex rel. Detroit & H. R. Co. v. Salem Twp. Board*, 20 Mich. 452, 4 Am. Rep. 400; *Concord R. Co. v. Greely*, 17 N. H. 47; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Whiting v. Sheboygan & F. du L. R. Co.* 25 Wis. 167, 3 Am. Rep. 30; *Bloodgood v. Mohawk & H. R. R. Co.* 18 Wend. 9, 31 Am. Dec. 313; *Dill. Mun. Corp.* 4th ed. §§ 159, 508; *Cooley*, Taxn. chap. 4; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39.

No individual in West Boylston has suffered any special damage, as distinct from the damage suffered by the public in general.

Willard v. Cambridge, 3 Allen, 574.

It cannot be said the individuals and firms coming within the provisions of the statute have any moral or equitable claims which the legislature has a right to recognize, for the commonwealth has not taken or destroyed anything which they owned.

Wilkinson v. Cheatham, 43 Ga. 258; *Cooley*, Taxn. chap. 4, p. 91.

Holmes, Ch. J., delivered the opinion of the court:

This is a petition brought by a practising physician to recover for damage to his business by the carrying out of the metropolitan water supply act. Stat. 1895, chap. 488, § 14. The case was referred to a commission. It reports that the plaintiff lived and had his office in West Boylston and had a practice which extended through that and some neighboring towns. The taking of land at West Boylston necessarily affected his business to a considerable extent, and the damages are assessed at alternative sums according to the rules suggested by the plaintiff and defendant respectively. The questions of law arising on the report were reserved by one of the justices for the consideration of the full court.

The commonwealth in the first place contends that the material portion of the statute, if it applies to cases like this, is unconstitutional. The ground seems to be that taxes cannot be levied for purposes of this sort, except to pay for property taken or destroyed, and that the business of a doctor is not properly within the principle. The test of what may be required to be paid for if destroyed or damaged under the power of eminent domain is not whether the same thing could have been sold, nor is it whether the destruction or harm could have been authorized without a provision for payment. Very likely the plaintiff's rights were of a kind that might have been damaged, if not destroyed, without the constitutional necessity of compensation. But some latitude is allowed to the legislature. It is not forbidden to be just in some cases where it is not required to be by the letter of paramount law. We think it so plain that, as was assumed by everybody in *Sawyer v. Metropolitan Water Board*, 178 Mass. 267, 59 N. E. 658, the provision is constitutional, that we prefer to say so without stopping to consider whether the question is open. See *Opinion of the Justices*, 175 Mass. 599, 49 L. R. A. 564, 57 N. E. 675; *Guilford v. Chenango County*, 13 N. Y. 143, 149; *People ex rel. Blanding v. Burr*, 13 Cal. 343; *United States v. Realty Co.* 103 U. S. 427, 41 L. ed. 215, 16 Sup. Ct. Rep. 1120; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 536, 537, 43 L. ed. 796, 800 19 Sup. Ct. Rep. 513; *New Orleans v. Clark*, 95 U. S. 644, 24 L. ed. 521.

Next it is contended that the plaintiff was not an "individual . . . owning . . . an established business on land in the town of West Boylston" within the meaning of Stat. 1895, chap. 488, § 14. A majority of the court does not see why not. The defendant cites *Ex parte Breull*, L. R. 16 Ch. Div. 484, for the proposition that the word "business" has no definite technical meaning. We agree, and think it quite wide enough to include the practice of a doctor. It is suggested that the practice was not established on land in West Boylston. It is true that a doctor can give advice elsewhere than in his office, and that in fact he does so to a greater extent than a shopkeeper sells his goods outside his shop. But no less than a shopkeeper a doctor usually has, as the plaintiff had, a locally established center to which patients resort, and from which he goes his rounds. There is even a certain amount of salable goodwill, as is made familiar to us by English law and literature, as well as by an occasional case in our own reports. *Smith v. Bergengren*, 153 Mass. 236, 10 L. R. A. 768, 26 N. E. 690.

The defendant demanded a finding or ruling that the plaintiff's business was not de-

creased in value by the carrying out of the act, because of the figures given for his income in 1894 and 1895, and later. But the commission may have found, and, for all that we can see, rightly, that the diminution of income before April 1, 1895, was due to precautions taken by the plaintiff in anticipation of the change, and we are unable to say that the defendant's request should have been granted.

The defendant next contends that the measure of damages is the difference in the market value of the business between April 1, 1895, and after the act was carried out. This recurs to the notion that the only interests which the law will recognize are salable, and that the plaintiff can recover only for such goodwill as might have been transferred for cash. The word "owning" in the statute is invoked. We shall not speculate whether ownership of an equitable life estate would be denied to a legatee deprived of the right of alienation. It is enough to say that, if the plaintiff's business is within the protection of the act, and "is decreased in value," damages are to be paid for "such injury," that is to say, for the actual decrease in value of that business, not for the decrease in the value of such elements in it, only, as admitted of being sold. There is no practical difficulty in the way of carrying out the statute according to its meaning. The money value of the plaintiff's business could be estimated, even though absolutely personal to himself.

But the rule suggested by the petitioner also seems to us unsafe on the facts before us. The damage theoretically would be the difference in value between the business as it had been and as it was left. Perhaps it might be reached by taking the difference in value between the business carried on as it was in West Boylston and a similar business carried on by the plaintiff in the nearest available place, bearing in mind the effect of requiring all West Boylston patients to move. It may be that the commission will find as a practical matter that the method suggested by the petitioner is as near as can be got to the thing to be determined, but as the case stands we do not feel warranted in adopting it. The commission has not said that it could not make an estimate on more obviously correct principles. It has confined itself to finding the damages according to the rules suggested on the two sides.

A request for a ruling that what the petitioner had earned as a specialist since his abandonment of his general practice could not be considered, went too far. Undoubtedly the evidence was not very important, and probably it was not regarded as being so.

Report recommended.

MICHIGAN SUPREME COURT.

Re Petition of Philip LITTLE.

(.....Mich.....)

A prisoner charged with violation of the Federal laws, who is transferred from one state to another for trial under process from a Federal court, may be turned over to the authorities of the latter state for trial upon a charge of violation of its laws, without being afforded an opportunity to return to the former state.

(February 11, 1902.)

PETITION for a writ of habeas corpus to obtain the release of petitioner from the custody of the sheriff of Montcalm County to which he had been committed under a charge of burglary. *Denied.*

The facts are stated in the opinion.

Messrs. Ritchie, Murphy, & Phelan for petitioner.

Mr. Frank A. Miller, for the People:

Where a person is indicted for a certain offense, and extradited from another state, he may be indicted, held, and tried for another offense without first having a reasonable opportunity to return to the state whence he was extradited.

State v. Kealy, 89 Iowa, 94, 56 N. W. 283; *State v. Ross*, 21 Iowa, 467; *State v. Stewart*, 60 Wis. 587, 50 Am. Rep. 388, 19 N. W. 429; *Ham v. State*, 4 Tex. App. 645; *State v. Brewster*, 7 Vt. 118; *Dow's Case*, 18 Pa. 37; *State v. Wenzel*, 77 Ind. 428; *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706; *Carr v. State*, 104 Ala. 4, 16 So. 150; *People ex rel. Post v. Cross*, 135 N. Y. 536, 32 N. E. 246, 64 Hun, 348, 19 N. Y. Supp. 271; *Williams v. Weber*, 1 Colo. App. 191, 28 Pac. 21; *Com. v. Wright*, 158 Mass. 149, 19 L. R. A. 206, 33 N. E. 82; *State v. Patterson*, 116 Mo. 505, 22 S. W. 696; *Adrianse v. Lagrave*, 59 N. Y. 110, 17 Am. Rep. 317; *United States v. Caldwell*, 8 Blatchf. 131, Fed. Cas. No. 14,707; *United States v. Lawrence*, 13 Blatchf. 295; Fed. Cas. No. 15,573; *People v. Rowe*, 4 Park. Crim. Rep. 253.

A fugitive from justice, extradited under the Constitution and laws of the United States on the charge of the commission of a specific crime, and discharged therefrom, can be held by the courts of that state to which he is surrendered for another and entirely different crime.

Re Noyes (U. S. D. C. N. J.) 17 Alb. L. J. 407; *Re Miles*, 52 Vt. 609; *Ham v. State*, 4 Tex. App. 645; *Williams v. Bacon*, 10 Wend. 636; *Browning v. Abrams*, 51 How. Pr. 172; *Dow's Case*, 18 Pa. 37; *State ex*

rel. Petry v. Leidigh, 47 Neb. 126, 66 N. W. 308; *Lascelles v. Georgia*, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687; *Ker v. Illinois*, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225; *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204; *Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40; *Kentucky v. Denison*, 24 How. 66, 101, 102, 16 L. ed. 717, 727; *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Re Walker*, 61 Neb. 803, 86 N. W. 510.

A man cannot claim immunity from extradition proceedings because he was induced to come into the state by falsehood and stratagem.

Ex parte Brown, 28 Fed. 653.

Nor is it any objection to his extradition that he was kidnapped and brought into the state illegally and against his will.

Ker v. People, 110 Ill. 627, 51 Am. Rep. 706, 119 U. S. 436, 30 L. ed. 422, 7 Sup. Ct. Rep. 225; *Lascelles v. Georgia*, 148 U. S. 537, 542, 37 L. ed. 549, 551, 13 Sup. Ct. Rep. 687, Affirming 90 Ga. 347, 16 S. E. 945; *Re Mahon*, 34 Fed. 525; *United States v. French*, 1 Gall. 1, Fed. Cas. No. 15,165; *Re Fow*, 51 Fed. 427; *People ex rel. Post v. Cross*, 135 N. Y. 536, 32 N. E. 246; *Williams v. Weber*, 1 Colo. App. 191, 28 Pac. 21; *Com. v. Wright*, 158 Mass. 149, 19 L. R. A. 206, 33 N. E. 82; *State v. Patterson*, 116 Mo. 505, 22 S. W. 696; *State v. Glover*, 112 N. C. 896, 17 S. E. 525.

Before the state should forego its right to try or punish for violation of its laws when the offender is found within its jurisdiction there should be some plain and very positive duty. But whatever may be thought of the considerations which should influence the executive department of the state, the courts must administer the law as they find it, without regard to any supposed rights of other states not defined by law, and not asserted before them by the proper authority.

2 Moore, Extradition, ed. 1891, §§ 516, 642-644 *et seq.*; Rorer, Interstate Law, 227; Hawley, Interstate Extradition, 1890, 79 *et seq.*; 1 Bishop, Crim. Proc. § 224b; *People ex rel. Post v. Cross*, 135 N. Y. 536, 32 N. E. 246, 64 Hun, 348, 19 N. Y. Supp. 271; *Williams v. Weber*, 1 Colo. App. 191, 28 Pac. 21; *Ham v. State*, 4 Tex. App. 645; *State v. Stewart*, 60 Wis. 587, 50 Am. Rep. 388, 19 N. W. 429; *Re Noyes* (U. S. D. C. N. J.) 17 Alb. L. J. 407; *Lascelles v. Georgia*, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687; *Com. v. Wright*, 158 Mass. 149, 19 L. R. A. 206, 33 N. E. 82.

Upon the question whether the same rule shall be applied to what has been called the extradition between states of the United States under the Constitution of the United States the decisions are not uniform, but the weight of authority seems to be that the rule is not applicable.

People ex rel. Post v. Cross, 135 N. Y. 536, 32 N. E. 246; *Ham v. State*, 4 Tex.

NOTE.—For another case in this series holding to the same effect as the case above, see *Molitor v. Sinnen* (Wis.) 7 L. R. A. 817.

As to right to try person brought from another state on a requisition to answer for a crime, for another crime which he has committed, see note to *Com. v. Wright* (Mass.) 19 L. R. A. 206; also *Reid v. Ham* (Minn.) 21 L. R. A. 232; and *State v. McNaspy* (Kan.) 38 L. R. A. 756.

57 L. R. A.

App. 645; *State v. Stewart*, 60 Wis. 587, 50 Am. Rep. 388, 19 N. W. 429; *Waterman v. State*, 116 Ind. 51, 18 N. E. 63.

Mr. Charles W. McGill, with Mr. Horace M. Oren, Attorney General, also for the People:

A person extradited from one state to another may be tried in the demanding state for any offense whatever, whether it is named in the warrant of extradition or not.

Hawley & McGregor, Crim. Law, p. 75; *Lascelles v. Georgia*, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687; *State v. Kealy*, 89 Iowa, 94, 56 N. W. 283; *State v. Ross*, 21 Iowa, 467; *State v. Stewart*, 60 Wis. 587, 50 Am. Rep. 388, 19 N. W. 429; *Ham v. State*, 4 Tex. App. 645; *State v. Brewster*, 7 Vt. 118; *Dow's Case*, 18 Pa. 37; *State v. Wenzel*, 77 Ind. 428; *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225; *Re Mahon*, 34 Fed. 525; *Re Walker*, 61 Neb. 803, 86 N. W. 510; *Lascelles v. State*, 90 Ga. 347, 16 S. E. 945; *People ex rel. Post v. Cross*, 135 N. Y. 536, 32 N. E. 246; *Re Miles*, 52 Vt. 609; *Re Fox*, 51 Fed. 427; *Com. v. Wright*, 158 Mass. 149, 19 L. R. A. 206, 33 N. E. 82; *State v. Patterson*, 116 Mo. 505, 22 S. W. 696; *Harland v. Territory*, 3 Wash. Terr. 131, 13 Pac. 453; *Williams v. Weber*, 1 Colo. App. 191, 28 Pac. 21; *State v. Glover*, 112 N. C. 896, 17 S. E. 525; *People ex rel. Suydam v. Sennott* (Ill.) 20 Alb. L. J. 230; *Hackney v. Welsh*, 107 Ind. 253, 57 Am. Rep. 101, 8 N. E. 141; *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204; *State v. Glover*, 112 N. C. 897, 17 S. E. 525; *State v. Smith*, 1 Bail. L. 283, 19 Am. Dec. 679.

Grant, J., delivered the opinion of the court:

The petitioner is confined in the jail of Montcalm county under a complaint and warrant charging him with the crime of burglary, committed in that county. He seeks release upon the writ of habeas corpus, for the reason that at the time of his arrest for this crime he was confined in the jail of Kent county, Michigan, under a warrant issued from the United States court for the northern district of Ohio, charging him with the crime of robbery of postoffices in Michigan, and, under the order of the United States court in Ohio, removing him to the United States court for the western district of Michigan, to await the action of the grand jury upon said alleged offense. The marshal of the United States court for the western district of Michigan, upon the request of the sheriff of Montcalm county, and the presentation to him of the warrant for the petitioner's arrest, surrendered him to the jurisdiction of the state courts for examination and trial. His counsel insist that upon his release by the United States marshal he was entitled to return to the state of Ohio, whence he was brought under the order and judgment of the Federal court; that he was by law entitled to a reasonable time and opportunity to return, and was, during that time, privileged from ar-

rest by the authorities of the state court. Courts have shown no inclination to scrutinize too closely the means used by police officers to secure fugitives from justice and bring them before the courts for trial. It has been repeatedly held that, when alleged criminals are brought by force or by false representation, or even by abuse of process, from one jurisdiction to which they have fled, into another, they are not entitled to return to the jurisdiction whence they were taken. *Re Mahon*, 34 Fed. 525, 528; *Lascelles v. Georgia*, 148 U. S. 537, 543, 37 L. ed. 549, 550, 13 Sup. Ct. Rep. 687, and authorities there cited. The prisoner, upon being discharged by the United States authorities, would not be entitled to return to Ohio, even if he had been extradited. It is just to counsel to say that they do not intend to carry their argument to this extent. If extradited for larceny, and discharged, and a charge of murder had been lodged against him, he would not be absolutely released, and given the opportunity to escape trial upon the more heinous offense. What counsel mean to say is this: That the United States marshal would take him back to Ohio, and there retain him until the necessary papers could be obtained from the governor of Michigan for his return to this state to be tried. This would be an idle ceremony.

No question of treaty stipulation is involved. Petitioner has not been extradited. He was brought to this state under a United States warrant, arrested in one jurisdiction, where the crime was not committed, and transferred to another jurisdiction, where the crime was committed, for appropriate action. But, if the case were to be disposed of upon the rules governing extradition proceedings, the controversy has been settled by *Lascelles v. Georgia*, 148 U. S. 537, 543, 37 L. ed. 549, 550, 13 Sup. Ct. Rep. 687. This is a Federal question, and the decision there made is binding, no matter what the previous decisions of this court may have been. Before the decision of that case the authorities had been divided, though we think the clear weight of authority was against the contention on behalf of petitioner. It was there expressly decided that "a fugitive from justice, surrendered by one state upon the demand of another, is not protected from prosecution for offenses other than that for which he was rendered up, but may, after being restored to the demanding state, be lawfully tried and punished for any and all crimes committed within its territorial jurisdiction, either before or after extradition." Counsel for the prisoner rely upon *Re Cannon*, 47 Mich. 481, 11 N. W. 280. Cannon was extradited as a fugitive from justice for a crime which was the proper subject of extradition. Upon being brought within the jurisdiction of Michigan, he was at once discharged, and proceedings for bastardy commenced against him, growing out of the same facts as those involved in the criminal charge. The court held (citing authorities) that bastardy proceedings were not criminal, but civil.

The rule is universal that one is privileged from arrest on civil process when he is brought into another jurisdiction, either as a witness or litigant, in obedience to the process of the court. The law gives him sufficient time to withdraw from the jurisdiction into which he is thus forced to come before he is subject to civil process. Only when he voluntarily enters within the jurisdiction of that court, or remains after he has had sufficient time to depart therefrom, can he be made the subject of civil process. In civil suits the defendant is entitled by law to be sued within the jurisdiction of his domicile, unless by his own act he places himself within the jurisdiction of the domicile of his adversary. This is not the rule, however, in criminal cases, which must be tried within the county and state where the crime is committed. Due protection to society against criminals forbids that they should be thus privileged from arrest for crimes, and opportunity given them to escape. A criminal acquires no right of asylum in a state to which he has fled. The

court in *Re Cannon* were not discussing a case involving a criminal arrest, but only an arrest upon civil process. This is equally true of *People ex rel. Watson v. Detroit Super. Ct. Judge*, 40 Mich. 729, cited in the opinion in *Cannon's Case*. The language used in each case was entirely applicable to the facts, and, if anything was said which can be construed into applying to arrests for crime, it must be regarded as *dictum*. The decision in that case would undoubtedly have been the same if the case of *Lascelles v. Georgia* had been decided. Some of the language might possibly have been modified; or not used at all. This being a Federal question, as above stated, and no such question being in fact involved in *Cannon's* and *Watson's Cases*, we feel compelled to follow the decision of the Supreme Court of the United States.

The prisoner is therefore remanded.

Long, J., did not sit. The other Justices concurred.

MINNESOTA SUPREME COURT.

STATE of Minnesota *ex rel.* Wallace B. DOUGLAS *et al.*

William P. WESTFALL.

(.....Minn.....)

*Chapter 237, Laws 1901, providing for the Torrens system of registering land titles, is not unconstitutional in that it is special legislation; nor in that it deprives the owner of his interest in land without due process of law; nor in that it violates article 3 of the Constitution, vesting the powers of government in three distinct departments; nor in that examiners of title provided for by the act are appointed by the court, and not elected as county officers are required to be by § 4, art. 11, Const.

(February 14, 1902.)

PETITION for a writ of quo warranto to determine respondent's right to the office of examiner of land titles. Writ quashed.

The facts are stated in the opinion.

Messrs. W. B. Douglas, Attorney General, and Childs, Edgerton, & Wickwire, for relator:

The legislature is not authorized by the Constitution to classify counties for the purposes expressed in chapter 237, Laws 1901.

*Headnote by START, Ch. J.

NOTE.—As to constitutionality of land registration acts, see *People ex rel. Kern v. Chase* (Ill.) 36 L. R. A. 105; *State ex rel. Monnett v. Gullbert* (Ohio) 38 L. R. A. 519; *People ex rel. Deneen v. Simon* (Ill.) 44 L. R. A. 801; and *Tyler v. Registration Ct. Judges* (Mass.) 51 L. R. A. 433, dismissed in 179 U. S. 405, 45 L. ed. 252.
57 L. R. A.

State ex rel. Courthouse & City Hall Comrs. v. Cooley, 56 Minn. 550, 58 N. W. 150; *Alexander v. Duluth*, 57 Minn. 49, 58 N. W. 866; *State ex rel. Duluth v. St. Louis County Dist. Ct.* 61 Minn. 547, 64 N. W. 190; *State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 108, 5 N. E. 228; *State ex rel. Columbus v. Mitchell*, 31 Ohio St. 592; *State v. Pugh*, 43 Ohio St. 98, 1 N. E. 439; *McGill v. State*, 34 Ohio St. 228; *Bronson v. Oberlin*, 41 Ohio St. 481, 52 Am. Rep. 90; *Darling v. Rodgers*, 7 Kan. 592; *Robinson v. Perry*, 17 Kan. 248; *Dundee Mortg. Trust Invest. Co. v. School Dist. No. 1*, 10 Sawy. 52, 21 Fed. 151; *State ex rel. Randolph v. Wood*, 49 N. J. L. 85, 7 Atl. 286; *State ex rel. Richards v. Hammer*, 42 N. J. L. 436; *Dunne v. Kansas City Cable R. Co.* 131 Mo. 5, 32 S. W. 641; *State ex rel. Atty. Gen. v. Miller*, 100 Mo. 449, 13 S. W. 677; *State ex rel. Dickason v. Marion County Ct.* 128 Mo. 442, 30 S. W. 103, 31 S. W. 23; *Murnane v. St. Louis*, 123 Mo. 491, 27 S. W. 711; *State, Long Branch Police, Prosecutor, v. Sloane*, 49 N. J. L. 356, 8 Atl. 101; *Ayers's Appeal*, 122 Pa. 278, 2 L. R. A. 577, 16 Atl. 356; *Davis v. Clark*, 106 Pa. 377; *Weinman v. Wilkinsburg & E. L. Pass. R. Co.* 118 Pa. 192, 12 Atl. 288; *Morrison v. Bachert*, 112 Pa. 322, 5 Atl. 739; *Re Ruan Street*, 132 Pa. 277, 7 L. R. A. 193, 19 Atl. 219; *Safe Deposit & T. Co. v. Fricke*, 152 Pa. 231, 25 Atl. 530.

The act is void because it contemplates the taking of property without due process of law, in violation of both the state and Federal Constitutions.

Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen.

Cooley, Const. Lim. 5th ed. 432-435; *State ex rel. Monnett v. Guilbert*, 56 Ohio St. 575, 38 L. R. A. 525, 47 N. E. 551; *People ex rel. Kern v. Chase*, 165 Ill. 527, 36 L. R. A. 105, 46 N. E. 454; *People ex rel. Deneen v. Simon*, 176 Ill. 165, 44 L. R. A. 801, 52 N. E. 910; *Tyler v. Registration Ct. Judges*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812; *Bardwell v. Collins*, 44 Minn. 103, sub nom. *Bardwell v. Anderson*, 9 L. R. A. 152, 46 N. W. 315.

The legislature cannot require a person in the uninterrupted enjoyment of his property to commence an action for the purpose of vindicating his rights against some void claim existing merely on paper, or to declare that by his failure to do so the title of his property shall vest in the holder of that void claim, who has never been in possession under it.

Baker v. Kelley, 11 Minn. 480, Gil. 358; *Feller v. Clark*, 36 Minn. 340, 31 N. W. 175.

The legislature cannot make the decree of the court confirming title in the applicant conclusive as against direct attack.

Vaulc v. Miller, 69 Minn. 445, 72 N. W. 452; *Shepherd v. Ware*, 46 Minn. 178, 48 N. W. 773; *Roussain v. Patten*, 46 Minn. 308, 48 N. W. 1122; *Brown v. Leves Comrs.* 50 Miss. 480; *Tyler v. Registration Ct. Judges*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206.

The legislature cannot confer upon the judiciary power to appoint examiners of titles.

State ex rel. Ooogan v. Barbour, 53 Conn. 85, 55 Am. Rep. 65, 22 Atl. 686; *Taylor v. Com.* 3 J. J. Marsh. 401; *Evansville v. State ex rel. Blend*, 118 Ind. 443, 4 L. R. A. 93, 21 N. E. 267; *People ex rel. Nichols v. McKee*, 68 N. C. 429; *Case of Election Supers.* 114 Mass. 251, 19 Am. Rep. 341; *People ex rel. Simmons v. Sanderson*, 30 Cal. 160; *Dickey v. Hurlburt*, 5 Cal. 343; *State ex rel. Luley v. Simons*, 32 Minn. 540, 21 N. W. 750; *People ex rel. Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *Rockwell v. Fillmore County*, 47 Minn. 219, 49 N. W. 690; *Smith v. Strother*, 68 Cal. 194, 8 Pac. 852; *Butler v. State*, 97 Ind. 373; *Houseman v. Montgomery*, 58 Mich. 364, 25 N. W. 369; *Re Senate*, 10 Minn. 78, Gil. 56; *Vaughn v. Harp*, 49 Ark. 160, 4 S. W. 751; *Ex parte Griffiths*, 118 Ind. 83, 3 L. R. A. 398, 20 N. E. 513; *Re Hathaway*, 71 N. Y. 238; *Foreman v. Hennepin County*, 64 Minn. 372, 67 N. W. 207.

The legislature cannot make the court a registration office.

If the said office can have any existence under the act, it is a county office, and must be filled by election.

State ex rel. Loring v. Benedict, 15 Minn. 198, Gil. 153; *State ex rel. Clark v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488; *Re Hathaway*, 71 N. Y. 238.

Messrs. Snyder & Gale, for respondent:
A constitutional prohibition against special legislation on a particular subject does not deprive the legislature of the power to classify the subjects of legislation and apply different rules to the different classes.

57 L. R. A.

State ex rel. Courthouse & City Hall Comrs. v. Cooley, 56 Minn. 548, 58 N. W. 150; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *State ex rel. Oblinger v. Spaude*, 37 Minn. 322, 34 N. W. 164; *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156; *Cobb v. Bord*, 40 Minn. 479, 42 N. W. 396; *Stave v. Donaldson*, 41 Minn. 74, 42 N. W. 781; *Alexander v. Duluth*, 57 Minn. 47, 58 N. W. 866, 77 Minn. 445, 80 N. W. 623.

In determining whether the legislature has adopted a proper basis of classification under these constitutional restrictions, the courts have uniformly applied the same tests which they apply in determining whether a law is commonly called "class legislation."

State ex rel. Courthouse & City Hall Comrs. v. Cooley, 56 Minn. 548, 58 N. W. 150; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Cameron v. Chicago, M. & St. P. R. Co.* 63 Minn. 384, 31 L. R. A. 553, 65 N. W. 652; *State ex rel. Luria v. Wagener*, 69 Minn. 206, 38 L. R. A. 677, 72 N. W. 67.

A law is general and uniform in its operation which operates equally upon all the subjects within the class of subjects for which the rule is adopted.

Nichols v. Walter, 37 Minn. 264, 33 N. W. 800; *State ex rel. Oblinger v. Spaude*, 37 Minn. 324, 34 N. W. 164; *State ex rel. Richards v. Hammer*, 42 N. J. L. 435.

Statutes which divide municipal corporations into classes according to population, and which embrace legislation adapted to the different classes, are general in their nature, and not a breach of the constitutional prohibition against the enactment of special laws.

State ex rel. Duluth v. St. Louis County Dist. Ct. 61 Minn. 542, 64 N. W. 190; *Bowes v. St. Paul*, 70 Minn. 341, 73 N. W. 184; *State ex rel. Anderson v. Sullivan*, 72 Minn. 127, 75 N. W. 8; *Murray v. Ramsey County*, 81 Minn. 359, 51 L. R. A. 828, 84 N. W. 103; *State ex rel. Douglas v. Ritt*, 76 Minn. 531, 79 N. W. 535; *Alexander v. Duluth*, 77 Minn. 445, 80 N. W. 623.

Every reasonable doubt should be resolved in favor of the constitutionality of a legislative act.

State ex rel. Hagestad v. Sullivan, 67 Minn. 379, 69 N. W. 1094; *State ex rel. Douglas v. Ritt*, 76 Minn. 531, 79 N. W. 535; *State ex rel. Anderson v. Sullivan*, 72 Minn. 127, 75 N. W. 8.

The Minnesota Torrens law applies with more force, and is needed much more, in the larger counties of the state than in the counties where there are fewer transfers, and where as a rule the people of the county are familiar with the history of the titles.

Peebles v. Dunn, 157 N. Y. 528, 43 L. R. A. 247, 52 N. E. 572; *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603; *Johnson v. Milwaukee*, 88 Wis. 383, 60 N. W. 270.

The tenure by which land within the bounds of a state is held, and the manner and form of its acquisition, transfer, and

descent, shall be determined and controlled by the state in which it lies.

Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192.

Due process of law, generally speaking, is the right of a person to the opportunity to be heard as to his rights before a competent tribunal to hear and determine under rules prescribed by law.

State ex rel. Blaisdell v. Billings, 55 Minn. 467, 57 N. W. 206, 794; *Baker v. Kelley*, 11 Minn. 480, Gil. 358.

The legislature may provide for determining and quieting the title of real estate within the limits of the state and within the jurisdiction of the court, after actual notice to all known claimants and notice by publication to all other persons.

Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585; *Shepherd v. Ware*, 46 Minn. 174, 48 N. W. 773; *McClymond v. Noble*, 84 Minn. 329, 87 N. W. 838; *Tyler v. Registration Ct. Judges*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812.

The provision binding possible claimants, who have been omitted for any reason from the proceedings, is also constitutional and valid, the time allowed such persons being a reasonable time in which to present their claims in these proceedings *in rem*.

Rezford v. Knight, 11 N. Y. 308; *State v. Messenger*, 27 Minn. 125, 6 N. W. 457; *Cooley*, Const. Lim. 6th ed. 450; *Hill v. Townley*, 45 Minn. 169, 47 N. W. 653; *Baker v. Kelley*, 11 Minn. 480, Gil. 358; *London & N. W. American Mortg. Co. v. Gibson*, 77 Minn. 394, 80 N. W. 205, 777; *Henningsen v. Stillwater*, 81 Minn. 217, 83 N. W. 983; *Vaule v. Miller*, 69 Minn. 445, 72 N. W. 452; *Whitney v. Wegler*, 54 Minn. 235, 55 N. W. 927.

By the provisions of § 1 of the law it is made optional with any owner of real estate to have his title registered.

If the owner of property consents to its taking for either a public or a private purpose, he cannot afterward claim the benefit of a constitutional provision prohibiting the taking of such property for either a public or private purpose.

Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; *Rochester v. Upham*, 19 Minn. 108, Gil. 78; *McGee v. Hennepin County*, 84 Minn. 472, 88 N. W. 9; *People ex rel. Deenen v. Simon*, 176 Ill. 165, 44 L. R. A. 801, 52 N. E. 910.

The provisions of the act relating to the appointment and services of the examiner of title are constitutional.

Carson v. Smith, 5 Minn. 78, Gil. 58, 77 Am. Dec. 539; *Rockwell v. Fillmore County*, 47 Minn. 219, 49 N. W. 690; *Re Supreme Ct. Janitor*, 35 Wis. 410; *State ex rel. Hovey v. Noble*, 118 Ind. 350, 4 L. R. A. 101, 21 N. E. 244.

If the power is extrajudicial there is no infringement of the constitutional provision in question.

State ex rel. Childs v. Griffen, 69 Minn. 311, 72 N. W. 117; *Hovey v. State ex rel. Carson*, 119 Ind. 395, 21 N. E. 21, 57 L. R. A.

The power to appoint is not exclusively legislative, executive, or judicial, but political.

People ex rel. Grinnell v. Hoffman, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788; *Terre Haute v. Evansville & T. H. R. Co.* 149 Ind. 174; 37 L. R. A. 189, 46 N. E. 77.

Start, Ch. J., delivered the opinion of the court:

This is an information in the nature of quo warranto to determine the respondent's right to the office of examiner of titles, to which he interposed a general demurrer. The sole issue of law raised by the demurrer is this: Is chapter 237, Laws 1901, by virtue of which the respondent was appointed such examiner, providing for the Torrens system of registering land titles, constitutional? The basic principle of this system is the registration of the title of land, instead of registering, as the old system requires, the evidence of such title. In the one case only the ultimate fact or conclusion that a certain named party has title to a particular tract of land is registered, and a certificate thereof delivered to him. In the other the entire evidence, from which proposed purchasers must, at their peril, draw such conclusion, is registered. Necessarily the initial registration of the title—that is, the conclusive establishment of a starting point binding upon all the world—must rest upon judicial proceedings. The act in question provides for such proceedings, and the full details thereof, which will be referred to as we proceed. The act, by its terms, applies only to counties having more than 75,000 inhabitants, and registration is made optional with the landowner. It is the contention of the relator that the act is unconstitutional for the reasons:

1. It is special legislation, contravening §§ 33 and 34 of article 4 of the state Constitution, because the classification of counties according to population for the purposes of the act is unauthorized. Population, if not limited to the present, may be a basis of classification of counties for the purposes of legislation if germane to the purpose of the law; otherwise not. *State ex rel. Duluth v. St. Louis County Dist. Ct.* 61 Minn. 548, 64 N. W. 190; *State ex rel. Anderson v. Sullivan*, 72 Minn. 127, 75 N. W. 8; *State ex rel. Douglas v. Ritt*, 76 Minn. 531, 79 N. W. 535; *Murray v. Ramsey County*, 81 Minn. 359, 51 L. R. A. 828, 84 N. W. 103. The subject of classification of counties on the basis of population is an embarrassing one for the courts, for the reason that numerous and complex considerations enter into it, and it is often difficult to determine whether there is any natural relation between the population of counties of the given class and the subject-matter of the law classifying them. *Alexander v. Duluth*, 77 Minn. 448, 80 N. W. 623. If it is clear that there is no natural relation or connection between the population of counties of a particular class and the subject-matter of the statutes so classifying them for the pur-

poses of legislation, courts ought unhesitatingly to hold them unconstitutional; otherwise it would sanction the classification of counties on the basis of population for any and all purposes of legislation, whereby the constitutional amendment forbidding special legislation would be deprived of all virility. On the other hand, courts ought never to be unmindful of the fact that the lawmaking power is vested in the legislature. Therefore, if there be any facts fairly calling for the exercise of legislative discretion in the classification of particular subdivisions of the state for the purposes of legislation, courts cannot review such discretion, and declare statutes making such classifications invalid, simply because they differ with the legislature as to the propriety of the classification. It is only when the classification is so manifestly arbitrary as to evince a legislative purpose of evading the provisions of the Constitution that the courts may and must declare the classification unconstitutional. In considering the constitutionality of a statute, courts will take judicial notice of all facts relevant to the question. *State ex rel. Courthouse & City Hall Comrs. v. Cooley*, 56 Minn. 540, 58 N. W. 150; *State ex rel. Marr v. Stearns*, 72 Minn. 200, 75 N. W. 210. If, then, the classification attempted in this act is merely an arbitrary one, it is special legislation, and void. But, if facts exist of which we may take judicial notice, which fairly suggest the practical necessity or propriety of different legislation in respect to land titles in counties of over 75,000 inhabitants than in the other counties of the state, the act is valid. With whether the law is a wise or an unwise one we have nothing to do. We are of the opinion that the facts that the largest cities of the state are within the limits of the classified counties, that the platted portions thereof embrace a greater number of subdivisions and parcels of land than the less densely populated portions of the state, that the individual owners of the land are more numerous, the value thereof much greater, and that the records of the evidence of the titles thereto rapidly increase in volume, and become more complex with the increase of population, whereby the risks of defective titles, and expenses for abstracts thereof, and the delays and difficulties in transferring real estate, are proportionately increased, were proper for the consideration of the legislature in determining whether there was a practical necessity or propriety for the classification in question, and justify it. The differences suggested are to some extent differences in degree (see *Murray v. Ramsey County*, 81 Minn. 359, 84 N. W. 103), but they are not wholly so, for many of them are essential differences in the conditions and needs in the premises of the three most populous counties of the state and those of the other counties having a much smaller population. It does not appear in this case that the classification was purely arbitrary; on the contrary, the facts suggest a natural reason therefor, which

57 L. R. A.

made it a question solely for the legislature. We therefore hold that the act is not void as special legislation.

2. The act is void because it contemplates the taking of property without due process of law, in violation of both state and Federal Constitutions. The act provides, among other things, that the owner of any estate or interest in land may have the title thereto registered by making an application in writing, stating certain facts, to the district court of the county wherein the land is situated. Thereupon the court has power to inquire into the state of the title, and make all decrees necessary to determine it against all persons, known or unknown. The application must be filed and docketed in the office of the clerk of the court, and a duplicate thereof filed with the register of deeds, who is *ex officio* registrar of titles. The application is then referred by the court to an examiner of titles, who investigates the titles, and inquires as to the truth of the allegations of the application, particularly whether the land is occupied or not, and makes and files a report of his examination with the clerk. Upon the filing of the report the clerk issues a summons by order of the court, wherein the applicant is named as plaintiff, and the land described, and all other persons known to have any interest in or claim to the land and "all other persons or parties unknown" claiming any interest in the real estate described in the application are named as defendants. The summons must be directed to such defendants, and require them to appear and answer within twenty days. It must be served in the manner now provided for the service of summons in civil action, with this exception: that the summons shall be served on non-resident defendants and upon all unknown persons by publishing it in a newspaper printed and published in the county where the application is filed once a week for three consecutive weeks. In addition to such publication the clerk shall, within twenty days after the first publication, mail a copy of the summons to all nonresident defendants whose place or address is known, and the court may order such additional notice of the application as it may direct. Any interested party may appear and answer. If no appearance is made, the court may enter the default, but must take proof of the applicant's right to a decree, and is not bound by the report of the examiner, but may require further proof. If appearance is made, the case shall be set down for trial, and heard as other civil actions. If the court finds that the applicant has title proper for registration, a decree confirming the title and ordering registration shall be entered. Every such decree shall bind the lands and quiet title thereto, except as otherwise provided in the act, and shall be forever binding and conclusive upon all persons, whether mentioned by name or included in the expression "all other persons or parties unknown," and such decree shall not be open by the reason of absence, infancy, or other disability, or any proceedings at

law for reversing judgment, except as provided in the act, but appeals may be taken to the supreme court as any other civil action. Any person who has any interest in the land, and who has not actually been served or notified of the filing of the application, may at any time within sixty days from the entry of such decree appear, and file his sworn answer, providing no innocent purchaser for value has acquired an interest. If there is any such purchaser, the decree of registration remains in full force forever, subject only to the right of appeal, and the person aggrieved must look for his relief to the assurance fund mentioned in the act, and to any person procuring the decree by fraud. Every person receiving a certificate of title and every subsequent purchaser in good faith takes the same free from all encumbrances, except such as are noted thereon. Upon entering the decree of registration, a certified copy thereof must be filed by the clerk in the office of the registrar of titles, who proceeds to register the title pursuant to the decree. This he does by entering an original certificate in the registrar of titles, and delivering a duplicate thereof to the owner, who may thereafter convey his title by the execution of deeds and the surrender of his certificate to the registrar for cancellation, who issues a new certificate to the purchaser. No title to registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession. The judges of the district court are required to appoint one or more attorneys as examiners of title, whose salaries are to be fixed by the board of county commissioners. Such examiners may act as referees on any pending application, but all their acts are subject to review by the district court. Every applicant must pay one-tenth of 1 per cent on the assessed value of the land to be registered for the purpose of creating an assurance fund, to be held in trust for the benefit of anyone sustaining loss by the operation of the act. Such is a brief outline of the provisions of the act, which it is necessary to have in mind when considering the question whether the act authorizes the taking of property without due process of law. Counsel for the relator suggests several objections to the law, which are not germane to the particular question whether the act contemplates the taking of property without due process of law. Attention is called to the fact that the act (§ 20) allows the defendant twenty days after the service of the summons in which to appear and answer, while by the prescribed form of the summons they are required to answer in ten days. This discrepancy does not affect the constitutionality of the law, or its practical operation, for it is apparent, when all of the provisions of the act as to the summons and the time within which the defendants must answer are considered, that the prescribed form of the summons, in so far as it requires the answer to be filed in ten days, must yield to the other express provisions upon the subject, and twenty days be

substituted in the form for ten days. Again, it is suggested that land held under a registered title cannot be gained or lost by adverse possession, while all land in the counties of the state to which the act does not apply may be so lost or gained; and, further, that the landowners in the counties to which the act applies have a remedy for clearing their titles from clouds, and quieting them, not accorded to other landowners of the state. These are suggestions pertinent to the legislative question of classification, but not to the question whether the procedure for securing a decree quieting the title to the land as a basis for the initial registration is due process of law. If the classification was authorized, none of the suggested matters render the act invalid. It is also contended by the relator that under the provisions of the act a person may be in actual possession of land the title to which is to be registered and service made upon him by publication, which may result in his being registered out of his title thereto without ever having any actual knowledge of the judicial proceeding instituted to secure a decree clearing and quieting a title as a basis for the initial registration. If this be the correct construction of the provisions of the act relating to the service of the summons, they do not constitute due process of law. *Baker v. Kelly*, 11 Minn. 480, Gil. 358. But the act is not reasonably susceptible of such a construction. The application for registration must be presented to the district court of the county in which the land is situate; hence such occupant is not a nonresident party, nor an unknown one. Having possession of the land, he has an apparent interest therein, and, if he is not the applicant, must be made a party defendant, and the summons served upon him as in civil actions. It is only on nonresidents and unknown persons or parties that service by publication may be made. Nor is this all. One of the matters which the examiner is particularly charged with the duty of investigating and reporting upon is the occupation of the land, to the end that the court may be advised as to all adverse claimants in possession, that they may be made parties to the proceedings, and served with the summons. It is not reasonably possible, if the mandates of the act are observed, that in any case the occupant of the land would not be made a party to the proceeding, and duly served with the summons. Actions and proceedings to conclusively establish rights and titles against all claimants and parties, known and unknown, are not novelties in our jurisprudence, for decrees probating wills, distributing estates of deceased persons, quieting title to real estate against unknown heirs and unknown parties, have been repeatedly held to be conclusive on the whole world. It is now the settled doctrine of this court that the district courts of this state may be clothed with full power to inquire into and conclusively adjudicate the state of the title of all land within their respective jurisdictions, after actual notice to

all of the known claimants within the jurisdiction of the court, and constructive notice by publication of the summons to all other persons or parties, whether known or unknown, having or appearing to have some interest in or claim thereto. The proceeding provided for by the act in question is such a one. It is substantially one *in rem*, the subject-matter of which is the state of the title of land within the jurisdiction of the court, and the provisions of the act for the serving the summons and giving notice of the pendency of the proceeding are full and complete, and satisfy both the state and Federal Constitutions. To hold otherwise would be to hold that the courts of this state cannot in any manner acquire jurisdiction to clear and quiet the title to real estate by a decree binding all interests and all persons or parties, known or unknown, for the provisions of this act are as full and complete as to giving notice to all interested parties as it is reasonably possible to make them. That the courts of this state have jurisdiction to so clear and quiet title by their decrees is no longer an open question in this state. *Shepherd v. Ware*, 46 Minn. 174, 48 N. W. 773; *Inglee v. Welles*, 53 Minn. 197, 55 N. W. 117; *McClymond v. Noble*, 84 Minn. 329, 87 N. W. 838. See also *Mayall v. Mayall*, 63 Minn. 511, 65 N. W. 942, and *Mathews v. Lightner* (Minn.) 88 N. W. 992.

It is further claimed by the relator that the provision of the act which limits the exercise of the right to a party not actually served with process or notified of the proceeding to apply to the court to open the decree and permit him to answer to sixty days after the entry of the decree, and that no proceeding shall be had for the recovery of the land after that time, is unconstitutional. It is urged in this connection that the legislature cannot require a person in the unchallenged possession of land to commence an action or institute any proceeding within a limited time to vindicate his claim, or be barred of all rights in the premises. This is true. *Baker v. Kelley*, 11 Minn. 480, Gil. 358. But it is equally true that when a party so in possession is by a summons served as in civil actions, and thereby notified that the land he occupies is claimed by another, and that he is required to appear in court and defend against the claim, he must so do, or be conclusively barred by the judgment entered in the proceeding. Now, as already suggested, all persons in possession of the land must be made parties to the proceeding to secure the registration of the title thereto, and the summons must be served upon them. If the act is complied with, it is extremely improbable that an adverse claimant in actual possession of the land would fail of receiving notice of the pendency of the proceeding to register the title. However this may be, it is reasonably clear, and we so hold, that the particular provision of the act, which, in effect, forbids the commencement or the defense, in opposition to the decree, of any action or proceeding to recover the land brought

more than sixty days after the entry of the decree, does not apply to an adverse claimant in the actual possession of the land, upon whom the summons is not served; for, being in possession, he cannot bring such an action, and his right to defend his possession and title in such a case cannot be made to depend upon his nonaction. So construed, the provision of the act, both as to the opening of the decree and as to the commencement of any action or proceeding to recover the land in opposition to the decree, is valid as a statute of limitations. The time limit seems to us to be a short one, but, in view of the complete and far-reaching provisions of the act for notice to all parties, and the fact that the right of appeal as in civil actions is given, we cannot hold that the legislature arbitrarily exercised its discretion in fixing the limit. *State v. Messenger*, 27 Minn. 119, 6 N. W. 457; *Russell v. H. C. Akeley Lumber Co.* 45 Minn. 376, 48 N. W. 3; *London & N. W. American Mortg. Co. v. Gibson*, 77 Minn. 394, 80 N. W. 205, 777; *Henningsen v. Stillwater*, 81 Minn. 215, 83 N. W. 983. Our conclusion, then, is that the act is not unconstitutional in that it deprives parties of their interest in land without due process of law. Similar statutes providing for the Torrens system of registration have been sustained against a like objection by the courts of other states in carefully considered opinions. *Tyler v. Registration Ct. Judges*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812; *People ex rel. Deneen v. Simon*, 176 Ill. 165, 44 L. R. A. 801, 52 N. E. 910. A contrary ruling was made in the case of *State ex rel. Monnett v. Guilbert*, 56 Ohio St. 575, 38 L. R. A. 519, 47 N. E. 551; but the provisions of the statute passed upon in that case as to notice to all persons having any possible interest in the land were not as full as they are in our statute.

3. The act, in so far as it attempts to confer upon the district courts the power to appoint examiners of titles, is void, because it violates article 3 of the state Constitution, vesting the powers of government in three distinct departments. The claim is without merit. Judicial power includes the authority to appoint all necessary subordinate officers and assistants essential to the conducting of judicial business. The examiners provided for by this act are subordinate officers or assistants of the courts, to aid them in the discharge of the judicial duties imposed upon them by the act. It was therefore competent and proper for the legislature to provide for their appointment by the courts, as much so as would be a statute authorizing them to appoint a stenographer or a receiver in insolvency. Nor does the act contravene article 3 of the Constitution by conferring judicial duties upon the registrars of titles, for it expressly provides that "all acts performed by registrars . . . shall be performed under rules and instructions established and given by the district court having jurisdiction of the county in which they act." The registration is the act of the court. The fact that

it may be done by the registrar, under general orders, where there is no question, is not different from the power of the clerk to enter judgment, in cases ripe for judgment, under a general order or rule of the court. *Tyler v. Registration Ct. Judges*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812. Nor does the act attempt to make the court a registration office, as relator claims. It simply confers upon the court certain judicial duties incident to the plan of registering land titles provided by the act.

4. The last reason urged why the act is

invalid is that the office of examiner of titles is a county office, which must be filled by popular election, as required by § 4 of article 11 of the state Constitution. Examiners of titles are not county officers, within the meaning of this constitutional provision, for the reason already stated in connection with the consideration of the question as to the power of the court to appoint them.

We therefore hold that chapter 237, Laws 1901, is constitutional.

Writ quashed.

NEBRASKA SUPREME COURT.

William THOMSEN *et al.*, Plffs. in Err.,
v.

HALL COUNTY.

(.....Neb.....)

1. An action brought against a county treasurer and his bondsmen for the recovery of moneys alleged to have been converted by such treasurer is not prematurely brought, if commenced after the termination of the office of such treasurer, and after he has given a bond and qualified as his own successor in office.

2. In this state a county treasurer is an insurer of the funds which come into his hands *ex officio*, and such treasurer and his bondsmen cannot, in an action by the county to recover funds not accounted for, plead that such funds were lost, without any fault or neglect on the part of the treasurer, by the failure of a bank in which they were deposited for safe keeping only, and in good faith, believing such bank to be solvent.

3. In an action by a county against a county treasurer and his bondsmen to recover funds alleged to have been converted by the treasurer, it is not error to compute interest on such funds from the date at which, under the terms of the statute and the official bond, the funds should have been accounted for and turned over to the successor in office of such treasurer.

(February 6, 1902.)

ERROR to the District Court for Hall County to review a judgment in favor of plaintiff in an action upon the county treasurer's bond. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. W. H. Thompson and O. A. Abbott, for plaintiffs in error:

Assuming the facts set out in the petition to be true, it was clearly the duty of the county board to remove this officer and appoint another in his stead.

*Headnotes by KIRKPATRICK, C.

NOTE.—As to liability on official bonds for loss of money by theft or bank failure, see also, in this series, *Wilson v. People ex rel. Pueblo & A. V. R. Co.* (Colo.) 22 L. R. A. 449, and note; *State ex rel. Overton v. Copeland* (Tenn.) 31 L. R. A. 844; *Fairchild v. Hedges* 57 L. R. A.

State ex rel. Craig v. Sheldon, 10 Neb. 452, 6 N. W. 757.

Until he is removed he is the only person authorized to receive or receipt for moneys due the county; and what is there to prevent him from going to the clerk's office and releasing this judgment and acknowledging payment thereof?

Washington County v. Semler, 41 Wis. 374.

The petition alleges two causes of action, and alleges them in the alternative,—“conversion or negligence.” These have but one feature common to both, and that is negative in its character. Neither can be based on the consent of the plaintiff. Negligence, broadly, consists in doing something which a man of ordinary prudence would not do, or failing to do something a prudent man should have done; conversion is the doing of some act an honest man would not do. Conversion can never be based on nonfeasance. As prudent men do not keep large sums of money about their persons or in fireproof safes or vaults, we would have been clearly guilty of negligence had we done so.

Law's Estate, 144 Pa. 499, 14 L. R. A. 103, 22 Atl. 831.

The law contemplates that the county board shall provide a place for the safe keeping of county funds.

State ex rel. First Nat. Bank v. Owen, 41 Neb. 651, 59 N. W. 886.

Had the principal provided a safe place for the keeping of his money, then the agent would have been responsible had he kept it somewhere else and loss had followed by reason of his acts.

Prior to *United States v. Prescott*, 3 How. 578, 11 L. ed. 734, the law of bailment applied to custodians of public moneys the same as to custodians of private funds.

Bridges v. Perry, 14 Vt. 282; *Albany County v. Dorr*, 25 Wend. 440; *Cumberland County v. Pennell*, 69 Me. 357, 21 Am. Rep. 284; *McCabe v. Fowler*, 84 N. Y. 314; *Law's*

(Wash.) 31 L. R. A. 851; *Bush v. Johnson County* (Neb.) 32 L. R. A. 223; *Healdsburg v. Mulligan* (Cal.) 33 L. R. A. 461; *Tillinghast v. Merrill* (N. Y.) 34 L. R. A. 678; *State v. Gramm* (Wyo.) 40 L. R. A. 690; and *Maloy v. Bernalillo County* (N. M.) 52 L. R. A. 126.

Estate, 144 Pa. 499, 14 L. R. A. 103, 22 Atl. 831; *Schouler, Exrs. & Admsrs.* § 321; *High, Receivers*, § 275; *Kerr, Receivers*, § 209.

The case of *United States v. Prescott*, 3 How. 578, 11 L. ed. 734, was not accepted as settling the law, and the question was presented to the Supreme Court again and again.

United States v. Morgan, 11 How. 160, 13 L. ed. 646; *United States v. Dashiell*, 4 Wall. 185, 18 L. ed. 321; *United States v. Kechler*, 9 Wall. 88, 19 L. ed. 576; *Boyden v. United States*, 13 Wall. 17, 20 L. ed. 527.

And the doctrine of these cases was finally repudiated in *United States v. Thomas*, 15 Wall. 353, 21 L. ed. 94; *Wilson v. People use of Pueblo & A. Valley R. Co.* 19 Colo. 199, 22 L. R. A. 449, 34 Pac. 944, and cases cited.

Messrs. Ralph R. Horth and Charles G. Ryan, for defendant in error:

The defendant Thomssen had already been removed from office by reason of the expiration of the term in which he defaulted. The fact that he was elected as his own successor, for a distinct and separate term of office, places the county in no worse position than if an entire stranger had been elected as his successor.

Amherst Bank v. Root, 2 Met. 536; *Citizens' Loan Asso. v. Nugent*, 40 N. J. L. 215, 29 Am. Rep. 230; *Thurston v. Clark*, 107 Cal. 285, 40 Pac. 435; *Woodward v. State ex rel. Thomssen*, 58 Neb. 598, 79 N. W. 164.

The petition, among other things, alleges a failure faithfully to account for and pay over all funds which came into his hands or under his control by virtue of his office; and these facts constitute such a breach of the condition of the official bond of a county treasurer as renders him and his sureties liable therefor.

Bush v. Johnson County, 48 Neb. 1, 32 L. R. A. 223, 66 N. W. 1023; *Mechem, Pub. Off.* § 914; *State v. Nevin*, 19 Nev. 162, 7 Pac. 650; *Washington County v. Semler*, 41 Wis. 374.

The court in *United States v. Thomas*, 15 Wall. 337, 21 L. ed. 89, approves of the results arrived at by the court in *United States v. Prescott*, 3 How. 578, 11 L. ed. 734, and the cases following it.

Tillinghast v. Merrill, 151 N. Y. 135, 34 L. R. A. 678, 45 N. E. 375; *Fairchild v. Hedges*, 14 Wash. 117, 31 L. R. A. 851, 44 Pac. 125; *State v. Nevin*, 19 Nev. 162, 7 Pac. 650; *State ex rel. Mississippi County v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *Maloy v. Bernalillo County (N. M.)* 52 L. R. A. 126, 62 Pac. 1112; *Wilson v. Wichita County*, 67 Tex. 647, 4 S. W. 67; *Hancock v. Hazzard*, 12 Cush. 112, 59 Am. Dec. 171; *State use of Wyandotte County v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *Halbert v. State ex rel. Martin County*, 22 Ind. 125; *Redwood County v. Tower*, 28 Minn. 45, 8 N. W. 907; *Lowry v. Polk County*, 51 Iowa, 50, 33 Am. Rep. 114, 49 N. W. 1049; *Nason v. Erie County Directors of Poor*, 126 Pa. 445, 17 Atl. 616; *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637; *Omro v. Kaime*, 39 Wis. 468; *Jefferson County v. Lineber* 57 L. R. A.

ger, 3 Mont. 231, 35 Am. Rep. 462; *State v. Walsen*, 17 Colo. 170, 15 L. R. A. 456, 28 Pac. 1119; *New Providence v. McEachron*, 33 N. J. L. 339; *Arnold v. State use of Itawamba County*, 77 Miss. 463, 27 So. 596; *Thompson v. Township Stateen*, 30 Ill. 99; *Rose v. Douglass Twp.* 52 Kan. 451, 34 Pac. 1046.

In the light of the conditions of this bond, the provisions of our statutes, and the adjudicated cases in other jurisdictions, the third count of the defendants' answer could not be held to state a defense to the cause of action stated in the petition.

Bush v. Johnson County, 48 Neb. 1, 32 L. R. A. 223, 66 N. W. 1023; *Lowry v. Polk County*, 51 Iowa, 50, 33 Am. Rep. 114, 49 N. W. 1049.

The wrongful act of a public officer cannot prejudice the public.

Bush v. Johnson County, 48 Neb. 1, 32 L. R. A. 223, 66 N. W. 1023; *Langan v. Sankey*, 55 Iowa, 52, 7 N. W. 393; *Kneeland v. Milwaukee*, 18 Wis. 413; *Mechem, Pub. Off.* § 934; *Herman, Estoppel*, § 1128; *Mullan v. State*, 114 Cal. 578, 34 L. R. A. 262, 46 Pac. 670; *Alleghany County v. Parrish*, 93 Va. 615, 25 S. E. 882; *Rund v. Fowler*, 142 Ind. 214, 41 N. E. 456; *Louisville Trust Co. v. Cincinnati*, 73 Fed. 716; *Hartford F. Ins. Co. v. State*, 9 Kan. 210.

Mr. W. S. Pearne also for defendant in error.

Kirkpatrick, C., filed the following opinion:

This is an action brought by the county of Hall against William Thomssen and the Fidelity & Deposit Company of Maryland, a corporation, defendants. Plaintiff in its petition recited the election of the defendant Thomssen to the office of county treasurer of Hall county; the execution, delivery, and approval of the bond upon which plaintiff in error the Fidelity & Deposit Company was surety; and the fact that Thomssen entered upon the discharge of his duties as county treasurer, and held the office for the term of two years and until the 4th day of January, 1898; that he had received from his predecessor in office and from other sources, as county treasurer, the sum of \$357,317.89, and that he had paid out and disbursed, together with what he had on hand and turned over to himself as his own successor, the sum of \$335,332.28, and no more, leaving as a balance due the county the sum of \$21,985.61, for which amount, with interest at the rate of 7 per cent per annum from January 4, 1898, the county prayed judgment. Plaintiffs in error filed separate answers, in which they admitted the election of Thomssen as county treasurer, and the execution and approval of his bond as set out in the petition, and in addition set out two defenses, each of which applies to a portion of, and, taken together, cover, the money alleged to have been converted: First, it is alleged that the Bank of Commerce of Grand Island had, during the term of office of the predecessor of Thomssen, given a bond to the county, and

been made a county depository for the sum of \$10,000, which had been deposited therein by the predecessor of Thomssen, and which sum was a part of the amount sought to be recovered by the county; that, for reasons pleaded in the answer, said sum had never been turned over to Thomssen, but still remained in the Bank of Commerce, on deposit to the credit of the county. To this portion of the answer a reply was filed by the county, which, in effect, admitted the allegations of the answer, and pleaded that the predecessor of Thomssen had given him a check for the \$10,000 so on deposit, and that Thomssen had presented the check at the bank, and had it certified, and allowed the funds to remain on deposit, and that Thomssen and his bondsmen by such act became liable to the county for the same. To this reply plaintiffs in error demurred, which demurrer was by the trial court sustained; the court's ruling thereon not being presented for consideration in this case. As to the remainder of the money alleged in the petition to have been converted by plaintiff in error Thomssen, it was alleged in the answers, in substance, that the Bank of Commerce was a corporation duly incorporated as a bank, and was at the time of his election, and for many years prior thereto had been, engaged in the banking business in the city of Grand Island; that it was then, and for many years past had been, generally known as a financially sound and safe depository for moneys, and was then believed to be safe; that at the time Thomssen entered upon the discharge of his duties as treasurer the county had provided no safe or secure place for the deposit or keeping of large sums of money, but had provided simply a fireproof safe and vault suitable for the purpose of keeping the records and valuable papers of the county, to prevent their loss and destruction by fire, and that the safe or vault was not a secure, safe, or suitable place in which to keep moneys of the county; that there were no banks in the county which had given bonds and were lawful depository banks; that plaintiff in error Thomssen, in good faith, and for the sole purpose of securely keeping and preserving the moneys belonging to the county, deposited a part of the moneys which came into his hands as treasurer in the Bank of Commerce to his credit as county treasurer, and not otherwise, and that such deposit was with the full knowledge and consent of the board of supervisors of the county, and that on or about the 20th day of January, 1896, the Bank of Commerce failed, suspended payment, closed its doors, and surrendered all of its assets and property into the hands of the state banking board, and that thereafter a receiver was appointed, who paid as dividends on the money so deposited the sum of \$6,415.05, leaving a balance in said bank to the credit of the county treasurer of \$9,450.38; that plaintiff in error Thomssen, by reason of the premises, was not liable for this balance; that he had acted in good faith and with due care and diligence; and that the money was lost

without any fault or negligence on his part. A jury was called to try the issues, and plaintiffs in error tendered evidence in support of the above set out portions of their answers, whereupon defendant in error interposed a demurrer *ore tenus*, which was sustained. Plaintiffs in error excepted to this ruling, and no further evidence being offered or received, the court instructed the jury to return a verdict for the county in the sum of \$9,450.38, with interest at 7 per cent thereon from January 4, 1898. Judgment was entered against plaintiffs in error on this verdict, separate motions for new trials were made and overruled, and the case brought to this court upon separate petitions in error for review.

Plaintiffs in error, in their brief, contend that the judgment of the trial court is erroneous for three reasons: First, because the action was prematurely brought; second, because the answer hereinbefore quoted constituted a good defense; and, third, because the court erred in allowing interest at 7 per cent from January 4, 1898, rather than from August 4, 1898, the date of the commencement of the suit. These assignments of error will be considered in their order.

In support of the first assignment it is contended that it was the duty of the county of Hall, under the provisions of § 1, art. 2, chap. 18, Comp. Stat. 1901, entitled *Counties and County Officers*, and under the provisions of § 94, art. 1, of the same chapter, on the 4th day of January, 1898,—the date on which the term of Thomssen as county treasurer expired,—to have required him to account for the funds in his custody and control, and that, upon his failure so to account, it was the duty of the county board to remove him from office and appoint a successor as county treasurer, and that because the county board failed to do this, and plaintiff in error Thomssen succeeded himself by re-election, there was no officer or person who could make a legal demand to turn over the county funds in his possession, and that no suit could be maintained by the county for funds in his hands during his first term of office until such legal demand had been made, and compliance therewith refused. The authorities cited by plaintiffs in error do not sustain this contention. There can be no doubt that under the statute the term of office of Thomssen expired, at the very latest, when he gave his bond, and qualified and entered upon the discharge of the duties of the office as his own successor. It is equally certain that upon his qualification for his new term he was another and distinct officer, to the same extent as though some other person had succeeded him. The sureties on his bond given for his first term would not be liable for any act of misfeasance on his part during his second term, and his second-term bondsmen would not be liable for money which never in fact came into his hands from himself as his own predecessor. In the case of *Amherst Bank v. Root*, 2 Met. 536, it is said: "If there be a re-election, it is in fact to another, and not the same, office,—such as the offices of treas-

urers of the state, counties, towns, and the like, where the office is created by law, and by the same law made annual." In *Citizens' Loan Assn. v. Nugent*, 40 N. J. L. 215, 29 Am. Rep. 230, it is said: "A man who is re-elected to an office may be truly said to have changed his official personality. Such a person, with respect to his position, is another officer, and it is in this sense that a man is sometimes said in these cases to be his own successor." In *Thruston v. Clark*, 107 Cal. 286, 40 Pac. 435, it is said: "Each term of office is an entity separate and distinct from all other terms of the same office." If this action had been brought prior to the 4th day of January, 1898, and during the continuance of the first term of office of plaintiff in error Thomssen, then there would be merit in this contention. It was properly the duty of the board of supervisors, under the terms of the statute cited, to have removed plaintiff in error from office, or to have refused to approve the bond tendered by him for his second term; but that there was a failure to perform this duty by the county board cannot prejudice the rights of the county in this action. It is very clear that the first contention of plaintiffs in error cannot be sustained.

It is next contended that the county treasurer, under the law of this state, is only a bailee for hire of the moneys that come into his hands by virtue of his office; that Thomssen having in good faith deposited the money of the county in the Bank of Commerce, which was at that time believed to be a safe and responsible banking institution, and these deposits being made with the knowledge of the county board, and the county having failed to furnish a safe and suitable place in which to keep the funds, therefore the answer of plaintiffs in error stated a good defense; and that the loss of the money must fall upon the county. This view is very ably presented by counsel for plaintiffs in error, and many authorities are cited which it is claimed support the doctrine stated. We have carefully examined these authorities, and are constrained to say that many of them were decided under statutes differing materially from our own, and the bonds therein involved differed materially from that involved herein. The weight of authority seems to be that the county treasurer is an insurer of the money coming into his hands by virtue of his office, and that such officer is liable absolutely to account for such funds, and, if funds are lost by the failure of a bank in which they have been deposited, the treasurer and his bondsmen must bear such loss. *Fairchild v. Hedges*, 14 Wash. 117, 31 L. R. A. 851, 44 Pac. 125; *State v. Nevin*, 19 Nev. 162, 7 Pac. 650; *Wilson v. Wichita County*, 67 Tex. 647, 4 S. W. 67; *Redwood County v. Tower*, 28 Minn. 45, 8 N. W. 907; *Lowry v. Polk County*, 51 Iowa, 50, 33 Am. Rep. 114, 49 N. W. 1049; *Mason v. Erie County Directors of Poor*, 126 Pa. 445, 17 Atl. 616; *Omro v. Kaime*, 39 Wis. 468; *Rose v. Douglass Twp.* 52 Kan. 451, 34 Pac. 1046. 57 L. R. A.

But if the weight of authority were as claimed by counsel, the rule could not obtain in this state. By the terms of § 21, art. 3, chap. 18, Comp. Stat. 1901, it is made a felony for the county treasurer to deposit money of the county in any bank other than such as may be deposited under the provisions of the depository law, and under this section it may be said that plaintiff in error Thomssen was violating a plain provision of the statute by making the deposit on account of which the loss occurred. And it seems clear that neither he nor his bondsmen can ask to be released from liability for the loss of money so wrongfully deposited. By § 91, art. 1, chap. 18, Comp. Stat. 1901, it is made the duty of the county treasurer to receive all moneys belonging to the county, from whatsoever source derived, and to pay out all moneys received by him for the use of the county, only on warrants issued by the county board according to law, except where special provision for the payment thereof is or may be otherwise made by law. By § 89 of the same chapter it is provided that the county clerk shall keep an account with the county treasurer, in which account he shall be charged with all moneys received by him, from whatever source derived, together with all taxes due, as shown by the tax lists, and in which he is to be credited only with uncollected taxes, and with the moneys he pays out in accordance with law. We find no provision in this section under which the treasurer may be credited with moneys that may have been lost, even though the loss occurred without any fault or neglect on his part. By § 21, chap. 10, Comp. Stat. 1901, it is provided that "any officer or person who is intrusted with funds belonging to the state or any county thereof, which may come into his possession by any appropriation or otherwise, shall be responsible for the same upon his bond." From an examination of these sections of the statute, it seems very clear that the purpose of the legislature was to make the county treasurer an insurer,—responsible absolutely for the repayment of all moneys which might come into his hands from any source,—and that from this liability, which under the law is absolute, neither he nor his bondsmen can be permitted to escape, even though the loss occurred through no fault or neglect of the treasurer. By § 23, art. 3, chap. 18, Comp. Stat. 1901, it is provided "that no treasurer shall be liable on his bond for money on deposit in bank under and by direction of the proper legal authority, if said bank has given bonds." From the provisions of this section, specifically exempting the treasurer from liability on his bond for funds deposited in a proper depository, it seems clear that the legislature understood that, under the other sections referred to, the treasurer's liability was absolute, requiring him to account for all other moneys.

An examination of the terms of the bond does not disclose anything that would in any way assist plaintiffs in error to avoid the liability which seems to have been fixed

by statute. Among the conditions contained in the bond we find the following: "Now, it the said William Thomsen shall render a true account of his office, and of the doings therein, to the proper authorities, when required thereby or by law, and shall promptly pay over to the persons or officers entitled thereto all moneys which may come into his hands by virtue of his said office, and shall faithfully account for all the balances of money remaining in his hands at the termination of his office," etc. It will thus be seen that by the terms of his bond, as well as by the provisions of the statute, plaintiffs in error are liable to account for all moneys coming into the hands of Thomsen as treasurer.

It cannot be said that the question is a new one in this state. In the case of *Bush v. Johnson County*, 48 Neb. 1, 32 L. R. A. 223, 66 N. W. 1023, this court said: "The duty imposed on a county treasurer by law, and assumed by him, of safely keeping, accounting for, and turning over the public funds which come into his hands by virtue of his office, is an absolute one; and, where his bond is conditioned for the faithful performance of the duties of the office by him, the sureties on the bond are bound and liable in like manner, and their responsibility is the same as that of their principal, and it will be no defense for either of the parties, in an action on the bond to recover public funds, predicated on an alleged failure of the treasurer to account for or pay them over, that the funds have been lost or stolen without the fault or negligence of the treasurer." It is said that the language just quoted is *obiter dictum*, and therefore not authority in the determination of the question under consideration. An examination of that opinion, however, shows that the language quoted was used in answer to the contention of Bush and his bondsmen, who pleaded in the action brought against them that the money sought to be recovered was lost in a reputable and presumably solvent bank that the treasurer had used due diligence in safeguarding the funds, and that they were lost through no fault or neglect on his part. Thus it is seen that the exact question here presented was decided in the *Bush Case*, and adversely to the contention of plaintiffs in error. It may therefore be said to be the settled law in this state, that a county treasurer is an insurer of the funds that come into his hands by virtue of his office, and that he and his bondsmen are li-

able for moneys lost by the failure of the banks in which moneys of the county are deposited, except where deposits are made in conformity with the depository act.

It is also contended that the county treasurer was justified in violating the law by depositing the funds in the Bank of Commerce, because the board of supervisors had failed to provide a suitably safe place to keep the funds, and that they knew that the county treasurer was depositing the funds in this bank. This contention is untenable. The county supervisors, as public officers, are not charged with the keeping of the county funds; and the rule is so elementary as to require no citation of authorities, that the public rights cannot be prejudiced by the fact that the supervisors knew that the county treasurer was violating the law; and the situation would be the same even though they connived at such violation.

It is next contended that the trial court erred in instructing the jury to return a verdict for interest at the rate of 7 per cent from the 4th day of January, 1898, up to the date of the trial. We are unable to find merit in this contention. Under the law, and by the terms of his bond, Thomsen was required to have on hand and account for this money at the end of his term, which was January 4, 1898. The county had a right to the use of the money at that time, with which to meet its obligations and stop interest on outstanding claims. The money in the hands of the treasurer was due at that time. That was the day on which, by the terms of his bond, he had agreed to account and turn over to his successor this money. Under the provisions of § 4, chap. 44, Comp. Stat. 1901, it would seem that interest should be computed from January 4, 1898, when the money became due. *Chenango County v. Birdsall*, 4 Wend. 453; *People v. Gasherie*, 9 Johns. 71, 6 Am. Dec. 263; *Board of Justices v. Fennimore*, 1 N. J. L. 242.

From what has been said, it follows that there is no error in the proceedings of the trial court, and it is therefore recommended that the judgment of the district court be affirmed.

Day and Hastings, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Ann Eliza RYERSON, *Plff. in Err.*,
v.

James E. BATHGATE *et al.*

(.....N. J.....)

*Where the owner or occupier of lands,

*Headnote by PITNEY, J.

by express invitation, induces a person to make use of a portion of the premises for an expressed purpose, his liability is confined within the limits of the invitation, and does not extend to injuries received by the person invited while using the premises for a purpose not expressed, and not authorized by the invitation.

NOTE.—For earlier cases in this series as to duty of owner of premises to protect person
57 L. R. A.

coming thereon by express or implied invitation, see *Pomponio v. New York, N. H. & H. R.*

(March 3, 1902.)

ERROR to the Circuit Court for Essex County to review a judgment in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. Edward Wade Benjamin, for plaintiff in error:

An express invitation to enter upon the premises of another, whether for the sole benefit of the person invited, or for their mutual benefit, imposes a duty on the owner to use reasonable care, so that the other party shall not be injured.

Phillips v. Burlington Library Co. 55 N. J. L. 307, 27 Atl. 478; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 584, 585, 26 L. ed. 235, 238.

A mere licensee can recover where he has been injured willfully by the defendant, or where the circumstances are such that concealment of hidden dangers would amount to a fraud.

Vanderbeck v. Hendry, 34 N. J. L. 467.

The defendants are bound by the acts of Mr. Silvernail done in the interest of his principals, although unauthorized, if the limitations or scope of employment are not known to the plaintiff, and they are within the agent's apparent authority.

1 Shearm. & Redf. Neg. 5th ed. §§ 146, 148; *Wilson v. Peverly*, 2 N. H. 548; *Oxford v. Peter*, 28 Ill. 434; *Schmidt v. Adams*, 18 Mo. App. 432; *Leviness v. Post*, 6 Daly, 321; *Hardegg v. Willards*, 12 Misc. 17, 33 N. Y. Supp. 25; *Courtney v. Baker*, 60 N. Y. 1; *Chicago, B. & Q. R. Co. v. Casey*, 9 Ill. App. 632.

The plaintiff was on the premises of the defendants on what she supposed was the business of the defendants; and while there she submitted herself to be directed by their agent, who was in sole charge of the premises at the time.

Persons left in charge of premises by their principals are empowered to take charge of them, at least for protection, and to control and direct, with that object in view, the conduct of strangers who may come upon the premises during that time.

West Jersey & S. R. Co. v. Welsh, 62 N. J. L. 655, 42 Atl. 736; 1 Shearm. & Redf. Neg. 5th ed. §§ 145, 146; *Allen v. London & N. W. R. Co. L. R. 6 Q. B. 65*; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Leviness v. Post*, 6 Daly, 321; *Courtney v. Baker*, 60 N. Y. 1; *Swinerton v. Le Bouillier*, 58 N. Y. S. R. 345, 28 N. Y. Supp. 53; *Mallach v. Ridley*, 15 N. Y. S. R. 4, 9 N. Y. Supp. 922; *Hardegg v. Willards*, 12 Misc. 17, 33 N. Y. Supp. 25; *Tousey v. Roberts*, 114 N. Y. 312, 21 N. E. 399.

Co. (Conn.) 32 L. R. A. 530; *Newark Electric Light & P. Co. v. Garden* (C. C. App. 3d C.) 37 L. R. A. 725; and *Tucker v. Draper* (Neb.) 54 L. R. A. 321.

As to liability to mere licensee, see notes to *Schmidt v. Bauer* (Cal.) 5 L. R. A. 580; and *Gordon v. Cummings* (Mass.) 9 L. R. A. 640; 57 L. R. A.

In view of the circumstances under which the plaintiff was acting, the nearness of the danger, the erroneous impression in her mind as to the character of the place created by Silvernail, the immediate consequence of a wrong step, will not justify the court in withholding the questions of negligence and contributory negligence from the jury.

Morman v. Rochester Mach. Screw Co. 53 App. Div. 497, 65 N. Y. Supp. 967; *Tousey v. Roberts*, 114 N. Y. 312, 21 N. E. 399; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *City R. Co. v. Lee*, 50 N. J. L. 435, 14 Atl. 883; *Pennsylvania R. Co. v. Middleton*, 57 N. J. L. 154, 31 Atl. 616; *Smith v. Irwin*, 51 N. J. L. 507, 18 Atl. 852.

Mr. Louis Hood for defendants in error.

Pitney, J., delivered the opinion of the court:

This was an action of tort for negligence, and upon the trial the plaintiff's evidence tended to prove the following facts: The plaintiff, a woman of sixty-one years of age, kept a small place of business in Newark, and the defendants were the proprietors of a meat shop near by, which was in the charge of one Silvernail, as manager. The plaintiff owned a domestic cat, of which she desired to be rid, and this fact she made known to Silvernail, who told her that the defendants needed a cat, and suggested that she bring it over to them. This she did a few days later, and on arriving at the meat shop found Silvernail, and also Mr. Swift, one of the defendants. As the plaintiff arrived at the place, the cat jumped from her arms and ran home, whereupon Mr. Swift said, "You must bring her over later." Accordingly, a few days later, plaintiff again carried over the cat, and upon entering the defendants' premises found Silvernail there alone. As she entered, she told him that he must put the cat in a closet, or else she would run away again. Silvernail thereupon walked to the opposite side of the room, opened a door, and said, "Put her in here." Plaintiff supposed it to be a closet, as she had requested him to put the cat in a closet. She testified that Silvernail only partially opened the door, "so that she could just get in to get the cat in," and that, as he opened the door, she anxiously ran and stooped to put the cat down, and did not see beyond the door, partly because it was dark there, and partly because a butcher's frock was hanging on the door. She says that she had the cat in her arms at the time, and it was scratching at her, and she was anxious to get the cat out of her arms; that she did not look in, but took it for granted the opening led to a closet. In fact the door opened upon a flight of stairs leading down to the cellar, and she stepped inside without

also *Redigan v. Boston & M. R. Co. (Mass.)* 14 L. R. A. 276; *Manning v. Chesapeake & O. R. Co. (W. Va.)* 16 L. R. A. 271; *Hart v. Cole (Mass.)* 16 L. R. A. 557; *Benson v. Baltimore Traction Co. (Md.)* 20 L. R. A. 714; and *Pomponio v. New York, N. H. & H. R. Co. (Conn.)* 32 L. R. A. 530.

looking, fell downstairs, and sustained injuries, to recover damages for which she brought this action against the defendants. Upon the evidence above indicated the plaintiff rested her case, whereupon the court granted the defendants' motion to nonsuit. To this ruling exception was taken, and the writ of error brings that ruling here for review. From the evidence the jury would have had a right to infer that the entrance of the plaintiff upon the defendants' premises was for their mutual benefit, and not for her benefit solely. Thereupon the plaintiff invokes the rule of law which was made the basis of the decision of this court in *Phillips v. Burlington Library Co.* 55 N. J. L. 307, 27 Atl. 478, and is exemplified in other recent cases, including that of *Furey v. New York C. & H. R. R. Co.* (decided by this court at the present term) 51 Atl. 505, viz., that the owner or occupier of lands, who, by invitation, express or implied, induces persons to come upon his premises, or to make use of the premises for a given purpose, is under a duty to exercise ordinary care to render the premises reasonably safe for such use. The application of this rule always depends upon the particular facts and circumstances of the case under consideration. The owner's liability for the condition of the premises is only coextensive with his invitation. And it is incumbent upon the plaintiff to show, not only that her entry upon the premises was by invitation of the owner, but also that at the time the injury was received she was in that part of the premises into which she was invited to enter, and was using them in a manner authorized by the invitation, whether express or implied. So far as Mrs. Ryerson's entry into the meat shop is concerned, she was undoubtedly within the protection of the rule. The question is whether she was entitled to that protection when she attempted to enter the door that was partially opened by Silvernail. The plaintiff's injury did not result from any defect in the doorway or in the staircase. So far as the case shows, there was no such defect. She was injured because she inferred that the doorway led to a closet, and thereupon attempted to enter, without taking observations herself, or making further inquiries. Was she justified in doing so? The case presents an instance of express invitation. In order to discover its extent, the words used by Silvernail are to be considered with reference solely to the plaintiff's expressed purpose and the act which accompanied his response. She said to Silvernail, "You must put her [the cat] in a closet, or she will run away again." He said, "Put her in here," and partially opened the door. This amounted to a declaration of her request that he should take the cat and put it in a closet. It did not even amount to a representation that the place indicated was a closet, in the ordinary acceptance of that term. By what he said and did he merely represented that the door opened into a place which, when the door was promptly closed again, would securely detain the cat. She had expressed no pur-

57 L. R. A.

pose to enter with the cat. On the contrary, she had notified him that the cat would run away on the slightest opportunity, which carried the inference that it was as important for the plaintiff to remain outside as it was for her to put the cat inside. The natural thing for her to do was to place the cat through the opening with her hands, and then permit Silvernail to quickly close the door, so as to detain the cat. If he had said, "This is a closet," she would have had a right to assume it to be such; but even so, in view of her expressed purpose and his reply, she would have had no right to infer an invitation to enter. If she went in with the cat, the way of exit required for her own withdrawal would necessarily be wider than would suffice for the cat's escape. The cat was confessedly more active than she. If she went in with the cat in her arms, it would, of course, be necessary for the door to be closed while she released the cat from her grasp. It is quite impossible to see how the plaintiff could then make her exit without permitting the cat to escape, especially if the closet was dark; and, in fact, she had not asked for a lighted one. It is sufficient to say that she had proposed no such roundabout program to Silvernail. The case shows that Silvernail formed a correct judgment of the exigencies of the problem, and that the plaintiff did not. He opened the cellar door barely wide enough to enable her to inject the cat according to the approved method, at the same time saying, "Put her in here." That was the extent of the invitation. The plaintiff exceeded the bounds of the invitation, and in so doing became a mere licensee. She was injured because she inferred, without warrant, that she might safely enter through the door, and because she thereupon did enter without taking observations herself or making further inquiries of Silvernail. The case rests upon its own peculiar circumstances; in view of which the disposition made of it by the trial court was correct.

The judgment should be affirmed.

Emma P. JENKINS, *Plff. in Err.*,
v.

PENNSYLVANIA RAILROAD COMPANY.

(.....N. J.....)

- *1. In an action of tort against a railroad company for negligently operating its locomotives in such manner as to cause them to emit smoke denser and more offensive in quality, and greater in volume, than

*Headnotes by PITNEY, J.

NOTE.—For other cases in this series as to right of abutting property owner to damages for smoke, noises, and smells caused by railroads or street railways, see *Wylie v. Elwood (Ill.)* 9 L. R. A. 726; *Sperb v. Metropolitan Elev. R. Co. (N. Y.)* 20 L. R. A. 752; and *Louisville R. Co. v. Foster (Ky.)* 50 L. R. A. 813.

reasonably required for the proper operation of the railroad, to the injury of plaintiff's property, situate near to the railroad, where the evidence shows such negligent operation, and substantial damage to the plaintiff's property, directly attributable thereto, it is erroneous for the trial court to limit the plaintiff's recovery to nominal damages, on the ground of inherent impossibility of determining how much of the damage was caused by smoke necessarily emitted in the careful operation of the railroad, and how much was caused by the smoke that was due to negligent operation.

2. In an action of tort, if it be impossible, in the nature of the case, to distinguish between the damage arising from the actionable injury and damage which has another origin, the jury should be left to make from the evidence the best estimate in their power, as reasonable men, and award to the plaintiff compensatory damages for the actionable injury.

(March 3, 1902.)

ERROR to the Supreme Court to review a judgment in favor of defendant in an action brought to recover damages for injuries to plaintiff's property by smoke and noxious vapors generated in the operation of defendant's road. *Reversed.*

The facts are stated in the opinion.

Messrs. Holt & Van Dike and Linton Satterthwait, for plaintiff in error:

In actions for personal injuries, juries are permitted to estimate the probable compensatory damages without any direct proof as to the amount. In actions for injuries to property, where, as in the case of personal injuries, the nature of the case makes exact proof impossible, the same rule, *ex necessitate*, obtains.

Ogden v. Lucas, 48 Ill. 492; *Elgin v. Welch*, 16 Ill. App. 483; *Harrison v. Adamson*, 86 Iowa, 693, 53 N. W. 334; *Washburn v. Gilman*, 64 Me. 163, 18 Am. Rep. 246; *Priest v. Nichols*, 116 Mass. 401; *Goldman v. Wolff*, 6 Mo. App. 496; *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339; *Mark v. Hudson River Bridge Co.* 103 N. Y. 28, 8 N. E. 243; *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.

If a part only of the injury of the plaintiff was the result of the negligent and improper operation of its railroad by the defendant, the plaintiff was entitled to such damages as the jury should find from the evidence would fairly compensate her for the injury thus sustained.

Thirteenth & F. Street Pass. R. Co. v. Boudrou, 92 Pa. 482, 37 Am. Rep. 707; *Gilbert v. Kennedy*, 22 Mich. 117; *Allison v. Chandler*, 11 Mich. 553.

Mr. Alan H. Strong for defendant in error.

Pitney, J., delivered the opinion of the court:

This was an action of tort. The gist of the plaintiff's declaration was that the defendant, in the operation of its railroad, negligently, unskilfully, and unnecessarily caused dense smoke, and noxious, penetrating, and discolored vapors, and offensive

odors, in greater quantities than were required for the legitimate and proper use and operation of the railroad, to arise and ascend near to, through, and about the plaintiff's dwelling house, situate near to the railroad, thereby rendering the house uncomfortable and unhealthy and unfit for habitation, and injuring the furniture and other personal property of the plaintiff therein contained. At the trial, evidence was introduced tending to show that smoke in great quantities, emitted from the locomotives upon the defendant's railroad, was carried to and upon the plaintiff's premises, causing substantial damage to the dwelling house and its contents. The plaintiff also introduced evidence tending to show negligent firing of defendant's locomotives, and that thereby smoke was produced, denser, darker in color, and greater in volume than was reasonably required for the proper operation of the railroad, and that, by the exercise of due care and skill on the part of defendant's employees in firing the locomotives, much less smoke would have been produced. The contention on the part of defendant was that its locomotives were properly fired, and that such smoke as had been produced was no greater in quantity and no more offensive in quality than was necessarily produced in the proper and careful operation of the railroad. Upon the question of damages the trial judge charged the jury, in effect, that the burden rested upon the plaintiff to show the jury, by proof, how much of the damage she claimed to have suffered was the result of negligence on the part of the railroad company; that the evidence was in such shape that no twelve men could say how much of the damage was the result of carelessness in firing, and how much was necessarily incident to the careful operation of the railroad; that there was no way by which the jury could rightly apportion the damage, and to attempt to do so would be mere guesswork; and that, therefore, if the plaintiff was entitled to any damages at all, she could recover only nominal damages. To this part of the charge, exception was taken. The jury, by their verdict, found the defendant guilty of the negligence charged in the declaration, and assessed the plaintiff's damages at 6 cents. Judgment having been entered thereon, the plaintiff now assigns error upon that portion of the charge just referred to.

The bill of exceptions shows that the state of the proofs was, in fact, such that no twelve men could tell with accuracy how much of the damage was the result of carelessness in firing, and how much was necessarily incident to the careful operation of the road; and this for a reason that inhered in the nature of the case, and consequently was unavoidable by the plaintiff. The damage was caused by clouds of smoke proceeding from the defendant's locomotives; and those clouds were formed in part of smoke conceded to have been necessarily emitted in the careful operation of the locomotives, and in part of other smoke alleged

by the plaintiff and found by the jury to have been unnecessarily emitted in the negligent operation of the locomotives. It was as impossible for the plaintiff to adduce evidence separating the unnecessary from the necessary damage, as for the defendant to split up each smoke cloud into two, label one, "Necessary," and the other, "Unnecessary," and send them separately to the plaintiff's premises. The question is whether, in a case where the proof shows that a railroad company has been guilty of a breach of duty in the respect indicated, and substantial damage has thereby accrued to an adjacent property owner, the right to recover substantial damages must be denied, by reason of the inherent impossibility of distinguishing between such damage as is necessarily incident to the careful operation of the road, and such as arises from the negligent and unskilful management of the road. It is obvious that, if the property owner must be confined to nominal damages in such a situation, it is the same, in effect, as to say that he is entitled to no recovery. In our opinion, this is not the law. The situation is one that is not very unusual in actions of tort. It many times happens that the damage arising from an actionable injury chargeable to the defendant is, in the nature of things, or from the circumstances of the cases, indistinguishable from other damage occurring at the same time, attributable to the acts of an independent tortfeasor or to natural causes. In such cases, since the injured party cannot supply the materials necessary to enable the jury to make an exact computation of the damages in suit, the approved practice is to leave it to the good sense of the jury, as reasonable men, to form from the evidence the best estimate that can be made under the circumstances, as a basis of compensatory damages for the actionable injury.

In *Ogden v. Lucas*, 48 Ill. 492, which was an action to recover damages for the destruction of corn by trespassing cattle, where it appeared that a part of the cattle were the property of others than the defendant, the court said: "In cases of this sort, entire accuracy is impossible. The jury had a right to consider from the evidence how much corn had been destroyed, and what proportion of the cattle in the field were turned in by the defendant, and thus arrive at as near an estimate of the damages as the nature of the case would permit." To the same effect is *Harrison v. Adamson*, 86 Iowa, 693, 53 N. W. 334. *Washburn v. Gilman*, 64 Me. 163, 18 Am. Rep. 246, was an action upon the case for a nuisance occasioned by casting refuse material out of the defendant's sawmill into a natural stream, whence it was carried by a spring freshet upon plaintiff's land. The court held the defendant liable for the damages arising from his own wrongful or negligent act, but not for those arising from the negligent acts of others, saying: "The difficulty may be great of accurately proportioning and assessing the damages done by

the defendant, but that difficulty the defendant would have avoided had he taken the care that no occasion should arise requiring such assessment of damages." *Phillips v. Phillips*, 34 N. J. L. 208, was an action to recover damages for overflowing lands of the plaintiff, where it appeared that the flowing was due partly to the defendant's acts and partly to natural causes. The late Chief Justice Beasley charged the jury as follows: "It seems to be obvious that all water which flows on plaintiff's land must necessarily occasion damage to him. There is no reason in saying that, because his land would be overflowed in the natural condition of that water, that no harm is done in augmenting such inundations. The larger the augmentation of water, it would seem, the greater the injury would be by reason of such increase. It is a question for the good sense of the jury." *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339, was an action against the railway company to recover damages for causing and permitting water to flow and escape from a water tank of defendant to and upon the land of the plaintiff. It appeared that the whole of the water which damaged the plaintiff did not come from the tank, but that, to some extent, it was surface water which flowed down from the hillside above. In view of this fact, the following instruction was requested by the defendant,—the refusal to give it being assigned for error,—viz: "If the jury cannot from the evidence determine what part or portion, if any, of damages was occasioned by the water escaping from the tank, then in no event can they find for the plaintiff more than nominal damages on account of damages he may have suffered from the flowing of the water." The court of review held this proposed instruction objectionable, as liable to mislead the jury to understand that, unless they could determine to a certainty the extent of damage from each of these sources, they should find only nominal damages for the plaintiff; the court declaring that if the jury could not separate and distinguish between the several amounts of the damage caused by the water from the tank and the surface water, respectively, they should have been left at liberty to estimate, as best they might, from the evidence, how much of the whole damage was occasioned by the water from the tank. See also *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; *Priest v. Nichols*, 116 Mass. 401; *Mark v. Hudson River Bridge Co.* 103 N. Y. 28, 8 N. E. 243. If the rule above indicated is proper to be adopted where the damage occasioned by the defendant's tortious acts is indistinguishable from that arising from the tortious acts of others, or that arising from natural causes, it follows, *a fortiori*, that the same rule is sufficiently favorable to a defendant from whose acts alone the entire loss to the plaintiff has arisen; it being found that a substantial part of the loss was occasioned by his tortious act, and conceded that the residue of the loss was attributable to some lawful act of the defend-

ant, inseparable in its consequences from the tortious act. To say that the plaintiff must be denied a substantial recovery because of the impossibility of distinguishing between the consequences that were lawfully originated and those that were unlawfully imposed upon him is to say that in such circumstances the best approximation to justice attainable in a court of law is to re-

quire the injured party to bear the entire burden of loss. From the standpoint of natural justice, it would be better to permit the wrongdoer to bear the whole. But the rule above indicated does equal justice to both, so far as the nature of the case permits.

The judgment should be reversed, and a venire de novo awarded.

NEW JERSEY SUPREME COURT.

STATE of New Jersey, Edward CLIFFORD,
Prosecutor,

v.

William HELLER, Sheriff.

(63 N. J. L. 105.)

- *1. The legality of the proceedings at the trial of a prisoner convicted of a crime by a court of competent jurisdiction cannot be challenged or reviewed by habeas corpus.
2. On a writ of certiorari allowed with the writ of habeas corpus to bring up a warrant for the execution of the prisoner, purporting to be issued by the executive department of the state government under authority of the act of April 16, 1846, the court will adjudge whether such warrant is valid.
3. When the governor of the state resigns, the powers, duties, and emoluments of the office devolve, under the Constitution, upon the president of the senate, but he does not thereby become the governor of the state in the constitutional sense. The president of the senate retains his office of senator, and as president of the senate he exercises the powers and performs the duties of the executive department.
4. When he resigns his office as senator, he ceases to be president of the senate, and thereupon the powers, duties, and emoluments of the executive office devolve in like manner upon the speaker of the house of assembly.
5. The granting of a reprieve and the fixing of a day for the execution of a convicted criminal is by the common law a judicial power, and cannot be exercised by the governor, or person administering the government, except in so far as it is expressly permitted by the Constitution.
6. The Constitution bestows upon the executive department the power to reprieve, but limits the exercise of that power to a period of ninety days after conviction, which means ninety days after sentence in the court below. As an incident to

this granted power, the executive department may direct the execution to be proceeded with within the ninety days, and in that event the execution takes place, not by force of the executive warrant, but in virtue of the judgment of the court.

7. After the lapse of the ninety days, the power of the executive department in this respect ceases.

(January 4, 1899.†)

APPPLICATION for a writ of habeas corpus to obtain petitioner's release from custody to which he was committed awaiting execution of a death sentence for murder. *Petitioner remanded.*

The facts are stated in the opinion.

Messrs. Warren Dixon and John P. Stockton for prosecutor.

Messrs. James S. Erwin and Samuel H. Grey, Attorney General, for the State.

Van Syckel, J., delivered the opinion of the court:

Edward Clifford was convicted of murder in the first degree in the court of oyer and terminer of the county of Hudson, and sentenced by the said court on the 15th day of September, 1898. The proceedings at the trial were subsequently taken to the court of errors and appeals for review, and by the judgment of that court the judgment of the oyer and terminer was in all respects affirmed. Thereupon the court of oyer and terminer ordered the said Clifford to be executed on the 16th day of February, 1898. On the 14th day of February, 1898, Foster M. Voorhees, president of the senate of New Jersey, under his hand and the great seal of the state of New Jersey, directed the sheriff of the county of Hudson to suspend the execution of said death sentence until the 16th day of March, 1898. Further proceedings were taken on behalf of Clifford in the Federal courts, by which the execution of sentence was stayed until November 25, 1898, when David O. Watkins, speaker of the house of assembly of New Jersey, under his hand and the great seal of the state, suspended the execution of said sentence until

*Headnotes by VAN SYCKEL, J.

NOTE.—For continuance of governor in office until successor is duly qualified, and as to choice of governor by assembly, see *State ex rel. Morris v. Bulkeley* (Conn.) 14 L. R. A. 657, and *Carr v. Wilson* (W. Va.) 3 L. R. A. 64.

For lieutenant governor filling governor's office, see *Barnard v. Taggart* (N. H.) 25 L. R. A. 613, and note; *State ex rel. Sadler v. La Grave* (Nev.) 35 L. R. A. 233; and *Taylor v. Beckham* (Ky.) 49 L. R. A. 258.

57 L. R. A.

†Proceedings to obtain a review of this decision were instituted in the court of errors and appeals, and also in the Supreme Court of the United States, but they proved ineffectual in both courts. Publication of the case has been delayed awaiting the outcome of such proceedings.

the 6th day of January, 1899, and ordered the said Clifford to be executed on that day. Clifford is now before this court on habeas corpus, and at his instance a writ of certiorari was allowed to bring before the court the proceedings upon which the state claims to rest the order of David O. Watkins, the validity of which is controverted in this case.

Our habeas corpus act provides that the following, among other, persons mentioned shall not be entitled to prosecute such writ: "Persons committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction or by virtue of any execution issued upon such judgment or decree, unless such judgment or decree be founded upon contract." It is clear, therefore, that the legality of the proceedings at the trial of Clifford cannot be challenged or reviewed by writ of habeas corpus; and, if the case before us presented no other question, it would be the duty of the court to dismiss the writ as improvidently granted. But the return to the certiorari, and the facts agreed upon, present a question of great importance, in which the validity of the judgment of our courts is in no wise involved. That question is whether David O. Watkins had the power to order the execution of Clifford. If the warrant issued by him was unauthorized, it is the province and the duty of this court to intervene for the purpose of preventing an unlawful execution of the person condemned.

The admitted facts controlling this controversy are as follows: On the 31st day of January, 1898, John W. Griggs, then governor of New Jersey, filed in the office of the secretary of state his resignation as governor, to take effect at the termination of that day. Foster M. Voorhees was then president of the senate of New Jersey, being a senator from the county of Union. He thereupon took the oath, diligently, faithfully, and to the best of his knowledge to administer the government of the state in conformity with the powers delegated to him; which oath was filed in the office of the secretary of state on the 1st of February, 1898. On the 18th of October, 1898, Foster M. Voorhees filed in the office of the secretary of state a paper writing, of which the following is a copy: "State of New Jersey, Executive Department. To the Secretary of State, and to the Governor or Person Administering the Government: I hereby resign my commission as a member of the senate from the county of Union. Foster M. Voorhees." David O. Watkins was then a member of the general assembly of the state of New Jersey from Gloucester county, and speaker of the house of assembly. On the 18th day of October, 1898, he filed in the office of the secretary of state an oath that he would diligently, faithfully, and to the best of his knowledge, administer the government of the state in conformity with the powers delegated to him. It is insisted on behalf of the prosecutor that when Foster M. Voorhees filed in the office of the secretary of state the oath before mentioned, he

ceased to be a member of the senate, and became governor of the state for the term fixed by the Constitution until another governor should be elected; that his resignation of his seat in the senate was unnecessary, and could not in any wise affect the tenure of his office as governor. To support this contention the well-settled rule laid down by Chief Justice Kirkpatrick in *State v. Parkhurst*, 9 N. J. L. 446, Appx., is relied upon: "That, if a person holding an office be appointed to and accept another office incompatible therewith, such acceptance of the second is a virtual surrender of and vacates the first." The argument is that Foster M. Voorhees became governor of New Jersey, and ceased thereby to be senator without resigning the latter office; that his subsequent resignation of the senatorship did not operate as a resignation of his office as governor, or in any wise affect his right to hold said office, or his duty to execute its prescribed functions; that under the Constitution the office of governor could become again vacant only by the death, resignation, or removal of Foster M. Voorhees, and, as neither of those contingencies has occurred, there was no vacancy in the office of governor by which David O. Watkins could succeed to that office.

Assuming the premises of the prosecutor to be entirely sound, it seems to result, not only that the resignation of the senatorship by Foster M. Voorhees did not vacate the office of governor, but that the resignation of the senatorship was equivalent to a declaration that he resigned that office, and elected to retain the office of governor, which he did not resign. It is well settled, both in England and in this country, that title to an office cannot be challenged on habeas corpus, or in any other collateral proceeding. Where the official is in possession of the office, and is executing its powers under color of title, he will be regarded at least as a *de facto* officer, and as to the public his official acts will be efficacious. That rule, so absolutely essential to the stability of government and the protection of the governed, should be recognized in its full force. The case *sub judice* is peculiar and novel. The situation is this: If Foster M. Voorhees, as president of the senate, was transferred by force of the constitutional provision to the office of governor, thereby vacating his office of senator, he is still governor of New Jersey, in full possession of the powers of the office, and under obligation to perform its duties; and if he is governor *de jure*, in possession of the office, David O. Watkins cannot at the same time be governor *de facto*, and the warrant signed by him is without the slightest legal value. All that appears in the case before us is that Gov. Griggs resigned; that Foster M. Voorhees, president of the senate, took the oath before stated; that he subsequently resigned his office of senator; that David O. Watkins is speaker of the assembly, and that he took the oath set forth. No act appears on his part to show that he is governor *de facto*, except the oath and the signing of the death warrant. If Foster M. Voorhees was gov-

error, and his resignation of the senatorship was not a vacation of his office as governor, he must still be governor, nothing appearing before us except his resignation as senator to show that he is not still acting and claiming to act as governor. We are constrained, therefore, to resort to an interpretation of the provisions of our state Constitution touching this subject, to determine whether David O. Watkins had the right, either *de jure* or *de facto*, to do the act which has given rise to this litigation.

The clause of the Constitution which provides for the vacancy in the office of governor is as follows: "In case of the death, resignation, or removal from office of the governor, the powers, duties, and emoluments of the office shall devolve upon the president of the senate, and in case of his death, resignation, or removal, then upon the speaker of the house of assembly, for the time being, until another governor shall be elected and qualified; but in such case another governor shall be chosen at the next election for members of the legislature, unless such death, resignation, or removal shall occur within thirty days immediately preceding such next election, in which case a governor shall be chosen at the second succeeding election for members of the legislature. When a vacancy happens, during the recess of the legislature, in any office which is to be filled by the governor and senate or by the legislature in joint meeting, the governor shall fill such vacancy and the commission shall expire at the end of the next session of the legislature unless a successor shall be sooner appointed; when a vacancy happens in the office of clerk or surrogate of any county, the governor shall fill such vacancy, and the commission shall expire when a successor is elected and qualified." Article 5, clause 12. In construing this clause of the Constitution it must be borne in mind that it was carefully drawn by learned jurists, who knew how to express with exactness and precision the purpose they had in view. The provision is that, in case of the resignation of the governor, the powers, duties, and emoluments of the office shall devolve upon the president of the senate, and not that the president of the senate shall thereby become governor, and hold the title and the office until another governor is elected. If the framers of the fundamental law had intended to transfer the president of the senate to the executive chair, and thereby to vacate his office of senator, it is reasonable to believe that they would have said so in no uncertain language. The language used is not ambiguous. It declares that the powers, duties, and emoluments of the office shall devolve on the president of the senate; it does not confer upon him the title of the office. The president of the senate exercises the powers of the governor; the president of the senate performs the duties of the governor; the president of the senate receives the emoluments of that office. He is still president of the senate, with the added duties required of the chief executive of the state imposed upon him. There is no language in the Con-

stitution from which it can reasonably be inferred that his office of president of the senate was to be vacated. He retains his office of senator; and as president of the senate, and not as governor, he exercises the added powers and performs the superimposed duties. That such is not only the ordinary acceptance and the reasonable interpretation of the language employed, but also the intention of those who framed this clause, is evinced in other parts of the organic law. In clauses 9 and 10 of article 5 and clauses 2 and 3 of article 8 this language appears: "The governor or person administering the government." Why is this language so sedulously used throughout the Constitution? If the president of the senate becomes governor, and ceases to be senator, he is fitly and accurately described in all those clauses by the word "governor," and therefore the words "person administering the government" are not only unnecessary and superfluous, but misdescriptive. The words "person administering the government" were inserted advisedly to describe the president of the senate who might be called upon to administer the government, but who would not thereby become or be governor; and, in the absence of that language, would not be subject to the clauses referred to. Again, article 3 of the Constitution provides as follows: "The powers of the government shall be divided into three distinct departments,—the legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided." What is the significance of the words in this clause "except as herein expressly provided?" What powers belonging to one department of government were there which it was expressly provided in the Constitution might be exercised by one of the other departments? The framers of this article said by this exception, in unmistakable language, there are some powers belonging to one department of the government which it is expressly provided in this Constitution shall be exercised by a person or persons belonging to one of the other departments. In the Constitution we find such a provision, and it is the only one in the Constitution except the power to relieve. That provision is the one before referred to in clause 12 of article 5, which provides that the president of the senate, or, in case of his death, resignation, or removal, the speaker of the house, shall exercise the powers of the executive department of the government in the contingency therein specified. It must, therefore, have been the understanding and intention of the Constitution makers that the executive powers to be exercised by a member of the legislative department were to be exercised in the capacity of a legislator, and that made the exception in article 3 a necessary provision.

But it is argued that the president of the senate is a judge of the court of impeachment, and may try himself if he is im-

peached, and pardon himself if convicted. This is clearly a misconception of the situation. As president of the senate he performs the duties of the chief executive, and any malfeasance in that respect is as much a violation of his duty as a senator and as president of the senate as malfeasance in his purely legislative action would be. If impeached, it would be as a senator, and not as governor. He would be tried by the senate, which is the trial court in all cases of impeachment. While there is no express provision in the Constitution that a member of the senate shall not sit as a judge on his own trial if impeached, he is nevertheless incompetent, and would be excluded. The principle that a man shall not be a judge in his own case is accepted universally by judicial tribunals. It is a rule of such fundamental character that it is deemed essential to the well-being of society, and underlies the organic law itself. If any doubt could arise upon this point, a reference to § 3 of article 6 of the Constitution should set it at rest. That section provides that all impeachments shall be tried by the senate, and that the members of the senate, when sitting for that purpose, shall each take an oath "truly and impartially to try and determine the charge in question according to evidence." It would be the sublimity of folly to attempt to bind a senator by such an oath when he was sitting in his own case. If the president of the senate was impeached and convicted, he would cease to be senator, and thereupon the powers of the executive would devolve upon the speaker of the house. The fact that the president of the senate exercises both legislative and executive functions in the view herein taken can have no significance in this discussion, when we advert to the fact that under the first state Constitution the governor was not only the chief executive, but he was also president of the legislative council, with a casting vote, and presiding judge of the highest court in the state. The powers of government were more wisely distributed by the Constitution of 1844, in which, by article 3, a member of one department could not exercise a power belonging to either of the others, except in the instances where the office of governor became vacant, and the power to reprieve was granted. If anything is needed to establish the correctness of this view, it is found in clause 13 of article 5, which reads as follows: "In case of the impeachment of the governor, his absence from the state or inability to discharge the duties of his office, the powers, duties, and emoluments of the office shall devolve upon the president of the senate; and in case of his death, resignation, or removal, then upon the speaker of the house of assembly for the time being, until the governor absent, or impeached, shall return or be acquitted, or until the disqualification or inability shall cease, or until a new governor be elected and qualified." In case of the absence of the governor from the state, precisely the same language is used as in clause 12 in relation to his resignation of the office, and it must

necessarily receive the same interpretation. In case of his absence from the state, "the powers, duties, and emoluments of the office shall devolve upon the president of the senate" until the governor returns. Will it be seriously contended that, when the governor goes out of the state, the president of the senate becomes governor until the duly elected governor returns, and thereby vacates and loses his office as senator? That such an interpretation of this language would be adopted could not have been within the contemplation of the able men who incorporated it in this clause relating to a matter of supreme importance. If it is the true construction, then, when the senate was composed of ten members of one party and eleven of the other, the governor of the state, by the simple device of passing into an adjoining state, could have vacated the seat of one senator, and thus have deprived the opposing party of a majority in that branch of the legislature. In my judgment, the framers of the Constitution meant simply what they said,—that, in case the governor resigned, the president of the senate, as such, should have the powers and perform the duties of the office. Foster M. Voorhees did not become governor upon the resignation of Gov. Griggs. He still continued to be a senator, and president of the senate. He could not resign the office of governor, which he never held. When he resigned and vacated the office of senator, he ceased to be president of the senate, and could no longer exercise the functions pertaining to the executive department. Therefore, upon his resignation as senator, the powers, duties, and emoluments of the office devolved upon David O. Watkins, the speaker of the house of assembly. He is *de jure* the speaker of the house, and of right, as such speaker, exercises the executive powers. He is not governor, either *de jure* or *de facto*, in the constitutional sense of that term. The act of 1898 cannot, in any respect, affect this controversy.

The question, therefore, remains to be considered whether the issuing of the warrant for the execution of Clifford was a valid exercise by David O. Watkins of the powers committed to him as speaker of the house of assembly? By the common law, where the judgment was pronounced in theoyer and terminer, a precept for execution was issued to the sheriff in the name and under the hands and seals of the three commissioners before whom judgment was given; but the precepts by justices of the jail delivery need not have been otherwise than by a simple award upon the roll. In later times there was no more done, but, after judgment was entered, the judges subscribed a calendar in paper directing the several judgments of deliverance to the parties acquitted, or the execution of the parties condemned, of which the sheriff was required to take notice openly in court. 2 Hale, P. C. p. 409. It is also quite clear that by the common law the time and place of execution were not named in the sentence; it was left to the judgment and discretion of the sheriff. The

execution of the prisoner was directed by the words "sus. per coll." written against his name in a calendar prepared for the purpose. Mr. Chitty says: "The practice at the present day at the assizes is as follows: When all the other public business of the court is terminated, the clerk of assize makes out in writing four lists of the prisoners with separate columns containing their crimes, verdicts, and sentences, and a blank column, in which the judge writes what is his pleasure respecting those capitally convicted as to be executed, respited, or transported. If the sheriff afterwards receives no special order from the judge, he executes the judgment of the law in the usual manner, according to the directions of his calendar." 1 Chitty, Crim. Law, 781. The only instance of a warrant from the Crown was in the case of high treason, where a peer of the realm was tried before Parliament. Where all the rest of the judgment save the beheading was pardoned, the execution was to be under the great seal. 3 Co. Inst. p. 31; 2 Hale, P. C. pp. 409-412. In felonies we think it clear that the direction for the execution of the sentence was a judicial act, for these reasons: First, that the judgment of the court was a sufficient warrant; and, secondly, issues extraneous of those raised at the trial might be raised in suspension of the sentence, which required a judicial determination,—as, for instance, where the convict is a female, she may plead that she is quick with child; and, second, if an allegation be made that since the conviction the accused has become insane. In both of these cases, as well as others, there is to be a judicial investigation. 4 Bl. Com. 395. At common law, reprieve might be granted either by the King, under his power to pardon, or by the court; and every court which had power to award execution had power to grant a reprieve. This reprieve was simply a suspension of the sentence. In *Re v. Harris*, 1 Ld. Raym. 482, counsel urged "that in criminal causes, where execution is deferred, it cannot be awarded without bringing the prisoner to the bar, . . . to which Holt, Ch. J., agreed, and he cited *Knightley's Case*, who was indicted for high treason, . . . and, being arraigned at bar in the King's bench, confessed the indictment, and judgment of death was pronounced against him in Easter term, and execution was countermanded, so that Trinity term passed, and then in the long vacation they had a design to execute it, and upon that all the judges of England met to consider what could be done, and it was resolved by all that in regard a term had intervened without execution done it could not be awarded without bringing Knightley to the bar. And, per Holt, Ch. J., it would be the same thing if Trinity term had not passed, but only begun, so that Knightley was imprisoned until Michaelmas term, and in the meantime he obtained a pardon." In *Sir Walter Raleigh's Case* the question was whether a privy seal was sufficient for execution. It was resolved on a conference between all the judges

that the prisoner ought to be brought to the court, and then demanded if he could say anything, etc., and that it was not a legal course that he should be commanded by a privy seal or great seal to be executed without being demanded what he hath to say, etc. Hutton, 21. If the governor can intervene and have execution by virtue of his warrant, the prisoner will be deprived of the right of a judicial determination of matters which in law are subjects of judicial cognizance. If the order which shall carry the judgment of the court into effect is one within judicial control,—as we deem it to be,—then the several constitutional provisions are to be considered. By the Constitution of 1776 the governor had no power to pardon or to grant reprieve. Whatever power there was in that respect was vested in the governor and council; that is the court of appeals.

Under the power to pardon at common law the power of the King to reprieve was included, and the power of reprieve was not vested in the governor, but in the governor and council. By the act of November 16, 1820, the governor, with the advice of his privy council, had power to suspend execution of the sentence of death until the rising of the next meeting of the governor and council. By the act of 1821, where such a reprieve was granted, and a pardon was not granted at the next meeting, it was made the duty of the governor and council to appoint a time for the execution of the criminal. Elmer's Digest, p. 118. By the Constitution of 1844 the executive, with the concurrence of the chancellor and of the six judges of the court of appeals, or a major part of them, may grant pardons after conviction (art. 5, clause 10); and by article 5, clause 9, the executive was given power to grant reprieve to extend until the expiration of a time not exceeding ninety days after conviction. By the act of April 16, 1846, it is provided that, where a reprieve is granted by the governor, the governor shall issue his warrant to the sheriff of the proper county, commanding him to execute the sentence at such time as shall therein be appointed and expressed. Revision, p. 290, § 123. Power to reprieve is limited to a postponement of the execution for ninety days after the conviction; that is, after the sentence in the court below. By article 3 of the Constitution of 1844, before set forth, the governor is prohibited from exercising any legislative or judicial power except as in said Constitution is expressly provided. The express provision of the Constitution on this subject, so far as concerns the executive, is that he shall have power to suspend the sentence of the court for a period not exceeding ninety days. The term "reprieve," as used both in the Constitution and in the statute, is merely the postponement of the sentence for a time. It does not and cannot defeat the ultimate execution of the judgment of the court; it merely delays it. In the exercise of the power to reprieve for ninety days, which is the constitutional limit of that power, the governor has, as an incident to that power, the right to say that at the

expiration of that time the sheriff shall no longer be stayed, but shall proceed to execute the judgment of the court. The reprieve, to be in proper form, should fix a day not exceeding ninety days from the sentence, when it shall expire, and direct the execution to be proceeded with at the expiration of that time. The execution takes place then, not by order of the governor, but in virtue of the judgment of the court. The governor simply says: "The prisoner is adjudged to be executed on a certain day. I direct the execution to be postponed until a future day specified, and then the execution is to be proceeded with." In *Ex parte Fleming*, 60 Miss. 910, the court said: "The power to respite necessarily carries with it the power to fix another and later day for the execution of the death sentence, since the respite is nothing more than a suspension of the sentence until its own expiration. The subsequent execution takes place, not by virtue of a new sentence, but by reason of the expiration of the temporary suspension of the original sentence which was caused by the respite." *Sterling v. Drake*, 29 Ohio St. 457, 23 Am. Rep. 762, is to the like effect. If there was a doubt in respect to the prop-

er procedure in this respect, the long continued practice of the executive department to make orders for the execution of sentences where there has been a reprieve will justify the construction that such orders may be issued, provided that the time for execution is not extended beyond the ninety days. That practice, commencing in 1853, has been pursued until the present time. The order certified into this court was made after the expiration of the ninety days, and is without any legal or constitutional warrant, and must be set aside. The order made in the case of Martin by Gov. Ludlow does not conflict with the views herein expressed. The reprieve and order were both within ninety days from the time of conviction, and, that time having elapsed, Martin was executed, not under the governor's warrant, but under an order made by the court of oyer and terminer.

The traverse of the sheriff's return to the writ of habeas corpus must be stricken out, and the prisoner remanded. Let rules be entered accordingly.

Depue and Lippincott, JJ., concur.

NEW YORK COURT OF APPEALS.

Frank H. PRESBY, *Respt.*,
v.
George G. BENJAMIN, *Appt.*

(169 N. Y. 377.)

A covenant in a lease against assigning or subletting is not violated by placing a care taker in possession during the tenant's absence.

(January 14, 1902.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County in plaintiff's favor in an action brought to recover rent. *Reversed.*

The facts are stated in the opinion.

Messrs. Kuzman & Frankenheimer and A. L. Gutman, for appellant:

The defendant had the right, under his lease, to occupy the flat by himself and his servants; he had the right to place his servant O'Brien in charge of his flat, during his absence, to take care of the flat and its contents as care taker.

McAdam, Land. & T. pp. 473, 479; Chaplin, Land. & T. p. 501; Tallman v. Murphy, 120 N. Y. 345, 24 N. E. 716; Sully v. Schmitt, 147 N. Y. 248, 41 N. E. 514; Kerrains v. People, 60 N. Y. 221, 19 Am. Rep. 158.

NOTE.—As to assignment of lease generally, see, in this series, Chicago Attachment Co. v. Davis Sewing Mach. Co. (Ill.) 15 L. R. A. 754, and note.

57 L. R. A.

No restriction whatever upon the tenant's right to employ servants is contained in the lease, and none can be injected into it by implication.

Delaware & H. Canal Co. v. Pennsylvania Coal Co. 8 Wall. 276, 19 L. ed. 349; *Bruce v. Fulton Nat. Bank*, 79 N. Y. 161, 35 Am. Rep. 505; *Zorkowski v. Astor*, 156 N. Y. 393, 50 N. E. 983.

In taking care of the contents of the flat O'Brien was performing a service, which the landlord's express exemption under the lease from liability for loss or damage to the defendant's effects rendered necessary. In order to discharge these services properly, occupation of the flat by O'Brien was not only necessary, but absolutely essential. His occupancy of the flat would, therefore, be that of a servant, and not that of a tenant.

Kerrains v. People, 60 N. Y. 221, 19 Am. Rep. 158; *Haywood v. Miller*, 3 Hill, 90; *People ex rel. Hubbard v. Annis*, 45 Barb. 304; *McQuade v. Emmons*, 38 N. J. L. 397; *Bowman v. Bradley*, 151 Pa. 351, 17 L. R. A. 213, 24 Atl. 1062; *School Dist. No. 11 v. Batsche*, 106 Mich. 330, 29 L. R. A. 576, 64 N. W. 196; *State v. Page*, 1 Speers, L. 408, 40 Am. Dec. 608; *Pence v. St. Paul, M. & M. R. Co.* 28 Minn. 488, 11 N. W. 80; *State v. Curtis*, 20 N. C. (4 Dev. & B. L.) 222; *Watson v. McEachin*, 47 N. C. (2 Jones, L.) 207; *Clark v. Clark*, 58 Vt. 527, 3 Atl. 508; *Todhunter v. Armstrong* (Cal.) 53 Pac. 446; *Paige v. Akins*, 112 Cal. 401, 44 Pac. 666; *King v. Oshesunt*, 1 Barn. & Ald. 473; *Dobson v. Jones*, 5 Mann. & G. 112; *King v. Kelstern*, 5 Maule & S. 136;

Snedaker v. Powell, 32 Kan. 396, 4 Pac. 869;
Bertie v. Beaumont, 16 East, 33.

Messrs. Young, VerPlanck, & Prince,
 for respondent: ,

Mr. Benjamin's attempt to install another family, with their furniture, in the apartment he had vacated, if successful, would have been in violation of the lease.

The objections against defendant's attempted act are not obviated by calling O'Brien a servant or a care taker, for, even if such, he was not *ipso facto* entitled to be installed with his family and furniture in the vacated apartment.

Defendant's own testimony shows that the relation between himself and O'Brien was that of landlord and tenant.

Cullen, J., delivered the opinion of the court:

The action was to recover the rent reserved in the lease of an apartment in the city of New York. The defense was eviction. The claim of the defendant was that, upon leaving his apartment before the expiration of the demised term, he placed the porter of his store, with his wife, in the apartment, as his servants, to take care of the apartment on his behalf during his absence; that the plaintiff refused to allow the defendant's servants to enter or occupy the apartment; and that thereupon he surrendered and abandoned the premises to the landlord. The tenant of the apartment has necessarily, as appurtenant thereto, an easement of way in the common halls or passages which afford access to the apartment from the street. The unjustifiable refusal of the landlord to suffer the tenant to exercise this right of access would amount to an eviction, for it would destroy the enjoyment of the demised premises. The controverted question in the case is whether the action of the landlord was justified. He claims that the attempt of the defendant to place his porter in occupation of the premises was in violation of the terms of the lease, and that he was entitled to prevent it. By virtue of the right to exclusive occupation which a tenant acquires by his lease, he "becomes entitled to use the premises in the same manner as the owner might have done, except that he must do no act to the injury of the inheritance." Taylor, Land. & T. § 172. This right may be limited or qualified by the terms of the lease, but it is not necessary for the tenant to show any particular provision of the instrument to justify his unlimited right of use and occupation, but the landlord who denies it must point out the covenant which expressly restricts the tenant's rights. The lease provides that the apartment shall be used as a private dwelling only. The defendant's action in no way tended to violate this covenant. The lease contained the further covenant that the lessee would not assign or sublet the premises, or any part thereof, without the consent of the landlord, under penalty of forfeiture. It is first to be observed that "such covenants are restraints which courts do not favor. They are

construed with the utmost jealousy, and very easy modes have always been countenanced for defeating them." *Riggs v. Purcell*, 66 N. Y. 193; Taylor, Land. & T. § 403; McAdams, Land. & T. § 141. Thus a covenant not to assign does not prevent an underletting (*Jackson ex dem. Stevens v. Silvernail*, 15 Johns. 278), and a covenant not to underlet the premises is not broken by a sublease of a part of the premises (*Roosevelt v. Hopkins*, 33 N. Y. 81). In this case it is not at all necessary to go to the extent of the authorities cited. It is clear that, even under a liberal construction of the covenant, to constitute a violation of this lease the defendant must have attempted to put in possession of the premises a new tenant, not merely a new occupant. To be a tenant a person must have some estate, be it ever so little, such as that of a tenant at will or on sufferance. A person may be in occupation of real property simply as a servant or licensee of his master. In that case the possession is not changed; it is always in the master. *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158. Therefore, if the defendant sought to place his porter in occupation of the premises as care taker or as servant, he was entirely within his rights. His testimony to this effect was not conclusive. There were circumstances from which the jury might have inferred that the suggestion of a care taker was a subterfuge, and that the real intent was to make the porter a tenant of the premises. But in this respect the evidence presented a question of fact for the jury to pass upon. The court could not determine it as a matter of law. Indeed, the learned trial court seems not to have passed on this question, but to have disposed of the case on the ground that placing the porter and his wife in his apartment, even as the defendant's servants, was a violation of the lease. This view, as we have said, was erroneous.

The judgment should be reversed and a new trial ordered; costs to abide the event.

Gray, Bartlett, and Martin, JJ., concur. **Parker, Ch. J.**, and **Vann and Werner, JJ.**, dissent.

Olive A. STERNAMAN, *Appt.*,

METROPOLITAN LIFE INSURANCE COMPANY, Respnt.

(170 N. Y. 13.)

1. Public policy prohibits an agreement by an applicant for life insurance that the medical examiner appointed and paid by the insurer shall be the agent of the applicant in recording the medical examination; and such agreement will not pre-

NOTE.—As to effect of agent's knowledge of falsity of answers in application, see, in this series, note to *Equitable Life Assur. Soc. v. Hazlewood* (Tex.) 7 L. R. A. 217; *Clemens v. Supreme Assembly Royal Soc. of G. F.* (N. Y.)

vent a showing that the answers written were not those given by the applicant.

2. An insurer cannot rely on a warranty by the applicant that the answers to the questions in the medical examination were properly recorded, to forfeit the policy, if it knew at the time through its medical examiner that they were not.
3. An agreement by an applicant for insurance that no information not contained in the application, received by any person at any time, shall be binding on the insurer, will not prevent him from showing that his answers to the questions of the medical examiner were not properly recorded.

(Parker, Ch. J., and Gray, J., dissent.)

(February 25, 1902.)

APPPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Erie County in favor of defendant in an action brought to recover the amount alleged to be due on a life insurance policy. *Reversed.*

Statement by Vann, J.:

This action was brought to recover the sum of \$1,000, alleged to be due on a policy of insurance issued by the defendant to the plaintiff, as beneficiary, upon the life of her husband, George H. Sternaman. The policy recites that the promise to insure was made in consideration of the statements contained in the application, all of which are referred to as warranties, and made a part of the contract. The application consists of two parts, A and B. Part A, entitled, "Application to the Metropolitan Life Insurance Company," consists of questions relating to the age, occupation, family history, etc., of Mr. Sternaman, all of which were truthfully answered. At the close of these questions and answers there appeared the following: "It is hereby declared, agreed, and warranted by the undersigned that the answers and statements contained in the foregoing application, and those made to the medical examiner, as recorded in parts A and B of this sheet, together with this declaration, shall be the basis and become part of the contract of insurance with the Metropolitan Life Insurance Company; that they are full and true and are correctly recorded, and that no information or statement not contained in this application and in the statements made to the medical examiner, received or acquired at any time by any person, shall be binding upon the company, or shall modify or alter the declaration and warranties made therein; that the persons who wrote in the answers and statements were and are our agents for the purpose, and not the agents of the company, and that the com-

pany is not to be taken to be responsible for its preparation, or for anything contained therein or omitted therefrom; that any false, incorrect, or untrue answer, any suppression or concealment of facts in any of the answers, any violation of the covenants, conditions, or restrictions of the policy, any neglect to pay the premium on or before the date it becomes due, shall render the policy null and void, and forfeit all payments made thereon." Part A, dated April 25, 1896, was signed by both Mr. and Mrs. Sternaman, and witnessed by one Godson. Part B, entitled, "Statements Made to the Medical Examiner," consists of more than 100 questions in fine print, and the answers thereto, written in a blank space so contracted as to admit of an affirmative or negative answer, with little or no opportunity for explanation. They relate to the health, past and present, of the applicant, the diseases he had been afflicted with, and the physicians he had consulted. Among them were the following: "Have you ever had loss of consciousness? No. Any personal injury? No. Name and residence of your usual medical attendant? Dr. Frost, Plymouth avenue. When and for what have his services been required? For *la grippe*. Have you consulted any other physician, and, if so, when, and for what? No." Part B closed as follows: "I hereby declare that the application to the Metropolitan Life Insurance Company on the reverse of this sheet for an insurance on my life was signed by me, and that I renew and confirm my agreements therein as to the answers given above to the medical examiner, and I hereby declare that said answers are correctly recorded." Part B, dated April 27, 1896, was signed by Mr. Sternaman only, and was witnessed by Dr. Langley, the medical examiner.

Upon the trial the defendant introduced evidence tending to show that some of the answers above quoted, made to the medical examiner, were not literally true. The plaintiff then proved that the application "was brought to the house of the insured by Dr. Langley, who was one of the defendant's medical examiners and was designated and paid by the defendant; that the questions were asked of the deceased, and the answers thereto in the application were filled in by the doctor in his own handwriting; that the doctor took the application away with him after it had been signed by the plaintiff and said insured; and that the application has been in the possession of the defendant ever since. The plaintiff was present and heard the conversation between the doctor and the deceased at the time the application was filled in and signed." The plaintiff was then sworn as a witness in her own behalf, but was not allowed to testify

16 L. R. A. 33, and note; Steele v. German Ins. Co. (Mich.) 18 L. R. A. 85; Beebe v. Ohio Farmers' Ins. Co. (Mich.) 18 L. R. A. 481; Michigan Shingle Co. v. State Invest. Ins. Co. (Mich.) 22 L. R. A. 319; Mutual Ben. L. Ins. Co. v. Robison (C. C. App. 8th Cir.) 22 L. R. A. 325; Dailey v. Preferred Masonic Mut. Accl. 57 L. R. A.

Asso. (Mich.) 26 L. R. A. 171; W. B. Goode & Co. v. Georgia Home Ins. Co. (Va.) 30 L. R. A. 842; Yoch v. Home Mut. Ins. Co. (Cal.) 34 L. R. A. 857; Home Ins. Co. v. Hancock (Tenn.) 52 L. R. A. 665; and the case of Taylor v. Anchor Mut. F. Ins. Co. (Iowa) next following.

to the answers in fact made by her husband to the questions put to him by the medical examiner. The plaintiff's counsel offered to prove by her "that in this interview, at this time and place, George H. Sternaman, the insured, told Dr. Langley, the medical examiner of the defendant, that he had suffered from malaria, and was attended by Dr. McFadden, of Buffalo, or, rather, that he went to Dr. McFadden's on several occasions, for malaria, to consult him, but that he was not at any time on that account laid up from work; and that he also doctored with Dr. McFadden, by going to his office, for sore eyes; and also that at the time the beneficiary, the plaintiff here, was sick, and the insured did have sore throat or tonsillitis, and that Dr. Tanner did attend him on three or more occasions at that time, but that he was not seriously ill; and that the deceased also stated to Dr. Langley that on one occasion he had been hurt in a fall from his bicycle, in that the skin from the palm of his hand had been injured, and that he had been attended by Dr. Staples, mentioned in the proofs of loss, for that injury to the hand; and that he had, during the period of his life principally preceding his marriage, had peculiar spells, of which he did not know the name, in which he had partly lost consciousness, and that they were occasioned by any disappointment or reverse or mental pain that he suffered; and that his wife had consulted with Dr. Frost about them at one time, and that Dr. Frost had said that they were not of very much importance; and that one of these different physicians whom he had gone to had said that he had catarrh of the stomach, and that Dr. Langley thereupon examined him and questioned him in regard to catarrh of the stomach, and said that he did not have it; and that, in regard to the other matters (being the malaria, the injury to the hand, and the tonsillitis), Dr. Langley said that they were not of enough importance to insert them in the medical examination, and that these consultations with other physicians were not of so serious a character as to require mentioning; and, further, that all particulars of every consultation with every physician, and every injury to his health, or disease, were fully disclosed to Dr. Langley in this interview, prior to his filling out both parts of the application, and Dr. Langley said that they were none of them of sufficient importance to warrant being inserted; and that Dr. Langley thereupon filled out the application and it was signed. The plaintiff's attorney offered to make proof of each of these facts separately, as well as a whole." This testimony was excluded upon the objection of the defendant that it was incompetent, immaterial, and in violation of the contract, and that the plaintiff could not by parol vary the terms of the application and contract. Exceptions were taken to the rulings which excluded this evidence.

The insured died of multiple neuritis,—a disease which apparently had no connection with the answers alleged to be false, 157 L. R. A.

though this did not expressly appear. *Da Costa, Medical Diagnosis*, 128; *Lippencott, Medical Dict.* 673.

The jury, as directed by the trial judge, rendered a verdict for the defendant; and, the judgment entered thereon having been affirmed by the appellate division (one of the justices dissenting, and another not voting), the plaintiff appealed to this court.

Messrs. Duckwitz, Thayer, & Jackson, for appellant:

This is a case of the defendant's medical examiner intentionally and in good faith omitting certain trivial ailments and the consultations therefor, fully disclosed to him by the insured, but which he considered too unimportant to be inserted.

The defendant required the substantial truth to be recorded in a quarter of an inch of space, where literal truth would require a foot of space, and it sent its medical examiner to the insured to find out and put down the substantial truth.

James v. Manhattan L. Ins. Co. 40 App. Div. 465, 58 N. Y. Supp. 244.

Neither the insured nor the defendant could have had the intention of making its medical examiner the insured's agent in this transaction, any more than they could have had the intention of making its president agent for the insured under the same circumstances.

Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 281, 36 Am. Rep. 617, 92 N. Y. 274, 44 Am. Rep. 372; *Flynn v. Equitable L. Ins. Co.* 78 N. Y. 568, 34 Am. Rep. 561.

There is no clause in the warranty which makes the medical examiner, if he be the one that inserts the answers, the agent for the insured, so as to bind the insured by his wrong interpretation of what the questions mean and the substantially correct answers thereto.

O'Farrell v. Metropolitan L. Ins. Co. 22 App. Div. 500, 48 N. Y. Supp. 199; *Bernard v. United L. Ins. Assn.* 14 App. Div. 142, 43 N. Y. Supp. 527.

The defendant cannot transform an agent representing it into an agent for the insured, so as to make the insured responsible for his mistakes.

Bushaw v. Women's Mut. Ins. & Acci. Co. 28 N. Y. S. R. 524, 8 N. Y. Supp. 423; *O'Farrell v. Metropolitan L. Ins. Co.* 22 App. Div. 495, 48 N. Y. Supp. 199.

Mr. Seward A. Simons, for respondent:

There is abundant authority to sustain the decision of the trial court.

Hamilton v. Fidelity Mut. L. Assn. 27 App. Div. 480, 50 N. Y. Supp. 526; *Allen v. German American Ins. Co.* 123 N. Y. 6, 25 N. E. 309; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *Kabok v. Phoenix Mut. L. Ins. Co.* 21 N. Y. S. R. 203, 4 N. Y. Supp. 718; *Muier v. Fidelity Mut. L. Assn.* 24 C. A. 230, 47 U. S. App. 322, 78 Fed. 566; *Wilkins v. Mutual Reserve Fund L. Assn.* 54 Hun, 204, 7 N. Y. Supp. 589; *Bernard v.*

United L. Ins. Asso. 14 App. Div. 142, 43 N. Y. Supp. 527.

To reverse this judgment, and deny the defendant's right to contract as it has fairly contracted with the plaintiff and the intestate, is to do violence to the universally accepted rule that a principal may limit an agent's powers by notice to all parties dealing with him.

Quinlan v. Providence W. Ins. Co. 133 N. Y. 356, 31 N. E. 31; *McCoy v. Metropolitan L. Ins. Co.* 133 Mass. 82; 16 Am. & Eng. Enc. Law, 2d ed. p. 947; *Continental L. Ins. Co. v. Chamberlain*, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87.

Vann, J., delivered the opinion of the court:

The decision of this appeal turns substantially upon the following question: When an applicant for life insurance makes truthful answers to all questions asked by the medical examiner, who fails to record them as given, and omits an important part, stating that it is unimportant, can the beneficiary show the answers actually given, in order to defeat a forfeiture claimed by the insurer on account of the falsity of the answers as recorded, even if it was agreed in the application that the medical examiner, employed and paid by the insurer only, should not be its agent, but solely the agent of the insured?

The power to contract is not unlimited. While, as a general rule, there is the utmost freedom of action in this regard, some restrictions are placed upon the right by legislation, by public policy, and by the nature of things. Parties cannot make a binding contract in violation of law or of public policy. They cannot in the same instrument agree that a thing exists, and that it does not exist, or provide that one is the agent of the other, and at the same time, and with reference to the same subject, that there is no relation of agency between them. They cannot bind themselves by agreeing that a loan in fact void for usury is not usurious, or that a copartnership which actually exists between them does not exist. They cannot by agreement change the laws of nature or of logic, or create relations, physical, legal, or moral, which cannot be created. In other words, they cannot accomplish the impossible by contract. The parties to the policy in question could agree that the person who filled out part A of the application was the agent of the insured, and not of the company. There is a difference in the nature of the work of filling out the blank to be signed by the insured, and that of filling out the blank furnished for the use of the medical examiner. The former is the work of the insured, and may be done as well by one person as by another. He may do it himself, or appoint an agent to do it for him. It is quite different, however, with the work of the medical examiner, because that requires professional skill and experience and the insurer permits it to be done only by its own appointee. The insured can neither do that work himself, nor

appoint a physician to do it, because the insurer very properly insists upon making the selection itself. The medical examiner was selected, employed, and paid by the company. The insured had nothing to do with him, except to submit to an examination by him, as the expert of the company, and to answer the questions asked by him in behalf of the company. This he was forced to do in order to procure insurance; for the company required him to undergo a medical examination by an examiner selected and instructed by itself, before it would act upon his application for a policy. He could neither refuse to be examined, nor select the examiner, and he was not responsible if the latter was negligent or unfit for the duty assigned to him. He could not direct or control him, but the company could and did; for it required him to make the examination, fill out part B of the application blank, and report the facts, with his opinion. The insured made no contract with the examiner, and was under no obligation to pay him for his services. The company, however, made a contract with him to do certain work for it, and agreed to pay him for the work when done. As between the examiner and the insured, the relation of principal and agent did not exist, while, as between the examiner and the company, that relation did exist by operation of law; yet it is claimed that, as between the insured and the company, the examiner was the agent of the former only, because he had so agreed, not with the examiner, but with the company itself. Under the circumstances, an agreement that the physician was the agent of the insured was like an agreement that the company or its president was his agent. It was in contradiction of every act of the parties and of every fact known to either. The law, when applied to the facts, made the physician the agent of the company, and not of the insured; and can it be held that, as the insured agreed that the physician was his agent, he became such in spite of the law and the facts? This is not a case of agency of one party for one purpose, and of another party for a different purpose; for the physician was employed for a single purpose only, and that was to make a physical examination of the insured, ask him the questions furnished by the company, record his answers, and report the result. They were not the questions of the insured, put to himself, to elicit facts for his use. He knew the facts. He did not need to question himself to find out what he knew, nor to employ an agent for that purpose. The questions were those of the company, carefully prepared for it by skilful hands, and furnished to its medical examiner to be asked, so that it could learn what the insured knew about himself. It needed the facts for its use, and what was done by its own examiner to get the facts and report them to the company was its work, done for its benefit and in the course of its business. The answers were not volunteered, but were given in response to questions asked by the company, as much as

if, impersonated, it had actually asked them as an individual. Whatever it told Dr. Langley to do for it, in the view of the law, it did itself. *Qui facit per alium, facit per se*. It appointed Dr. Langley its agent for the purpose named, and he derived all his authority to act from the company, which could regulate his conduct by its rules, and could provide for such security to protect its interests from the consequences of his neglect or default as it saw fit. Can parties agree that facts which the law declares establish a certain relation, not only do not establish that relation, but establish directly the opposite? Can A appoint B his agent for a definite purpose, and then agree with C that B is not the agent of A, but is the agent of C for that purpose; there being no agreement whatever between B and C?

An agency is created by contract, express or implied. It "is a legal relation . . . by virtue of which one party—the agent—is employed and authorized to represent and act for the other—the principal—in business dealings with third persons. The distinguishing features of the agent are his representative character and his derivative authority." *Mechem, Agency*, § 1; *Story, Agency*, § 3. "To constitute agency there must be consent both of principal and of agent." *Wharton, Agency*, § 1. What was the contract between the company and the examiner? The defendant, being a corporation, could act only through agents. Having some work to do in the form of a medical examination, it requested Dr. Langley to do it. It created the relation of agency between him and itself by employing him, paying him, etc. It alone could discharge him, and to it alone was he responsible for disobedience or negligence. It could control his conduct by any reasonable instructions, and hold him liable if he violated them. It prescribed certain questions that he should ask, and required him to take down the answers in a blank prepared by itself. It could sue him if he did not do it properly, and he could sue the company if it did not pay him for doing it. Thus we have an agency between the company and the examiner established by mutual agreement, with the right on the one hand to instruct, to discharge, and to hold liable for default, and on the other to compel payment for services rendered. Hence what the examiner did in the course of his employment the company did, and what he knew from discovery while acting for it the company knew. What was the contract between the insured and the examiner? None whatever. The insured did not employ the examiner, and the examiner did not agree to work for him. Neither was under any legal obligation or liability to the other. The insured could not instruct the doctor, nor discharge him, nor sue him for negligence, and the doctor could not sue the insured for compensation. The relation of principal and agent did not exist between them, either by virtue of any contract or by operation of law. What was the contract between the 57 L. R. A.

insured and the insurer? With the relations above described as existing between the insurer and the examiner in full force, and in the absence of any legal relation between the examiner and the insured, an attempt was made by the insurer, by an agreement imposed upon the insured, to subvert the relation of its own examiner to itself, and establish a relation between him and the insured, without the consent of either given to the other. There was no tripartite contract. While the contract between the doctor and the company was still in existence, the latter agreed with a third party only that that contract did not in fact exist between the two parties who made it, but did exist between two parties who did not make it. This was not possible by any form of words, any more than to make black white, or truth falsehood. We think that the medical examiner was the agent of the defendant in making the examination of the insured, recording his answers, and reporting them to the company.

Sound public policy prohibits the company from stipulating for immunity from the consequences of its own negligence, or, what is the same thing, the negligence of its agent. *Rathbone v. New York C. & H. R. R. Co.* 140 N. Y. 48, 35 N. E. 418. The manner of conducting the examination was, of necessity, intrusted to the judgment of the medical examiner to a great extent. His judgment might influence him to take down the answers in a general or in a particular way. In exercising his judgment he determined that certain answers were too trivial to be recorded. In making that determination he was not acting for the insured, but for the company; for it had furnished him with a blank, and had invested him with power to take down the answers, and hence with power to decide how they should be taken down. If he was negligent or failed to do his duty in this regard, the company could not, by an agreement made in advance, cast the burden upon the insured, who did not select or employ him. His negligence was its own negligence, and it could not by contract make it the negligence of the insured, or relieve itself from the legal consequences thereof.

But it is insisted the insured warranted that the answers were true, and that they were correctly recorded. When the company issued the policy, however, it knew, through its medical examiner, that the answers as recorded were not literally true; that the answers as given were not correctly recorded; and that this occurred through no fault of the insured. It could not take the money of the insured while he lived, and, when he was dead, claim a forfeiture on account of what it knew at the time it made the contract of insurance, for that would be a fraud. *Van Schoick v. Niagara F. Ins. Co.* 68 N. Y. 434; *O'Brien v. Home Benefit Society*, 117 N. Y. 310, 22 N. E. 954; *Kenyon v. Knights Templar & M. Mut. Aid Assn.* 122 N. Y. 247, 25 N. E. 299.

The insured also agreed that "no information or statement not contained in this

application and in the statements made to the medical examiner, received or acquired at any time by any person, shall be binding upon the company, or shall modify or alter the declarations and warranties made therein." The facts sought to be proved were contained in the oral statements made to the medical examiner, but, assuming that recorded statements only were meant, the result would be an agreement that the company might perpetuate a fraud upon the insured by issuing a policy and accepting premiums thereon, knowing all the time that the contract was void, or voidable at its election. The law does not permit this; for it declares that the company is estopped from taking advantage of such a contract, because it would be against equity and opposed to public policy. We adopt, as expressing our own views upon the subject, the following language used by the Supreme Court of the United States in a case somewhat analogous: "If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet, knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract, and that it was made by the defendant, who procured the plaintiff's signature thereto. It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. . . . Indeed, the doctrine is so well understood and so often enforced that if, in the transaction we are now considering, Ball, the insurance agent who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal. . . . This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used

against the party whose name is signed to it." *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617.

We think it is established by the weight of authority in this state that the medical examiner is the agent of the insurer in making the examination, taking down the answers, and reporting them to the company; that his knowledge thus acquired, his interpretation of the answers given, and his errors in recording them, are the knowledge, interpretation, and errors of the company itself, which is estopped from taking advantage of what it thus knew and what it had thus done when it issued the policy and accepted the premiums. *O'Farrell v. Metropolitan L. Ins. Co.* 22 App. Div. 495, 48 N. Y. Supp. 199, 44 App. Div. 554, 60 N. Y. Supp. 945, 168 N. Y. 592, 60 N. E. 1117; *O'Brien v. Home Benefit Society*, 117 N. Y. 310, 318, 22 N. E. 054; *Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274, 44 Am. Rep. 372; *Grattan v. Metropolitan L. Ins. Co.* 80 N. Y. 281, 36 Am. Rep. 617; *Flynn v. Equitable L. Ins. Co.* 78 N. Y. 568, 34 Am. Rep. 561; *Whited v. Germania F. Ins. Co.* 76 N. Y. 415, 32 Am. Rep. 330; *Sprague v. Holland Purchase Ins. Co.* 69 N. Y. 128.

The earlier cases of *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451, and *Alexander v. Germania F. Ins. Co.* 66 N. Y. 464, 23 Am. Rep. 76, involved the authority of a fire insurance broker or solicitor only, and were distinguished in *Whited v. Germania F. Ins. Co.* 76 N. Y. 419, 420, where the court said: "If the procurer of the insurance is to be deemed the agent of the insured, and Harmon is to be deemed such procurer, he may not be taken into the service of the insurer as its agent also; or, if he is so taken, the insurer must be bound by his acts and words when he stands in its place and moves and speaks as one having authority from it, and *pro hac vice*, at least, he does then rightfully put off his agency for the insured, and put on that for the insurer." In *Allen v. German American Ins. Co.* 123 N. Y. 6, 25 N. E. 309, the intermediary was also a mere broker, and not the agent of the company, as distinctly appears on page 15, 123 N. Y., and page 310, 25 N. E., where the court said: "So far as it appears. Noble had no relations whatever with the defendant, other than that he forwarded this paper writing which contained statements of the amount of insurance proposed for, and of the privileges desired. He certainly appears to have been nothing more than an insurance broker, soliciting insurance business; and when, upon the acceptance of the risk, he received back a policy of the company for the plaintiff, his sole office was simply to deliver it for the company, and to collect the premium. That is certainly not enough to constitute him an agent for the company, with authority to bind it retroactively or presently in transactions relating to the insurance. Circumstances are wholly wanting from which we may presume the authority of an agent." In the earlier *Grattan Case* the medical examiner was instructed by the defendant to

report the answers to the questions in the certificate in his own handwriting, but he failed to report one of the answers as given by the applicant. In an action on the policy the falsity of the answer as recorded was insisted upon as a defense, although the answer as given was absolutely true. The court, referring to the medical examiner, said: "He was, as medical examiner, charged with certain duties by the defendant, and was acting in concert with the soliciting agent of the company. On the part of the life insured was entire good faith and truthfulness, and there is no reason to suspect any intentional unfairness on the part of the examiner. The omission was inadvertent. Is the company thereby released from its obligation? Many decisions in this court show that it is not. *Mowry v. Rosendale*, 74 N. Y. 360, and cases there cited. Within the principles therein recognized as well established, the erroneous answers must be taken as the declaration of the defendant, and, in any controversy depending upon it, must, between the parties, be taken to be true. In this case the physician was not the agent to solicit insurance, but he had an act to perform in regard to it as the agent of the company. His written instructions were to write out the answers. In this instance he failed to do it correctly. The principle upon which it has been held that the company, and not the insured, is responsible for the error of the soliciting agent, is equally applicable here. This question has been repeatedly considered by this court, and in the recent case of *Flynn v. Equitable Life Assur. Soc.* 9 N. Y. Week. Dig. 324, 78 N. Y. 568, 34 Am. Rep. 561, was again before us. The point presented was similar to the one now under review. The decision was in conformity with the views above expressed, and the doctrine referred to must be deemed settled." The *O'Farrell Case* was strikingly like the one before us, so far as the point now involved is concerned. In that case the insured agreed that his application was "made, prepared, and written" by himself, "or by his own proper agent," and that the company was "not to be taken to be responsible for its preparation, or for anything contained therein or omitted therefrom." He warranted that the answers made to the questions in both parts of the application, including that provided for the use of the medical examiner, were "strictly correct and wholly true;" that they should "form the basis and become part of the contract of insurance;" and that "any untrue answers" should "render the policy null and void." The policy itself referred to the application, and declared that the statements therein contained were warranties, and a part of the contract. Among the printed questions to be put by the medical examiner to the insured was the following: "Did any of the parents, grandparents, brothers, or sisters of the life proposed ever have consumption or any pulmonary or scrofulous diseases?" To this question he answered that he did not know, but the physician recorded

the answer as "No." A recovery, at first denied, was finally had upon the policy, and it was sustained in both appellate courts. We divided in judgment and filed no opinion, but the following extract from the opinion of the supreme court upon the last appeal suggests the view that finally prevailed: "If it be accepted as a fact that the insured made answer to this question by stating that he did not know, then such fact became one known to the company, as it was known to its agent; and, if it thereafter chose to deliver the policy and accept the payment of premiums thereon, it became bound according to the tenor of its terms." In that case, as an examination of the appeal book on the files of this court shows, the answer, as made to the medical examiner by the insured, was received upon the trial, notwithstanding the strenuous objections of the defendant, and without that evidence there could have been no recovery on the policy. The affirmance of the judgment by this court necessarily involved an adjudication that such evidence was properly received.

Upon the trial of the case in hand, the defendant's objection to similar evidence on similar grounds was sustained, but both upon principle and authority we think it should have been received.

This conclusion requires a reversal of the judgment and the award of a new trial, with costs to abide the event.

O'Brien, Bartlett, Haight, and Martin, JJ., concur.

Parher, Ch. J., dissenting:

The decision about to be made is an unusually interesting one, because it introduces a new feature into the law of contracts, by which persons of sound and open minds and honest purposes are cut off in one direction from freedom of contract, in that they may not agree that an intermediary shall, for all purposes of the contract, be deemed the agent of one of the parties, if some court be of the opinion that he was the agent of the other; and this is to be held notwithstanding this court, in *Allen v. German American Ins. Co.* 123 N. Y. 6, 13, 25 N. E. 309, 310, in speaking of a similar provision in a contract of insurance, said: "Parties may insert any provisions they choose in contracts, provided they violate none of the rules of law, and they should all be given their appropriate and intended effect." The underlying reason prompting this decision received both consideration and condemnation in *Maier v. Fidelity Mut. Life Assn.* 24 C. C. A. 239, 47 U. S. App. 322, 78 Fed. 566, by Mr. Justice Harlan, writing for the circuit court of appeals of the sixth circuit; his associates concurring. In that case an application blank was erroneously filled up by an agent of defendant, for whose neglect or wrong plaintiff contended the defendant should not be advantaged, and the court said: "But here the assured was distinctly notified by the application that he was to be held as warranting the truth of his statements, 'by whom-

soever written.' Such was the contract between the parties, and there is no reason in law or in public policy why its terms should not be respected and enforced in an action on the written contract. It is the impression with some that the courts may, in their discretion, relieve parties from the obligation of their contracts whenever it can be seen that they have acted heedlessly or carelessly in making them. But it is too often forgotten that, in giving relief under such circumstances to one party, the courts make and enforce a contract which the other party did not make or intend to make."

In the case at bar the defendant proved a breach of warranty which forfeited the policy. The facts thus warranted are found in that part of the application signed by the medical examiner; and the contention of the plaintiff is that Dr. Langley, the medical examiner, was the agent of the defendant, and hence it may be shown that the insured communicated to him certain facts about his life which the doctor did not write down, and which were in conflict with those written down, and that this may be done notwithstanding the application, which forms part of the contract, contains this provision: "It is hereby declared, agreed, and warranted by the undersigned that the answer and statements contained in the foregoing application, and those made to the medical examiner, as recorded in parts A and B of this sheet, together with this declaration, shall be the basis and become part of this contract of insurance with the Metropolitan Life Insurance Company; that they are full and true and are correctly recorded, and no information not contained in this application and in the statements made to the medical examiner (A and B, respectively), received or acquired at any time by any person, shall be binding upon the company, or shall modify or alter the declaration and warranties made therein; that the persons who wrote in the answers and statements were and are our agents for the purpose, and not the agents of the company, and that the company is not to be taken to be responsible for its preparation, or for anything contained therein or omitted therefrom; that any false, incorrect, or untrue answer, any suppression or concealment of facts in any of the answers, any violation of the covenants, conditions, or restrictions of the policy, any neglect to pay the premium on or before the day it becomes due, shall render the policy null and void and forfeit all payments made thereunder." At the close of the statements of the medical examiner, which are to be found in Exhibit B, is the following: "I hereby declare that the application to the Metropolitan Life Insurance Company, on the reverse of this sheet, for an insurance on my life, was signed by me, and that I renew and confirm my agreement therein as to the answers given above to the medical examiner, and I hereby declare that said answers are correctly recorded." This was followed by the signature of the applicant. It appears, therefore, by the terms of the contract, that

the insured declared that the medical examiner had correctly recorded the answers given to the questions; and it would seem that in the absence of fraud, of which there is no pretense in this case, the insured would be bound by the answers written out by the medical examiner, although he were in fact the defendant's agent, and there was no agreement on the part of the insured and the company that the physician should, for the purposes of the contract, be deemed the agent of the insured. Now, notwithstanding his agreement renewed and confirmed the answers as written out by the medical examiner, those answers were in fact untrue in important particulars,—so important that it is quite likely that, if the questions had been answered truly, a policy would not have been issued. But that fact, if it be such, is one of no legal importance in the disposition of this case. By the terms of the application it was agreed that the insured warranted the truth of the answers as they appeared in the application, and, further, that if untrue the policy should be null and void. Unless the right of insurance companies and individuals to contract with each other as they will may be abridged by the courts, this judgment must be affirmed. That the legislature may provide a standard form for life insurance policies is unquestioned, but the power is legislative, and no attempt should be made indirectly to exercise it by the courts, which would best discharge their duty in the end, as experience proves, by giving full force and effect to the contracts of all parties.

The method by which the plaintiff sought to relieve the contract from the effect of the several untrue answers in the application upon which the defendant acted was to prove that the insured made very different answers to Dr. Langley, the physician who undertook to write down the replies; to prove, in fact, that the insured told Dr. Langley everything which the defendant has now proved about his physical condition, and then to ask the court to hold, notwithstanding the insured had contracted to the contrary, that Dr. Langley was the defendant's agent, and hence that the defendant is estopped from denying that it knew the whole truth about the insured's prior state of life. The defendant's counsel contended (and so far the courts have sustained him) that his client had issued its policy in reliance on the truth of the statements contained in the application, and that Sternaman, the applicant, had in terms contracted that it might do so, and that, if any of the answers should prove to be untrue, it should render the policy null and void. He asserted the right of his client to the protection of the law in the enforcement of its contract, and pointed out the necessity, according to his client's view, of the incorporation into such contracts of a provision that the applicant for insurance shall be held to warrant the truth of all answers, no matter by whom written, and although the writer be in the service of the company. The reasons presented in support of defend-

ant's contention are briefly stated in the language of Mr. Justice Williams in *Bernard v. United L. Ins. Assn.* 14 App. Div. 142, 43 N. Y. Supp. 527, in which all his associates concurred. The aim of the defendant is by its policy "to protect itself in two respects: First, against any attempt by the agent and the insured, conspiring together, to defraud the company by presenting to it an application containing false statements and answers, and securing a policy thereon, which would not have been issued if the truth has been known to the company; second, against any attempt by the beneficiary, after the death of the assured, by parol evidence to avoid the effect of false statements and answers in an application upon which a policy was actually issued." These reasons seem to be well grounded; for it is not in the public interest that frauds should be permitted for the benefit of individuals, however needy they may be. But it matters not whether the reasons be sound or not, the defendant has a right to issue policies of insurance to such persons and upon such terms as it chooses, so long as it violates no provision of law; and he who would be insured must accept its contracts upon its own terms, or go elsewhere for his insurance. These parties agreed that, for the purposes of the application for the policy of insurance, the medical examiner who wrote down the answers was to be regarded by both parties as the agent of the applicant; and one of the objects of that stipulation was to assure the defendant that it could rely upon the truth of the answers contained in the application, and that it could issue a policy without fear that it might afterwards be claimed that it was bound by some information that its agent had obtained that was in conflict with the answers in the application. And this does not seem at all unfair to the applicant, for he signs the application, and is carefully advised of the importance of the truth of his answers, while it is certainly no more than fair to the defendant that it should have the whole truth before it when determining whether the risk is one that it should accept. But in any event the defendant has the right to insist, as a condition of its issuing the policy, that an applicant shall agree that, for the purposes of the application and the issuance of the policy, whoever fills up the blanks, whether he be in the employ of the defendant, or a soliciting agent, or one occasionally paid by it for making a medical examination, shall for that purpose be deemed the agent of the applicant. If the applicant does not care to so agree, he need not make the application. But if he does make it, and incorporates that agreement into his application, and upon the strength of it the policy is issued, he is bound by it, and the defendant is entitled to the full protection of it; and so this court and the Supreme Court of the United States have unvaryingly held.

Rohrbach v. Germania F. Ins. Co. 62 N. Y. 47, 20 Am. Rep. 451, was an action on a policy issued for insurance against fire. The 57 L. R. A.

facts stated in the application were by its terms made warranties, as stated therein. They proved to be untrue, and it was held that a recovery could not be had, although the applicant had truly stated the facts to the agent who filled up the application; and the reason for it was, as in this case, that the policy provided, in effect, that the agent should be deemed the agent of the insured, and not of the company, and it was held that the knowledge of the agent was immaterial, and could not affect the warranty. In the course of the opinion the court said: "It is hereupon urged by the plaintiff that the errors and omissions were those of the defendant. But the plaintiff and defendant have in the policy, the contract between them, expressly agreed that Brand should be deemed the agent of the plaintiff, and not of the defendant, under any circumstances.

But we must take the contracts of the parties as we find them, and enforce them as they read. By the one before us the plaintiff has so fettered himself as to be unable to retain, as the case now stands, the real essence of his agreement. Though he has frankly and fully laid before the actor between him and the defendant all the facts and circumstances of the case, he is made responsible for error in legal conclusions which he never formed, and which were arrived at by one in whom he trusted, and whom he supposed to stand in the place of the defendant. . . . Held to the letter and substance of his contract, the plaintiff made a breach of a warranty and condition precedent, upon the truth of which his contract rested, and for that reason may not recover in this action, as the facts now stand." The *Rohrbach Case* was followed by the *Alexander Case*, 66 N. Y. 464, 23 Am. Rep. 76. That contract contained the following clause: "It is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." The court (Judge Rapallo writing), on the assumption, as he said, that the agent, Brewster, was the agent of the company for the purposes of the application, said: "But the policy now in question contains an express agreement that any person other than the assured, who may have procured the insurance to be taken by the company, shall be deemed to be the agent of the assured, and not of the company, under any circumstances whatever, or in any transaction relating to the insurance. In *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451, this court decided that such a clause was operative, and precluded the insured from claiming that the company was bound by the knowledge of a similar agent through whom a policy had been procured."

The last utterance on the subject in this court is to be found in the *Allen Case*, 123 N. Y. 6, 25 N. E. 309. In that case, as in this one, the court was asked to draw the

inference of fact that the person who did the writing was the agent of the company (notwithstanding the stipulation that he should be deemed the agent of the applicant for all the purposes of the contract), and to thrust its inference of fact into the contract in the place of the provision declaring him to be the agent of the insured. But the court repudiated the plaintiff's claim, saying, among other things (Judge Gray writing): "Then, too, the policy contained the provisions that the company would not be bound by any acts of, or statements of or to, any agent or other person, which were not contained in the policy; and, further, that any person other than the assured procuring the policy, or any renewal thereof, should be deemed the agent of the assured, and not of the company. To these conditions the plaintiff's assent is presumed to have been given by his acceptance of the policy, and there is no reason why he should not be bound by them. If Noble had been the agent of the defendant, it was perfectly competent to stipulate by this contract of insurance that anything done by or known to the agent should be without effect upon the contract, unless made known in writing to the principal,"—citing authorities above quoted. The parties were competent to make that stipulation, said this court in that case; but they are not competent to make the stipulation in this case, it is now said. No attempt, however, is made to give a reason for holding that the parties are competent to make one, but not the other. None can be given, I assume, that will persuade any mind. A reversal in this case will, as a matter of fact, overrule *Allen's Case*; and it would seem as if the court's assertion in that case of competency on the part of the parties to contract as they did should be opposed with something more than a contrary assertion in this case; that, at least, the court should point out what it is that prevents two men of sound mind, dealing with each other honestly, from agreeing that for all the purposes of a particular contract a person who shall act as the agent for one shall be deemed the agent of the other.

In the United States courts the view hitherto taken by this court has been adopted. *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *Maier v. Fidelity Mut. L. Asso.* 24 C. C. A. 239, 47 U. S. App. 322, 78 Fed. 566. The *Fletcher Case* was an action brought upon a life insurance policy, the application for which stipulated that the statements therein were warranties, and that no statement to the agent not contained in the application, and thus transmitted to the company, should be binding upon it. The agent, without the knowledge of the applicant, wrote down false answers, and the applicant signed without reading the application. It was held that the policy was void, and no recovery could be had thereon, notwithstanding the insistence of counsel that inasmuch as the applicant never in fact made the false statements and representa-

tions to which his name was signed, but did truthfully answer the agent, the company which employed the agent should suffer, rather than the applicant. From the opinion in that case we quote: "It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made or business fairly conducted if such a rule should prevail, and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove, not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true."

The *Maier Case*, 24 C. C. A. 239, 47 U. S. App. 322, 78 Fed. 566, has already been briefly referred to; and other reference to it will not be had, except to say that the contention of the plaintiff in that case was that the questions were propounded and answers written by an agent of the insurance company who knew all of the facts, but suppressed them when preparing the answers, and that hence the company was estopped from denying that it possessed the knowledge which he had. But the court held that the insured, having contracted otherwise, should be bound by his contract, in a very careful opinion written by Mr. Justice Harlan, in which he cites, among other cases, in support of the decision made, the *Fletcher Case*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837. This position is followed in a carefully considered opinion by the appellate division of the first department, in *Bernard v. United L. Ins. Asso.* 14 App. Div. 142, 43 N. Y. Supp. 527, and by the Fourth department in *Hamilton v. Fidelity Mut. L. Asso.* 27 App. Div. 480, 50 N. Y. Supp. 526, and there are no later authorities in this court or in the United States Supreme Court to which our attention has been called, which are in conflict with the decisions to which reference has been made.

Appellant's counsel cites *Sprague v. Holland Purchase Ins. Co.* 69 N. Y. 128, and *Whited v. Germania F. Ins. Co.* 76 N. Y. 415, 32 Am. Rep. 330. The *Sprague Case*, the opinion in which was written by Judge Folger, who also wrote in the *Rohrbach Case*, is distinguishable from the latter in two respects, which will be sufficiently pointed out by taking extracts from the opinion. The first is: "Nor will the defendant's position hold, that Bowers was the agent of the plaintiff therein. There is

the clause, to be sure, in the policy, that he who procures the insurance from the defendants shall be held by contract to be the agent of the plaintiff. There is, however, the other condition, hostile thereto, imposed by the defendants themselves, that the application must be made out by an authorized agent of them. And the referee finds, and so is the proof, that Bowers was the agent of the defendant." And the second extract is: "This defense of the defendant rests entirely upon the statement in the paper called the application. There is no finding of fact which permits us to call that the application of the plaintiff, and hence his warranty. There is no breach of warranty, therefore, by him, for he has made no warranty. The case is entirely without findings of fact to sustain the position of the defendants." The opinion in the *Whited Case* (Judge Folger again writing) distinctly approves of the *Rohrbach Case*, which is controlling in the case at bar. After saying that it would be fatuous to deny that Harmon was the agent of the defendant, were it not for a clause in the policy upon which the defendant builds, the opinion continues: "The clause is in this wise: That any person other than the assured, who may have procured the insurance to be taken, shall be deemed to be the agent of the assured, and not of the company, under any circumstances whatever, or in any transaction relating to this insurance. That clause we have held to be forceful in *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451, and *Alexander v. Germania F. Ins. Co.* 66 N. Y. 464, 23 Am. Rep. 76. We have not held it so, as yet, further than the scope of the facts in those cases. . . . That case [referring to the *Rohrbach Case*] dealt with matters before the issue of the policy,"—meaning thereby that the stipulation by which the plaintiff agreed that the answers were true and were made by him, and that, if written out by another, that other was his agent, and not the agent of the company, was incorporated into the application upon which the company acted in determining whether to issue a policy, in the *Rohrbach Case*, whereas in the *Whited Case* the policy was not issued on the strength of a partly written and partly printed application, and the provision as to agency was merely incorporated in the policy, which was procured through one Harmon, who countersigned it as defendant's agent. That policy was renewed twice, each renewal receipt being signed by the defendant's president, and each contain-

ing this clause: "Not valid unless countersigned by the duly authorized agent of the company." Each receipt was countersigned by Harmon, who received the premiums and forwarded them to the defendant. On applying for a third renewal, plaintiff informed Harmon that he had sold the premises, and that his interest was as mortgagee. Harmon received the premium, gave another renewal receipt, and said he would make it all right. The court held that in the renewal of the policy, not in obtaining it, Harmon was the agent for the defendant, and it was bound by his acts. If there are any other authorities in this court, which, even as a matter of first impression, appear to militate against the position taken by this court and the United States courts in the cases cited *supra*, they have not been brought to my attention. The *Grattan Cases*, 80 N. Y. 281, 36 Am. Rep. 617, and 92 N. Y. 274, 44 Am. Rep. 372, and *Flynn v. Equitable L. Ins. Co.* 78 N. Y. 568, 34 Am. Rep. 561, and *O'Brien v. Home Benefit Society*, 117 N. Y. 310, 22 N. E. 954, certainly do not, for they have not even the merit of being in point. The question presented in this case was not raised in those cases, and could not have been, because in none of them did the contract contain a stipulation that the medical examiner or other representative of the company should be deemed to be the agent of the insured.

Since the foregoing was written I have found the case of *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, decided by the United States Supreme Court less than two months ago, which contains an exhaustive review of the cases both in England and this country which have grown out of attempts, through one device or another, to break down the written contract by parol evidence. In that case the attempt was made to show knowledge in the company's agent of a fact denied in the policy, and because of such agency to charge the company with knowledge. The court, in repudiating the plaintiff's contention, pays critical attention to some of the authorities in this state, and demonstrates, as I think, that both on principle and on the authority of nearly all jurisdictions in this country, as well as England, the stipulations of this contract should control.

The judgment should be affirmed, with costs.

Gray, J., concurs with Parker, Ch. J.

Rehearing denied April 1, 1902.

IOWA SUPREME COURT.

James T. TAYLOR
v.

ANCHOR MUTUAL FIRE INSURANCE
COMPANY, Appt.

(.....Iowa.....)

1. An insurance company cannot de-

feat liability on its policy because of misrepresentations in the application as to the title to the property or the encumbrances thereon, if they were correctly stated to the agent and he failed to make out the application in accordance with the information given.

2. Entirety of premium in a policy im-

NOTE.—As to effect of agent's knowledge of falsity of answers in application, see the preceding case of *Sternaman v. Metropolitan L. Ins. Co.* and footnote thereto.
57 L. R. A.

ceding case of *Sternaman v. Metropolitan L. Ins. Co.* and footnote thereto.

surging a dwelling house and live stock as separate items, with a specified amount on each, will not prevent the policy from being severable; but a recovery may be had for loss on the house, although the policy has been avoided as to the live stock by placing encumbrances thereon, where the property is so situated that both classes are not exposed to the same risks.

(January 22, 1902.)

APPEAL by defendant from a judgment of the District Court for Mills County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

Statement by McClain, J.:

Action to recover for a loss within the terms of a policy of fire insurance. Defendant relied upon misrepresentation in the application as to plaintiff's title, and encumbrance of the insured property subsequent to the making of the contract of insurance, and in violation of its terms; also that there was a failure to furnish proofs of loss. There was a judgment on a verdict for plaintiff, from which defendant appeals.

Messrs. Sullivan & Sullivan, for appellant:

The instructions, whether right or wrong, are the law for the jury; and if the verdict is in conflict with the instructions a new trial will be granted.

Reynolds v. Keokuk, 72 Iowa, 371, 34 N. W. 167; *Way v. Chicago, R. I. & P. R. Co.* 73 Iowa, 463, 35 N. W. 525; *State v. Moore*, 81 Iowa, 578, 47 N. W. 772; *Fisk v. Chicago, M. & St. P. R. Co.* 83 Iowa, 253, 48 N. W. 1081; *Davis v. Chicago, R. I. & P. R. Co.* 83 Iowa, 744, 49 N. W. 77.

The court is under no obligations to instruct the jury in regard to a theory not raised by the pleadings, or claimed to be true by either party, or sustained by the testimony of any witness.

George v. Swafford, 75 Iowa, 491, 39 N. W. 804; *Storrs v. Emerson*, 72 Iowa, 390, 34 N. W. 176; *Negley v. Cowell*, 91 Iowa, 256, 59 N. W. 48.

The making of the chattel mortgage was a violation of the contract.

This policy is the contract of the parties. It is not for this court or any other person to make a different contract, so long as the contract in suit is not against public policy or against any statute of the state of Iowa.

Lee v. Agricultural Ins. Co. 79 Iowa, 379, 44 N. W. 683; *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133.

If the policy is void in part it is void in all.

Geiss v. Franklin Ins. Co. 123 Ind. 172, 24 N. E. 99; *Baldwin v. Hartford Ins. Co.* 60 N. H. 422, 49 Am. Rep. 324; *Gore Dist. Mut. F. Ins. Co. v. Samo*, 2 Can. S. C. 411; *Plath v. Minnesota Farmers' Mut. F. Ins. Asso.* 23 Minn. 479, 23 Am. Rep. 697; *Bowman v. Franklin F. Ins. Co.* 40 Md. 620; 57 L. R. A.

Bloakley v. Niagara Dist. Mut. Ins. Co. 16 Grant Ch. 198; *Barnes v. Union Mut. F. Ins. Co.* 51 Me. 110, 81 Am. Dec. 562; *Day v. Charter Oak F. & M. Ins. Co.* 51 Me. 91; *Gould v. York County Mut. Ins. Co.* 47 Me. 403, 74 Am. Dec. 494; *Kimball v. Howard F. Ins. Co.* 8 Gray, 33; *Lee v. Howard F. Ins. Co.* 3 Gray, 583; *Associated Firemen's Ins. Co. v. Assum*, 5 Md. 165; *Friesmuth v. Agarcam Mut. F. Ins. Co.* 10 Cush. 587; *Etina Ins. Co. v. Resh*, 44 Mich. 55, 38 Am. Rep. 228, 6 N. W. 114; *Gottzman v. Pennsylvania Ins. Co.* 56 Pa. 210, 94 Am. Dec. 55; *Moore v. Virginia F. & M. Ins. Co.* 28 Gratt. 508, 28 Am. Rep. 373; *Bryan v. Peabody Ins. Co.* 8 W. Va. 605; *Garver v. Hawkeye Ins. Co.* 69 Iowa, 202, 28 N. W. 555; *Kahler v. Iowa State Ins. Co.* 106 Iowa, 380, 76 N. W. 734.

Messrs. O. R. Patrick and Shirley Gilliland for appellee.

McClain, J., delivered the opinion of the court:

The application on which the policy was issued represented that insured owned 93 acres of land, "on which the property to be insured is located," of the value of \$35 per acre; that there was \$900 encumbrance thereon; that he had a fee-simple title to the land "on which the above-described property to be insured is situated;" and that his title was undisputed to the property proposed for insurance; and these representations were, in the policy, warranted to be correct. The policy specifies the risk assumed as follows: "\$250 on frame dwelling house; \$250 on household furniture, beds, and bedding while therein; \$50 on family wearing apparel therein; \$25 on sewing machines while therein; \$50 on silver and plated ware while therein, and family jewelry, books, pictures, picture frames; \$100 on work horses, mules, and colts on premises, and against loss by lightning, at large or in use, not to exceed \$75 on each; \$100 on cattle on premises; \$100 on grain in building; \$25 on wagons, carriages, and harness." It is provided in the policy, not only that it shall be void in case of false representations in the application, or in case of change in title or possession, but also that it shall be void after any sale, conveyance, or encumbrance of the property insured, without the consent of the company.

1. It appears that the 93 acres described as the premises on which the buildings and other property insured were located consisted, in fact, of two tracts,—one of 80 acres, and another adjoining of 13 acres,—and that the property was all located on the latter of these two tracts. There was some contention as to breach of warranty with reference to the title of, and encumbrance upon, the 80-acre tract; but it is shown that the true condition of the property with reference to title and encumbrance was truly stated to the agent, and that, if the application had been made out in accordance with the information given, there would have been no falsity in the statements. Therefore no defense is made out as to the

title of, or encumbrance upon, the real estate.

2. Subsequently to the issuance of the policy the insured gave a chattel mortgage on some of the cows and horses covered by the policy, and this is relied on by defendant as a breach of condition, avoiding the entire policy, and therefore preventing recovery for the loss, which was of the dwelling house and furniture therein. We may concede that the giving of the chattel mortgage was a breach of the condition of the policy as to the property covered by the mortgage, and we are therefore at once confronted with the question whether a breach of condition as to a part of the property covered by the policy will avoid the policy as to other property enumerated and covered by a separate stipulation thereof, as to the amount of the risk assumed on such property. It will be seen at once that if the house and furniture had been included in one policy, and the animals in another, a breach of the condition of the policy covering the animals would not prevent recovery under the policy covering the dwelling house and furniture; but it is contended that, where an insurance on different classes of property is effected by a policy which states a gross premium, the contract is entire, although the risks assumed on the different classes of property are distinct and separate. On this question the authorities are in hopeless confusion, and there are cases holding, without qualification, to the rule that the entirety of the premium is conclusive as to the entirety of the contract, so that a breach of condition as to one class of property will avoid the policy as to all, notwithstanding the two classes are included in separate clauses as to the amount of loss to be paid. On the other hand, there are cases in which it is held that if the risks are separately enumerated the policy is divisible, notwithstanding the entirety of the premium. We think, however, the great weight of authority at the present time is to the effect that the question is one of the intention of the parties, and that, if the condition of the property is such that the risk as to one class of property would be affected by the destruction of the other, then it must be presumed that the breach of condition as to one class is a violation of the contract also as to the other class, because the company would not have insured the one except upon the condition imposed as to the other; while, if the loss of the one class of property could not affect the risk as to the other, then it must be presumed that there was no intention that the conditions as to one should apply to the risk as to the other. In support of this construction we find the following pertinent language used by the supreme court of New York in the case of *Merrill v. Agricultural Ins. Co.* 73 N. Y. 452, 29 Am. Rep. 184: "When there are several subjects of insurance (as there are fourteen here), separately valued, on which a gross sum is insured, not exceeding the aggregate of that valuation, for the insurance of which a premium

in gross is paid, it is easy to see what is the rate of premium on the whole valuation, and what is the amount of premium on each subject insured. This being so, it seems fanciful to say that, if the facts thus easily reached were stated in detail in the contract, it would be severable, while, not being specifically spread out, it is entire. If there were anything in the terms or nature of the particular contract, or in the circumstances of the case, or in the nature of the different subjects of the insurance, from which it was to be inferred that the insurer would not have been likely to have assumed the risk on one or several of them unless induced by the advantage and profit of having a risk on all, that would be a rational cause for deeming the contract entire. But when, for aught that appears, when, indeed, it is as likely that, the insurer would have taken a risk upon any one or any few of the subjects insured at the same rate of premium as upon the whole, and has in the policy so separated the subjects, and so singled them out by a specific valuation, as that there is no difficulty in distinguishing one of the subjects from the rest, and closing the contract as to that separately, and carrying forward the contract as to the rest, it does result that the contract is severable in practical operation, and hence in law. And so, also, that though there may have been some conduct of the insured as to some of the property, not evil in itself, but working a breach of a condition in its letter, the effect of that breach may be confined to the insurance upon that property; the contract as to that may be held avoided, and as to the other subjects held valid. There is another rule, that in construing the consideration as entire or distributed the law will be guided by a respect to general convenience and equity, and by the good sense and reasonableness of the particular case; for it must be supposed that it was the intention of the parties that such construction should take place, in the occurrence of contingencies not contemplated and provided for at the making of the contract." In *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, the court uses this language: "In this case we are unable to see how the risk on the house named in the second and third paragraphs of the answer could affect the risk on the barn or the personal property, for the destruction of which the suit was prosecuted. The risks on the different items of property named in this policy are many of them separate and distinct. It is true that the risk on the household goods in the house would be affected by whatever would affect the risk on the house; so the risk on the grain in the barn would be affected by whatever would affect the risk on the barn; but we think it impossible to conceive how the risk on the barn could affect the risk on the house, or *vice versa*." And it was accordingly held in another action between the same parties (*Pickel v. Phenix Ins. Co.* 119 Ind. 291, 21 N. E. 898) that while, under the former case, the policy should be treated as several with reference

to the different buildings, it was indivisible with reference to the risk on the house and personal property contained therein, although they were enumerated under separate clauses in describing the loss to be paid; and the doctrine of these cases is reiterated by the same court in *Geiss v. Franklin Ins. Co.* 123 Ind. 172, 24 N. E. 89, where it was held that although different classes of personal property, involving the same risk, were separately enumerated, a breach of condition as to one would be a breach as to all. To the same effect it was held in *Loomis v. Rockford Ins. Co.* 77 Wis. 87, 8 L. R. A. 834, 45 N. W. 813, that, "although the insurance is distributed to the different items of insured property, the contract is indivisible if the breach of contract as to an item of the property affects, or may reasonably be supposed to affect, the other items by increasing the risk thereon." In support of the same general proposition, see *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247; *Koontz v. Hannibal Sav. & Ins. Co.* 42 Mo. 126, 97 Am. Dec. 325; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, 81 Am. Dec. 521; *Hanover F. Ins. Co. v. Crawford*, 121 Ala. 258, 25 So. 912; *Manchester F. Assur. Co. v. Glenn*, 13 Ind. App. 365, 40 N. E. 928, 41 N. E. 847. A recent case strongly supporting the proposition that the contract is indivisible, and a breach of condition as to one class of property will avoid it as to all the property covered, is *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 52 L. R. A. 70, 36 S. E. 821. But it is unnecessary to elaborate by quotations from or citations of the many cases in which this question has been considered. The citations found in several of the recent cases above referred to cover the whole ground. It may be said, further, that several cases in which the courts have announced the unqualified rule that a breach of condition as to one class or item of property covered by the policy will constitute a breach of the contract as to all the property covered are cases where the different classes or items of property were so situated with reference to each other that the risk as to one constituted a risk as to all, and in these cases the same result might have been reached by adopting the rule which we have above announced as supported by the weight of authority. See, as illustration, *Lee v. Howard F. Ins. Co.* 3 Gray, 583; *Fire Asso. of Philadelphia v. Williams*, 26 Pa. 196; *Agricultural Ins. Co. v. Hemilton*, 82 Md. 88, 30 L. R. A. 633, 33 Atl. 429; *Cuthbertson v. Carolina Home Ins. Co.* 96 N. C. 480, 2 S. E. 258. It may be noted, also, that the North Carolina court in a later case than that last cited, 67 L. & A.

although not involving the same question, has held that where the policy classifies and specifies numerous items of property, and the sums of money for which they are severally insured, the contract is not single, but severable. *Pioneer Mfg. Co. v. Phoenix Assur. Co.* 110 N. C. 176, 14 S. E. 731. The question has not been fully discussed in any cases which have been decided by this court. In *Garver v. Hawkeye Ins. Co.* 69 Iowa, 202, 28 N. W. 555, the proposition is broadly laid down that where the premium is in gross the contract is not divisible, and a breach of warranty as to a part of the property will vitiate the policy as to the whole. But it is to be noticed that there the policy covered a barn and certain horses, and the court might well have held that the risk, so far as the horses were concerned, was involved in any risk affecting the barn; and the conclusion was therefore in accordance with the rule which we think to be the proper one, although we do not regard the reason given as satisfactory. In *Kahler v. Iowa State Ins. Co.* 106 Iowa, 380, 76 N. W. 734, the view expressed in the *Garver Case* was qualified so as to leave the way open for adopting the position which we now take. We therefore hold on this question, as involved in the case before us, that entirety of premium does not necessarily prove that the contract is indivisible, and that where it appears from the terms of the policy that distinct items or classes of property were separately insured the policy may be valid as to one item or class, although it is invalid as to another item or class by reason of breach of conditions of the policy with reference thereto, provided it appears, also, that the risk which it was intended to exclude by the condition which is broken does not apply to the other items or classes of property. In this case a chattel mortgage on the cows and horses could not in any way affect the nature of the risk as to the dwelling house and contents, and therefore we find that a breach of a condition in the policy as to the one class of property did not invalidate the insurance as to the other.

3. As to failure to furnish proofs of loss, the plaintiff relied upon a waiver contained in a letter from an officer of the company to the plaintiff with reference to an adjustment of the loss, and subsequent conduct of the adjuster with reference to the loss. Under the issues, the question of waiver was properly submitted to the jury, and their finding is conclusive upon us.

Affirmed.

Rehearing denied.

TENNESSEE SUPREME COURT.

A. T. COTTRELL *et al.*

v.

George C. GRIFFITTS *et al.*, *Appts.*

(.....Tenn.....)

Including the husband as grantee in a deed to partition to the wife her share of property in which she has an undivided interest will give him no greater interest than though the deed had been to the wife alone.

(November 23, 1901.)

A PPEAL by defendants from a judgment of the Court of Chancery Appeals rendered upon appeal from a decree of the

NOTE.—*Effect of deed in partition, as distinguished from ordinary deeds.*

- I. Deed to person other than cotenant, 332.
- II. Warranty.
 - a. In general, 333.
 - b. Implied warranty between those holding by descent, 334.
 - c. Implied warranty between those holding by purchase, 336.
- III. Estoppel to set up after-acquired title, 337.
- IV. Estates acquired by partition deed between parties holding different estates, 337.
- V. Words of inheritance as necessary to vest fee, 338.
- VI. Rights of subsequent purchasers, 338.
- VII. Changing title from descent to purchase, 339.
- VIII. Effect as revoking previous will, 339.
- IX. Failure of wife to join in deed, 340.
- X. Deed by person under disability, 340.
- XI. Execution of deed.
 - a. Deed not executed by all the parties to it, 340.
 - b. Defective execution, 340.
- XII. Effect on judgment and mortgage liens, 340.
- XIII. Parol evidence to show nature of deed, 341.

I. Deed to person other than cotenant.

In the following cases involving partition deeds between coparceners and tenants in common holding by descent, it was held that a partition deed conveys no title, but merely severs the unity of possession, and the husband or wife of a cotenant named as a grantee in the partition deed acquires thereby no greater title or interest in the property than he or she had before the partition. *Palmer v. Alexander*, 182 Mo. 127, 62 S. W. 691; *Davis v. Davis*, 46 Pa. 342; *Stehman v. Huber*, 21 Pa. 260; *Carson v. Carson*, 122 N. C. 645, 30 S. E. 4; *Whitsett v. Wamack*, 159 Mo. 14, 59 S. W. 961.

In another case, where, prior to the partition, one of the heirs had conveyed her undivided share to her husband, it was held that she acquired no title by reason of the fact that she, instead of her husband, was named as grantee in the partition deed executed by her husband and the cotenants. *Gouldie v. Northampton Water Co.* 7 Pa. 238.

In *Trimble v. Reis*, 87 Pa. 448, where the deed was executed to a cotenant and her husband jointly, it was held that the fact that the

Chancery Court for Knox County, which judgment disallowed the claim of defendant to certain land which had been deeded to himself and wife in partition proceedings to divide her undivided interest in certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. C. Ford and Webb & McClung for appellants.

Messrs. De Armond & Ford and Green & Shields, for appellees:

At the time the deed was made to Griffiths and wife, Mrs. Griffiths already owned by inheritance a one-third interest in the lands covered by this deed, and she, not having joined in the said deed or made any other conveyance thereof, still remained

grantees had agreed to pay an annuity to the widow of the ancestor in lieu of her dower did not give the husband any rights under the deed.

But in *Stehman v. Huber*, 21 Pa. 260, where the husband, who was named as a grantee in the deed, had paid a sum of money for equality of partition, it was held that he acquired an interest in the property to that extent.

A partition deed naming one of the tenants in common and her husband as grantees does not deprive her of exclusive title to the portion conveyed, or invest the husband with any title unless it is affirmatively shown that she made a gift to her husband of a joint interest in her share of the land. *Dexter v. Billings*, 110 Pa. 135, 1 Atl. 180.

In *Harrison v. Ray*, 108 N. C. 215, 11 L. R. A. 722, 12 S. E. 993, it was held that this is so, even though the conveyance is so made at the direction of the heir; the court saying that the grantors conveyed no part of their shares, and had no interest in the share embraced in the deed to the grantees; it belonged to the husband by conveyance from his father, and, the title being already in him, the deed merely designated his share by metes and bounds, and allotted it to be held in severalty.

A similar question was involved in *Yancey v. Radford*, 86 Va. 638, 10 S. E. 972, where it was held that a deed executed to a cotenant and her husband grants no estate to the husband, even though it constitutes a family settlement, and was executed with the intention of conveying to the husband his wife's share in the land, as the grantors had no title to the share granted, the title being in the wife. It was hers by descent, and the grantors could not convey it away. The wife's title could only be divested by a deed from her in the mode prescribed by law.

But in *Schellinger v. Selover* (N. J. Eq.) 46 Atl. 1058, where an attempt was made, after the expiration of forty years and after the death of both the cotenant and her husband, to have the husband's title declared to have been held as trustee for the wife, the court decided that the transaction must be regarded as a family settlement, and the presumption indulged in that the conveyance of the wife's share to the husband was a gift.

Some of the decisions, while reaching the same result as that attained in the above cases, are founded on different grounds, as in *Rogers v. Turley*, 4 Bibb, 355, where it was held that a release executed by coparceners to one of the coparceners and her husband passed no title to the husband, as a release will not pass an estate unless there exists a privity between the

the owner of the one-third interest. So that at most the deed to Griffiths and wife merely conveyed a two-thirds undivided interest.

It would be a legal anomaly to hold that Mrs. Griffiths owned a one-third interest in the lands in dispute as tenant in common, while she and her husband owned the other two-thirds interest therein as tenants by the entireties; and the effect of this holding would be that she is a tenant in common in her own right with herself and her husband in their joint right.

A tenancy by entireties is created when husband and wife take an estate to themselves jointly by grant or devise or limitation of use made to them during the coverture. The essential thing is, that the title or interest is devolved upon husband and wife at the same time and during coverture.

releasor and the releasee,—that is to say, one of the estates must be so related to the other as to make but one estate in law.

And in the following cases it was held that where a partition deed is executed to the husband of one of the cotenants he holds the title in trust for his wife; the consideration of the conveyance having proceeded from the wife, and consisting of her release to the other cotenant. *Weeks v. Haas*, 3 Watts & S. 520, 39 Am. Dec. 89; *Nichols v. Nichols*, 149 Pa. 172, 24 Atl. 194. In these cases no reference was made to any of the above cases, or to the doctrine supported by them.

In *Wade v. Dera*y, 50 Cal. 376, it was held that the parties executing partition deeds do not convey to the others any portion of their own interest in the land, but merely sever the unity of possession, and that hence, where, previous to the partition, one of the parties to it had conveyed to a stranger all his right, title, and interest in and to the portion of the premises conveyed to him by the partition deeds, and was no longer a cotenant, he acquired by the deed no title or interest other than that which he had conveyed to his grantee, and that the allotment of such portion to him inured to the benefit of such grantee.

There are two cases which arrive at conclusions different from those sustained in any of the above cases, and which are based on reasoning in conflict with the doctrine that a partition deed conveys no title, though that doctrine was not discussed, and apparently not considered, in either of the cases.

One of the cases is *Webb v. Nease*, 66 Ark. 155, 49 S. W. 1081, where there had been a partition between two heirs, and the widow of the ancestor was named as a grantee with one of the heirs in the deed conveying his share. After her death her cognatee brought an action to reform the deed, claiming that the words of inheritance used therein were not intended to apply to her portion. The court denied this relief on the ground that there was not sufficient evidence of mistake, but held that the widow was entitled to a one-fourth, and not a one-half, interest in the land conveyed to her and her son. This was on the ground that the son had an undivided half interest in the land prior to the partition, and that all the coheirs could convey to him and his mother was the other undivided half interest.

The other case was *Sharpe v. Davis*, 76 Ind. 17, where tenants in common, owning two separate farms, partitioned them by each taking a farm and executing a deed of his undivided half in the other farm. The deed of one of

Tindell v. Tindell (Tenn. Ch. App.) 37 S. W. 1107.

The deed to Griffiths and wife did not convey title to Mrs. Griffiths, because she already owned it. This deed was simply a separation between the tenants in common of their interests, and the setting apart of the same in severalty, and it would have been good if made in parol.

Meacham v. Meacham, 91 Tenn. 535, 19 S. W. 757; *Palmer v. Alexander*, 162 Mo. 127, 62 S. W. 691.

Snodgrass, Ch. J., delivered the opinion of the court:

The question involved in this case is, What is the legal effect of a partition deed executed by two tenants in common to a third tenant, a married woman, where the deed includes the husband as joint grantee,

the farms was executed to the cotenant's wife and daughter, and at his request it was held that a judgment against the cotenant, which was a lien on his undivided half at the time of the partition, did not extend to the undivided half conveyed to his wife and daughter, and that he had no title to it; the court saying that if he had voluntarily conveyed the property to his wife and daughter he could not have set the conveyance aside, and that the same rule would apply in this case where his cotenant had conveyed it to them at his request.

In *Yancey v. Radford*, 86 Va. 638, 10 S. E. 972, it was held that tenants in common, who have executed a partition deed to their cotenant's husband, are not thereby estopped from subsequently claiming title as heirs of the cotenant.

And the fact that a tenant in common accepted and registered a partition deed, naming his wife as grantee, did not estop his heirs from claiming title, as the deed did not convey title. *Harrison v. Ray*, 108 N. C. 215, 11 L. R. A. 722, 12 S. E. 993.

It was also held in the above case that it was not necessary to reform the deed by striking out the wife's name, as its insertion had no effect.

And in *Carson v. Carson*, 122 N. C. 645, 30 S. E. 4, it was held that where a partition deed, conveying the share of a cotenant to her husband, shows on its face that it is only a partition deed, it does not constitute color of title so as to entitle the husband to claim under it adversely to the heirs.

II. Warranty.

a. In general.

Where a partition deed contains an express covenant of warranty the law will not imply any other warranty. *Rogers v. Turley*, 4 Bibb, 355; *Morris v. Harris*, 9 Gill, 19; *James v. Adams*, 64 Tex. 196.

An implied warranty in partition between coparceners extends only to the parties and their privies,—that is to say, their heirs,—and does not extend to a devisee of one of the parties to the deed, so as to entitle him or his representatives to maintain an action. *Weiser v. Weiser*, 5 Watts, 279, 30 Am. Dec. 313.

A quitclaim partition deed by which the grantor transfers to his cotenant his share of the common property, passes with it the covenants of warranty contained in the deed under which the grantor claims title, and on failure of the title to the share so assigned, the

though no agreement upon any consideration was made for such conveyance, or in fact made at all, but deed was executed under the following circumstances, and upon the facts so showing, found by the court of chancery appeals? Jesse Wells, father of Mrs. Ford, Mrs. Cottrell, and Mrs. Griffiths, was the owner of the land in controversy. He died, and it descended to these married ladies as tenants in common. Mrs. Griffiths and Mrs. Ford conveyed to Mrs. Cottrell her share of the land, and later undertook to have the remainder of the land partitioned between them. A surveyor and notary was employed to partition, and draw deeds to be executed by the parties, each to the other, for the shares so surveyed and partitioned. This was done, but in drawing the deeds, without direction from the parties, and not in accord with their inten-

tion, the notary named the husbands of the two married women as conveyees. The parties were all dissatisfied with this form of conveyance; the husbands setting up no claim of right or agreement upon any consideration, or without consideration, to have it done. The draftsman was consulted, and he said the deeds conveyed no interests to the husbands as matter of law, but that he would insert a clause removing any supposed difficulty on this point; and thereon be interlined a clause showing that the deeds were in division of the lands of Jesse Wells, deceased,—as already stated, the father of the married women attempting the partition. This was not altogether satisfactory, but they agreed to keep the deeds from record until they could take advice and look further into the matter. The husbands and wives concurred in this, and so

grantee may proceed under such covenants for indemnity. *Beardsley v. Knight*, 10 Vt. 185, 33 Am. Dec. 193.

Where the lands of two joint tenants holding with warranty are partitioned by writ under the statute of 31 Henry VIII. chap. 1, the warranty remains because by the King's writ they are compellable by statute to make partition; and the party having pursued his remedy according to the act should not be injured by its operation. But it was said that if the partition had been by deed, instead of pursuing the statute, the partition would remain as at common law, and the warranty would be gone. *Morrice's Case*, 6 Coke, 12.

As, at common law, a deed intended as a release between tenants in common will not pass a fee without the word "heirs," although a release between joint tenants and coparceners would pass a fee without such word, a warranty contained in such a deed becomes extinct on the death of the grantee. *Rector v. Waugh*, 17 Mo. 13, 57 Am. Dec. 251.

b. Implied warranty between those holding by descent.

At common law, upon a partition between coparceners there is an implied warranty that if either loses any of his share by eviction on account of defect of title in the ancestor, the party evicted may defeat the partition, or by proper proceedings may call upon his former cotenants for contribution. *Dugan v. Hollins*, 4 Md. Ch. 139.

In *Welser v. Welser*, 5 Watts, 279, 30 Am. Dec. 313, *infra*, where it was held that the law did not imply a warranty, the deed involved was executed by tenants in common holding under a will, so that the decision did not affect the question whether a warranty would be implied in case of partition between tenants in common holding by descent; but that question arose in the latter case of *Patterson v. Lanning*, 10 Watts, 135, 36 Am. Dec. 154, where it was held that by analogy the warranty implied in a voluntary partition between coparceners should be implied between tenants in common holding by descent. This was on the ground that when the law bestows an estate it provides the party with whatever may be requisite, not only to relieve him from any inconvenience which may attend his enjoying the estate, but also to secure him against any loss, so far as may be practicable, which may occur in consequence of the relief granted.

In *Morris v. Harris*, 9 Gill, 19, the court said that at common law a partition between

coparceners had annexed to it an implied warranty that if, by defect of title in the ancestor, either loses any part or his share by eviction, the party affected may defeat the partition or obtain compensation for the part so lost. And in Maryland the same rule applies to a partition by deed between coheirs, as they are assimilated to coparceners.

Though partition deeds exchanged between cotenants holding by descent are only quitclaim deeds, there is an implied warranty that each tenant will make good to the other any loss sustained by an eviction under a superior title. *Huntley v. Cline*, 93 N. C. 458.

In addition to the above cases, the cases hereinafter referred to (*infra*, II. c), which hold that the warranty is to be implied in cases involving deeds executed by persons holding by purchase, are, of course, authority in favor of the application of the same doctrine to voluntary partitions between those holding by descent. The reasoning applied in those cases is not only equally applicable to the cases herein considered, but is reinforced by the analogy existing between parcceners and tenants in common holding by descent.

In *Davidson v. Coon*, 125 Ind. 497, 9 L. R. A. 584, 25 N. E. 601, the court held against the doctrine of implied warranty, saying that the rule established by the decisions of the American courts is that a voluntary partition of land made by tenants in common, although evidenced by quitclaim deeds, does not imply a warranty. Though, as the court said, the question of implied warranty was not involved, the court deciding the case on another point, and reaching the same result as though an implied warranty had been found. The court cited, in favor of its holding, the cases hereinafter referred to, in which the effect of the statutes 31 & 32 Henry VIII. are discussed, and a case in which it was held that the execution of a partition deed did not prevent the parties from subsequently setting up an after-acquired title; the court saying that the rule has been asserted in cases where there has been an attempt to estop one of the cotenants from asserting an after-acquired title.

The cases involving the latter doctrine are not authority on the question of implied warranty, as the result would have been the same even though there had been an implied warranty. In fact, some of the cases holding that a cotenant is not estopped from setting up an after-acquired title are cases in which the partition deed contained covenants of warranty. See *infra*, III. The theory on which these cases were decided was that, even though they

the matter ended. The deeds were taken and kept by each, without registration or further action, until four days after the death of Mrs. Griffiths, which occurred on the 16th of February, 1901. The deeds were dated and put in possession of the parties on the 4th of October, 1892. There were no children born to Mr. and Mrs. Griffiths, and hence no estate by curtesy, if the partition vested no title either as tenant by the entirety or tenant in common with his wife in him. It was denied by the sisters of Mrs. Griffiths that any estate did so vest, and they insisted on their right to present possession of the land as heirs of their deceased sister. This claim was not admitted, and thereupon, on the 14th of March, 1901, they filed the bill in this cause, in connection with their husbands, to assert their right to recover the land of

Griffiths, and have his claim declared a cloud on their title thereto. The answer denied their right, and insisted that the deeds were delivered or made without question, and all parties had held and claimed under them since their date to the filing of the bill.

The main contention in the proof was as to the delivery of the deeds. The court of chancery appeals found upon the facts hereinbefore partly stated, and others not necessary to more fully recite, that there was no complete, unqualified delivery, which made the deeds take effect in favor of the husbands, as it was neither so intended nor understood by them, and that they therefore took no interest. The court therefore did not pass upon the legal effect of the deeds had they been in fact unqualifiedly delivered, and without other intent of operation

contain covenants of warranty, either express or implied, the covenants only extend to the title and interest owned by the parties at the time of the partition, and therefore do not prevent them from subsequently acquiring and setting up a paramount title.

The court also cited, as supporting its ruling, the cases of Dawson v. Lawrence, 13 Ohio, 546, 42 Am. Dec. 210, and Picot v. Page, 26 Mo. 422, *infra*, which, in fact, support the contrary doctrine. The case of Welser v. Welser, 5 Watts, 280, 30 Am. Dec. 313, *supra*, which was afterwards limited by Patterson v. Lanning, 10 Watts, 135, 36 Am. Dec. 154, to cases of partition between tenants holding by purchase, was also cited.

Effect of statutes 31 & 32 Henry VIII.

In *Sawyers v. Cator*, 8 Humph. 256, 47 Am. Dec. 608, where there had been a compulsory partition between tenants in common holding by descent, the court in holding that the statutes 31 & 32 Henry VIII. were in force in Tennessee, and that an implied warranty accompanied a partition under the statute, said that, as to a voluntary partition between such parties, they stood as they did before the statute,—that the implied warranty only attached where the partition had been compulsory. And in *Welser v. Welser*, 5 Watts, 279, 30 Am. Dec. 313, *infra*, it was held that a warranty would not be implied in the case of a voluntary partition, as the statute must be limited in its effect to cases of compulsory partition. This case was distinguished in *Patterson v. Lanning*, 10 Watts, 135, 36 Am. Dec. 154, *supra*, and limited in its effect to cases of voluntary partition between tenants in common holding by purchase.

In *Morrice's Case*, 6 Coke, 12, *supra*, the same view as to the effect of the statute was expressed, though the question of implied warranty was not involved there.

And in *Rountree v. Denson*, 59 Wis. 522, 18 N. W. 518, the court expressed the same opinion though the question was not involved, as the deed in that case contained express covenants. This view of the statute was not followed in *Stroecker v. Housel*, 3 Clark (Pa.) 379, *infra*, the court there holding that it applied to voluntary, as well as compulsory, partitions.

Conclusions.

From the above it will be seen that the implied warranty existing at common law on a voluntary partition between parceners has, by analogy, been applied to partition deeds between tenants in common holding by descent. The decisions are uniform on this question, 57 L. R. A.

with the exception of *Davidson v. Coon*, 125 Ind. 497, 9 L. R. A. 584, 25 N. E. 601, *supra*, and the *dicta* found in the cases involving the statutes 31 & 32 Henry VIII.

There are cases holding that a warranty will not be implied (*infra*, II. c), but they involve partition deeds executed between tenants in common holding by purchase, and, while they make no distinction between the different kinds of tenancy, they must, in view of the fact that the cases involving tenancy by descent make the distinction, be limited in their effect to partition deeds executed by tenants in common holding by purchase.

Some of the text writers have been influenced by the language of the statute 31 & 32 Henry VIII. and the *dicta* above noted into attempting to distinguish between voluntary and compulsory partitions; but the cases in which the question of implied warranty was actually involved will not support any such distinction. Neither can such a distinction be founded on reason so far as cases of partition between tenants in common holding by descent are concerned.

The statute 31 & 32 Henry VIII., authorizing compulsory partition between tenants in common, and giving them the benefit of the implied warranty existing at common law in favor of parceners, did not thereby exclude from the benefit of such warranty those voluntarily doing what they could have been compelled to do, pursuant to the statute. A different question would be presented had the statute expressly limited the warranty to cases of partition made pursuant to it. Ought the parties to be placed in a worse position because they voluntarily do that which the law would have compelled them to do?

The courts, in deciding questions arising out of voluntary partitions, have held that where the parties voluntarily do that which the law would have compelled them to do their acts are of the same force and effect as though done compulsorily. See *infra*, IX., X., XI.

The warranty is derived by analogy from that existing at common law, on a partition between parceners; and whether that warranty was implied by reason of the fact that a partition could have been compelled at law, or whether it was based on the ground that, the estate having come to the parties by an act of law, the law will relieve them from any inconvenience which may attend the enjoyment of the estate,—that is, it will permit a partition, and secure him against any loss resulting from the relief given,—is immaterial; as the analogy in either case is complete.

than that which appeared on their face. The assignment of errors raises the question that upon the facts found such delivery must be legally presumed, and defendant held to be the owner as survivor of his wife, the joint grantee, or at least to a one-half interest as tenant in common. This question need not be discussed at length. While we are satisfied with the conclusion of the court of chancery appeals that what occurred did not bind the conveyee Mrs. Griffiths to a release of her interest, in whole or in part, to her husband, yet we hold that such would not have been the effect of the deed had it been to the satisfaction of the parties, and unqualifiedly delivered. We think the proposition of law is soundly settled, in the best-reasoned cases, that partition or partition deeds between tenants in common, when they are married women, and the decree or deed includes husbands, with their wives, as decratal parties or joint conveyees, carry no other or more interest to the husband than if such decree or partition deed had been made to the wife alone. Such decree or deed only adjusts the rights of the interested parties to the possession. It makes no new title, or change in degree

of title. Each does not take the allotment by purchase, but is as much seized of it by descent from the common ancestor as of the undivided share before partition. The deed of partition destroys the unity of possession, and henceforth each holds her share in severalty; but such deed confers no new title or additional estate in the land, or, we may add, less estate than that descended. The title being already in her, the deed merely designated her share by metes and bounds, and allotted it to be held in severalty. *Whitsett v. Wamack*, 159 Mo. 14, 59 S. W. 961, and authorities cited. This being the law, it makes no difference whether deed of partition was made to Mr. and Mrs. Griffiths, or to her alone, or, if made to both, was in fact delivered, as the result would have been the same, so far as the rights of both or either were concerned. The husband could, under such deed, take no more interest than he could under one made to his wife alone.

It follows that in any event *the decree of the Court of Chancery Appeals*, holding that complainants were entitled to the relief sought, is correct, and it is *affirmed*, with cost.

c. Implied warranty between those holding by purchase.

In *James v. Adams*, 64 Tex. 196, where the tenants in common held by purchase, it was decided that on a partition by deed between them, a covenant of general warranty would be implied; the statutes having abolished the common-law distinction between estates held by joint tenants, tenants in common, and parceners, and given them the rights and remedies which appertain to parceners at common law.

An implied warranty accompanies a partition deed, which at least estops each tenant from evicting the other by adverse title, and binds him to repartition in case of such eviction by a stranger. *Venable v. Beauchamp*, 3 Dana, 321, 28 Am. Dec. 74; *Picot v. Pate*, 26 Mo. 398.

In *Dawson v. Lawrence*, 13 Ohio, 543, 42 Am. Dec. 210, the tenants in common had exchanged deeds of bargain, sale, and release, whereby they divided between them the lands held in common. Subsequently a third person established his right to a portion of the undivided interest previously claimed by one of the grantors in the partition deeds. It was claimed that the deeds were positive, affirmative conveyances by which each grantor transferred his title to the other, and that each grantee must stand the loss arising from a defect in his grantor's title. But the court held that, notwithstanding the form of the deed and its recital of a nominal money consideration, it merely operated as a partition deed, and neither party acquired any better title in the part allotted to him than he previously had to his undivided share; that the cotenant whose original title was defective must stand the loss, and not the cotenant to whom he had conveyed.

But in *Beardsley v. Knight*, 10 Vt. 185, 33 Am. Dec. 193, it was held that where cotenants for the purpose of partition convey to each other specific portions in the land, the partition is not invalidated by failure of title on the part of one of the grantors, and the loss must fall on the grantee. In so holding, the court said that in the old law of exchange something similar to the right claimed did exist, but that that species of conveyance result-

ing from the feudal tenures never existed in Vermont. And he inferentially limited the doctrine of implied warranty to partition deeds as distinguished from mutual deeds executed by each tenant and conveying specific portions of the land; saying that the division of estates in Vermont has not been by partition, but that the usual method of division has been that adopted in the present case, *viz.*, by deeds from each to the other of his portion; that if a cotenant recognizes another as his cotenant, and exchanges quitclaim deeds of partition with him, there is no reason why such deeds should be treated differently from other conveyances, in the absence of fraud.

And in *Welser v. Welser*, 5 Watts, 279, 30 Am. Dec. 813, it was held that a warranty would not be implied in case of a voluntary partition, the court saying that if the statute of 31 Henry VIII., giving to tenants in common the right to compel partition, can be considered as annexing to a partition an implied warranty such as exists in the case of coparceners, it would be limited to partitions made pursuant to statute, and would not extend to voluntary deeds executed by the tenants in common.

In *Morrice's Case*, 6 Coke, 12, *supra*, and in *Sawyers v. Cator*, 8 Humph. 256, 47 Am. Dec. 608, *supra*, the court took the same view of the statute, though the question involved here was not in issue in those cases.

And in *Rountree v. Denson*, 59 Wis. 522, 18 N. W. 518, where the deed contained covenants of warranty, the court said that the statute only applied to compulsory partitions, and that, in the absence of express covenants, the parties are without relief.

And in *Patterson v. Lanning*, 10 Watts, 135, 36 Am. Dec. 154, where it was held that there was an implied warranty annexed to a partition deed between tenants in common holding by descent, the same as between coparceners, *Kennedy, J.*, in delivering the opinion of the court, distinguished between tenants in common holding by descent and those holding by purchase, saying that when the law bestows an estate it provides the party with whatever may be requisite, not only to relieve him from any

inconvenience which may attend his enjoying the estate, but also to secure him against any loss, as far as may be practicable, which may occur in consequence of the relief granted; whereas in an estate acquired by purchase the law leaves the party to seek relief from such inconvenience as shall be necessarily incident to his purchase by his own exertion or act, and in doing so to provide, if he wishes it, against any future loss which may occur to him from the relief which he has gained. Thus, for instance, the common law enabled a coparcener to compel a partition of the land, but in the case of joint tenants or tenants in common, they, having become such by their own act, could not compel a partition. It was competent for them, however, to make partition by agreement, but if they did so the law would not imply a warranty of title, as it would in the case of parceners who became vested of their title to land by right of law.

As will be seen from the above cases, the doctrine of implied warranty as applied to the voluntary execution of partition deeds between those holding by purchase is not so free from doubt as when applied to cases arising out of such partitions between those holding by descent. Some of the cases hold that such a warranty exists, while others, distinguishing between those holding by descent and purchase, hold that the warranty is not to be implied in cases of the latter class.

III. Estoppel to set up after-acquired title.

Where a partition deed merely divides the property between the tenants in common so that they thereafter hold in severalty the portions allotted to each, and does not purport to convey anything, the grantors are not thereby estopped from claiming under an after-acquired title. *Townsend v. Outten*, 95 Va. 536, 28 S. E. 958.

As a partition deed does not confer upon the grantee any greater title to the portion allotted to him than he had in the undivided estate, a clause of warranty contained in the deed will not by estoppel confer any greater title. *Chace v. Gregg*, 88 Tex. 552, 32 S. W. 520.

A partition deed executed by tenants in common, conveying only their interest in the land, does not estop them from afterward claiming a portion of such land as heirs of one of the cotenants. *Carson v. Carson*, 122 N. C. 645, 30 S. E. 4.

A covenant in a partition deed wherein the tenant agrees to warrant and forever defend said premises does not estop him from claiming under an after-acquired title, where the deed only purports to convey all his estate, right, title, and interest in the premises, and contains no description whatever of any particular interest owned or possessed by him; this is on the ground that the warranty is coextensive with the grant, and binds only the vested interest of the grantor at the time. *White v. Brocaw*, 14 Ohio St. 339.

A partition deed containing a qualified covenant wherein the parties covenant that each shall hold his share in severalty, free and discharged of all right, title, or claim of the others, does not estop either of the parties from subsequently acquiring a paramount title held at the time of the partition by a third person, as such covenant only applies to the title and interest which the parties had in the premises at the time of the partition. *Doane v. Willcutt*, 5 Gray, 328, 66 Am. Dec. 369.

Where a tenant in common held her share of an estate in fee on the condition that upon her death without issue the share was to go to her cotenant, or his heirs in case of his death, such

cotenant's heirs are not estopped from claiming the land upon her death without issue, by the fact that their father, the cotenant, had previously executed a partition deed conveying to her her share of the estate in fee with warranty, as the children, taking the property as heirs of the original testator, and not as heirs of the cotenant, are not bound by his warranty. *Chace v. Gregg*, 88 Tex. 552, 32 S. W. 520.

But where the tenant at the time of executing the partition deed containing covenants of warranty had no title, having previously conveyed his interest to another, he is estopped from afterwards claiming under a title acquired by a reconveyance from such grantee. *Rountree v. Denson*, 59 Wis. 522, 18 N. W. 518.

And, in *Venable v. Beauchamp*, 3 Dana, 321, 28 Am. Dec. 74, it was held that a tenant in common cannot, after the execution of partition deeds between such tenants, purchase an outstanding title for the purpose of using it against his former cotenant. This was on the ground that an implied warranty accompanies a partition deed, and that the parties to it cannot afterwards assert an adverse title for the purpose of ousting the other from the portion allotted to him.

And in *Tewksbury v. Provizzo*, 12 Cal. 20, it was held that where cotenants execute a partition deed, each receiving a several portion of the common estate, the deed, founded as it is upon mutual releases, is such an affirmation of interest in title on the part of each as to estop him from afterwards denying such interest and disputing his grantee's title or claiming under a title paramount to that which he conveyed.

IV. Estates acquired by partition deed between parties holding different estates.

Where a tenant in common owning an estate in fee in a moiety of the common property, and a contingent remainder in fee in the other moiety, entered into a partition, by the execution of partition deeds, with the other tenant, who owned a conditional estate in fee in the other moiety, no new title or estate was created thereby, and the other tenant held the portion set apart to her in the partition under the same condition that she had held the undivided moiety. *Chace v. Gregg*, 88 Tex. 552, 32 S. W. 520.

But in *Re Coates Street*, 2 Ashm. (Pa.) 12, where the tenants in common held under a devise to them, share and share alike, with a limitation over to the surviving heirs in case of the death of either of them without issue, it was held that they might, by their deed of partition, release and discharge their respective purparts of the limitation imposed by the law; and, upon their so doing, each would take title in fee simple to his share.

And in *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. 647, where the parties, holding under a similar devise, executed a partition deed which recited the provisions of the will and expressed a desire to vest exclusive title to the parcels of land allotted to the several parties, it was held that the deed conveyed an absolute title, and the right of survivorship passed under it. In this case the court said that the cases which hold that a partition deed should not be so strictly construed as other deeds were decided prior to the Code, at a time when the law permitted partition to be made by parol, and, no deed being necessary, the title vested, not by operation of the deed, but by the original grant; and that subsequently, when the Code made a deed necessary, the reason no longer existed.

In *Buxton v. Uxbridge*, 10 Met. 87, where two tenants in common, one owning an undivided estate in fee and the other an estate tail,

made partition, the court held that the partition could not bind the heir in tail, and that consequently the tenant in tail took an estate in fee in an undivided half only of the portion conveyed to him by his cotenant, who, in return, took but a life estate in an undivided half of the premises conveyed to him. It would seem from this decision that where tenants in common, holding different estates in the common property, make partition, neither can impress the character of his estate on more than an undivided half of the portion conveyed by him.

In *Hershizer v. Florence*, 39 Ohio St. 516, the question involved was whether the marital rights of the husband in his wife's property, as fixed by the common law at the time his wife acquired the property, were lost by his joining in a deed to a trustee for the purpose of partitioning the land held by them in common, and the court held that whatever interest the husband had passed by the deed to the trustee, and that when the title to the share allotted to the wife became again vested in her, his rights accrued under the law as it then stood. The court, in so holding, said that the decisions which hold that no new title is created by a partition apply to partition proceedings, and do not affect a deliberate conveyance by the parties,—especially where there is an independent consideration for such conveyances, as in this case, where the wife released her inchoate right of dower in the land conveyed to the husband.

Where a husband of a tenant in common joins in a partition deed, he is not thereby estopped from afterwards claiming a right of way over the land owned by him at the time of the partition, as the deed does not affect rights held by him independent of a title under which the partition was made. *Bauer v. Lohr*, 6 Ohio Dec. Reprint, 427, 8 Am. Law Rec. 426.

Where tenants in common made partition of their lands, and executed to each other releases in fee, and at the time of such partition one of the tenants had but a life estate in her portion of the property so that her grantee took but a life estate in the portion allotted to him, her conveyance of the portion allotted to her amounts to a confirmation of the partition, and estops her from making any claim to the premises allotted to her cotenant. *Baker v. Lorillard*, 4 N. Y. 257.

Where a husband owning a parcel of land adjoining the tract owned by his wife and another as coparceners joins his wife in a partition deed which includes the parcel owned by him, and which parcel is by the deed transferred to him and his wife jointly as a portion of her share, so that they take by entirety, the husband is thereby estopped from afterwards claiming such parcel of land under his original title, and his wife and he become joint tenants in it. And upon his death she takes the entirety, and his heirs are likewise estopped. *Simmons v. Logan*, 1 Harr. (Del.) 110.

Where a legacy is made a charge on land of which the legatee was also a residuary devisee, the lien of the legacy becomes merged in his title as owner, and upon his executing a partition deed the lien of the legacy passes with it, and he cannot, after waiting twenty years, during which the rights of innocent purchasers have intervened, invoke the doctrine that equity will not suffer a merger to take place where injustice would result. *Davidson v. Coon*, 125 Ind. 497, 9 L. R. A. 584, 25 N. E. 601.

V. Words of inheritance as necessary to vest fee.

While the case of *McKinney v. Stacks*, 6 57 L. R. A.

Heisk. 286, was not strictly one of partition, but related to a conveyance from one cotenant to the other of the grantor's undivided interest in the land, it did involve the nature of the relation existing between them and the necessity for the use of the word "heirs" in the conveyance from one to the other for the purpose of passing a title in fee. The court held that while coparceners could convey from one to the other a title in fee without using words of inheritance, such could not be done by tenants in common, and that the statute of Tennessee made those holding by descent tenants in common, and not coparceners. Hence, the conveyance from one tenant to the other of his undivided interest in the land without words of inheritance passed only a life estate.

In *Rector v. Waugh*, 17 Mo. 13, 57 Am. Dec. 251, it was held that a partition deed between tenants in common did not pass the fee without words of inheritance.

Where tenants in common made partition by one releasing to the other all his right in the western half of the land, together with the right of digging and carrying off the plaster from the quarries on the eastern half, and the other releasing to him all his right in the eastern half of the land, except the plaster therein, it was held that under the deed the one to whom the western half of the land was conveyed did not part with his right as owner in fee of the plaster in the eastern half, and that such right on his death vested in his heirs, though no words of inheritance were used in the exception. *Prince of Wales Coal Co. v. Osman*, 22 N. B. Rep. 115.

VI. Rights of subsequent purchasers.

Where cotenants execute mutual releases for the purpose of partition, one of which is executed to the husband of the cotenant, it cannot operate as a release, as there is not the proper privity between the parties; but where there is a pecuniary consideration stated in it, it becomes, in substance, a deed of bargain and sale, and it is not sufficient to give notice to a purchaser from the grantee named therein that it is a partition deed, and such purchaser takes an absolute estate. *Weeks v. Haas*, 3 Watts & S. 520, 39 Am. Dec. 39.

In *Dooley v. Baynes*, 86 Va. 644, 10 S. E. 974, where the partition deed was executed to the cotenant and her husband, the court held that the grantee from the husband took no title. The partition deed expressed a money consideration, and did not show upon its face to have been a partition deed. On the question of the rights of the husband's grantee as a bona fide purchaser the court said, in referring to the hardship cast upon him by the decision, that the hardship would be greater if the wife and her heirs were to be deprived of the land simply because such purchaser chose to take a conveyance of it without sufficiently investigating the title; that the recorded partition deed did not help him, as that was no conveyance at all. The court further called attention to the fact that there was no record title in the cotenants who executed the partition deed, they having taken by descent, saying that that was sufficient to have put the purchaser on inquiry.

But in *Farmers' & M. Nat. Bank v. Wallace*, 45 Ohio St. 152, 12 N. E. 439, the tenants in common holding by descent had exchanged quitclaim deeds for the purpose of partitioning the land, and the deed to one of the tenants was executed to her and her husband jointly and showed a money consideration, and did not show upon its face that it was executed for purposes of partition. The court held that the record of the deed would not bring home to a

grantee from the husband notice of any latent equity of the wife independent of her rights as joint grantee with her husband, and that such a grantee, having no other knowledge, was justified in relying upon evidence furnished by the records, and was entitled to be protected to the extent of the husband's undivided moiety in the parcel conveyed to himself and wife.

Where mutual deeds of bargain, sale, and release executed between tenants in common recite their common ownership in the land conveyed, and that the purpose of their execution is a partition, their character as partition deeds is not destroyed, even as against a subsequent purchaser, by the fact that they recite a nominal money consideration, and such purchaser acquires no different title than that possessed by his vendor. *Dawson v. Lawrence*, 13 Ohio, 546, 42 Am. Dec. 210.

In *Buxton v. Uxbridge*, 10 Met. 87, where, after a partition by deed between tenants in common, one holding an estate in fee and the other an estate tail, the tenant in fee conveyed the portion assigned him, it was held that the heir in tail could not affirm the partition, and upon the death of the tenant in tail claim the premises so conveyed as against the purchaser, but that he would be restricted to an undivided half of the premises.

VII. Changing title from descent to purchase.

A partition deed executed by tenants in common, holding by descent, does not change the grantee's title from that of descent to one of purchase, so as to change the course of descent, and on the death of the grantee intestate such of his heirs as are not of the blood of his ancestor are excluded. *Conkling v. Brown*, 8 Abb. Pr. N. S. 348, 57 Barb. 265; *Dooley v. Baynes*, 86 Va. 644, 10 S. E. 974; *Smith v. Carver*, 36 Ohio L. J. 189; *Carter v. Day*, 59 Ohio St. 96, 51 N. E. 967.

The principle embodied in these cases is well stated in *Doe ex dem. Crosthwaite v. Dixon*, 5 Ad. & El. 834, 1 Nev. & P. 255, 2 Har. & W. 364, where one of two parceners alienated his share in the realty, and subsequently the alienee and the other coparcener executed a deed of partition. In this case it was admitted that if the partition had been between the parceners themselves the descent would not have been broken, but it was claimed that, inasmuch as one of the parties to the deed was a stranger in blood, whatever was taken must be taken by purchase. But the court, speaking through Lord Denman, Ch. J., said that nothing was taken by the parcener from the alienee under the deed, the effect of which was only that the parcener had by it a divided moiety in severalty discharged from any right in the alienee, instead of an undivided moiety in common. He had the same estate in the land as before.

The case of *Wilson v. Hall*, 6 Ohio C. C. 570, is apparently in conflict with the above cases. The opinion is somewhat obscure, saying that, under the facts of the case, the question is settled by *Brower v. Hunt*, 18 Ohio St. 312, without stating all the facts. The *Brower* case did not relate to the effect of a partition deed: the question involved there was whether the parties trading with each other the parcels assigned them by the partition took the portion received on the exchange by descent or purchase. If the facts in the *Wilson* Case are in accord with those presented in the *Brower* Case, the decision is not in point, and does not conflict with the other cases on this question. If, in fact, it was the partition deed that was being considered, then the decision must be considered as overruled by the later case of *Car-*
57 L. R. A.

ter v. Day, 59 Ohio St. 96, 51 N. E. 967, *supra*, where it was held by the supreme court of Ohio that a partition deed between tenants in common holding by descent does not change their title to that of purchase.

In *Hershizer v. Florence*, 39 Ohio St. 516, 525, a case relating to the separate property of a married woman, the question involved was whether the marital rights of the husband in the wife's property should be governed by the common law in force at the time of her inheritance of an undivided interest in the property, or by the statutes in operation at the time of the partition, whereby her share of the property was conveyed to her; it being claimed that she acquired no new title by the partition, and that the common law in force at the time of her inheritance should govern. The court held against such contention upon the ground that the conveyance to the wife was based upon an independent consideration, she having released her inchoate right of dower in the remainder of the land, and that the rights of the husband must be determined under the law as it stood at the time of the conveyance to her under the partition.

VIII. Effect as revoking previous will.

In the following cases it was held that a deed executed solely for the purpose of partition was an exception to the common-law rule that a conveyance of land operated as a revocation of a former will devising the land conveyed, even though the title was reinvested in the grantor by the same conveyance. *Swift ex dem. Neale v. Roberts*, 3 Burr. 1490, Amb. 617, 1 W. Bl. 467; *Barton v. Croxall*, Tamlyn, 164, 7 L. J. Ch. 188; *Risley v. Baltinglass*, T. Raym. 240.

In *Luther v. Kidby*, 3 P. Wm. 169n, 8 Vin. Abr. 148, it was certified by the judges of the King's bench, to whom the case had been sent for their opinion, that a will made by a tenant in common, devising his undivided moiety, is not revoked by a subsequent partition between the cotenants. But in *Tickner v. Tickner*, cited in 3 Atk. 742, where one of the parceners in gavelkind, being possessed of an undivided moiety, executed with his coparcener a deed of partition by which the gavelkind estate which he had devised was allotted entirely to him to such uses as he should appoint by deed or writing, and in default of such appointment to him in fee, it was held that the deed amounted to a revocation of the will. This case was distinguished by the Lord Chancellor in *Maundrell v. Maundrell*, 10 Ves. Jr. 256, 264, on the ground that the object of the *Luther* Case was a mere partition; while in the *Tickner* Case the deed accomplished more than a mere partition, and affected the nature of the estate conveyed.

In *Atty. Gen. v. Vigor*, 8 Ves. Jr. 281, where the question was not as to the effect of a partition, but whether an exchange of land devised worked a revocation, the Lord Chancellor said, in speaking of partition cases, that they are to be considered as special in their nature. Each party can compel the other to make partition; the estate is the same, enjoyed afterwards in a different quality and in another mode. And upon a principle compounded a little of these two reasons it had been established that a partition deed does not revoke a prior will provided nothing more is done than mere partition. That it had been long established that if the object is to do anything beyond the partition, it will be a revocation; and it is tried by the fact, whether the act demonstrates any intention to go beyond the mere partition; and, notwithstanding the expression of the judges in some of the reports that *Luther*

v. Kidby, 3 P. Wms. 169n, 8 Vin. Abr. 148, and Tickner v. Tickner, cited in 3 Atk. 742, cannot stand together, they have stood together, and are perfectly reconcilable.

This distinction was recognized in Grant v. Bridger, 36 L. J. Ch. N. S. 377, L. R. 8 Eq. 347, 15 Week. Rep. 610, where the deed which went beyond that of a simple partition extinguishing various rights of pasturage in common, and providing for the construction of roads, ditches, and fences, was held to have worked a revocation of a prior will of one of the cotenants devising his interest in the land.

In Duffel v. Burton, 4 Harr. (Del.) 290, 295, one of the tenants in common made a will devising his undivided moiety in the estate, and subsequently instituted proceedings for partition; and, it being determined that the land could not be divided without prejudice and injury, the entire tract was set off to him at a fixed valuation, he covenanting to pay his co-heirs their proportionate share. The court held that these proceedings did not produce a revocation of the will, although the devisee could not take more than the undivided moiety devised to him. The court in this case charged the jury that partition proceedings effect the same object as a partition deed between the parties, and that each tenant holds in severalty the estate which he before held in common; and that this mere severance of possession will not revoke a prior will.

And in Knollys v. Alcock, 5 Ves. Jr. 648, it was held that where a tenant in common in several separate parcels of land entered into a partition with her cotenant and conveyed to her one of the entire tracts of land as her share, she thereby revoked a will devising her undivided interest in that tract of land.

IX. Failure of wife to join in deed.

In the following cases it was held that inasmuch as partition is an absolute right, to which inchoate dower rights are subordinate, and it can be compelled by law, a partition deed is valid where the partition is just and equal, even though not executed by the wife of the tenant, her dower rights being thereby transferred to the portion assigned to the husband. *Huntington v. Huntington*, 9 N. Y. Civ. Proc. Rep. 182; *Napper v. Mutual L. Ins. Co.* 21 Ky. L. Rep. 791, 53 S. W. 28; *Totten v. Stuyvesant*, 3 Edw. Ch. 503; *Potter v. Wheeler*, 13 Mass. 506.

But in *Rauk v. Hanna*, 6 Ind. 20, where a tenant in common conveyed his undivided interest in the land to a third person without his wife's joining in the deed, it was held that on a subsequent partition between the husband's grantee and the other tenant, her right to dower was not restricted to the portion set off to such grantee.

And in *Mosher v. Mosher*, 32 Me. 414, where one tenant in common was indebted to the other at the time they executed deeds of partition, and for the purpose of paying the indebtedness conveyed to him a greater share of the estate than he would otherwise have been entitled to, it was held that such partition did not restrict the widow of either tenant to dower to the share assigned or conveyed to her husband, as a partition to have such effect must be equal and unaffected by extraneous considerations.

X. Deed by person under disability.

In the following cases it was held that the execution of a partition deed by a tenant in common is not an alienation of the land within the meaning of a statute prohibiting a widow under subsequent coverture from alienating 57 L. R. A.

land inherited from her former husband. *Mickels v. Ellsesser*, 149 Ind. 415, 49 N. E. 373; *Bumgardner v. Edwards*, 85 Ind. 117.

In *Mickels v. Ellsesser*, 149 Ind. 415, 49 N. E. 373, it was held that a partition deed made by a cotenant during coverture will be upheld as binding when fairly and equally made, and free from fraud, as parties may voluntarily do that which the law would have compelled them to do had an action been brought for that purpose.

To the same effect was *Amey v. Cockey*, 73 Md. 297, 20 Atl. 1071, where the court refused to disturb a partition deed in the absence of evidence to impeach its fairness and equality, although one of the parties was, at the time of executing it, under the disability of infancy and coverture.

In *Ernst v. Zerbe*, 2 Legal Chron. 129, it was held that a partition among heirs is not a conveyance of real estate within the meaning of the statute requiring the husband of a *feme covert* to join in a conveyance of her real estate.

A voluntary partition creates no new or additional title, and the restrictions of a statute prohibiting a widow during subsequent coverture from alienating the land acquired from her deceased husband, applies with the same force to the share in such land conveyed to her by her cotenant on the partition, as it did to her undivided share prior to the partition. *Mickels v. Ellsesser*, 149 Ind. 415, 49 N. E. 373.

Deed between husband and wife.

A partition deed executed between a husband and wife is void. *Frissell v. Rozler*, 19 Mo. 448.

XI. Execution of deed.

a. Deed not executed by all the parties to it.

A partition deed is not binding upon any of the parties to it unless executed by all of them. *Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418; *Tewksbury v. O'Connell*, 21 Cal. 60; *Stuart v. Baker*, 17 Tex. 417.

And the fact that the parties who neglected to execute it have so acted in relation to the property since the partition as to estop them from denying it will not validate it so as to make it enforceable against those who executed the deed. *Tewksbury v. O'Connell*, 21 Cal. 60.

b. Defective execution.

In a Texas case it was held that, a parol partition being valid, a partition deed executed by a married woman is valid, though not properly acknowledged by her. *Ikard v. Thompson*, 51 Tex. 235, 16 S. W. 1019.

The reasoning in the above case would apply to all partition deeds executed in those states which hold a parol partition to be valid.

And where one of the cotenants is a married woman, a partition deed executed by her is valid, when followed by possession in severalty, though no certificate of the privy examination of such wife is annexed to the deed. *Bryan v. Stump*, 8 Gratt. 241, 56 Am. Dec. 139.

In *Rhoad's Estate*, 3 Rawle, 420, where it was held that a partition deed executed by a *feme covert* is binding without a separate examination and acknowledgment, the decision was on the ground that, had the partition been made by proceedings in court, the wife would not have been a necessary party, as in such proceedings the order is made on a petition by the husband in right of his wife.

XII. Effect on judgment and mortgage liens.

Where one holding a mortgage on an undi-

vided half interest in a tract of land joins with his mortgagor in a partition deed, for the purpose of releasing the portion conveyed to the mortgagor's cotenant from the lien of the mortgage, he does not thereby discharge any part of the mortgagor's estate from the mortgage, but the lien attaches to the entire portion set off to the mortgagor. *Torrey v. Cook*, 116 Mass. 163; *Bradley v. Fuller*, 23 Pick. 1.

In *Port v. Parfit*, 4 Wash. 369, 30 Pac. 328, it was held that a provision of the Code, that where lands are partitioned by judicial proceedings a lien on the undivided interest is thereby transferred to the share assigned to the one holding such interest, applies to a case where the partition is by act of the parties.

In the absence of fraud the mortgagee of the undivided share of a tenant in common in realty is bound by a partition deed executed by the cotenants, and his mortgage follows the separation, and attaches to the share allotted to the mortgagor. *Long's Appeal*, 77 Pa. 151.

The lien of a judgment upon the undivided share of a tenant in common in land is not affected by a voluntary partition of the land. In this case an attempt was made to apply to the lien of the judgment the rule applicable to the inchoate right of the wife to dower in partitioned lands. *Emson v. Polhemus*, 28 N. J. Eq. 439.

In *Sharpe v. Davis*, 76 Ind. 17, where tenants in common in two separate farms located in different counties partitioned the same by

each taking a farm, one tenant conveying to the other his undivided half interest in the farm allotted to his cotenant, while that tenant conveyed his undivided half interest in the other farm to the wife and daughter of his cotenant, the court held that a judgment recovered against the husband, and which was a lien upon his undivided half interest at the time of the partition, did not attach to the undivided half conveyed to his wife and daughter. This was on the ground that the tenant took no title under the deed, but that the title vested in his wife and daughter. As to the soundness of this ruling, see *supra*, I.

XIII. Parol evidence to show nature of deed.

Where a partition deed to one of the tenants in common, conveying his share of the estate, recites a money consideration, evidence is admissible to show that in fact no money was paid, and that the deed was merely for the purpose of dividing the land. *Carter v. Day*, 59 Ohio St. 96, 51 N. E. 967.

Parol evidence is admissible to show that a deed which is apparently an absolute one is, in reality, a partition deed between coparceners, as such a deed is not a conveyance within the meaning of the rule declaring that the declarations of a grantee in an absolute deed are not admissible for the purpose of showing an estate less than a fee. *Dooley v. Baynes*, 86 Va. 644, 10 S. E. 974. C. W. P.

NORTH DAKOTA SUPREME COURT.

John DRINKALL, *Respt.*,
v.
MOVIUS STATE BANK, *Appt.*

(.....N. D.....)

- *1. A cashier's check, being merely a bill of exchange drawn by a bank upon itself, and accepted in advance by the act of its issuance, is not subject to countermand, like an ordinary check, and the relations of the parties to such an instrument are analogous to those of the parties to a negotiable promissory note payable on demand.
2. Both under elementary principles of the law of contracts and by the provisions of § 59 of chapter 100 of the Civil Code (Rev. Codes 1899), the title of an indorser of a negotiable note is defective when the consideration for the indorsement is unlawful, or where the indorsement is procured by unlawful means.
3. Payment of a negotiable instrument, to effect a discharge, must be made to the rightful holder or his authorized agent; but the mere possession of such an instrument indorsed by the payee in blank is prima facie evidence of the holder's right to demand and receive payment, and payment

*Headnotes by YOUNG, J.

NOTE.—For another case holding that cashier's check is a negotiable instrument, see *Henry v. Allen* (N. Y.) 36 L. R. A. 658.

As to effect of cashier's check to give preference to depositor in funds in hands of receiver, see *Clark v. Chicago Title & T. Co.* (Ill.) 53 L. R. A. 232.

As to right to recover on gambling contracts, 57 L. R. A.

to such holder will discharge the instrument, when made in good faith, and in ignorance of facts which impair the holder's title.

4. Under the statutes of this state gambling is expressly prohibited. It is accordingly held, that the indorsement and delivery of a cashier's check by the payee to a gambler in payment for chips to be used in a gambling game does not make such gambler a holder in due course, and his title so acquired is defective.
5. The rule that courts of law and equity will leave the parties to prohibited transactions where their unlawful acts have placed them, so far as the same are executed, does not authorize an indorsee who has procured the indorsement of a negotiable instrument in a gambling transaction to rely upon the indorsement so procured, either against the indorser or the maker of the instrument. Neither will it prevent the payee of the instrument which has been so indorsed from enforcing payment against the maker, for the obvious reason that the contract which the latter enforces is not tainted with the unlawful transaction.
6. The plaintiff in this action seeks to recover on a cashier's check issued to him by the defendant which check he indorsed and delivered to a gambler in payment for chips to be used in playing a

see, in this series, *Sprague v. Warren* (Neb.) 3 L. R. A. 679, and *note*; *Harvey v. Merrill* (Mass.) 5 L. R. A. 200; *Snoddy v. American Nat. Bank* (Tenn.) 7 L. R. A. 705; *Jackson v. City Nat. Bank* (Ind.) 9 L. R. A. 657; *White v. Wilson* (Ky.) 37 L. R. A. 197; *Olson v. Sawyer Goodman Co.* (Wis.) 53 L. R. A. 648; and *Appleton v. Maxwell* (N. M.) 55 L. R. A. 93.

roulette wheel. The check was thereafter paid to the gambler by the defendant. We find there is substantial evidence in the record to sustain the finding of the jury that the defendant had notice of the defect in the gambler's title prior to making such payment, and therefore hold that it was not error for the trial court to overrule defendant's motion for a new trial, based upon the insufficiency of the evidence as to notice.

(October 26, 1901.)

A PPEAL by defendant from a judgment of the District Court for Richland County in favor of plaintiff in an action brought to recover the amount alleged to be due on a cashier's check issued by defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. Purcell & Bradley, for appellant:

It was plaintiff's duty to disclose to the bank every reason known to him for asking the bank to refuse to pay the check, and if he did not do so, and the bank would have been bound not to pay the check if he had done so, plaintiff is suffering the result of his own laches and neglect.

Watson v. Walker, 23 N. H. 471; *Hatch v. White*, 22 Pick. 518; *Lamphere v. Cowen*, 42 Vt. 175.

The burden of proof was on him to show that Maxwell was not a bona fide holder.

Penn Bank v. Frankish, 91 Pa. 339.

The cashier's check in controversy is a bill of exchange drawn by the drawer upon itself, and this is equivalent to acceptance.

1 Dan. Neg. Inst. 444; 1 Parsons, Notes & Bills, 288; 2 Randolph, Com. Paper, 588; *Hassey v. White Pigeon Beet Sugar Co.* 1 Dougl. (Mich.) 193; *Cunningham v. Wardwell*, 12 Me. 406.

A bank issuing a cashier's check has accepted it in advance, and is liable to pay it to the payee, or to any person to whom the payee has transferred it by indorsement.

Byles, Bills, 198; Chitty, Bills, 347; 1 Dan. Neg. Inst. 452; *Thornton v. Dick*, 4 Esp. 270; *Andressen v. First Nat. Bank*, 1 McCrary, 252.

It stood on the same basis as a certified check.

Morse, Banks & Banking, § 399.

The contract which arose in the gambling transaction and upon which the rights of the parties to this action must be determined was an executed, and not an unexecuted, contract.

3 Am. & Eng. Enc. Law, 1st ed. p. 824, note 3.

If the contract is still executory, the promisor is left undisturbed in the possession of the money or other property which he agreed to pay or transfer; if the contract is executed, the promisee is left undisturbed in the possession of the money or other property which has been paid or transferred to him.

Pom. Eq. Jur. § 939; *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368; *Kerr v. Birnie*, 25 Ark. 225; *Ager v. Duncan*, 50 Cal. 325; *Houell v. Fountain*, 3 Ga. 176, 46 57 L. R. A.

Am. Dec. 415; *Morris v. Philpot*, 11 Ind. 447; *Nudd v. Burnett*, 14 Ind. 25; *Dumont v. Dufore*, 27 Ind. 263; *Worcester v. Eaton*, 11 Mass. 368; *Clarke v. Omaha & S. W. R. Co.* 5 Neb. 314; *Blystone v. Blystone*, 51 Pa. 373; *Hill v. Freeman*, 73 Ala. 200, 49 Am. Rep. 48; *Adams v. Barrett*, 5 Ga. 404; *Leveroos v. Reis*, 52 Minn. 259, 53 N. W. 1155; *Reed v. Bond*, 96 Mich. 134, 55 N. W. 619; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203; *Cowles v. Raguet*, 14 Ohio, 38; *Thomas v. Cronise*, 16 Ohio, 54.

On petition for rehearing.

Neither party to an illegal contract will be aided by the courts either to set it aside or to enforce it.

Rosenbaum v. Hayes, 10 N. D. 311, 86 N. W. 973; *Reed v. Bond*, 96 Mich. 134, 55 N. W. 619; *Jackson ex dem. Malin v. Garnsey*, 16 Johns. 189; *Ager v. Duncan*, 50 Cal. 325; *Ybarra v. Lorenzana*, 53 Cal. 197.

Messrs. Freerks & Freerks, for respondent:

The bare indorsement or assignment of the check did not operate as an assignment of the \$200 in funds against which it was drawn, in the bank's possession.

2 Dan. Neg. Inst. § 1623.

Not operating as an assignment of the funds, the indorsement and delivery of the paper delivered nothing of value, until the money was paid thereon by the bank, and the contract in this sense was executory.

Rev. Code, § 3919.

While in an intoxicated condition the plaintiff was induced to gamble, and to indorse and deliver the check in question to Maxwell, for gambling chips received and lost to the amount of \$200. This transaction was wholly void, being against the statutes of this state, and against public morals, and entirely without legal consideration, and his right of action against the defendant was not affected thereby.

Rev. Codes, 3873.

Wagering contracts are void.

Dows v. Glaspel, 4 N. D. 251, 60 N. W. 60.

The courts, being established to conserve the law, good morals, and the due order of society, cannot lend their aid to parties conspiring to impede these objects. Therefore, a consideration immoral, illegal, or contrary to public policy, will not support a contract.

Widoe v. Webb, 20 Ohio St. 431, 5 Am. Rep. 664; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Stornburg v. Bouman*, 103 Mass. 325; *Tucker v. West*, 29 Ark. 386; *Bailey v. Bussing*, 28 Conn. 455; *Hennessey v. Hill*, 52 Ill. 281; *Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411; *Harwood v. Knapper*, 50 Mo. 456; *Porter v. Jones*, 52 Mo. 399.

All contracts which provide that anything shall be done which is distinctly prohibited by law, or morality, or public policy, are void.

2 Parsons, Contr. p. 746; *Congress & E. Spring Co. v. Knowlton*, 103 U. S. 50, 26 L. ed. 347.

If money has been paid, or goods have been delivered, under an unlawful contract,

which remains in other respects executory, the party paying the money or delivering the goods may repudiate the transaction, and recover back his money or goods. The action is then founded, not upon the unlawful agreement, but upon its disaffirmance.

Congress & E. Spring Co. v. Knowlton, 103 U. S. 50, 26 L. ed. 347; *Vischer v. Yates*, 11 Johns. 23; *Jennings v. Reynolds*, 4 Kan. 110; *Reynolds v. McKinney*, 4 Kan. 94, 89 Am. Dec. 602; *Cleveland v. Wolff*, 7 Kan. 185; 2 Parsons, Contr. p. 139; *Stacy v. Foss*, 19 Me. 335, 36 Am. Dec. 755; *Tarleton v. Baker*, 18 Vt. 9, 44 Am. Dec. 358; *Wheeler v. Spencer*, 15 Conn. 28; *Moore v. Trippe*, 20 N. J. L. 263; *McAllister v. Hoffman*, 16 Serg. & R. 147, 16 Am. Dec. 556; *Forrest v. Hart*, 7 N. C. (3 Murph.) 458; *Wood v. Wood*, 7 N. C. (3 Murph.) 172; *Bates v. Lancaster*, 10 Humph. 134, 51 Am. Dec. 696; *Perkins v. Hyde*, 6 Yerg. 288; *Shackleford v. Ward*, 3 Ala. 37, 36 Am. Dec. 435; *Wood v. Duncan*, 9 Port. (Ala.) 227; *Jeffrey v. Ficklin*, 3 Ark. 227, 36 Am. Dec. 456; *Humphreys v. Magee*, 13 Mo. 435; *Barrett v. Neill*, Wright (Ohio) 472; *Morgan v. Groff*, 4 Barb. 527.

Young, J., delivered the opinion of the court:

The plaintiff in the action, John Drinkall, seeks to recover from the defendant, the Movius State Bank, a state banking corporation organized under the banking laws of this state, and doing business in the village of Lidgerwood, the sum of \$200 and interest, as due and unpaid, on a certain cashier's check or certificate of deposit issued by the defendant to the plaintiff on the 18th day of December, 1899. The defense interposed is payment to the holder and owner thereof in due course of business. The case was tried to a jury, and a verdict returned for plaintiff for the full amount claimed. Defendant moved for a new trial. This was denied, and judgment was entered on the verdict. The defendant appealed from the judgment, and assigns for review in this court the same errors which were relied upon in the trial court in its motion for a new trial.

The complaint, in substance, alleges that on the 18th day of December, 1899, the plaintiff deposited with the defendant bank in Lidgerwood the sum of \$200; that the defendant issued therefor and delivered to plaintiff its certificate of deposit or cashier's check, dated on that day, and payable to plaintiff on demand; that on the 30th day of December thereafter he duly demanded of defendant the payment of the sum of \$200 represented by said certificate of deposit or cashier's check; that defendant refused, and still refuses, to pay the same, and has not paid the same, or any part thereof. The complaint further alleges that after receiving said check, and on the same day, he went to the place of business of Ralph Maxwell and William Van Dorn, in Lidgerwood, where he became intoxicated, and while so intoxicated he was induced by said Maxwell and Van Dorn to gamble and

take part in a game of chance played by means of an instrument known as a "roulette wheel;" that he played at said game of chance, and wagered large sums of money thereon; that for the purpose of playing the same he was induced to indorse and did indorse the check in question, and delivered the same to the said Maxwell for the purpose of paying money lost by plaintiff, and claimed to have been won by said Maxwell and Van Dorn, in said gambling transaction; that on the following day, to wit, December 19, 1899, and prior to the presentation of said check to defendant for payment, the plaintiff notified the defendant of the facts in reference to the loss of said check and of the possession thereof by Maxwell and Van Dorn, and instructed said defendant not to pay the same when presented. The answer admits the deposit of the money by plaintiff, and the issuance of the cashier's check as alleged in the complaint, but by a denial places in issue the facts as to the loss and notice of loss of the check alleged in the complaint, and alleges that "said cashier's check was, on or about the 19th day of December, 1899, presented to the defendant in the usual course of business for payment, by the then holder and owner of said check, properly indorsed by the signature of plaintiff upon the back of said check, and was, by said defendant, in the usual course of business, paid to the holder of said check." This appeal presents for review the order overruling defendant's motion for a new trial, which involves a consideration of the grounds upon which the motion was based. The errors specified in the statement of case on which the motion was made are eighteen in number. They need not be discussed separately. So far as they are important to a review of the order denying the motion for a new trial they are disposed of by our conclusion on the questions which we shall hereafter discuss.

Before taking up the consideration of the questions presented by the assignments of error, a brief statement of facts is necessary. It is established by undisputed evidence that on the 18th day of December, 1899, the plaintiff, Drinkall, deposited in the defendant bank in Lidgerwood the sum of \$200, and received therefor the cashier's check in suit, which check was signed by the assistant cashier of the bank, drawn on said bank, and made payable in terms to the plaintiff. Thereafter, and in the evening of the same day, Drinkall went to a gambling house in Lidgerwood, which was operated by Ralph Maxwell and William Van Dorn, which is known in the record as "Maxwell's Blind Pig," where he drank sufficient liquor to render him intoxicated, and while so intoxicated he was invited into a rear room in the building by Van Dorn, and there engaged in the gambling game operated by the gambling device known as a "roulette wheel." When he entered their place of business, he had in his possession \$28 in money and the cashier's check in question. During the progress of the game

he exchanged his ready cash for chips, and when they were exhausted, which was at about 11 o'clock P. M., at the request of Van Dorn, he signed his name upon the back of the check in question, and delivered the same to said Maxwell in exchange for more chips and some money to be used in playing said game. At 2 o'clock in the morning Drinkall was without money, check, or chips. The wheel was stopped, and Drinkall, whose condition was unsteady from frequent libations during the progress of the game, was, at Maxwell's request, given another drink, and led upstairs, and put to bed. Before doing this, Maxwell had him again write his name on the check, his former signature not being satisfactory. On the morning of the 19th, Maxwell presented the check at the bank's office, duly indorsed by himself, and the same was paid in full by the defendant. As to the foregoing facts there is no controversy. They establish the deposit by plaintiff, the issuance to him of the check in question, the transfer of the check by indorsement to Maxwell and Van Dorn in a gambling transaction, and the payment of the same to said Maxwell by the defendant.

One of appellant's contentions is that "the evidence is insufficient to show that the bank had knowledge or notice of sufficient facts to put it on inquiry as to the invalidity of plaintiff's indorsement of the cashier's check or of the illegality or insufficiency of the consideration upon which such indorsement was made," and that, therefore, it was error to deny the motion for a new trial on this ground alone. Before referring to the evidence as to notice to the defendant, it is important to determine the legal rights and obligations of the parties to the instrument, and with that end in view we will consider in order (1) the character of the cashier's check upon which the plaintiff bases his cause of action; (2) the legal effect of the indorsement made in the gambling transaction, and (3) the duty of the defendant as to payment of the cashier's check.

A cashier's check, so called, differs radically from an ordinary check. The latter is merely a bill of exchange drawn by an individual on a bank, payable on demand; or, in other words, it is an order upon a bank purporting to be drawn upon a deposit of funds, for the payment of a certain sum of money to a person named, or to order or bearer, on demand. As between himself and the bank, the drawer of the check has the power of countermanding his order of payment at any time before the bank has paid it, or committed itself to pay it. 5 Am. & Eng. Enc. Law, 2d ed. p. 1079, and cases cited. When the check, however, is certified by the bank, the power of revocation by the drawer ceases, and the bank becomes the debtor. 1 Morse, Banks & Banking, §§ 398, 399. A cashier's check is of an entirely different nature. It is a bill of exchange, drawn by the bank upon itself, and is accepted by the act of issuance; and, of course, the right of countermand, as applied to ordinary checks, does not exist as 57 L. R. A.

to it. 2 Randolph, Com. Paper, § 588; 1 Dan. Neg. Inst. 444; 1 Parsons, Notes & Bills, 288. The bank, in such case, is the debtor, and its obligation to pay the cashier's check is like that of the maker of any other negotiable instrument payable on demand. As applied to the case under consideration, the rights and obligations of the plaintiff and defendant as to the cashier's check in question were those of a payee and maker of a negotiable promissory note payable on demand.

What was the legal effect of plaintiff's indorsement, being based upon a gambling transaction? The solution of this question, under the authorities, is difficult, by reason of the difference in statutes on the subject, and also because of the conflict in the common law, both in England and the United States. At early common law in England, gambling contracts, when fair and free from cheating, were assumed by the courts, without discussion, to be valid. Later the courts were disinclined to entertain actions based on gambling contracts; but still later they returned to the original rule that such contracts were valid and actionable, excepting therefrom, however, certain classes of wagering contracts. In the United States, in a number of the states it is held that the common law of England upon gambling contracts is unsuited to the conditions and institutions, and that all gambling contracts are void by their common law. In others it is held that the English statutes against gambling passed prior to the American Revolution are in force in their jurisdiction as common law, or as adopted by statute in general terms. Still another class of states hold that the common law of England on the subject of gambling contracts is in force, and that gambling contracts not of the forbidden classes are valid, and enforceable by their common law. See cases cited in 14 Am. & Eng. Enc. Law, 2d ed. pp. 586-590. In Illinois, under the peculiar statute of that state, it has been held that an indorsement of commercial paper on a gambling consideration is void, and, although in the hands of an innocent holder for value, the legal consequence of such an indorsement is of no more effect than a forged indorsement (*Chapin v. Duke*, 57 Ill. 295, 11 Am. Rep. 15); and the property in the instrument remains in the payee unaffected by such indorsement (*Commercial Nat. Bank v. Spaid*, 8 Ill. App. 493). So, also, under the statutes of Mississippi declaring all gambling contracts utterly void, the maker of a note payable to an individual named or bearer, when sued by another than the party named as payee, may successfully defend by showing that the plaintiff won the note on a wager. *Holman v. Ringo*, 36 Miss. 690; *McAuley v. Mardis*, Walk. (Miss.) 307; *Adams v. Rowan*, 8 Smedes & M. 624; *Lucas v. Waul*, 12 Smedes & M. 157; *Martin v. Terrell*, 12 Smedes & M. 571; *Smither v. Keys*, 30 Miss. 179. The same is true under the Iowa statute, and a promissory note so given is void even in the hands of an innocent

holder for value. *Traders' Bank v. Alsop*, 64 Iowa, 97, 19 N. W. 863. See also *Conklin v. Roberts*, 36 Conn. 461; *Suinn v. Edwards*, 8 Wyo. 54, 55 Pac. 306. In this state there is no statute declaring in express terms that all contracts in furtherance of gambling are void, as in the above states. But gaming itself is made unlawful by chapter 37 of the Penal Code (Rev. Codes 1899), which chapter, in its prohibitions, extends to the game at which the plaintiff herein lost the check in suit. It is entirely clear, and, indeed, it is not controverted, that the transaction in which the indorsement of the note by plaintiff to Maxwell was made was one prohibited by express law, and that the consideration for such indorsement was illegal. Of what legal effect, then, we may ask, was the indorsement? Did it have the effect of transferring the check to Maxwell as to an innocent purchaser, and enable him to legally enforce payment from defendant, notwithstanding the unlawful means by which the possession and indorsement were obtained? Defendant's counsel contend that it did have such effect, and that, had the defendant refused to pay him, it could, under the law, have been compelled to do so, even though it had notice of the entire gambling transaction. This contention we cannot sustain. It is not, however, without specious reason and respectable authority to support it. The well-settled rule of law and equity is invoked by the defendant, *In pari delicto potior est conditio possidentis*, under which neither party to an illegal contract may be aided by the courts, either to set it aside or enforce it; or, as was said in *Roll v. Raguet*, 4 Ohio, 400, 22 Am. Dec. 759: "Whenever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties as it finds them; if the agreement be executed, the court will not rescind it; if executory, the court will not aid in its execution." And in *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124: "It will not recognize a right of action founded on the illegal contract in favor of either party against the other." This court had occasion to apply the rule to a Sunday transaction, which was alleged to have been illegal, in *Rosenbaum v. Hayes*, 10 N. D. 311, 86 N. W. 973, and we there held that, so far as the transaction was executed, the law leaves the parties where their unlawful acts have placed them. In addition to the cases cited in the opinion in that case, see also, *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203; *Congress & E. Spring Co. v. Knoultton*, 103 U. S. 49, 26 L. ed. 347; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. Rep. 953, 15 Am. & Eng. Enc. Law, 2d ed. p. 999. Under the same authorities, and for the same reasons, so far as it is executory, the contract is not enforceable. 2 Pom. Eq. Jur. § 939. It is contended that the indorsement and delivery of the check in this case was an executed transaction, and that, accordingly, under the foregoing rule, the plaintiff lost all of his rights

in the check, and that Maxwell acquired the same. In support of this position counsel for appellant cite *Reed v. Bond*, 96 Mich. 134, 55 N. W. 619, and *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203. *Reed v. Bond* is similar to the case at bar, and is squarely in point, and upholds counsel's view. It rests, however, upon the declaration that the gaming contract was fully executed. The unsoundness of this contention lies in the assumption that the contract of indorsement was valid and complete. "An indorsement is a written contract, the terms of which, though usually omitted for the convenience of commerce, are certain, fixed, and definite, and not the less perfectly understood because not expressed in words." It, "like any other written promise or agreement, requires two things besides the mere writing to constitute a contract, viz., a delivery and a consideration," and "the delivery and the consideration are always open to impeachment" (4 Am. & Eng. Enc. Law, 2d ed. pp. 485, 487, and cases cited); and the general rule that parol evidence is inadmissible to contradict, vary, or add to a written contract does not preclude the admissibility of such evidence to show the illegality of a contract. In such case the evidence is not admitted to vary or control the contract, but to show that in contemplation of law, in consequence of the proven illegality, no contract at all ever had any existence; that it was void *ab initio*." And it is further held that "when the defendant does not set up the defense of illegality, but such illegality appears from the case as made by either the plaintiff or the defendant, it becomes the duty of the court *sua sponte* to refuse to entertain the action." 15 Am. & Eng. Enc. Law, 2d ed. p. 1015, and notes; *Johnson v. Williard*, 83 Wis. 420, 53 N. W. 776. It is clearly the plain policy of the law not to extend aid to either party to an unlawful transaction, and to refuse to recognize rights or entertain actions which arise from acts which are under its condemnation.

Does the application of these principles to the facts of this case make Maxwell an indorsee in due course, and clothe him with all of the rights of a good-faith purchaser for value? A negative answer to this question must be given. In the first place, the contract of indorsement was defective, and subject to impeachment, by reason of the admitted illegality of the consideration,—this upon elementary principles of the law of contracts. The defective indorsement did not, in our opinion, constitute a contract to which the principle invoked could apply. It is clear that Maxwell could not successfully maintain an action against the plaintiff upon the indorsement; and it would seem that the courts would not aid him to enforce payment from defendant for the sufficient reason that his right of action would arise out of the indorsement made in the unlawful gambling transaction. On the other hand, plaintiff is not seeking the aid of the court in this action to enforce a gambling contract, or of any right growing out

of the indorsement, but is merely attempting to enforce the defendant's promise to him contained in the cashier's check, which is not tainted by any illegality whatever. His cause of action does not arise in the gambling transaction; whereas the defense of payment, which is relied upon to defeat a recovery by plaintiff, rests entirely upon an affirmation of the transfer of the check in the gambling transaction, for on no other ground could Maxwell, after notice, have the right to receive or enforce payment. As has been already stated, the courts will not recognize and enforce rights arising on illgotten title. *Kirkpatrick v. Clark*, 132 Ill. 342, 8 L. R. A. 511, 24 N. E. 71; *Miller v. Marckle*, 21 Ill. 152; *Riedle v. Mulhausen*, 20 Ill. App. 68; *Cochran v. Strong*, 44 Ga. 636; *Southern Exp. Co. v. Duffey*, 48 Ga. 358. On principle therefore, we have reached the conclusion that the title, rights, and possession of the check by Maxwell, under the facts as they appear, are directly analogous to those of the finder of a lost note which has been indorsed by the payee, or of such an instrument in the hands of one who has stolen it. Prima facie, every holder of a negotiable instrument is deemed a holder in due course, both under the law merchant and under the statute of this state. See § 59 of chapter 100 of the Civil Code (Rev. Codes 1899), which is the chapter governing negotiable instruments executed after July 1, 1899; 2 Randolph, Com. Paper, § 730; *Million v. Ohnsorg*, 10 Mo. App. 432. And "the mere possession of a negotiable instrument which is payable to the order of the payee, and is indorsed by him in blank, or of a negotiable instrument payable to bearer, is in itself sufficient evidence of his right to present it, and to demand payment thereof. And payment to such person will always be valid, unless he is known to the payor to have acquired possession wrongfully." 1 Dan. Neg. Inst. § 573, and cases cited in notes. If any doubt could exist as to the correctness of our conclusion that Maxwell's title to the check was imperfect, and the contract of indorsement legally unenforceable either against the indorsee or the payor, it is set at rest by § 55 of the act above referred to, which reads as follows: "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." The above statute was in force when the transaction in question took place, and is controlling. Under said section Maxwell's title was defective for two reasons: First, he procured the signature of plaintiff by unlawful means; and, second, he obtained the check for an illegal consideration. Further, the fact is established that he was not a holder in due course, and had not the rights of such a

holder, for the reason that he did not take the instrument in good faith and for value, which is one of the requirements to render a holder a holder in due course under § 52 of the chapter above referred to.

The rule as to the payment and discharge of negotiable instruments is that payment of the bill or note must be made to the rightful holder or his authorized agent. "In general, a payment is valid as against other parties when made in good faith, and in ignorance of all facts which impair the holder's title. . . . If . . . payment is made to one who holds under a blank indorsement, his possession will be presumptive evidence of his title and right to receive the money. Anyone in possession is entitled prima facie to receive payment of a note payable to bearer, or to 'A., or bearer.' If it is so payable, even a payment made in good faith to a thief or finder who is in actual possession will be good. . . . But a payment made through negligence to one who is neither the rightful holder nor a bona fide purchaser before maturity, after notice of loss, will not be sufficient." 3 Randolph, Com. Paper, § 1444, and cases cited. And the same author says in § 1467 that, "if . . . the indorsement is for an illegal consideration, such as a gambling debt [and that is this case], payment made to the indorsee after notice of that fact will be of no avail as against the indorser;" citing *Commercial Nat. Bank v. Spaid*, 8 Ill. App. 493, and *Wheeler v. Winn*, 38 Vt. 122. Under the above doctrine, which appeals to us as both just and sound, it is apparent that the defense of payment to Maxwell, the indorsee,—which is the only defense in the case,—turns entirely upon the question as to whether such payment was made in good faith, and without notice of the defect in Maxwell's title; for, as before stated, payment by the maker to a party who claims to be a bona fide holder is not sufficient to protect the maker against the claim of the real owner, when made after notice. *Bainbridge v. Louisville*, 83 Ky. 285.

The remaining question relates to the sufficiency of the evidence as to defendant's notice. The jury found that the defendant had notice, and the trial court refused to grant a new trial upon the ground of the alleged insufficiency of the evidence to sustain such finding. Our inquiry is limited to ascertaining whether there is any legal evidence in the record fairly tending to sustain this finding. "Under an established rule of practice, this court will not ordinarily disturb a verdict upon a question of mere fact, where there is substantial evidence upon which the verdict may rest." *Heyrock v. McKenzie*, 8 N. D. 601, 80 N. W. 762; *Taylor v. Jones*, 3 N. D. 235, 55 N. W. 593; *Black v. Walker*, 7 N. D. 414, 75 N. W. 787; also, *Flath v. Casselman*, 10 N. D. 419, 87 N. W. 988. We find the evidence contained in the record sufficient to support the finding of the jury on this point. It discloses that plaintiff went to defendant's place of business in the morning of the 19th,

—the next day after he had made the deposit,—and before the bank opened for the day. Maxwell and Mr. Movius, the president of the bank, were then on the inside of the building. After entering, the plaintiff called Maxwell aside, and tried to induce him to return the check, or all or a part of the money, telling him that he had made him sign the check, and had practically stolen it. Maxwell refused. The paying teller's window was opened just at this time, and Maxwell stepped up, and presented the check to Nellie Sanders, the paying teller, for payment. The plaintiff said to her: "Madam, I cancel that check. I don't want you to pay it." Plaintiff testifies: "When I demanded the cancelation of the check, she took the check, and asked if that was my name, and I said, 'Yes,' and she said . . . I would have to go and see Mr. Movius. . . . I went and called him, and he came out, and she had paid the money to Maxwell, and he was going out the door. I asked him [Movius] why that money was paid, and he said, 'Because your name was on the back; and I said, 'I shall have to try and get that money back.' 'Well,' he said, 'you go ahead, and find a way to get it back.'" Nellie Sanders, in narrating the circumstances under which the payment was made, says: "Mr. Maxwell came in a little before nine in the morning. The outside door was open. We had not yet opened the curtain. E. A. Movius, the president of the bank, came in, and told Miss Movius [the assistant cashier] that she had better open up; that it was not quite nine, but she had better open up, as he thought Ralph Maxwell wanted something. . . . As soon as the curtain was up, Maxwell pushed the check through the cashier's window. It was already indorsed by himself and John Drinkall. . . . I turned, and took up the signature book, to see that it was properly indorsed, and as I did so Maxwell said: 'It is all right. I have indorsed it. I am good for it.' Drinkall stood right by Maxwell, and said, before it was paid, 'I demand it canceled.' Maxwell replied, 'That is all right.' After seeing that the signature was correct, I proceeded to count out the money. While I was doing this, Drinkall several times said, 'I demand it canceled.' To each such statement Maxwell replied, 'That is all right,' or some such answer. I supposed he was talking to Maxwell, and because he was under the influence of liquor I paid less attention to him. Maxwell said to him, 'You can go and see Emil' (meaning Movius). He was in the private office. He went in there, and when he returned I had paid the check to Maxwell." E. A. Movius testifies in part: "After the bank had opened, Drinkall and Maxwell were standing together in the office. I don't know what they were talking about. As soon as Drinkall came in, he said to me, 'I want that canceled;' and I said, 'What do you want can-

celed?' and he said, 'I want that check or money.' . . . I stepped out to him, and Maxwell was standing in front of the bank window, and had the money counted. . . . I said, 'Is that your signature on the back?' and he said, 'Yes.' 'Well,' I said, 'I don't know how I can help you. It is paid;' and I passed it back." There is other testimony in the record going more into the details of payment, but that above quoted is sufficient for the purpose of this decision. We have reached the conclusion that the facts as detailed were sufficient to warrant the jury in finding that defendant had notice of the defect in Maxwell's title, and to make its act in paying the check to him an act of bad faith. Section 5113, Rev. Codes, provides that "every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself." The plaintiff had deposited this money only the day before. Movius admits that he knew Maxwell conducted a gambling establishment. It appears that he ordered the bank opened before the regular time to accommodate Maxwell, and, further, that the check was paid to Maxwell in open defiance of the plaintiff's personal and repeated protests against its payment to him. These facts and circumstances might well be held by the jury to be sufficient to put a prudent man upon inquiry as to how Maxwell had obtained the check, and that an inquiry made with reasonable diligence would have disclosed the entire transaction is entirely apparent. A simple inquiry by the bank's officers for his reasons for demanding that Maxwell should not be paid would have made known the specific defect in the latter's title.

But we are also of opinion that the evidence is sufficient to sustain a finding by the jury that defendant had not only constructive notice, but actual notice, that plaintiff, and not Maxwell, was the owner of the note, and entitled to payment. It is true, the language he used, "I cancel that check; I don't want you to pay it," would be more appropriate to a countermand by the maker of a check, in which case the language would be strictly within the legal right of the party countermanding payment. But in considering the question of notice we are not controlled by the technical language used. The question here is whether Drinkall brought home to the bank knowledge of Maxwell's defective title before it parted with its money. We are constrained to hold the evidence sufficient for that purpose. The language of his demand, when taken in connection with the other circumstances, would fairly mean that plaintiff claimed that he, and not Maxwell, was the owner of the check. *Prima facie*, Maxwell was entitled to receive payment; but when his title was challenged by the plaintiff, as

it was, the defendant paid it at the peril of having to pay the rightful owner.

Finding no error in the record, *the judgment is affirmed.*

All concur.

Wallin, Ch. J.:

I concur in the result. Upon the question

of notice to the bank, I am of the opinion that there was competent evidence tending to show notice, and that the question of notice was properly submitted to the jury.

Petition for rehearing denied January 18, 1902.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania to Use
of City of TITUSVILLE

v.

L. S. CLARK, *Appt.*

(195 Pa. 634.)

1. The exemption of real-estate dealers and contractors, whose business does not amount to \$1,000 per annum, from the operation of an ordinance imposing a license tax for the privilege of transacting business is unconstitutional and void as class legislation, where such contractors and dealers are classified with other persons effecting sales, to whom a similar exemption is not allowed.
2. The unconstitutionality of a portion of an ordinance does not render the entire ordinance void. The unconstitutional part falls, but the act stands.
3. The provision in an ordinance requiring a license tax from all dealers or vendors of merchandise, that no manufacturer who is a citizen of the municipality shall be considered a dealer or vendor unless he sells goods not of his own manufacture, is a proper classification and a valid exercise of legislative power.
4. An ordinance authorizing a license tax for revenue purposes, which classifies the different subjects of taxation according to the amount of business transacted, providing a graduated rate for the various classes, and which places wholesalers in a separate class from retailers, and imposes on them a lower rate, is not in violation of U. S. Const. 14th Amend., or Pa. Const. art. 9, § 1, providing that all taxes shall be uniform upon the same class of subjects, where no discrimination is made between the different members of the same class.

(May 7, 1900.)

NOTE.—For another case in this series similar to the one above, holding that classification of dealers into wholesalers and retailers and the imposition of taxes on these classes at different rates does not constitute an unconstitutional discrimination, see *Kniesly v. Cotterel* (Pa.) 50 L. R. A. 86.

As to necessity of uniformity in license or privilege tax generally, see *Chaddock v. Day* (Mich.) 4 L. R. A. 809, and *note*; *Simrall v. Covington* (Ky.) 9 L. R. A. 556; *Magenau v. Fremont* (Neb.) 9 L. R. A. 786; *Sayre v. Phillips* (Pa.) 16 L. R. A. 49; *Ex parte Williams* (Tex. Crim. App.) 21 L. R. A. 783; *Denver City R. Co. v. Denver* (Colo.) 29 L. R. A. 808; *Ottumwa v. Zekind* (Iowa) 29 L. R. A. 734; *State ex rel. Tol v. French* (Mont.) 30 L. R. A. 415, 57 L. R. A.

APPEAL by defendant from a judgment of the Superior Court affirming a judgment of the Quarter Sessions for Crawford County convicting him of violation of a municipal ordinance requiring him to procure a license to carry on the grocery business. *Affirmed.*

The facts are stated in the opinion of the Court of Quarter Sessions, which was as follows:

"By agreement of counsel this case is tried upon a case stated for the opinion of the court in the nature of a special verdict. The city of Titusville is, and has been since 1876, a city of the third class, and on June 25, 1888, the legislative body of the said city duly and regularly passed, and the mayor of said city duly approved of, the ordinance by virtue of which the license tax under consideration is imposed. The ordinance was evidently enacted by virtue of the unconstitutional act of May 24, 1887, but the municipal actions had under and based upon said act were legally ratified by the act of May 13, 1889. *Melick v. Williamsport*, 162 Pa. 408, 29 Atl. 917; *Chester v. Pennell*, 169 Pa. 300, 32 Atl. 408. Nor is there any contention of the parties upon this point, but defendant denies the legality of the ordinance upon two grounds, *viz.*: First, because certain of the merchants and business men of Titusville are exempt from any taxation whatever; and, second, the tax imposed is not uniform, and the classification adopted is prohibited by the 14th Amendment to the Federal Constitution. The tax imposed, being authorized by cl. 4, § 3, art. 5, of the act of May 23, 1889, is for general revenue purposes, and by virtue of

with note on limit of amount of license fees: *Carrollton v. Bazsette* (Ill.) 31 L. R. A. 522; *Re Haskell* (Cal.) 32 L. R. A. 527; *State v. Harrington* (Vt.) 34 L. R. A. 100; *Singer Mfg. Co. v. Wright* (Ga.) 35 L. R. A. 497; *Banta v. Chicago* (Ill.) 40 L. R. A. 611; *State v. Gardner* (Ohio) 41 L. R. A. 689; *Phoenix Assur. Co. v. Montgomery Fire Department* (Ala.) 42 L. R. A. 468; *Fleetwood v. Read* (Wash.) 47 L. R. A. 205; *Lasher v. People* (Ill.) 47 L. R. A. 802; *State ex rel. Wyatt v. Ashbrook* (Mo.) 48 L. R. A. 266; *Williams v. Fears* (Ga.) 50 L. R. A. 086; *Stull v. De Mattos* (Wash.) 51 L. R. A. 892; *Harrodsburg v. Renfro* (Ky.) 51 L. R. A. 897; and *State v. Willingham* (Wyo.) 52 L. R. A. 198.

the general taxing powers of the municipality, and not through or by virtue of its police powers. *Williamsport v. Wenner*, 172 Pa. 173, 33 Atl. 544; *Oil City v. Oil City Trust Co.* 151 Pa. 459, 25 Atl. 124. Section 3 of the ordinance classifies those who make and effect annual sales of divers amounts. Section 4 provides 'that contractors whose business and real estate agents whose sales exceed \$1,000 per annum, shall be classified and rated as provided for in § 3 of this ordinance, and shall pay a license according to said section.' By § 3 no exemption is allowed to persons doing an annual business of less than \$1,000, and, as contractors and real-estate agents are otherwise classified with the persons making and effecting sales, to thus exempt a part of the class doing an annual business of less than \$1,000 and impose a tax upon others belonging to the same class is clearly violative of §§ 1 and 2, art. 9, of the Constitution of this commonwealth. *Com. v. Germania Brewing Co.* 145 Pa. 84, 22 Atl. 240; *Com. v. Sharon Coal Co.* 164 Pa. 305, 30 Atl. 127, 128; *Fox's Appeal*, 112 Pa. 337, 4 Atl. 149; *Pittsburgh v. Coyle*, 165 Pa. 64, 30 Atl. 452. This exemption is class legislation, which is forbidden by the Constitution, and not in any way or under any guise to be tolerated. This portion of the ordinance must fall, but this defect alone does not render the entire ordinance void. As was said by our supreme court in *Fox's Appeal*, 112 Pa. 337, 4 Atl. 149, in declaring unconstitutional that part of the act of 1885 which excepted from taxation notes or bills for work or labor done: 'But for this vice we are not required to declare the act of 1885 void. The 2d section of article 9 of the Constitution provides: "All laws exempting property from taxation, other than the property above enumerated shall be void." The exemption of "notes or bills for work or labor done" is void under this provision, and drops out of the act of 1885. The exception falls, but the act stands. It will be the duty of the assessors to assess and return such bills or notes the same as other moneyed securities in the hands of individuals.' Section 16 of said ordinance provides 'that no manufacturer who is a citizen of the city of Titusville shall be considered a dealer or vender of merchandise within the spirit of this ordinance unless he sells goods not of his own manufacture.' We think that distinguishing such persons from the ones classified in said ordinance is a valid exercise of the power of the legislative body of said city. We can readily understand how and why manufacturers who regularly have taxable capital invested in a plant, and whose chief item of profit consists in converting the raw material into the finished product, should not be classified with vendors of merchandise, whose chief capital consists of their stock in trade, and whose profits are derived from selling at retail at an advanced price over that of the wholesale purchase. If the entire classification in this ordinance rested on as good, valid, and reasonable grounds as does this distinction

57 L. R. A.

or classification, if we may so term it, we would see little to complain of. Whether or not the merchant tailors, tinsmiths, or tombstone dealers referred to in the case stated come under the manufacturers provided for by § 16 need not now be decided, nor need we decide in this action the rights of defendant against the city for a failure of its officials to enforce the ordinance against others who may properly come under its provisions. Even were the said 16th section unconstitutional and void, we do not think that would invalidate the entire ordinance. *Fox's Appeal*, 112 Pa. 337, 4 Atl. 149.

"Let us, then, examine the second objection to the validity of this ordinance, and, bearing in mind that it is a tax levied for general revenue purposes, determine whether the taxes levied by virtue thereof, and under the classification therein adopted, are forbidden by the 14th Amendment to the Federal Constitution, or whether they lack that uniformity imposed by the Constitution of this commonwealth. The said amendment provides: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' It is true, as urged, that the equal protection of the laws herein enjoined is a pledge of the protection of equal laws (*Yick Wo v. Hopkins*, 118 U. S. 369, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064); but it does not forbid a classification of persons or property for various purposes, nor enjoin upon the legislative authorities the impossible duty of making the same or equal laws for the several classes. It does compel the equal application of the laws to all members of the same class, allowing classification, which should be based upon reasonable grounds, and is not a mere arbitrary selection. *Gulf, O. & S. F. R. Co. v. Ellis*, 165 U. S. 165, 41 L. ed. 666, 17 Sup. Ct. Rep. 255. Such classification is not only allowed, but it is recognized as necessary, in order that uniformity and equality of taxation, and of the just adaptation of property to its burdens, may be accomplished. *Western U. Teleg. Co. v. Indiana*, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345; *Pacific Exp. Co. v. Seibert*, 142 U. S. 351, 35 L. ed. 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250. In all cases where classification for purposes of taxation has been recognized, it has been held that the requirements of the Federal Constitution have been fulfilled if the rates, though different for separate classes, operate uniformly on each class. *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 164, *sub nom. Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 94; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Com. v. Sharon Coal Co.* 164 Pa. 305, 30 Atl. 127, 128; *Home Ins. Co. v. New York*, 134 U. S. 606, 33 L. ed. 1031, 10 Sup. Ct. Rep. 593; *Kentucky Railroad Tax Cases*, 115 U. S. 322, *sub nom. Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 20 L. ed. 414, 6 Sup. Ct. Rep. 57. If the ordinance passed and the classification made therein

is not in conflict with the Federal Constitution or some valid act of Congress, the court may not say whether the law is the best that could have been enacted, or whether the common good demands or requires such a law. We can only determine whether, in such a case, the legislative body, acting under the laws and Constitution of this commonwealth, had the power and authority to enact such a law. The responsibility of the legislative body for so acting, if they had the power so to do, is not to the court, but to the people whom they represent. And for a construction of the Federal laws and Constitution we must look to our Federal courts, while the construction of the Constitution and laws of the commonwealth, so far as they do not conflict with those of the nation, is determined by our own courts. *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 164, *sub nom. Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 946; *Memphis Gaslight Co. v. Shelby County Tazing Dist.* 109 U. S. 400, 27 L. ed. 976, 3 Sup. Ct. Rep. 205; *United States v. New Orleans*, 98 U. S. 392, 25 L. ed. 225; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Spencer v. Merchant*, 125 U. S. 355, 31 L. ed. 767, 8 Sup. Ct. Rep. 921, and the cases therein cited; *Palmer v. McMahon*, 133 U. S. 669, 33 L. ed. 770, 10 Sup. Ct. Rep. 324; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 155, 41 L. ed. 387, 17 Sup. Ct. Rep. 56; *Lewis v. Monson*, 151 U. S. 549, 38 L. ed. 266, 14 Sup. Ct. Rep. 424; *Iowa C. R. Co. v. Iowa*, 160 U. S. 393, 40 L. ed. 469, 16 Sup. Ct. Rep. 344; *Central Land Co. v. Laidley*, 159 U. S. 109, 40 L. ed. 94, 16 Sup. Ct. Rep. 80.

"No objection is raised in this case as to the method of making the assessments, or arriving at valuations. The principal contention is that, by virtue of the classification made, unequal burdens and rates are imposed upon the several members of different classes; but it is not alleged, with the exceptions heretofore noted, that the ordinance applies to or is enforced differently against the same members of any class. We therefore conclude that the ordinance in question does not violate the provisions of the Federal Constitution, and we must determine whether or not it is in conflict with the Constitution and laws of this commonwealth. Article 9, § 1, of our Constitution declares that 'all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.' We herein have a recognition of the classification of subjects for taxation, and a provision that said taxes must be uniform as to each class. The Constitution of this commonwealth, as well as the Federal Constitution, not only permits classification of subjects of taxation on a proper basis, and in the approved manner, but the several classes thereby constituted may be taxed independently and differently. *Germania L. Ins. Co. v. Com.* 85 Pa. 519; *Com. v. Delaware Division Canal Co.* 123 Pa. 620, 2 L. R. A. 798, 16 Atl. 584; *Pittsburgh v. Coyle*, 165 Pa. 64, 30 Atl. 452; 57 L. R. A.

Com. v. Germania Brewing Co. 145 Pa. 36, 22 Atl. 240; *Com. v. Sharon Coal Co.* 164 Pa. 305, 30 Atl. 127, 128. We must therefore consider whether the classification herein made produces the result of special legislation; whether taxes imposed are uniform, as required by the Constitution; and whether the classification is made upon such basis as is by law required. It is complained that wholesalers are made a distinct and separate class from retailers, and that the ordinance specially legislates in favor of the wholesalers. This is true, so far as separately classifying the wholesale dealers is concerned, but each member of the subclass of wholesalers is treated alike, and the tax is uniform upon each member of said division or subclass. We see no objection to classifying wholesalers and retailers separately. The same principle is involved in the subdivision of the wholesalers, as maintains in the general classification under § 3 of the ordinance, and what is said in relation thereto equally applies to the subdivision of wholesalers. If special legislation is produced in this ordinance, it is a result of the mode of classification adopted. The several members of the respective classes and subclasses with the exception heretofore noted are treated alike, and the taxes imposed upon them are uniform throughout their class. Is the classification herein made legal? In *Ayars's Appeal*, 122 Pa. 277, 2 L. R. A. 584, 16 Atl. 363, the court says: 'On the contrary, the underlying principle of all the cases is that classification, with the view of legislating for either class separately, is essentially unconstitutional, unless a necessity therefor exists,—a necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately that would be useless and detrimental to others.' This is as near to a definition of the requirements for classification as our courts have attempted. It is true this refers to classification for legislative purposes, but we know of no reason why the same does not obtain in the classification for the purposes of taxation. Each class should have purposes to subserve peculiar to itself, and all its members local functions to perform which differentiates them from the members of each and every other class. When such a state of facts exists, classification is not only permissible, but is necessary to subserve the purposes of the members, as a part of the body politic, as well as of their individual classes, and may be the only means whereby uniformity of taxation can be accomplished. The 'classification should be made according to some reasonable, practical rule, drawn from experience, which would prevent a gross inequality in the burdens of taxation.' *Com. v. Delaware Division Canal Co.* 123 Pa. 620, 2 L. R. A. 798, 16 Atl. 584; *Weinman v. Wilkesburg & E. L. Pass. R. Co.* 118 Pa. 202, 12 Atl. 288. It is the legislative authority that must determine what difference in situation, circumstances, and needs calls

for a classification, subject, however, to the supervision of the courts, as the final interpreters of the Constitution, and to see that the same is really classification, and not special legislation. *Lloyd v. Smith*, 176 Pa. 218, 35 Atl. 199.

"The classification made by this ordinance is as follows:

Retail.		Tax.
Class.	Business.	
1	Over \$60,000	\$100
2	\$50,000 to 60,000	80
3	40,000 to 50,000	70
4	30,000 to 40,000	60
5	20,000 to 30,000	50
6	10,000 to 20,000	35
7	5,000 to 10,000	25
8	2,500 to 5,000	15
9	1,000 to 2,000	10
10	1,000 and less	5

Wholesale.		Tax.
Class.	Business.	
1	\$100,000 and upwards	\$60
2	60,000 to \$100,000	50
3	50,000 to 60,000	40
4	40,000 to 50,000	35
5	30,000 to 40,000	30
6	20,000 to 30,000	25
7	10,000 to 20,000	20
8	5,000 to 10,000	15
9	2,500 to 5,000	10
10	2,500	5

"Is this classification, made by the proper legislative authority, such as is reasonable, just, and proper, or was it passed for the purpose of, or does it produce the result of, special legislation for any of the respective classes? It is urged that it is unequal and unjust. We again repeat that this may be true, as in most cases of assessments we find like results to a greater or less extent; but unless it is grossly so, or the ordinance enacted with a view or effect of producing such results contrary to law, the place to seek relief is with the legislative authority. It is as impossible to produce exact uniformity in levying taxes as it is to give universal satisfaction, but, if no legal principles have been violated, we are powerless to adjust all of the inequalities complained of. The knowledge or judgment of the judiciary, under given circumstances, as to what is equitable taxation is no better than that of the legislative authority; and, as this is the department upon whom is imposed the duty of making the adjustment, there it must rest, so long as they act within their authority. It may be true that the results produced of advantage to the dealers from the sources to which this general tax is applied may be in the exact, or at least approximate, ratio of the burdens imposed by this license tax, and that the expense to the municipality in rendering such protection and producing such results is in like proportion. For example, we certainly could not say that the expense to the city of furnishing police and fire protection to the man who does \$100,000 worth of business is 100 times as great as for that of him who does \$1,000 worth. We know of no better authority to determine the proper ratio and 57 L. R. A.

adjust the burdens of taxation in proportion to the expense imposed and benefits received by the various subjects than the one upon which the law now imposes it. Classification according to the amount of business done has been frequently recognized in this commonwealth and by our Federal courts. (*Dow v. Beidelman*, 125 U. S. 690, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 164, *sub nom. Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 96; *Allentown v. Gross*, 132 Pa. 322, 19 Atl. 269; *Hadtner v. Williamsport*, 15 W. N. C. 138; *Williamsport v. Wenner*, 172 Pa. 173, 33 Atl. 544, the last of which cases was very much like the case at bar); and a classification there adopted, very similar, though not so justly discriminating as to the smaller dealers, was held to be a valid exercise of the powers of the city council. It is argued, however, that in the case of *Williamsport v. Wenner* the initial class was composed of those doing a business of \$1,000 or less, and paid \$1, and every multiple of that amount of business paid a similar multiple of that amount of tax, and that this was fair and equitable. We do not find that the classification thus adopted produced any 'fairer' results than does the one at bar. What was argued is true as to the maximum of each class only, and why the man doing \$1,000 worth of business and paying the same tax as the one doing \$5,000 worth can be considered any more of a fair and equitable proportionate adjustment than the one at bar we do not clearly comprehend. The right to make such classification seems to be settled by our courts. We are not unfamiliar with a similar classification as to sales, with different rates as to different classes in the state mercantile tax, imposed upon vendors of merchandise. True, the act by virtue of which this is made was passed prior to the adoption of our present Constitution. The right to make the classification being determined, we have no doubt as to the legislative authority to impose different 'rates' upon the several classes. And now, July 11, 1898, it is ordered that the defendant pay a fine of \$72 to the commonwealth for the use of the city of Titusville, and the cost of prosecution, or give security therefor within ten days from this date; and in default thereof he shall stand committed to the county jail for a period of twenty days."

Messrs. Julius Byles and Eugene Mackey for appellant.

Mr. George Frank Brown, for appellee:

A license tax levied under the act of 1889, governing municipalities, is an act of general taxation, being for "general revenue purposes."

Oil City v. Oil City Trust Co. 151 Pa. 454, 25 Atl. 124; *Williamsport v. Wenner*, 172 Pa. 181, 33 Atl. 544.

The mercantile license tax has been set apart as a tax on "property estimated by the volume of the annual sales."

Williamsport v. Wenner, 172 Pa. 173, 33

Atl. 544; *Allentown v. Gross*, 132 Pa. 319, 19 Atl. 269.

Our courts have construed the Constitution as permitting classification of taxables, and allowing the several classes to be taxed independently and differently.

Germania L. Ins. Co. v. Com. 85 Pa. 519; *Com. v. Delaware Division Canal Co.* 123 Pa. 620, 2 L. R. A. 798, 16 Atl. 584; *Kittanning Coal Co. v. Com.* 79 Pa. 100; *Kitty Roup's Case*, 81* Pa. 211; *Williamsport v. Brown*, 84 Pa. 439; *Coal Ridge Improv. & Coal Co. v. Jennings*, 127 Pa. 397, 17 Atl. 986; *Pittsburg v. Coyle*, 105 Pa. 61, 30 Atl. 452; *Com. v. Sharon Coal Co.* 164 Pa. 305, 30 Atl. 127, 128; *Williamsport v. Wenner*, 172 Pa. 173, 33 Atl. 544; *Com. v. Germania Brewing Co.* 145 Pa. 87, 22 Atl. 240.

In the Federal courts, in construing the 1st section of the 14th Amendment, classification of taxables has been permitted in a numerous line of decisions.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, sub nom. *Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 94; *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Absolute equality is of course unattainable; a mere approximate equality is all that can reasonably be expected.

Com. v. Delaware Division Canal Co. 123 Pa. 620, 2 L. R. A. 798, 16 Atl. 584; *Fow's Appeal*, 112 Pa. 353, 4 Atl. 149; *Hunter's Appeal*, 18 W. N. C. 411; *Loughlin's Appeal*, 19 W. N. C. 517.

The moment we concede the power to classify we have disposed of the question of uniformity, for then all that is required by the Constitution is that the taxes shall be uniform upon the members of a class.

Kittanning Coal Co. v. Com. 79 Pa. 105.

Classification according to the amount of business done, or volume of business, has been recognized as a proper classification by both the courts of this commonwealth and the Federal courts.

Williamsport v. Wenner, 172 Pa. 173, 33 Atl. 544; *Allentown v. Gross*, 132 Pa. 322, 19 Atl. 269; *Com. v. Delaware Division*, 57 L. R. A.

Canal Co. 123 Pa. 620, 2 L. R. A. 798, 16 Atl. 584; *Hadtner v. Williamsport*, 15 W. N. C. 138; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 164, sub nom. *Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 96.

The equal protection of the laws has been authoritatively held to mean that all persons subject to legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.

Guthrie, The Fourteenth Amendment, p. 111; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Kentucky Railroad Tax Cases*, 115 U. S. 321, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Fire Asso. of Philadelphia v. New York*, 119 U. S. 120, 30 L. ed. 347, 7 Sup. Ct. Rep. 108; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Hallinger v. Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

The subject of classification is legislative in the first instance, as legislative power is necessarily exercised through a classification of subjects (for a law operating at once and alike upon all subjects is inconceivable). A legislative classification is presumed to be valid and to have been made in the exercise of a wise discretion and for sufficient and proper reasons, unless an infringement of some provisions of the state or Federal Constitution appears.

Sanderson, Validity of Statutes, p. 137; *McCarthy v. Com. ex rel. Griffiths*, 110 Pa. 243, 2 Atl. 423.

Per Curiam:

We concur entirely with the views expressed in the opinion of the learned judge of the Court of Quarter Sessions in this case, and on that opinion the judgment is affirmed.

Affirmed by Supreme Court of United States March 3, 1902.

LOUISIANA SUPREME COURT.

Fred P. RUSH *et al.*, Appts.,

v.

Franklin LANDERS.

Martha E. LANDERS, Intervener.

(107 La. 549.)

- *1. Where immovable property in this state purports to have been sold by a husband to his wife for a certain sum of money, the title is invalid on its face, the apparent consideration not being within the exceptions provided by Civil Code, art. 2446, as essential to the validity of a sale in such case; and the property is liable to seizure by the creditors of the husband.
- *2. Where property so situated is seized upon a claim against the husband,

*Headnotes by MONROE, J.

NOTE.—Conflict of laws as to matrimonial property.

- I. Introduction, 353.
- II. When *lex domicilii* is opposed to the *lex rei sitæ* or *lex fori*.
- a. Real estate, or immovables, 353.
 - b. Personal property, or movables, 354.
 - c. What law determines character of property as real or personal, 359.
- III. When law of matrimonial domicile is opposed to that of place where marriage celebrated, 359.
- IV. How original matrimonial domicile ascertained, 360.
- V. Change of matrimonial domicile.
- a. Property acquired prior to change, 363.
 - b. Property acquired after the change, 366.
 - c. Tacit mortgages or liens, 367.
- VI. Marriage settlements, 368.
- VII. Summary, 373.

I. Introduction.

It is important, in the consideration of any subject relating to conflict of laws, to bear in mind that all principles of private international law, however well established, are subject to alteration or abrogation by the statutes of any state or country, so far as their enforcement in its courts is concerned. Courts are undoubtedly loath to give to a statute a construction which will bring it in conflict with the principles of international law, but, in the absence of vested rights protected by the Federal or state Constitution, the statutes must prevail over such principles if the former are not susceptible of a construction which will harmonize them with the latter. Again, the courts of any state or country may refuse to recognize or enforce rights arising under the laws of another state or country which, according to the established principles of international law, ought ordinarily to govern, if they are opposed to the distinctive public policy of the forum. It is obvious, however, that the distinctive policy of the forum is not necessarily violated by the recognition or enforcement of rights created by the laws of another state or country operating upon facts and conditions, which, by the principles of international law, are within the legitimate sphere of their operation, although a different result would be produced by the laws of the forum operating upon similar facts and conditions, which, by such principles, are with-

57 L. R. A.

band, and the wife intervenes, setting up title, and the seizing creditor propounds to her interrogatories on facts and articles, her answers thereto are entitled to no greater effect, as against such creditor, than her testimony, or that of any other witness, given orally.

- *3. Where the seizing creditor, in propounding such interrogatories, takes the initiative, and attempts to show that the consideration of the putative sale was other than as stated, either in the intervenor's title or in her intervention, and thereafter falls, in this court, to ask for any ruling upon his objection, made during the trial, to the introduction of parol evidence to show the real consideration of such sale, it will be presumed that the objection is abandoned.
- *4. Where the answers to such interrogatories show that property in an-

in the legitimate sphere of their operation. The existence of such differences creates the very condition which calls for the application of the principles of international law. It follows, from what has been said, that all rules of international law with respect to the effect of marriage upon property rights are subject to the qualification that they have not been altered or abrogated by a statute of the forum, and that they do not require the recognition or enforcement of rights that are contrary to the distinctive public policy of the forum. There is another circumstance which sometimes interferes with the application of these rules, without, however, at all detracting from their universality, *viz.*, the failure to prove the law of the place which according to these rules should determine the rights of the parties. In that case the *lex fori* is frequently applied, sometimes on the presumption that the law of the other place on the point in question is the same, and sometimes on the theory that the court must apply the *lex fori* when no other law is proved. The question here suggested, as to what course the court should adopt when the appropriate law is not proved, is broader than the subject of this note, and is only referred to incidentally.

II. When *lex domicilii* is opposed to the *lex rei sitæ* or *lex fori*.

a. Real estate, or immovables.

It is a settled principle of very extensive operation that real property is governed by the *lex rei sitæ*. In accordance with this principle, it is well established that the respective rights of husband and wife in real property, in the absence of an antenuptial contract, are determined by the law of the place where the property is situated, irrespective of the domicile of the parties, or of the place where the marriage was celebrated. *McCollum v. Smith*, Meigs, 342, 33 Am. Dec. 147; *Nelson v. Goree*, 34 Ala. 565; *Vertner v. Humphreys*, 14 Smedes & M. 130; *Newcomer v. Orem*, 2 Md. 297, 58 Am. Dec. 717; *Heldenheimer v. Loring*, 6 Tex. Civ. App. 560, 28 S. W. 99.

Thus, the legal status of a husband and wife domiciled in Pennsylvania with reference to land situated in Michigan, is governed by the law of Michigan. *Duffy v. White*, 115 Mich. 284, 73 N. W. 363. In this case a conveyance of land from the wife to her husband, executed in Pennsylvania, was upheld upon the ground

other state had been conveyed by the husband to the wife, for a particular consideration arising under the laws of that state, this court will not assume, even though it should be made to appear that such consideration was inadequate, that a different consideration, testified to as moving in the matter of the conveyance of the Louisiana property, was therefore included and exhausted for the purposes of the conveyance in such other state.

5. The validity of the conveyance of immovable property in Louisiana, and the capacity of a husband and wife to deal with each other with respect thereto, are to be determined by the law of Louisiana.

6. A sale of such property between husband and wife can be made only in the cases and for the consideration as provided in Civil Code, art. 2446, and if apparently made for some other consideration is invalid on its face; and if attacked by a

party showing sufficient interest, the burden of proof, if proof be admitted, rests upon the party seeking to maintain the validity of such sale to show that the real consideration was within the exceptions provided in said article.

7. If in such case the claim be that the consideration was an indebtedness of the husband to the wife for money said to have belonged to the wife, and to have been received and used by the husband, it must be shown, where the parties are domiciled in another state, that by reason of such receipt and use the husband became the debtor of the wife, that the debt existed at the time of the conveyance, and that the property was conveyed in satisfaction or in part satisfaction of such debt.

8. Whether, in such case, the husband becomes the debtor of his wife, depends upon the law of their domicil.

9. The courts of Louisiana will take

that by the law of Michigan the land was her separate property, and might be lawfully conveyed by her, either directly or indirectly, to her husband.

A distinction is, however, to be observed in this connection. It may be that the location of the domicil or residence, within or without the state or country in which the property is situated, will affect the question which of two or more rules of law in force in that state or country is applicable to the facts, and is therefore to govern. This distinction, however, does not at all detract from the universality of the rule previously stated, since in any case it is the *lex rei sitæ* that is applied. Thus, it has been held that, prior to the Louisiana act of March, 1852, by which the community of property was extended to nonresident married persons with respect to property thereafter acquired in the state, real property acquired by nonresidents who were not married within the state did not fall into the community. *Waterer's Succession*, 25 La. Ann. 210; *Wolfe v. Gilmer*, 7 La. Ann. 583; *Huff v. Borland*, 6 La. Ann. 436; *Leech v. Guild*, 15 La. Ann. 349; *Dohan v. Murdock*, 41 La. Ann. 494, 6 So. 131. And it was held in *Conner v. Elliott*, 18 How. 591, 15 L. ed. 497, that, the distinction being based on the place of the marriage or the residence of the parties, and not on their citizenship, there was no violation of the provision of the Federal Constitution that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. In these cases there was no question of conflict between the law of Louisiana and that of the domicil of the parties, but it was simply a question as to which law of Louisiana was applicable to the facts.

In *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88, the court, while conceding that the existence of an equity in favor of the wife in land in Missouri, the legal title of which is vested in the husband, must be determined by the law of Missouri, and not by the law of Louisiana, held that such an equity arose in favor of a wife on account of the use, in the purchase of the property, of money which, by the law of Louisiana (the matrimonial domicil at the time of its acquisition), was a part of the community property of the husband and wife.

Real estate in Washington, which, though standing in the name of the wife, is the community property of herself and husband, is subject to a debt incurred by the husband in Wisconsin, under circumstances which would have made it a charge upon the community property 57 L. R. A.

in Washington if it had been incurred in the latter state, it appearing that, according to the law of Wisconsin, the property, if situated in that state, would have belonged to the husband, and would have thus been subject to his debts. *LaSelle v. Woolery*, 11 Wash. 337, 32 L. R. A. 73, 39 Pac. 663.

b. Personal property, or movables.

With respect to personal property, the general rule of international law, in the absence of any statute changing it, is that the respective rights of husband and wife and their creditors are determined by the law of the matrimonial domicil, irrespective of the place where the property is acquired, found, located, or seized. *Nelson v. Goree*, 34 Ala. 565; *Birmingham Waterworks Co. v. Hume*, 121 Ala. 168, 25 So. 806; *Davis v. Zimmerman*, 67 Pa. 70; *Hicks v. Pope*, 8 La. 556, 28 Am. Dec. 142; *Young v. Young*, 5 La. Ann. 611; *Worthington v. Hanna*, 23 Mich. 530; *Steers's Succession*, 47 La. Ann. 1551, 18 So. 503; *Pearl v. Hansborough*, 9 Humph. 433; *Lyon v. Knott*, 26 Miss. 548; *Cahalan v. Monroe*, 70 Ala. 271.

It is obvious that the application of this principle will sometimes operate to the advantage, and sometimes to the disadvantage, of the wife, according to whether the *lex domicilii* is more or less favorable to her than the *lex rei sitæ* or *lex fori*.

Thus, the mere transportation of cotton from the domicil of a married woman, by the law of which it is her separate property, into Alabama, does not change its status so as to constitute it her separate statutory estate under the laws of the latter state, and it is therefore necessary to join her husband with her as coplaintiff in an action of trover for the property. *Bush v. Garner*, 73 Ala. 162.

Slaves inherited by a married woman in Mississippi, where the common law prevails, according to the principles of which they became the property of the husband, are liable for his debts when brought into Louisiana. *Slocumb v. Breedlove*, 8 La. 143, 28 Am. Dec. 135. In this case the husband and wife were domiciled in Mississippi at the time the slaves were acquired, and also at the time they were seized for the husband's debts.

In *Quigly v. Muse*, 15 La. Ann. 197, it was held that the nature and effect of a purchase of a slave by a married woman must be determined by the law of Mississippi, where the purchase was made, and that, in accordance with that law, the title acquired vested absolutely

judicial cognizance of the prevalence of the common law in a sister state, and of the rule of the common law that a married woman cannot possess personal property independently of her husband except where a trust has been created for her separate benefit. But statutory modifications of the common law, or the creation of such trust, must be proved, if either be relied on.

(April 14, 1902.)

APPEAL by plaintiffs from a judgment of the Judicial District Court for the Parish of Vermilion in favor of intervener in a suit to subject property to the payment of a debt of Franklin Landers. *Reversed.*

The facts are stated in the opinion.

Messrs. W. B. White and W. W. Edwards, for Messrs. Wilson & Townley, for appellants.

in her husband, and she had no power to make a gift of the slave. In this case the parties were apparently domiciled in Mississippi at the time of the purchase.

Moneys of a wife domiciled in Mississippi, though received in Louisiana, belong to her as a citizen of the former state, and do not acquire the character or incidents of paraphernal funds under the law of Louisiana, and, if converted by her husband, she has no mortgage on his property in the latter state for their restitution, nor can she receive from him a *dation en paiement* to the prejudice of attaching creditors who are citizens of that state. *Hyman v. Schlenker*, 44 La. Ann. 108, 10 So. 623.

It has long been settled by the jurisprudence of this country that, notwithstanding marriages may have been contracted in other states, the rights of the married persons after being domiciled in this are governed by its laws in relation to all property acquired during their residence here,—so far, at least, as they have reference to acquets and gains which form the matrimonial community. If a husband and wife were placed in this category, and the first should acquire personal property by purchase in another state, it would, perhaps, at the moment of acquisition, form a part of the matrimonial community, even before it was brought into the place of the domicile of the partners. *Hicks v. Pope*, 8 La. 556, 28 Am. Dec. 142.

So, the marital rights of the husband, domiciled in Texas, to personal property given to the wife during a temporary sojourn in Tennessee, are governed by the law of Texas, and not by the law of Tennessee (*Edrington v. Mayfield*, 5 Tex. 363); and, as between the law of Tennessee and that of Texas, the latter was held, in *State v. Barrow*, 14 Tex. 180, 65 Am. Dec. 109, to govern the marital rights to personal property given to the wife, during their temporary sojourn in Tennessee while on their way from Mississippi, their original matrimonial domicile, to Texas, where they contemplated establishing their domicile, though there was no decision as between the law of Texas and that of Mississippi.

So, though it is a well-established rule of international law that the distribution of the personal property of a decedent is governed by the law of his last domicile, and that law, therefore, determines whether either husband or wife is entitled to take, when the right to take is established in either, their respective rights in the property, as between themselves and their privies, is determined by the law of their domicile, and not by that of decedent's unless

Mr. Walter Augustus White for appellee.

Monroe, J., delivered the opinion of the court:

Fred P. Rush and George E. Townley, residents of Indiana, and original plaintiffs herein, in February, 1900, obtained judgment in the circuit court of Marion county, Indiana, against the defendant Franklin Landers, also a resident of that state, in the sum of \$4,745.58, representing the principal and interest of a debt said to have been contracted in 1895; upon which judgment, in March, 1900, they instituted suit in the district court for the parish of Vermilion, and caused to be seized, by attachment, a rice farm lying in that parish, which they alleged belonged to the defendant. The defendant, appearing through the curator ad

the two happen to be the same. *McCollum v. Smith*, Meigs, 342, 33 Am. Dec. 147; *McLean v. Hardin*, 58 N. C. (3 Jones, Eq.) 294; *Muns v. Muns*, 29 Minn. 115, 12 N. W. 343; *Hicks v. Pope*, 8 La. 556, 28 Am. Dec. 142.

So, the law of the matrimonial domicile at the time of the death of the wife governs the disposition of, and succession to, her distributive share of her father's estate, although he was domiciled in another state at the time of his death and the administration of his estate was still open at the time of the wife's death. *Nocnan v. Kemp*, 34 Md. 73, 6 Am. Rep. 307. In this case it was held that the distributive share should go to the surviving husband, that being the law of Kentucky, where the matrimonial domicile was established.

The capacity of a married woman domiciled in France, separated in bed and board from her husband, to compromise her rights in the succession of property, is to be determined by reference to the law of France, and not by that of Louisiana, where the succession is pending. *Garnier v. Poydras*, 13 La. 182.

In *McCormick v. Garnett*, 5 DeG. M. & G. 278, 18 Jur. 412, 23 L. J. Ch. N. S. 777, the court ordered the payment of the wife's legacy to an assignee of the husband, the husband and wife being domiciled in Scotland, in which country a wife had no right to a settlement of the fund upon her.

So, in *Dues v. Smith*, Jac. 544, money belonging to a wife was paid out of court to the husband without requiring him to settle the property upon the wife, it appearing that they were subjects of Denmark, and that according to the Danish law he was entitled to receive her property without making such a settlement.

The law of the matrimonial domicile prevails over that of the forum with reference to the marital rights of husband and wife in a fund administered at the forum. *DeSerre v. Clarke*, L. R. 18 Eq. 587, 43 L. J. Ch. N. S. 821, 31 L. T. N. S. 161, 23 Week. Rep. 8.

But the law of Louisiana respecting the rights of a married woman to slaves inherited by her during the marriage governs in the absence of proof of the law of the matrimonial domicile at the time. *Allen v. Allen*, 6 Rob. (La.) 104, 39 Am. Dec. 553.

The tenure by which personal property acquired in another state and brought here is held as between husband and wife will depend upon the laws of the state where acquired. *Shumway v. Leakey*, 67 Cal. 458, 8 Pac. 12. This language, if literally construed, would make the law of the place where the property

hoc appointed by the court to represent him, answered, disclaiming title. Thereupon Martha E. Landers, his wife, intervened, claiming to be the owner of the seized property by virtue of a conveyance made by her husband in January, 1894, in part satisfaction of an alleged debt for a larger amount, said to be due for separate funds belonging to her, which had been delivered to and used by him, and praying that her title be recognized, and the attachment dissolved. About the time that this intervention was filed, George E. Townley died, and Morris M. Townley, his administrator, was made party plaintiff in his stead, and he and Rush answered the intervention in effect as follows, to wit: That the property seized belonged to the community between Landers and his wife, and that the transfer of title to the wife, as set up by the intervener,

was null and void, because not within any exception to the prohibition contained in the law of this state against sales between husband and wife, because the property was worth \$10,000, whereas the cash consideration of the alleged conveyance purports to have been \$2,000, and for the balance the wife undertook to bind herself with respect to certain mortgages bearing upon the property in the name of her husband, or, if it be held that she did not so undertake, then that the price is "vile;" and that the debt claimed by plaintiffs is a debt of the community, for which said property remains liable. The answer concludes with a prayer that interrogatories on facts and articles be propounded to the intervener, and for judgment etc. Interrogatories were accordingly propounded to and answered by the intervener under a commission executed at her

was acquired govern, rather than that of the matrimonial domicile at that time; but it is probable that the two were the same, though it does not expressly so appear. In the result, the law of California (*lex fori* and *lex rei sitæ*) was applied upon the presumption that the law of Nevada (where the property was acquired and where the matrimonial domicile was probably established at the time of its acquisition) was the same, that law not being proved.

In *Keyser v. Pilgrim*, 25 Tex. Supp. 217, *infra*, V. a., it was held that the marital rights of husband and wife in a slave acquired by the wife from the estate of her father in Tennessee were governed by the law of Tennessee, and not by that of Kentucky, although they were domiciled in the latter state at the time the slave was received; but it will be observed that the decision is upon the ground that at the time of the father's death the matrimonial domicile was in Tennessee.

In *Smith v. McAtee*, 27 Md. 420, 92 Am. Dec. 641, it was held that the wife's share of the proceeds of a sale in partition of real property in Maryland was not subject to attachment for a debt of the husband, notwithstanding that the parties were domiciled in Illinois, by the law of which a husband was entitled to all the personal property of the wife. In this case, however, it was expressly provided in the decree directing a sale of the real property, that the wife's portion of the proceeds should be deemed her separate estate for her sole and separate use and benefit, free from any claim or control of her husband or of his creditors. The court said: "The courts of our state have perfect jurisdiction over all personal property, as well as real, within its limits, belonging to the wife, and they have a right to protect both from the debts of the husband. If, therefore, our legislative enactment in regard to the property of the wife and the laws of Illinois conflict, it cannot be made a question in our own courts which shall prevail. 'Where there is no constitutional barrier, we are bound to observe and enforce the statutory provisions of our own state.'"

The conflict here referred to undoubtedly means a conflict with reference to the very property in question after giving due consideration to the fact that the parties are domiciled in another state. That is, in order to raise such a conflict as is here contemplated, there must be a statute which requires a construction making it applicable to a case where the parties were domiciled in another state, and which, therefore, abrogates, so far as the 57 L. R. A.

forum is concerned, the rule of international law that makes the matrimonial domicile prevail in such a case. The court cannot have contemplated the ordinary conflict which arises between statutes of different jurisdictions which are susceptible of a construction confining them to cases where the parties are domiciled within the state where they were enacted, thus bringing them into harmony with the general principle of international law that the law of the domicile governs. The very necessity for international rules on any subject is created by the existence of a conflict of laws in the sense last referred to.

The law of the domicile also governs with respect to the substantial rights of husband and wife, as between themselves and their privies, in choses in action accruing to either, though the law of the forum may affect the right of either to bring an action thereon without joining the other. Thus:

In *Craycroft v. Morehead*, 67 N. C. 422, a judgment entered in North Carolina in favor of a wife against her husband on judgment notes given before the intermarriage of the parties was upheld as against the other creditors of the husband, upon the ground that the rights of parties were governed by the law of Pennsylvania where the husband and wife were domiciled, which provides that the property owned by a single woman continues to be hers after marriage.

An action may be maintained in the District of Columbia by a married woman domiciled in New York to recover money earned by her in New York, according to the law of which it constituted a part of her separate estate, and loaned by her to the defendant, although such earnings, under the law of the District of Columbia, would belong to her husband. *Frank v. Hirsch*, 3 App. D. C. 491. In this case the loan was made in New York, but the court said if it had been made in the District of Columbia it would not have affected the decision. The court admitted that the necessity, or otherwise, of joining the husband as a plaintiff was to be determined by the law of the District of Columbia, irrespective of the law of New York, but that the substantive right was to be determined by the law of New York.

In *Jones v. Aetna Ins. Co.* 14 Conn. 508, the court expressed a doubt whether an action in Connecticut upon a chose of action belonging to a married woman domiciled in Canada, according to the law of which it constituted a part of her separate estate, must be brought by the husband, although, if she were domiciled

residence in Indiana, and the commission was duly returned, and made part of the record. The intervener was also sworn as a witness in her own behalf, and testified orally. Other evidence was adduced, and the case was argued and submitted, and decided in favor of the intervener on the question of title and in favor of the defendant by judgment of nonsuit, and from the judgment so rendered the plaintiffs prosecute this appeal. In the course of the execution of the commission under which the intervener answered the interrogatories on facts and articles, the point was reserved on behalf of the plaintiffs that the answers were read from a paper which had been prepared in advance, and that the intervener declined to answer in any other way, and declined to state by whom the paper had been prepared. The point thus reserved was not,

however, insisted upon in the district court, and has not been referred to by counsel for plaintiffs, who rely in their argument before this court upon their ability to show that the answers given by the intervener to the interrogatories and in her oral testimony are self-destructive, and are overborne by other testimony. We take it, therefore, that the answers to the interrogatories on facts and articles are to be accepted subject to the conditions last mentioned, since they can hardly be used for the purposes of an attack upon the oral testimony given by the intervener if they are to be excluded from the record. As to the effect of those answers, counsel for the intervener contends that it can be destroyed only by the testimony of two witnesses, or of one witness and strong corroborating circumstances, which, he claims, have not been produced;

in Connecticut, it would have to be brought by him. The court was inclined to the opinion, but did not decide the question, that, since the Connecticut rule requiring the action to be brought by the husband was based on the principle that the chose in action was vested in him, it did not apply where, according to the law of the domicile of the wife, the chose in action was a part of her separate estate. The court held that, whatever the law might be on that subject, the fruits of such an action, even if brought by the husband, could not be taken for his debt.

In *Williams v. Pope Mfg. Co.* 52 La. Ann. 1417, 50 L. R. A. 816, 27 So. 851, it was held that a married woman, whose matrimonial domicile was in Mississippi, might maintain an action in Louisiana, in her own name, to recover damages *ex delicto* for a tort committed against her while temporarily sojourning in the latter state, and which by the law of Mississippi would constitute a part of her separate estate, notwithstanding the Louisiana statute, which provides that "all property acquired in this state by nonresident married persons . . . shall be subject to the same provisions of law which regulate the community of acquets and gains between citizens of this state." The decision is upon the ground that the statute is a real, rather than a personal, statute, *i. e.*, deals with and regulates property within the state, and not with the personal rights or conditions of the spouses, and that the legal situs of the chose in action, if it is to be treated and considered as personal property, was at the matrimonial domicile of the plaintiff in the state of Mississippi.

In *Howard v. Chesapeake & O. R. Co.* 11 App. D. C. 300, the release of a claim for personal injuries executed by a married woman in the District of Columbia was held invalid in the absence of proof of the law of Kentucky (where the injury was received), or of Indiana (where she was domiciled), regarding the property rights of married women. The decision is upon the ground that the presumption must be indulged, either that the rule of the common law, or that in force in the District of Columbia, prevailed in those states, and that under either rule the release would be invalid. The court said that it was unnecessary to consider whether the wife's right of property in a cause of action for personal injury accruing in another state must be determined by the law of the forum, of the domicile of the injured party, or of the place of the contract and injury.

In *Snashall v. Metropolitan R. Co.* 8 Mackey, 57 L. R. A.

399, 10 L. R. A. 746, however, it was held that a married woman could not give a valid release of a cause of action for personal injuries sustained by her in the District, which, by the law of the District, would not constitute a part of her separate property, even if it would be her separate property under the law of Wisconsin, where she was domiciled. The decision is upon the ground that, even if the cause of action for personal injuries is to be regarded as property within the statute of the domicile regulating the property rights of married women, it cannot be regarded as property—at least not as movables—within the rule of international law that the rights of husband and wife to movables are governed by the law of the domicile, irrespective of their actual situation.

A distinction, somewhat analogous to that already alluded to, between the right of husband or wife to share in the distribution of a decedent's estate, and their respective rights in the property when acquired, is pointed out by the following case.

The effect of the payment to the husband of dividends upon shares of stock in a Virginia corporation as a payment to the wife, to whom the stock was issued, is to be determined by the law of Virginia rather than the law of Maryland, where the husband and wife are domiciled. *Graham v. First Nat. Bank*, 84 N. Y. 393, 38 Am. Rep. 528. It was proved in this case that the common-law rule with reference to husband and wife prevailed in Virginia, and that within that jurisdiction the husband had the absolute right to reduce to his own possession, and use for his own benefit, the personal property of the wife. It was accordingly held that the payment to the husband was good, notwithstanding that according to the law of Maryland (*lex domicilii*) the stock was a part of the wife's separate property. The decision is upon the ground that the contract out of which the right to dividends grew was both made, and to be performed, in Virginia. It was admitted that the respective rights of the husband and wife to the property, as between themselves, would be determined by the *lex domicilii*, and a distinction was made between their rights *inter se* and their rights as against the debtor in another state.

So, in *Pearl v. Hansborough*, 9 Humph. 433, *supra*, the court held that the validity of a contract of purchase of personal property in Tennessee by a married woman domiciled in Mississippi must be determined by the law of Tennessee, though it conceded that if the contract

while counsel for plaintiffs insist that such effect should be determined in this case by the rules applicable to ordinary testimony, for the reasons: (1) That the law governing the answers of the defendant in a case is inapplicable where interrogatories "are answered by one who, as intervener, has the burden of proof;" (2) that certain of the answers of the intervener as to the value of the real estate in Indiana transferred to her by her husband are merely expressions of opinion upon matters concerning which it does not appear that she was qualified to judge; and they further insist that as to certain mortgages, which are said to have borne upon the Indiana property at the time of its transfer, the answers are contradicted by official certificates from the mortgage records; and, finally, that they are over-

borne throughout either by the testimony of two witnesses or its equivalent.

The Code of Practice provides that "both plaintiff and defendant" may propound interrogatories on facts and articles (art. 347), and the answers are given the same effect whether made by the one or the other, and irrespective of the burden of proof. The plaintiffs correctly assumed that, as they occupied the position of defendants *quoad* the claim set up by the intervener, they were entitled to propound such interrogatories to her; and, if this be true, there can be no reason why her answers should not be given the effect that would be accorded to those of a person occupying the position of plaintiff *eo nomine*. Prior to 1870 article 354 of the Code of Practice read as follows: "The answers of the party interrogated are evidence, but do not exclude

had been valid the respective rights of the husband and wife in the property acquired would have been determined by reference to the law of Mississippi, and not by that of Tennessee.

It is apparent, for reasons stated in subdivision I., *supra*, that the rule that the rights of the parties are governed by the law of their domicile, rather than that of the place where the property is found, may be changed by statute so far as its applicability in any particular state or country is concerned. This was done, to a limited extent, in Louisiana by the act of 1852 (art. 2400 of the Code), which provides that all property acquired in the state by nonresident married persons shall be subject to the same provisions of law which regulate the community of acquets and gains between citizens of Louisiana. This provision is impliedly held in *Williams v. Pope Mfg. Co.* 52 La. Ann. 1417, 50 L. R. A. 816, 27 So. 851, *supra*, to subject to the community personal property or movables situated in Louisiana belonging to a married woman domiciled with her husband in another state, though, as already seen, it was held not to apply to a mere right of action for a personal injury sustained in Louisiana by a married woman domiciled in another state by the law of which it constituted a part of her separate property, because, if such a right of action could be regarded as personal property at all, its situs was at her domicile. Before the passage of the statute referred to the supreme court of Louisiana adopted the doctrine, which was in reality a rule of statutory construction, that the statute which regulated the rights of husband and wife was real, not personal,—that is, it operated on property within the limits of the state, and not on persons. The terms in which this rule of statutory construction was expressed are calculated to induce the belief that it would accomplish the same result that was afterwards provided for by the express terms of the statute already alluded to, *viz.*, the subjection of personal property acquired in Louisiana to the community, although both husband and wife were nonresidents; but prior to that statute such result seems to have been avoided by the adoption of the view that the situs of personal property, even of chattels, was at the matrimonial domicile, and if that domicile were in another state the property was not, in a legal sense, to be regarded as located in Louisiana. The doctrine was first promulgated in *Saul v. His Creditors*, 5 Mart. N. S. 563, 16 Am. Dec. 212, and it was there applied

simply for the purpose of subjecting to the community property acquired in Louisiana after the removal of the domicile of the husband and wife to that state from the place where the marriage was celebrated and the original matrimonial domicile established, upon the idea that where the personal statute of the domicile is in opposition to a real statute of situation the real statute will prevail. In *Cole v. His Executors*, 7 Mart. N. S. 41, 18 Am. Dec. 241, the rule was applied for the purpose of subjecting to the community personal property acquired by the husband while domiciled in Louisiana, although the wife, who was claiming the benefit of the community, had never been a resident of Louisiana. The court did say in this case that property within the limits of the state must, on the dissolution of the marriage, be distributed according to the laws of Louisiana, "no matter where the parties reside;" but it is obvious that the court merely meant that the residence of the claimant was immaterial if the property was located in Louisiana, that is, was there physically and had its situs there, for it immediately adds: "Because, viewing the statute as real, it is the thing on which it operates that gives it application, not the residence of the person who may profit by the rule it contains." It will be observed that in both these cases the property was not only physically in Louisiana, but its situs was also there in any view, since the husband was domiciled there. In *Packwood's Succession*, 9 Rob. (La.) 438, 41 Am. Dec. 341, however (which was also decided before the act of 1852), it was held that personal property acquired in Louisiana after the removal of the husband and wife to New York, did not fall into the community, but was governed by the law of New York. In this case, upon the theory that situs of the property was at the domicile, it would not be regarded as properly located in Louisiana, although it was acquired there and was physically there. It is thus distinguishable from the last two cases. Of course, it would have come within the terms of the act of 1852 if the property had been acquired before the passage of that act. It was also held in *Armorer v. Case*, 9 La. Ann. 289, 61 Am. Dec. 209; *Cooper v. Cotton*, 6 La. Ann. 256, and *McGill's Succession*, 6 La. Ann. 327, that, prior to the act of 1852, personal property acquired within the state by nonresident married persons did not fall into the community. In *Robinson's Succession*, 23 La. Ann. 174, the court, evidently proceeding on the theory that the community law was a real statute operating only on prop-

adverse testimony, and may be destroyed by the oath of two witnesses or of one single witness corroborated by strong circumstantial evidence, or by written proof." Fuqua, Code Prac. art. 354. And the case of *Hynson v. Tzada*, 19 La. Ann. 470, to which we are referred, was decided under the law as thus expressed. The present article 354 reads: "The answers of the party interrogated are evidence, but do not exclude adverse testimony, and shall be weighed by the judge as other testimony." And for general purposes, to which the article applies, there can be no doubt that the answers referred to are to be dealt with as therein provided. It is true that under the Code of Practice as now written it is well settled, as it was well settled before the amendment, that, as between the parties to a sale of real estate, there are but two ways

of impeaching the title, which is required to be in writing,—the one, by means of a counter letter, and the other by interrogatories on facts and articles,—and that, when answers to such interrogatories are substituted for the counter letter, the title thus established can no more be impeached by parol testimony than if established in any other written form. *Semere v. Semere*, 10 La. Ann. 704; *Godwin v. Neustadt*, 42 La. Ann. 735, 7 So. 744. This rule of exclusion applies, however, only to the parties to the instrument attacked, and does not apply to third persons. *Westholz v. Retaud*, 18 La. Ann. 287; *Blake v. Hall*, 19 La. Ann. 52; *Finley v. Bogan*, 20 La. Ann. 444; *Cary v. Richardson*, 35 La. Ann. 505. We conclude, therefore, that for the purpose of this case the answers of the intervenor to the interrogatories on facts and articles are

erty within the state, held that revenues of a plantation situated in Mississippi did not fall into the community, although the parties were domiciled in Louisiana.

c. What law determines character of property as real or personal.

The rule stated in subd. II. b, *supra*, that the *lex domicilii* is to govern without reference to the location of personal property, needs this explanation or qualification, that the character of property as real or personal is to be determined by reference to the law of the place where it is found, and not by the law of the domicile, or by the *ius gentium*, or even by the law of nature. *Newcomer v. Orem*, 2 Md. 297, 56 Am. Dec. 717; *Kneeland v. Ensley*, Meigs, 420, 32 Am. Dec. 168.

In the latter case it was held that the law of Tennessee, where the matrimonial domicile was established, by which the husband acquires an absolute right to the movable property of his wife, governed with respect to all movable property acquired by the wife from a decedent domiciled in Louisiana, where a different rule obtained; but it was also held that the law of Louisiana must be looked to in determining what was movable, and what was immovable, property, and it was accordingly held that the law of Louisiana governed with respect to the marital rights in slaves, cattle intended for cultivation, implements of husbandry, and other things ordinarily regarded as movable property, but which the law of Louisiana regarded as immovable.

See further, on this point, *infra*, V. a.

III. When law of matrimonial domicile is opposed to that of place where marriage celebrated.

While it is a general principle of international law, subject to some exceptions, that the validity of a marriage depends upon the law of the place where it was celebrated, that law does not necessarily determine the effect of the marriage upon the property rights of the parties. With respect to real property owned by either party at the time of the marriage, or subsequently acquired, the law of the place where it is situated governs, in the absence of any antenuptial contract. See *supra*, II. a. With respect to personal property owned by either party at the time of the marriage, or subsequently acquired by one or both before a change of domicile, the law of the matrimonial

domicil, which may or may not be the place of marriage, governs. Thus:

A marriage celebrated according to rites and ceremony recognised by the laws of the country where it takes place is valid everywhere; and, as a general rule (not without exceptions), by that law the capacity of the parties to contract a marriage is determined. But with respect to the property rights of husband or wife in the personal property of either, derived from the marriage relation, the place where the marriage was celebrated is not decisive; these rights, at least as to property *in esse* at the time of the marriage, depend upon what is known in law as the matrimonial domicile. *Harral v. Harral*, 39 N. J. Eq. 279, 51 Am. Rep. 17.

Although the *lex loci contractus* is to be observed in determining the marriage contract, its formation and validity, the rights consequential to and arising out of the contract when formed may have to be determined and ruled according to the laws of the domicile of the contracting parties if they were domiciled in a place not the *lex loci contractus*. *Steele v. Braddell*, Millw. Const. 1.

The rights of spouses are not to be regulated by the laws of the state in which the marriage is celebrated, when it appears they intend immediately to remove and fix their residence in another country. *Allen v. Allen*, 6 Rob. (La.) 104, 39 Am. Dec. 553.

The contract of marriage has not been made an exception to the well-understood rule of common law that the law of the place where contracts are entered into, *unless they are made with reference to performance in another place*, is to regulate and determine the relative rights and obligations of the parties making them; although other important exceptions have been engrafted upon the rule. *Lyon v. Knott*, 26 Miss. 548.

Where there is no express marriage contract, the law of the matrimonial domicile will govern, as to all the rights of the parties to their present property in that place, and as to all personal property everywhere upon the principle that movables have no situs, and that they accompany the person. As to immovable property, the *lex rei sitæ* will prevail. Where there is no change of domicile, the same rule will apply to future acquisitions as to present property. *Newcomer v. Orem*, 2 Md. 297, 56 Am. Dec. 717. In this case the place of celebration of the marriage and the matrimonial domicile were the same.

In *Noonan v. Kemp*, 34 Md. 73, 6 Am. Rep. 307, *Robinson, J.*, said: "If there be a prin-

entitled to no greater effect than her oral testimony given in her own behalf.

Counsel for plaintiffs also objected in the course of the trial to the proof of any other consideration for the conveyance to the intervenor of the property in controversy than that evidenced by the written instrument, and the objection was overruled. But as the counsel themselves appear to have opened the door to such proof by their interrogatories on facts and articles, and as they do not refer to the matter in their argument before this court, we assume that the objection in question, like the other, has been abandoned, and for this reason we make no ruling concerning it.

Proceeding upon the basis thus established, it appears that in January, 1894, Franklin Landers, the husband of the intervenor, conveyed to his wife a number of

pieces of real estate in Indiana, consisting of farms, town lots, etc., concerning which it is claimed on behalf of plaintiffs that the aggregate value was \$158,051, and that the mortgages with which they were burdened amounted to \$86,865, leaving a margin of value, carried by the conveyance to his wife, of \$71,186; while the intervenor claims that the property was worth \$119,080, and that the mortgages equaled or exceeded its value, and the defendant also, upon January 22, 1894, conveyed to his wife the farm seized in this case, which is said to be worth \$10,000, and which was then burdened with mortgages amounting to \$7,500, exclusive of interest, etc. These different conveyances, evidenced by written instruments, duly recorded, purport to have been sales for money in hand paid. But the interrogatories on facts and articles were propounded by the plain-

ciple of international law settled beyond dispute, it is that the succession to personalty is governed and regulated by the law of the domicile, and, in the absence of a marriage contract, the law of the matrimonial domicile governs as to all rights of the parties to their present property in that place, and as to all personal property wherever it may be situated."

In *Townes v. Durbin*, 3 Met. (Ky.) 357, 77 Am. Dec. 176, also, the court said that the law of the matrimonial domicile determines the respective rights of husband and wife with regard to movables owned by either at the time of the marriage, though in this case the marriage was celebrated in the state where the parties were domiciled, so that the *lex loci* and *lex domicilii* were the same.

The court in *Doss v. Campbell*, 19 Ala. 590, 54 Am. Dec. 198, said that the *lex loci contractus* must govern, not only as to the validity of the marriage itself, but also in ascertaining the rights which each party takes in the property of the other, and which either owned at the time of the marriage. In this case, however, both parties to the marriage were domiciled in the state where the marriage took place, and the question was not whether the *lex loci contractus* or the *lex domicilii* ought to govern, but as to whether rights already acquired in personal property were affected by a change of the matrimonial domicile and the removal of the property into another state.

In *Frank v. Hirsch*, 3 App. D. C. 491, the court said that it was a generally admitted rule of law that the law of the place of the marriage governs the rights of the parties in respect to all personal, movable property, wherever situated. In this case the question was simply whether the *lex fori* or the *lex domicilii* ought to govern, and there was no conflict between the *lex loci* of the marriage, and the *lex domicilii*.

In addition to the above cases which expressly contrast the law of the place where the marriage was celebrated and the law of the matrimonial domicile and hold that the latter governs, that is assumed to be the rule by the cases cited in subdivision IV. *infra*, and, though they are chiefly concerned with the question as to what place is to be deemed the matrimonial domicile, it will be observed that most of them, having fixed the matrimonial domicile at a place other than that where the marriage was celebrated, apply the law of such domicile to the determination of the rights of the parties, although they would have equally applied the law of the place where the mar-

riage was celebrated if that had happened to coincide with the matrimonial domicile.

IV. How original matrimonial domicile ascertained.

The question as to what place is to be regarded as the matrimonial domicile, the law of which will determine the effect of the marriage upon personal property owned by either party at the time, or subsequently acquired by either or both during the continuance of such domicile, is in its last analysis one of the intention of the parties at the time of the marriage as to where they shall establish their residence, assuming that such intention is carried out within a reasonable time. The various rules that have been adopted on the subject are really rules for ascertaining that intention, or for supplying, by presumption, the lack of any evidence or other circumstances which will reveal it. It follows that one rule yields to another when the existence of an additional fact or circumstance makes the latter a surer guide than the former to the intention of the parties. Thus:

If there be no determinate domicile of either the husband or wife at the time of the marriage the *lex loci contractus* governs the husband's rights to movable property of his wife at the time of the contract, and the *lex rei sitæ* to the immovable. *Kneeland v. Ensley*, Meigs, 620, 33 Am. Dec. 168. This is obviously not because the *lex loci* will prevail over the *lex domicilii*, but because, under the circumstances, the matrimonial domicile must be presumed to have been established in the state where the marriage took place. When, however, the previous domicile of the husband is shown, that is to be regarded as the matrimonial domicile in the absence of anything showing a contrary intention, though the marriage was celebrated elsewhere. *Ford v. Ford*, 2 Mart. N. S. 574, 14 Am. Dec. 201; *Kneeland v. Ensley*, Meigs, 620, 33 Am. Dec. 168; *Layne v. Pardee*, 2 Swan, 234; *Parrett v. Palmer*, 8 Ind. App. 356, 35 N. E. 713; *Mason v. Homer*, 105 Mass. 116; *Land v. Land*, 14 Smedes & M. 99; *Corrie's Case*, 2 Bland, Ch. 488.

In *Brien Dit Desrochers v. Marchildon*, Rap. Jud. Quebec, 15 C. S. 318, the community of property obtaining in Quebec (the domicile of the husband at the time of the marriage) was applied to the property of the wife, rather than the law of New Hampshire, where the marriage was celebrated and where the parties were residing at the time of its celebration. The de-

tiffs for the purpose of enabling them to show that the consideration for the conveyance of the Indiana property was something other than cash, and that it must have included and have extinguished the alleged debt, if any such debt existed, in part payment of which the intervener alleges that the Louisiana farm was conveyed to her. In her answers to those interrogatories, however, and also in her oral examination, the intervener states that the Indiana property was conveyed to her in fulfillment of the verbal promise of her husband that he would in that way make good an interest in that and other property, which interest, secured to her by the law of Indiana, she had parted with at his request, and in order to facilitate him in paying his debts. And in her oral testimony she also states that the Louisiana farm was so conveyed in part satis-

faction of her claim against her husband, represented by his note of \$10,324.87, for personal funds belonging to her, which had been delivered to and used by him, together with accumulations of interest. As to the consideration for the conveyance of the Indiana property, it appears that by the law of Indiana, which plaintiffs have proved, tenancies by curtesy and in dower have been abolished, and a married woman is given one inchoate one-third, one-fourth, or one-fifth interest, varying, *quoad* the creditors of her husband, with the value of the property, in all real estate acquired by her husband during the marriage, or in which he may have an equitable interest at the moment of his death, which inchoate interest becomes absolute upon the death of the husband, or upon the forced alienation of the property during his life, unless the wife has previously

cision is upon the ground that the husband had not lost his domicile in Quebec, and that the law of the domicile prevails over the law of the place where the husband was temporarily residing and where the marriage was celebrated.

In the foregoing cases the husband's previous domicile was held to fix the matrimonial domicile, and therefore to furnish the law which determined the rights of the parties to the personal property, even though it did not expressly appear that it was the intention of the parties at the time of the marriage to establish it there. It is to be observed, however, that there was nothing to negative such an intention, and it is expressly stated or assumed that the marital home was in fact established there within a reasonable time after the marriage.

A *fortiori*, the husband's previous domicile will fix the matrimonial domicile and furnish the law by which to determine the rights in personal property, when it expressly appears that at the time of the marriage the parties intended to establish their home there and did so within a reasonable time. It was so held in the following cases, though the husband's domicile was in a state different from "that" in which the marriage was celebrated, and in which the previous domicile of the wife was established: Glenn v. Glenn, 47 Ala. 204; Mason v. Fuller, 36 Conn. 162; Jaffrey v. McGough, 83 Ala. 202, 3 So. 594; Vertner v. Humphreys, 14 Smedes & M. 130; Walker v. Duverger, 4 La. Ann. 569; Ford v. Ford, 2 Mart. N. S. 574, 14 Am. Dec. 201; Routh v. Routh, 9 Rob. (La.) 224, 41 Am. Dec. 326; Connor v. Connor, 10 La. Ann. 440; Arendell v. Arendell, 10 La. Ann. 566; Percy v. Percy, 9 La. Ann. 185; Fisher v. Fisher, 2 La. Ann. 774.

In LeBreton v. Nouchet, 3 Mart. (La.) 60, 5 Am. Dec. 736, it was held that the effect upon property rights of the marriage of a girl thirteen years of age, residing in Louisiana, who, without the consent of her widowed mother, went into Mississippi and was there married, and thereafter, in pursuance of a previous intent, returned to Louisiana with her husband, and there resided with him, was governed by the laws of Louisiana (the *lex domicilii*, rather than the law of Mississippi (the *lex loci contractus*). The decision was upon two grounds: First, that the parties intended to and did make Louisiana the matrimonial domicile; and second, even if they did not originally intend to make their domicile in that state, yet the personal incapacity of the minor, under the Louisiana statute, to give her property to her husband, followed her into Mississippi, and 57 L. R. A.

that by the law of nations even a court sitting in Mississippi would recognise her incapacity under the law of her domicile.

While it is true that in the foregoing cases the place which was held to be the matrimonial domicile was in each instance the previous domicile of the husband, yet that fact was regarded as a mere coincidence, or, at most, as one of the circumstances showing the intention of the parties to establish the matrimonial domicile there, and, as already shown, that fact, in the absence of any other circumstances, will be sufficient, of itself, to raise a presumption that such was their intention. In all of these cases, however, it was the intention of the parties at the time of the marriage, followed by its fulfillment within a reasonable time thereafter, that was held to fix the matrimonial domicile, and the principle which governs the decisions would seem to be equally available to fix the matrimonial domicile at a place different from that where the marriage was celebrated, or where either party was previously domiciled. It was held in Harral v. Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17, that the matrimonial domicile must be regarded as established in France so as to subject the personal property *in esse* at the time of the marriage to its law, although the husband was an American and had never obtained the authorization from the French government which was necessary to enable him to acquire a personal domicile in France. The decision was upon the ground that it was the intention of the parties to make their habitation there. It is true that in this case the marriage was celebrated in France, and the wife was previously domiciled there, but these facts do not appear to have been regarded as important, except, perhaps, for the purpose of illustrating the intent of the parties.

Kneeland v. Ensley, Meigs, 620, 33 Am. Dec. 168, states the principles of international law on the subject as follows:

1. If there be no determinate domicile of either the husband or wife, at the time of the marriage, the *lex loci contractus* governs the husband's right to the movable property of the wife at the time of the contract, and the *lex rei sitæ* to the immovable.

2. If the husband and wife have different domiciles, the law of that of the husband is to prevail as to the wife's movable property, because the wife is presumed to follow the domicile of the husband.

3. If the parties at the time of the contract had reference to another state than the one

joined him in such alienation, or in imposing encumbrances importing the right to alienate; provided that the wife may elect to take under the will of her husband, if there be one, and provided, also, that in case of judicial sales of such real estate where the value exceeds \$20,000 her interest becomes absolute only up to that value. Ind. Rev. Stat. §§ 2482, 2483, 2491, 2499, 2508, 2509. As to the consideration for the conveyance of the Louisiana property, it is shown that the intervener was first married to Washington Conduitt, who died in 1862, leaving her \$4,000 by his will, together with \$1,400, which he had given her shortly before his death; that in 1865 the \$5,400 thus received had increased to \$7,200, and that she then married Franklin Landers, to whom, at one time or another, she turned over the whole of that amount, taking his

notes therefor; that by reason of the accumulation of the interest allowed by Landers the \$7,200 had increased by January, 1883, to \$10,324.87; that he then substituted a note for that amount in place of the notes previously given; and that, while interest had been paid on said note from time to time, little or nothing had been paid in reduction of the principal amount up to the date of the conveyance of said Louisiana property, and that said property was conveyed to her in part satisfaction—that is to say, up to the sum of \$2,000—of the claim represented by said note. It is admitted by the argument that the intervener had a valuable interest, under the law of Indiana, as above recited, and it is not denied that she parted with it in joining her husband in mortgaging or selling the property to which it attached. Nor is it denied that it was

where it was made, as the place where they intended to live, the law of the place of intended residence, if it become the actual residence, will govern the right of the husband to the movable property of the wife, and not the *lex loci contractus*.

The third principle is clearly broad enough to cover a case where the intention was to establish the marital residence at a place other than the place of the marriage or of the domicile of either party, though the case was apparently disposed of on the second principle.

In *McIntyre v. Chappell*, 4 Tex. 187, however, the Texas supreme court, though the decision of the point was not necessary to the disposition of the case, held that the mere intention of the parties at the time of a marriage celebrated in Tennessee, where both were previously domiciled, to remove to Texas did not make the latter state their matrimonial domicile, but that Tennessee must be regarded as such domicile, and its law determined the respective rights of the parties to the personal property owned by the wife at the time of the marriage, notwithstanding that the husband left for Texas within two weeks after the marriage and within a little over a year was joined by his wife, and the parties subsequently resided there. The court cited *Ford v. Ford*, 2 Mart. N. S. 574, 14 Am. Dec. 201, *supra*, but attempted to distinguish it upon the ground that in that case the husband was previously domiciled in Louisiana, where the matrimonial domicile was held to be fixed, and that that fact materially influenced the court's decision. That was true, but it is to be observed that in that case no express intention was shown, and the decision is referable to the second of the principles stated in *Kneeland v. Ensley*, Meigs, 620, 38 Am. Dec. 168, *supra*, the presumption being, in the absence of evidence to the contrary, that the parties intended to establish the matrimonial domicile at the previous domicile of the husband. In later Louisiana cases, which have been cited above, where the intention expressly appeared, it is clear that that intention governed, though, as already stated, it happened in these cases that the intention coincided with the husband's previous domicile. The Texas supreme court, in a subsequent case (*State v. Barrow*, 11 Tex. 179, 65 Am. Dec. 109), questioned the correctness of the decision in *McIntyre v. Chappell*, 4 Tex. 187, on the point, and, while it did not overrule it, it said that it was open for re-examination whenever the necessity arose. It further said that its means of investigating the subject at the

time of the first decision were very limited, and admitted that later decisions in Louisiana assert the principle that the intention governs in terms which do not admit of the qualification that the intended domicile shall coincide with the husband's previous domicile.

In *Layne v. Pardee*, 2 Swan, 234, it was held that the law of Tennessee, the previous domicile of the husband, governed as to the personal property of the wife, although the marriage was celebrated in Texas, where she was domiciled, and notwithstanding that he entertained a floating idea of making his home in Texas at some time or other, it appearing as a fact that the matrimonial domicile was established in Tennessee and continued there until his death. The court questioned whether even his actual agreement at the time of the marriage to establish the home in Texas would make the law of that state govern, but it was found that there was no such actual promise.

The last case suggests a qualification, which is also implied in the cases previously cited, of the rule that the intention of the parties at the time of the marriage determines the matrimonial domicile, *viz.*, that the domicile actually established after the marriage must coincide with the intended domicile, otherwise the law of the intended domicile will not govern. It would seem to follow, as a necessary corollary, that if the intention is abandoned after the marriage the law of the intended domicile will not govern, though even in that case it might be plausibly urged, by those who adopt the theory that the law by which the parties intended to be governed constitutes a tacit contract, that it should still govern, in reply to which, however, it might be said that by abandoning the intention the parties abandoned the tacit contract, if there was any such. But it is not necessary that the intention of the parties should be carried out immediately after the marriage. In the cases above cited it will be observed that the qualification is that the intention must be carried out within a reasonable time. In *Fisher v. Fisher*, 2 La. Ann. 774, where the intention prevailed, nearly a year elapsed before the parties went to Louisiana (the intended domicile) to reside. So far as concerns property which is acquired after the domicile is actually established, it would seem to be immaterial whether it be regarded as the original matrimonial domicile or not, since, even upon the theory of a change of domicile, its law would govern as to such property. See *infra*, V. b. But with respect to property owned at the time of the marriage, or acquired before

competent, under the law of Indiana, for the husband to make that interest good by the conveyance to the wife of real estate there situated. It is also virtually admitted that this court will be justified, from the evidence in the record, in holding that the intervenor had placed in the hands of her present husband \$5,400, with the accretion thereto, which she had received from her first husband and his estate, and that the same had not been returned to her, or otherwise accounted for, prior to the month of January, 1894. And from these premises counsel for the plaintiffs present an argument involving several propositions of law, which may be conceded with certain modifications not material to the plaintiffs' case. Thus, it is conceded that the validity of a conveyance of real estate lying in Louisiana is to be determined by the law of Louisiana, and that the

capacity of persons occupying the relation of husband and wife to deal with each other with respect thereto is to be determined by the same law. It is also conceded that under the law of Louisiana a sale between husband and wife can take place only for the considerations stated in the law itself; that, where such sale purports to have been made for some other consideration, it is invalid upon its face, and, if attacked by a party having sufficient interest, the burden of proof, whenever such proof is admissible, rests upon the party seeking to maintain its validity to show that the real consideration was within the exceptions provided by law; and, if the claim be that the real consideration was indebtedness by the husband to the wife on account of money said to have belonged to the wife and to have been received and used by the husband, it must be

the parties have actually established their residence at the place of the intended domicil, that place must be regarded as the original matrimonial domicil if its law is to govern. And it is to be observed that the cases heretofore cited have applied the law of the intended domicil indifferently to property acquired before, and to that acquired after, the actual establishment of the marital residence there, and without reference to where the property was received.

V. Change of matrimonial domicil.

a. Property acquired prior to change.

As the marital rights with respect to real property are determined by the *lex rei sitæ*, *supra*, II. a, they cannot be affected by the removal of the matrimonial domicil.

With respect to personal property, the rule, established by the great weight of authority is that the rights of the respective parties in such property owned at the time of the marriage or acquired prior to the change are not affected by the removal of the domicil and of the property to a place where a different law obtains. Thus, rights acquired by the husband, by virtue of the common-law rule that obtains at the matrimonial domicil, in personal property owned by the wife at the time of the marriage or acquired prior to the removal, are not affected by a change of the domicil to a place, by the law of which such property remains the separate property of the wife or becomes the common property of the husband and wife. *Jaffrey v. McGough*, 83 Ala. 202, 3 So. 594; *Calahan v. Monroe*, 70 Ala. 271; *Kraemer v. Kraemer*, 82 Cal. 302; *Dye v. Dye*, 11 Cal. 163; *Thorn v. Weatherly*, 50 Ark. 237, 7 S. W. 33; *Lichtenberger v. Graham*, 50 Ind. 288; *Oliver v. Robertson*, 41 Tex. 422; *McIntyre v. Chappell*, 4 Tex. 187; *Stokes v. Macken*, 62 Barb. 145; *Vardeman v. Lawson*, 17 Tex. 10; *Cressey v. Tatom*, 9 Or. 541; *Henderson v. Trousdale*, 10 La. Ann. 548.

So, personal property purchased by a wife from her husband while they were domiciled in a country where she could not thus acquire title remains subject to the claims of the husband's creditors after the removal of the domicil and the property to Maine. *Bond v. Cummings*, 70 Me. 125.

And personal property of a married woman, which, by the common-law rule in force at the place where the matrimonial domicil was established when the property was acquired, became the property of the husband, does not

lose its character as such, or become a part of her paraphernal property, upon the subsequent removal of the domicil to Louisiana, they not having originally intended to establish their domicil there. *Hayden v. Nutt*, 4 La. Ann. 65.

The removal of the matrimonial domicil and the personal property does not affect the marital rights as fixed by the law of the matrimonial domicil at the time the property was acquired, if that law is proved. *Hill v. M'Dermot*, *Dallam* (Tex.) 419. In this case, however, the law of Texas, which was the new domicil, was applied, not because it was the law of the new domicil, but because it was the law of the forum, and there was no proof of the law of the original domicil, the court holding that it could not be presumed that the common law was in force there.

So, in *Savage v. O'Neil*, 44 N. Y. 298, property given to a wife by her mother during the marriage was treated as her separate property under the New York married woman's act of 1848, even upon the assumption that the parties were married, and the property was received. In *Russia*. The decision, however, is upon the ground that, as the law of *Russia* on the subject was not proved, and as it could not be presumed that the common-law rule on the subject obtained there, the law of New York (*lex fori*) furnished the rule for the determination of the rights of the parties.

The removal of the matrimonial domicil from Louisiana to a state where the community of property does not exist does not vest in the wife any distinct and separate title to one half the community property acquired while the domicil was in Louisiana; but the husband retains the right of administering such property, and will continue to be entitled to enjoy the fruits of the total property. *Packwood's Succession*, 9 Rob. (La.) 438, 41 Am. Dec. 341.

In *Schurman v. Marley*, 29 Ind. 458, it was assumed that if the husband, prior to the removal of the domicil from North Carolina, where the common-law rule was, presumptively, in force, had reduced his wife's personal property to his possession, his right thereto would not have been affected by the subsequent removal of the domicil and property to Indiana, and the decision denying the right of his creditors to the property is upon the ground that prior to the removal to Indiana he had treated the property as the separate property of the wife, and that after that time it was protected as her separate property by the Indiana statute.

On the other hand, personal property which

shown, where the parties reside in another state, that by reason of such receipt and conversion the husband became the debtor of the wife, that the debt existed at the time of the conveyance of the property, and that such conveyance was made in satisfaction, or part satisfaction, thereof. It is further conceded that, the intervener and her husband having been residents of Indiana, the question as to whether the husband became indebted to his wife by reason of his receipt and conversion of money said to have belonged to her prior to his conveyance to her of the real estate in Louisiana must be determined by the law of Indiana. The learned counsel then proceed as follows: "(1) It having been shown that the common law has been adopted in Indiana, and it not having been shown that it has, in that respect, been modified by statute, this court will assume,

agreeably to the common-law rule, that the husband of the intervener owed her nothing on account of any money belonging, or said to have belonged, to her, which may have been received and converted by him; and hence that there was no consideration, which the law of Louisiana will recognize, to validate the conveyance of the property here situated. (2) If the position, as thus stated, be not sustained, then that the verbal promise of the husband to make good, by conveyance of real estate in Indiana, the interest of which the intervener had divested herself for his accommodation, was not enforceable, in view of the provisions of the Indiana statute of frauds (which the counsel have offered in evidence) on the subject of verbal contracts relating to real estate. And (3) that the net value, after deducting the mortgage debt, of the Indiana property con-

by the law of the place where the matrimonial domicile was established at the time of the marriage, or at the time the property was acquired, if it was acquired after the marriage, remained the separate property of the wife, does not lose its character as such by the removal of the domicile to a place where a different rule obtains. *Drake v. Glover*, 30 Ala. 382; *Parrott v. Nimmo*, 28 Ark. 351; *Grote v. Pace*, 71 Ga. 231; *Powell v. DeBlane*, 23 Tex. 66.

The marital rights of husband and wife in a slave descended to the wife upon the death of her father are governed by the law of Tennessee, where the parties were married in that state without any intention at the time of removing to another state, and were domiciled there at the time the descent was cast upon the wife, although the property was not received until after they had removed to Kentucky. *Keyser v. Pilgrim*, 25 Tex. Supp. 217. It was so held upon the assumption that by the law of Tennessee the property would be the separate property of the wife, while under the law of Kentucky it would not.

Where a husband, while residing in Alabama, converts personal property of his wife, and thereby, according to the law of that state, becomes her debtor, that debt is not extinguished or merged into the property of the husband upon their removal to Tennessee, and it will constitute a valid consideration for a conveyance by the husband to the wife in preference to his other creditors. *Bank of Columbia v. Walker*, 14 Lea, 299. The court admitted that rights arising under the law of Alabama could not be enforced in Tennessee if such law were repugnant to the policy and spirit of the law of Tennessee, but held that there was no such repugnancy between the statutes of the two states.

So, the removal of the matrimonial domicile from Louisiana to Missouri does not change the community character of personal property acquired in Louisiana before the removal of the domicile. *DePas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88; and a similar decision, *mutatis mutandis*, is made in *Drake v. Glover*, 30 Ala. 382, though in the latter case it was held that the mode of transferring the title after its removal, and the change of domicile, to Alabama, must be governed by the law of that state.

The rights and powers of a married woman with respect to personal property acquired before the removal of the matrimonial domicile and the property to Mississippi are governed by the law of the original matrimonial domicile, and not by that of Mississippi. *Block v. Cross*, 36 Miss. 549. 57 L. R. A.

Slaves secured to a wife in Virginia by deed of trust executed while the matrimonial domicile was established there do not become subject to the debts of the husband after their removal, and the removal of the matrimonial domicile to Louisiana. *Jeter v. Deslonde*, 6 La. Ann. 379.

In *Gilkey v. Pollock*, 82 Ala. 503, 3 So. 99, it was held that the obligation of a husband to pay his wife the income and profits received by him from the latter's property, and appropriated while domiciled in Mississippi, was to be determined by the laws of that state, notwithstanding the removal of the domicile to Alabama; but that the liability of the husband for income and profits accruing after the change of domicile was governed by the laws of Alabama, the new domicile. It is to be observed, however, that the Mississippi statute, by virtue of which the income and profits were claimed, did not create an equitable separate estate in the wife, such as equity creates independently of statute, with all its powers, rights, and incidents, but was merely an enabling statute.

Personal property belonging to the wife at the time of the marriage, and which, according to the law of Texas, where the parties were domiciled and the marriage was celebrated, did not vest in the husband, does not become subject to his debts by a change of domicile to another state and the removal of the property to that state. *Doss v. Campbell*, 19 Ala. 590, 54 Am. Dec. 198.

The removal of a married woman from New York to New Jersey does not divest her of a title to a fund which she held as trustee in New York, although by the law of New Jersey a married woman is incompetent to act as trustee; and the trust may still be enforced in New York after such removal. *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 5 L. R. A. 541, 22 N. E. 572.

But it has been held that when property acquired by a married woman at her domicile in another state, and claimed by her as a part of her separate estate, is brought by herself and husband into Arkansas upon their removal to that state, in order to protect her title to it against persons dealing with her husband with reference to it she must show that she acquired a perfect title to the property according to the law of the state where it was acquired, and that her title is recorded either in that state or in Arkansas, under the law of the latter state. *Hydrick v. Burke*, 30 Ark. 124.

It is to be observed that the rule that the law of the original matrimonial domicile governs as

veyed to the intervener exceeded the value of the interest which she claims it was intended to make good, and hence that it should be held that such conveyance also operated to extinguish the claim for money received and converted."

The propositions 2 and 3 will first be considered in their order as stated above. In support of proposition 2 we are referred to the case of *Worth v. Patton*, 5 Ind. App. 272, 31 N. E. 1130, in which it appeared that the husband desired to convey certain lands to the children of a former wife, and that he verbally promised the wife that, if she would join him in such conveyance, thus releasing her inchoate interest, he would convey to her certain other real estate, which promise was accepted and acted on by the wife; but that the husband died without fulfillment on his part. It further appeared

that the widow then made a claim against the estate of the deceased, asking to be made good with respect to the interest with which she had thus parted, which claim was resisted on the ground that the promise was void under the statute of frauds. It was held by the court that, if the action had been brought for specific performance, or for damages for breach of contract, the defense might have prevailed, but that the widow was entitled to recover the fair value of the interest with which she had parted upon the faith of a promise which had not been fulfilled, and which could not be enforced. This decision appears to us to be equally sound in law and in morals, but we are unable to perceive in what way it supports the proposition of the learned counsel. It was not held that the husband could not, under the statute of frauds, have complied with his

to the rights of husband and wife, as between themselves, in personal property acquired before the change of domicile, is strictly limited to rights which were vested in one or the other at the time of the change. As so limited this rule does not conflict with the well-established rule that the law of the last domicile of deceased governs the distribution of his personal estate. The latter rule, of course, only operates upon property which the decedent owned at the time of his death, and only to the extent of his title. A mere statute of distribution of the original domicile, by which either spouse is to share in the other's personal estate upon the latter's death, creates no vested rights which survive the removal of the domicile, and therefore offers no obstacle to the application of the statute of distribution of the new domicile if that was the domicile of the deceased spouse at time of death. When, however, a statute of the original domicile creates a right in either spouse which, though its enjoyment is postponed until the death of the other spouse, is nevertheless a vested right, it survives the removal of the domicile, and operates to withdraw the property, to the extent of the right, from the assets of the deceased upon which the law of the new domicile may operate.

Thus, in *Lyon v. Knott*, 26 Miss. 548, it was held that the right of a husband under the statute of Mississippi, where the marriage was celebrated and the original matrimonial domicile was established, to slaves owned by the wife at the time of the marriage, in the event of her death without issue, was a vested right which was not defeated by the removal of the matrimonial domicile and the slaves to Texas, and that upon the death of the wife, while the matrimonial domicile was established in Texas, his rights under the Mississippi statute would prevail over the rights of her next of kin under the Texas statute of distribution. The decision with reference to the vested character of the husband's right was upon the ground that at common law marriage operated as an absolute gift to the husband of the personal property of the wife in her possession at the time of the marriage, and that such right of the husband was not to be considered as restricted or abrogated to any greater extent than was required by the express and positive language of the statute, or by necessary implication.

But it was held by the same court in *Hairston v. Hairston*, 27 Miss. 704, 61 Am. Dec. 530, that a statute of the original matrimonial domicile which prevents a husband, by testamentary

disposition, from depriving the wife of her statutory portion of the effects of which he may die possessed, does not create a vested right in the wife with respect to personal property owned by the husband before the removal of the matrimonial domicile to another state, and does not govern the distribution of the estate of the husband, where, at the time of the death, the matrimonial domicile was established at another place where a different law prevailed.

The Texas supreme court, in *Powell v. DeBlane*, 23 Tex. 66, followed the construction of the Mississippi statute involved in *Lyon v. Knott*, 26 Miss. 548, which was adopted in the latter case, and accordingly held that the right of the husband to take the slaves in the event contemplated by the statute was a vested one, and was not affected by the removal of the matrimonial domicile and the death of the wife in a state, by the laws of which the slaves would go to the parents, or brothers, or sisters of deceased. The court was very much inclined to doubt whether, as an independent proposition, the right could be regarded as a vested one; but held that it would adopt the views of the Mississippi supreme court upon the construction of a statute of that state.

In *State ex rel. Cunningham v. Carroll*, 6 Mo. App. 263, it was held that where a married woman has acquired personal property which, by the law of the matrimonial domicile at the time of its acquisition, was a part of her separate estate, and the matrimonial domicile and property are subsequently removed to a state which forbids the recognition of the wife's separate right to property, the property will become liable to her husband's debts. In this case, however, it was held that there was in reality no conflict between the law of Ohio, the original matrimonial domicile, and the law of Missouri, to which the matrimonial domicile was removed, because a rule of equity in force in the latter state protected the separate estate of a married woman without the intervention of a nominal trustee, the husband becoming the wife's trustee by operation of law. The assumption in this case that the law of Missouri (the new domicile) would prevail over the law of Ohio (the original domicile) as to property acquired in Ohio is against the great weight of authority.

It was pointed out in subd. II. c. *supra*, that in general the character of property as real or personal is determined by the *lex rei sitæ*; but in neither of those cases did it appear that the property had been removed from a state where it bore a different character. It would seem

promise, nor was it held that, if he had complied with it, a creditor to whom he contracted a debt eighteen months later could have successfully attacked the conveyance upon the ground that the consideration was inadequate.

Proposition No. 3 appears to us to involve a *non sequitur*, since, assuming that the net value of the Indiana property conveyed to the intervener exceeded that of the interest which she claims it was intended to make good, it would not follow that the parties intended the excess in value to be attributed to the extinguishment of the claim for personal funds had and converted by the husband. There are other hypotheses to be taken into account. Landers may have intended to convey the property to his wife for an inadequate consideration, or he may have believed—the opinions of the witnesses

who have been examined in this case, or the fact, if it be a fact, or both the opinions and the fact, to the contrary notwithstanding—that the property was not worth more than the claim in satisfaction of which it was transferred. There is nothing to indicate that any creditor was left unsatisfied at the time that the conveyances in question were made, and those conveyances certainly inflicted no injury on plaintiffs, whose debt had not then been contracted, and was not contracted until a year or more later. But if the purpose had been to place the property of the husband, both in Indiana and Louisiana, beyond the reach of the husband's future creditors, it is not apparent why the claim of the wife for the restitution of her personal funds, which claim, there was reason to believe, might serve as a valid consideration for the conveyance to

that where the personal character had attached to property before its removal that character would be respected so far as rights previously acquired are concerned; and in *Henderson v. Trousdale*, 10 La. Ann. 548, *supra*, the law of Georgia, where the matrimonial domicile was established at the time slaves were acquired by the wife, was held to govern after their removal and the removal of the domicile, notwithstanding that in Louisiana slaves were regarded as real property, and not as personal property as in Georgia. No question, however, seems to have been raised that the slaves should have been treated as real property.

b. Property acquired after the change.

See also *Schurman v. Marley*, 20 Ind. 458, *supra*, V. a.

The respective rights of the parties in personal property acquired subsequently to the change of domicile are governed by the law of the new domicile,—at least if that domicile is accepted by both parties; or, to put the proposition in a somewhat broader form so as to cover a case where there has been more than one change, it is the law of the actual domicile at the time the property is acquired that governs, and not that of the original matrimonial domicile, or of any intermediate domicile. *Dow v. Gould & C. Silver Min. Co.* 31 Cal. 629; *Kneeland v. Ensley*, Meigs, 620, 33 Am. Dec. 168; *Halrston v. Halrston*, 27 Miss. 704, 61 Am. Dec. 530; *McCollum v. Smith*, Meigs, 342, 33 Am. Dec. 147; *State v. Barrow*, 14 Tex. 180, 65 Am. Dec. 109; *Castro v. Illies*, 22 Tex. 479, 78 Am. Dec. 277; *Saul v. His Creditors*, 5 Mart. N. S. 569, 16 Am. Dec. 212; *Gidney v. Moore*, 86 N. C. 485; *Murphy v. Murphy*, 5 Mart. (La.) 83, 12 Am. Dec. 475; *Packwood's Succession*, 9 Rob. (La.) 438, 41 Am. Dec. 341; *Hicks v. Pope*, 8 La. 556, 28 Am. Dec. 142; *Gaius v. Cannon*, 42 Ark. 503; *Lyon v. Knott*, 26 Miss. 548.

A husband is not liable to his wife for the value of personal property, other than choses in action, owned by her prior to the removal of the matrimonial domicile from a state where the common-law rule as to the rights of husband and wife obtains, although the property was not reduced to possession by him until after the removal to Louisiana; but it is otherwise with respect to the proceeds of choses in action not reduced to possession, but collected after the removal to Louisiana, and with respect to money received after the removal of the domicile, representing the proceeds of real

property of the wife situated at the former domicile. *Henderson v. Trousdale*, 10 La. Ann. 548. The distinction here made with reference to the different classes of property is due to the fact that the first class vested in the husband before the removal, and therefore, in accordance with the rule previously stated (*supra*, V. a) his right to it was not affected; while the other class never vested in him because not reduced to possession before the removal.

It will be observed that the rule relating to property acquired after a change of domicile has been stated with the qualification that both parties accept the new domicile. There is no warrant for such qualification in the cases above cited to sustain the rule. It may be remarked, however, that in none of these cases did it appear that there was any dissent by either party to the change of domicile. It has been suggested by some writers on Conflict of Laws (Wharton, § 194; Westlake, p. 64), in accordance with the views of the foreign jurists, that the rule does not apply when the change of domicile is disadvantageous to the wife, and is not accepted by her. This qualification in the broad form in which it is here stated seems to have no support from the American or English cases except as hereafter indicated. In *Bonati v. Welsch*, 24 N. Y. 157, which is cited by Wharton in support of it, the New York court of appeals did hold that the right of a wife, under the law of France, where the marriage was celebrated and the original matrimonial domicile established, to be reimbursed out of her husband's estate, upon his death, in preference to his legatees and creditors, for the proceeds of a sale of her immovable property in France which were appropriated by him, was not defeated by the fact that the husband was domiciled in New York at the time of his death, and that no part of the property left by him was acquired in France. The majority opinion in this case, however, proceeds upon the express assumption that the domicile of the wife, who remained in France, was not changed. It expressly said: "As a general rule the domicile of the wife follows that of the husband, and there is much force in the argument that in the absence of an express agreement defining the matrimonial rights the law of the contemplated or any future domicile should govern. But in the case now under consideration the domicile of the wife has not been changed and the rights she acquired . . . [under the law of the original] matrimonial domicile, are not, we think, lost or impaired by the change of the domicile of the husband." It does not ap-

her of the Louisiana property, should have been exhausted in Indiana, when, as we infer from the fact that plaintiffs appear to have made no attack on them, the consideration for the conveyances in Indiana, as stated by the intervener, was sufficient to enable her to hold the property there conveyed.

Passing to some other questions, there is no doubt that the Louisiana farm, having been acquired during the marriage, was community property, though Landers and his wife resided in Indiana. Civil Code, art. 2400. But that did not prevent its conveyance to the wife, provided there was a consideration, which, under the law of Louisiana, would be sufficient to support a sale or *dation en paiement* from husband to wife. The position taken in the answer to the intervention that the intervener, as

part of the price, assumed the mortgage debts resting upon the property, and due by the husband, is not sustained by the fact. The intervener did not assume the mortgage debts, but took the property subject to the mortgages, and only for its supposed value over and above the debts thus secured. So, also, with regard to the position that property worth \$10,000 was conveyed to her in extinguishment of her claim to the extent of only \$2,000, and that the price was "vile," etc. Such was not the fact. The property was conveyed subject to mortgages amounting to \$7,500, exclusive of costs, interest, attorney's fees, etc., for which it may be liable, and hence the interest acquired by the intervener seems to bear but a just proportion to the claim for which it is said to have been given in satisfaction. *Colvin v. Johnston*, 104 La. Ann. 655, 29 So. 274.

pear what the circumstances were that prevented the domicil of the wife from following that of the husband in accordance with the general rule; but in view of the language quoted it is clear that this case cannot be regarded as authority for the broad proposition that in every case where the change of domicil would be disadvantageous to the wife, and she refuses to accept the new domicil, the law of the original matrimonial domicil will govern. Upon the assumption that the wife's domicil did not, under the circumstances of the case, follow that of the husband, this case would not seem to come within the terms of the rule above stated, that the respective rights of husband and wife are governed by the actual domicil, for actual domicil in this connection undoubtedly means matrimonial domicil, or (if that term be confined to the domicil acquired at the time of the marriage) the marital domicil; and if the circumstances are such as to justify the wife in retaining the original domicil, the new domicil of the husband can scarcely be regarded as the matrimonial or marital domicil, to the exclusion of that of the wife. Therefore it seems unnecessary to invoke any exception to the general rule in order to account for the decision in this case. There was a dissenting opinion in the case which expressly proceeds upon the assumption that the wife's domicil followed the husband's; and the difference in these two assumptions accounts for the difference in the results reached without imputing to either majority or minority any intention to decide that in all cases the law of the original matrimonial domicil will govern when the change is disadvantageous to the wife and she refuses to accept the new domicil. Indeed, it has been expressly held in Louisiana that property acquired by a husband after his removal to that state falls into the community although the marriage was celebrated and the original matrimonial domicil established elsewhere, and the wife never actually resided in Louisiana. *Cole v. His Executors*, 7 Mart. N. S. 42, 18 Am. Dec. 241; *Dixon v. Dixon*, 4 La. 188, 23 Am. Dec. 478. These decisions, however, were upon the ground that the Louisiana statute regulating the rights of husband and wife was real, not personal, and that it regulated things and subjected them to the laws of the country in which they were found, irrespective of the residence of the parties.

It was held in the chancery division in *Re DeNicols* [1898] 1 Ch. 403, 67 L. J. Ch. N. S. 274, 78 L. T. N. S. 152, that the marital rights of a native French man and woman, married 57 L. R. A.

in France, in personal property acquired after the removal of the matrimonial domicil to England, were governed by the law of France (the original matrimonial domicil) where the community of property obtains, rather than the law of England, where such property belongs to the husband. The decision is upon the ground that where there is no express matrimonial contract there is an implied contract that the law of the matrimonial domicil shall govern with respect to all property wherever acquired. This decision, however, was reversed by the court of appeal in *Re DeNicols* [1898] 2 Ch. 60, 78 L. T. N. S. 541, 67 L. J. Ch. N. S. 419, and it was held by that court, upon the authority of *Lashley v. Hog*, 4 Pat. 581, that the law of England governed so that the whole of the husband's personal estate was effectually disposed of by his will. The English doctrine is therefore in accord with the American on this point.

c. Tacit mortgages or liens.

The mortgage or privilege upon the property of the husband's estate, which the law of Louisiana gives to a wife as security for her separate property converted by the husband, does not secure the restoration of money converted by the husband before the removal of the domicil to Louisiana, although the money was, by the law of the matrimonial domicil at the time of the conversion, protected as the separate property of the wife. The wife is to be regarded only as an ordinary creditor. *Arnold v. McBride*, 6 La. Ann. 703.

Neither does the tacit or legal mortgage upon the property of the husband in favor of the wife, created by the law of the original matrimonial domicil, to secure to the wife the restoration of the dower which she brought to her husband or of her paraphernal property converted by the husband, follow them into a new matrimonial domicil, and attach to property subsequently acquired in such new domicil. *Hall v. Harris*, 11 Tex. 305; *Valansart's Succession*, 12 La. Ann. 848.

By the acknowledged law of comity, a paraphernal right of a married woman under the law of Louisiana, the matrimonial domicil, and the lien on the husband's estate to protect it, are as ubiquitous as the persons themselves, and follow them wherever they may afterwards settle. *Kendall v. Coons*, 1 Bush, 530.

A tacit mortgage upon the husband's property in favor of the wife, arising under the law of the original matrimonial domicil, to secure

The question which remains is, Was there a consideration for the conveyance of the Louisiana property from husband to wife, such as can be recognized under Louisiana law? The conveyance purports to be a sale for \$2,000, and is invalid upon its face. A contract of sale between husband and wife can take place only in the three following cases: "(1) When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights. (2) When the transfer made by the husband to his wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated. (3) When the wife makes a transfer to the husband of property, in payment of a sum promised him as dowry." Civil Code, art. 2446. The burden of proof is on the intervener to show

that the conveyance, which appears upon its face to be invalid because the consideration expressed is not within the exceptions of the law, is based upon another and a different consideration, which is within those exceptions. She has undertaken to accomplish this by showing that she turned over to her husband certain funds, which, in this state, would be considered paraphernal, and that the property in question was conveyed to her by her husband in part satisfaction of the debt which he incurred in receiving and using said funds. But she has not shown that her husband thereby incurred any debt, for that is a matter which is to be determined by the law of their domicile, where the funds were received and converted. The plaintiffs have proved the adoption of the common law by the state of Indiana, — a fact of which we might have taken ju-

the restoration to the wife of her paraphernal property converted by the husband, will not, even as to property acquired at the original matrimonial domicile, be allowed a preference over the claims of creditors after the removal of the matrimonial domicile, and the property, to another state. *Hall v. Harrie*, 11 Tex. 305. This is upon the principle that a priority or preference acquired as an incident to a foreign contract by the *lex loci contractus* will not be enforced against those persons who have acquired rights under contracts made after the removal of the matrimonial domicile!.

VI. Marriage settlements.

As will hereafter be shown, the question as to what law determines the validity and construction of an antenuptial contract depends upon a variety of circumstances; but when the appropriate law has been applied, and the contract has been held valid, and its construction determined, it governs with respect to all the rights of the parties that are within its scope, and to that extent supplants all laws on the subject, even those of the forum, unless it is contrary to the public policy of the forum. Thus:

Where parties contracting marriage have entered into an express antenuptial contract, that contract will, of course, furnish the rule which will govern in regard to matrimonial property, and will, upon recognized principles, be carried into effect in every jurisdiction, subject, of course, to the exceptions which are applicable to all other classes of contracts. *Lyon v. Knott*, 26 Miss. 548.

Where there is an express antenuptial contract, it will generally be admitted to govern all the property of the parties, not only in the matrimonial domicile, but in every other place, unless it contravenes some law or principle of public policy of the country where it is sought to be enforced. *Besse v. Pellochoux*, 73 Ill. 285, 24 Am. Rep. 242.

But while it has been held that the contract will act directly on personal property within its scope, wherever situated, it will, with respect to real property in a foreign country, at most, only confer a right of action to be enforced according to the jurisprudence *rei sitæ*. *Ibid.*; *Ordonaux v. Rey*, 2 Sandf. Ch. 33. In the latter case it was held that a provision of the French Code, which gives the wife a mortgage on the immovables of the husband to secure her demands arising under an antenuptial settlement, could not be extended so as to give 57 L. R. A.

her such a lien upon real property of the husband situated in New York.

It sometimes becomes a question what property is within the scope of the contract. This question is, in its last analysis, one as to the intention of the parties, and the rules on the subject are in reality rules for ascertaining that intention. Thus, there can ordinarily be no question but that personal property, which was in *esse* at the time the contract was executed, or which was acquired during the continuance of the original matrimonial domicile, was within the contemplation of the parties; and, that being so, the fact that the domicile and the property are subsequently removed to another state or country does not take the property out of the contract, or affect any rights with respect to it which have vested under the contract. *De Lane v. Moore*, 14 How. 253, 14 L. ed. 409; *O'Neill v. Henderson*, 15 Ark. 235, 60 Am. Dec. 568; *Frank v. Hirsch*, 3 App. D. C. 491; *Young v. Templeton*, 4 La. Ann. 254, 50 Am. Dec. 563; *Jeter v. Deslonde*, 6 La. Ann. 379; *Eager v. Brown*, 14 La. Ann. 695; *LeBreton v. Miles*, 8 Paige, 261.

And it is not even necessary to record the contract in the state to which the domicile and property are removed in order to protect the wife's rights thereunder against the husband's creditors. *Frank v. Hirsch*, 3 App. D. C. 491; *Jeter v. Deslonde*, 6 La. Ann. 379; *O'Neill v. Henderson*, 15 Ark. 235; *Hicks v. Skinner*, 71 N. C. 539, 17 Am. Rep. 16.

So, a marriage settlement or deed in favor of the wife, duly executed and recorded in one state, will be good against the creditors of the husband in another jurisdiction, although they may have had no express notice. *Bank of United States v. Lee*, 13 Pet. 107, 10 L. ed. 81; *DeLane v. Moore*, 14 How. 253, 14 L. ed. 409.

In *Youngblood v. Flagg*, 11 La. 337, it was assumed that if the claims of the husband's creditors had accrued before the wife's death, the law of South Carolina, where the parties were domiciled at the time of the settlement, requiring acts of settlement to be recorded in order to be good as against such claims, would have governed, and that it would have been necessary to record the settlement in order to have protected the personal property of the wife in Louisiana from the claims of such creditors; but it was held that the law did not apply because the claims did not accrue until after the wife's death and until after the trust had vested for the benefit of the children.

The contract governs, even with respect to

dicial notice, as we now take judicial notice of what the common law is, though we do not take such cognizance of the statutory modifications of that law. *Copley v. Sanford*, 2 La. Ann. 335, 46 Am. Dec. 548; *Kling v. Sejour*, 4 La. Ann. 130; *Ripka v. Pope*, 5 La. Ann. 63, 52 Am. Dec. 579; *Gates v. Gaither*, 46 La. Ann. 292, 15 So. 50; *Lambert v. Penn Mut. L. Ins. Co.* 50 La. Ann. 1031, 24 So. 16; *Roehl v. Porteous*, 47 La. Ann. 1582, 18 So. 645; 13 Am. & Eng. Enc. Law, 2d ed. p. 1058. At common law a married woman cannot possess personal property independently of her husband except where a trust is created for her separate benefit, and the promise of the husband to repay money received from the wife during coverture would be without consideration. 15 Am. & Eng. Enc. Law, 2d ed. p. 820; *Henderson v. Trousdale*, 10 La. Ann.

548; *McCall v. White*, 10 La. Ann. 577; *Eager v. Brown*, 14 La. Ann. 695; *Quigly v. Muse*, 15 La. Ann. 197. There is no evidence in the record that this rule has been modified by statute in Indiana, and hence we have no basis upon which to hold that the receipt of money from his wife and its conversion by Landers imposed any obligation upon him the discharge of which could serve as the consideration for the conveyance to her of property in this state. Even if it had been shown that, by reason of statutory modification in Indiana of the common law otherwise prevailing there, Landers became the debtor of his wife with respect to her personal funds received and converted by him, and that he also owed interest thereon under an agreement to that effect, such obligation would not be held, in this state, to stand upon the same footing

future acquisitions, after a change of domicile, if such was the intention of the parties.

Thus, a stipulation in a marriage contract that there shall be a community of goods to be regulated by the custom of Paris wherever the parties shall go, governs the rights of the parties with respect to property acquired after their removal to a new domicile, and will be enforced by the courts of that domicile, if not incompatible with their own laws, or prejudicial to their own citizens. *Murphy v. Murphy*, 5 Mart. (La.) 83, 12 Am. Dec. 475.

But where an antenuptial contract applies in terms or intent only to present property, or is to be performed only in the country where made, and there is a change of domicile, the law of actual domicile will govern the rights of the parties as to all future acquisitions. *Besse v. Pellochoux*, 73 Ill. 285, 24 Am. Rep. 242; *Fuss v. Fuss*, 24 Wis. 256, 1 Am. Rep. 180.

It was held in the latter case, under the influence of this principle, that a marital contract executed in Prussia, and which was obviously made with reference to its operation and effect within the Kingdom of Prussia and upon the property of the parties there situated, and made no reference to property situated elsewhere, did not govern with respect to real property acquired in Wisconsin after the removal of the domicile to that state, but that the law of Wisconsin governed as to such property.

Where there is an antenuptial contract, and it does not expressly provide, and the intention is not manifest, that it is to apply to and govern all after-acquired property wherever the parties may reside, it will not be admitted to have that effect,—at least upon real property acquired in a country to which the matrimonial domicile is removed; but with respect to real property at least, if not personal property, acquired after such removal, the law of the new domicile governs. *Castro v. Illies*, 22 Tex. 479, 73 Am. Dec. 277. In this case the contract, which was made in France, provided that there should be no community of property. There was no stipulation that its provisions should govern as to property thereafter acquired in whatever country the parties might reside, but there was an express reference to the law of France, and a declaration of intention to be governed by its provisions, with certain modifications therein expressed. The court said that the inference was that the parties did not contemplate a change of domicile, and did not contract with reference to their after acquisitions in case of removal to another country.

57 L. R. A.

So, in *Long v. Hess*, 154 Ill. 482, 27 L. R. A. 791, 40 N. E. 335, it was held that an antenuptial contract executed in Germany did not govern with respect to real property in Illinois acquired by the husband after the removal of the matrimonial domicile to that state. The decision does not turn upon the point that the property was real property, but upon the point that the contract cannot be regarded as having contemplated future acquisitions of property after the removal of the original domicile, because, to use the language of Judge Story (*Conflict of Laws*, § 143), it "does not speak fully to the very point." The principle of the decision, therefore, seems equally applicable to personal, as well as to real, property.

In *Tourne v. Tourne*, 9 La. 457, the court held that, notwithstanding that the marriage contract was entered into at a place where no community of acquets and gains existed by law, and none were stipulated, yet when the parties removed to Louisiana such a community took place by operation of law with reference to property acquired in that state unless expressly excluded by the contract.

Having determined by the application of the principles stated in the foregoing cases whether the property is within the scope of the contract, it becomes necessary to determine the validity and construction of the contract; and to determine that question, it may be necessary to ascertain what law governs the contract. As between the law of the place where the contract was executed and that of the matrimonial domicile, the latter governs,—at least in the absence of a contrary intention,—with respect to the construction of the contract and as to its validity,—at least so far as its validity depends upon its subject-matter.

Thus, the law of the place or country which the parties contemplate as their domicile governs with respect to an antenuptial contract,—at least so far as personal property is concerned. *LeBreton v. Miles*, 8 Paige, 261. In this case it was held that an antenuptial contract executed in New York, where the marriage was celebrated, between natives of France, was to be construed according to the law of France, it appearing that the contract was made with reference to the law of France and to an intended residence in that country, and was, by its terms, to be afterwards drawn up in due form of a marriage contract according to the law of France, although that was not done, and although the parties subsequently changed their minds about their residence and continued to reside in New York.

as the debt of a citizen of Louisiana to his resident wife for paraphernal or dotal funds received by him. Nor would a conveyance of property, made in this state, in satisfaction of the one debt, be here given the effect which, under our law, is accorded to the *dation en paiement* in satisfaction of the other. *Prats v. His Creditors*, 2 Rob. (La.) 501; *Stewart v. His Creditors*, 12 La. Ann. 89; *Hyman v. Schlenker*, 44 La. Ann. 118, 10 So. 623. The counsel for the intervener contends, however, that a creditor can proceed by the seizure of property, the title to which is in another person than his debtor, only where such title is a pure simulation. Correctly stated, we take the rule upon this subject to be that, "when immovable property has been sold by authentic act, valid on its face, and accompanied by actual delivery, and continuous

possession and control by the vendee, as owner, a creditor of the vendor cannot seize the property in disregard of the transfer; and, when enjoined by the vendee, such seizing creditor will not be allowed to allege and prove that the sale is a fraudulent simulation. . . . The title of the vendor under such circumstances can only be attacked in a direct action in avoidance of the sale. . . . And in such direct action, whether revocatory or *en declaration de simulation*, the plaintiff must aver and prove that the act sought to be avoided operates injuriously to him." *Willis v. Scott*, 33 La. Ann. 1026; *Cochrane v. Gibert*, 41 La. Ann. 735, 6 So. 731; *Thompson v. Herring*, 45 La. Ann. 991, 13 So. 398. In the case last above cited the syllabus reads in part: "If the act of sale evidenced a real transaction, whatever its character, the

The question arose between the husband and wife as to their respective rights, under this contract, in the wife's share in her father's estate in New York.

An antenuptial agreement, entered into in Paris between persons residing there but domiciled in England, executed according to the formalities required by the law of France, and which was conditioned upon a marriage *avant la loi*, is, at least as to English property, put into effect by a marriage in Paris which is valid according to the law of England, whether it would be valid according to the law of France or not; and, with respect to such property, the validity of the agreement must be determined by reference to the law of England. *Este v. Smyth*, 18 Beav. 112, 23 L. J. Ch. N. S. 705, 18 Jur. 300.

In the two cases next cited it will be observed that the place of the contract and the place of the matrimonial domicile (determining the location of such domicile in the manner shown in *supra*, IV.) were the same, so that there was no conflict between the *lex loci* and the *lex domicilii*.

The validity of a marriage settlement made in England between a domiciled Turkish subject and an English woman, on faith of his promise to reside in England, is to be determined by the law of England rather than the law of Turkey. *Colliss v. Hector*, L. R. 19 Eq. 334, 44 L. J. Ch. N. S. 207, 32 L. T. N. S. 223, 23 Week. Rep. 485.

An antenuptial contract drawn in Scotch form, between parties domiciled in Scotland, is to be construed with reference to the law of Scotland in determining the respective property rights of the contracting parties. *Austruther v. Adair*, 2 Myl. & K. 513.

It will also be observed that in some of the cases cited below, where the place of the contract and the place of the matrimonial domicile were the same, and the conflict was between the law of that place and the law of the place where the property was situated, or the law of the forum, the law of the place of the contract is apparently held to govern; but since in these cases the *lex loci contractus* and the *lex domicilii* were the same, they are authority neither for nor against the proposition that, as between the *lex loci contractus* and the *lex domicilii*, the former governs.

But it was held in *Wilder's Succession*, 22 La. Ann. 219, 2 Am. Rep. 721, that the capacity of the parties to, and the form of, an antenuptial contract must be tested by the laws of the place where it was made, although its ef-

fect will be governed by the laws of the place where they contemplated the establishment of their matrimonial domicile and where it was intended the contract should have effect. In this case one of the parties was a minor, and it seems that by the *lex loci contractus* the question whether the contract was, for that reason, void, or voidable merely, would depend upon the question whether it was advantageous or otherwise to the minor. The court held that, in determining that question, the *lex loci contractus* alone must be considered, and that the law of the contemplated matrimonial domicile could not be considered for that purpose.

It was held in *Davenport v. Karnes*, 70 Ill. 465, however, that the validity of a parol antenuptial contract was to be determined by the law of Illinois, the matrimonial domicile, rather than that of Pennsylvania, where it was made.

In *Este v. Smyth*, 18 Beav. 112, 23 L. J. Ch. N. S. 705, 18 Jur. 300, the rule above stated, that, as between the *lex loci* and the *lex domicilii*, the latter governs, seems to be regarded as resting upon the presumed intention of the parties, and as yielding to a contrary intention. It was there held that persons domiciled in England may, in anticipation of an English marriage to be contracted in the country, agree that their marital rights shall be regulated according to the laws of any other country they may see fit.

In *Bourcier v. Lanusse*, 3 Mart. (La.) 581, however, it was held that a provision in a marriage contract entered into in Louisiana, which, so far as appears, was the matrimonial domicile, that rights of the parties should be determined according to the custom of Paris, was invalid, and that their rights must be determined according to the law of Louisiana. It was admitted that if strangers had made such a submission in a foreign country subject to that law, it would regulate the effect of their contract in Louisiana.

So, in *Morales v. Marigny*, 14 La. Ann. 867, it was held that, although the parties, by their marriage contract, submitted themselves to the law of Spain as to the interpretation of their rights and claims upon each other, they did not, and could not, oust the tribunals of Louisiana, the place of their intended and actual residence, of jurisdiction of their disputes, and that jurisdiction is necessarily to be exercised according to "our own" rules. In this case, also, the contract was apparently executed in Louisiana. Neither of these cases, therefore, presents the question whether parties may, by express provision to that effect, stipulate that

administratrix could not ignore it, or attack it collaterally, but could only claim its judicial revocation by direct action." But in the case at bar the putative sale from husband to wife, purporting to have been made for money in hand paid, is not valid upon its face, but is distinctly invalid, as being apparently in violation of a prohibitory law. It cannot, therefore, be said to evidence a real transaction, but leaves the title to the property, apparently, in the vendor, and subject to seizure at the suit of his creditor.

Our learned brother of the district court, after a conscientious and exhaustive review of the case, concludes his opinion as follows: "It seems, so far as I am advised, that under the law of Indiana the husband and wife have almost unlimited power to

contract with each other. Under our own law, restitution to the wife by the husband is looked upon with favor. . . . The sale in controversy in this case was an accomplished fact long before the plaintiffs ever became creditors of the defendant, Landers, and the intervener, by virtue of that sale, had accepted that property, and gone into actual possession of the same. For the foregoing reasons, and after a prolonged and thorough study of the question and all the law and facts bearing upon it, I am forced to conclude that the transaction or transfer in controversy vested title to the property in the intervener, and she is accordingly declared to be the true and lawful owner," etc. We infer from this that something may have been conceded in the argument in the district court as to the statutory modi-

their rights shall be determined by the *lex loci* rather than the *lex domicilii*.

As between the law of the matrimonial domicile on the one side and that of the forum, or of the place where the property is situated, on the other the former governs with respect to the validity of the contract,—at least so far as matters of substance are concerned. Thus, in *Townsend v. Maynard*, 45 Pa. 198, the validity of a husband's settlement of property upon his wife, and of a subsequent loan from the latter to the former out of the proceeds of the property so settled upon her, was determined by the law of New York, where the parties resided at the time, and where the transactions were had, though the question arose in Pennsylvania between the wife, who had seized goods of the husband in that state in satisfaction of her debt, and his other creditors, who claimed that the settlement, being voluntary, was void as against them.

So, in *Scheferling v. Huffman*, 4 Ohio St. 241, 62 Am. Dec. 281, the validity of an antenuptial contract executed in Germany between persons domiciled there was determined by the law of Germany. The contract involved in this case provided, in effect, that the wife should retain title to all the property previously owned by her, and that all the property that they might mutually acquire during the marriage should belong to her. The question arose between the wife and the creditors of the husband, who seized personal property in Ohio, some of which represented the joint product of the wife's means and the husband's labor. The contract was held to protect her as against the creditors, the court saying that the enforcement of the contract according to the law of Germany would not interfere with the policy of the laws of Ohio.

So, though it yields when a contrary intention is manifest, the general rule is that the law of the matrimonial domicile, rather than that of the place where the property is situated or located, or where the question arises, governs with respect to the construction of the contract, using the term "construction" in the sense of the interpretation of the language of the contract, and the determination of its effect on property which, under the rules previously stated, is within its scope. It will be observed that in some of the cases hereafter cited to sustain this proposition the language used indicates that it is the *lex loci* that governs; but in these cases there was no conflict between the *lex loci* and the *lex domicilii*, and, in view of the cases previously cited in this subdivision, and those cited in subdivision III. 57 L. R. A.

supra, it seems well established that if the *lex loci* and the *lex domicilii* had been different, the latter would have been chosen.

An antenuptial contract made in France between persons domiciled there at the time will be interpreted and allowed to have the same effect in New York as it would have in France, unless it is repugnant to the laws of New York or to its public policy; and it is not so repugnant because it provides for reciprocal or mutual donation between husband and wife, a mode of acquiring property by the wife unknown to the laws of New York. *Crosby v. Berger*, 3 Edw. Ch. 538.

So, rights dependent upon nuptial contracts are, even in the absence of a provision to that effect, to be determined by the *lex loci contractus*. *Découche v. Savetier*, 3 Johns. Ch. 190, 8 Am. Dec. 478. The *lex loci* and *lex domicilii* were the same in this case.

In *Carroll v. Renich*, 7 Smedes & M. 798, where the title to personal property in Mississippi was involved, it was held that the validity and extent of operation of an antenuptial contract executed in Tennessee, by parties resident there at the time, the marriage having taken place there, were governed by the law of Tennessee. In this case Tennessee was both the place of the contract and of the matrimonial domicile.

In *LaFitte v. Lawton*, 25 Ga. 305, the court said that an antenuptial contract, having been made in South Carolina by parties residing there at the time, it must be construed according to the laws of that state, and in this case the meaning of the word "issue" in the contract was determined by reference to the law of South Carolina, though the personal property, over which the controversy arose, was located in Georgia. In *Brown v. Ransey*, 74 Ga. 210, also, it was held that the word "heirs" in an antenuptial settlement which provided that, in case of the failure of the wife to dispose of her distributive share of an estate located in Georgia and South Carolina, it should go to her "heirs," was to be construed according to the law of South Carolina, where the contract was executed and the parties resided. The controversy in this case arose over real property in Georgia which was assigned to the wife as her share of the estate. In accordance with the law of South Carolina, it was held that the husband was not the sole heir, although by the law of Georgia he would have been.

So, in *Peake v. Yeldell*, 17 Ala. 636, the court held that slaves owned by the wife at the time of the marriage were protected by an antenuptial

fications of the common law in Indiana in so far as that law bears upon the relation of husband and wife, but we have been unable to find in the record any proof of a modification whereby the husband becomes the debtor of the wife by reason of his receipt and conversion of her personal funds. Our conclusion, therefore, upon the case presented, is that the intervener has failed to make the proof necessary to establish her claim, and that her intervention should be dismissed as in case of nonsuit.

Since the submission of the case the death of Franklin Landers has been sug-

gested, and his legal representatives have been made parties hereto.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the plaintiffs Fred. P. Rush and Morris M. Townley, administrator of George E. Townley, deceased, and against the intervener, Mrs. Martha E. Landers, dismissing the intervention of said Mrs. Landers as in case of nonsuit, and at her cost in both courts.

Rehearing denied May 12, 1902.

tial contract from the husband's creditors, that being the effect of the contract according to the law of South Carolina, where it was executed and where the marriage was celebrated, notwithstanding that, according to the law of Alabama, to which state the parties had removed and in which they were living at the time the slaves were seized by the husband's creditors, it would not have that effect. This decision is formally put upon the ground that the construction and interpretation of the contract, as well as its validity, are governed by the law of the place where it was made. In this case, however, the place of the contract and of the domicile were the same.

In *Smith v. Chapell*, 31 Conn. 589, also, it was assumed that the effect of an antenuptial contract made in England, where the marriage was celebrated, would govern, after the removal of the property and domicile of the parties to Connecticut, though in this case the rule in both places seems to have been the same. *Sherrod v. Callegan*, 9 La. Ann. 510, is to the same effect, but the rule is stated with the qualification that the contract does not create a prohibited substitution, a *fidei commissum*, or new tenure of property unknown to the laws of Louisiana. In this case the wife's title to slaves purchased from the husband after they were brought into Louisiana was upheld under a settlement made in Alabama, where the parties were domiciled at the time.

So the effect of an antenuptial contract made in Mississippi, where all the parties resided and where it was intended to have effect, must be governed by the law of Mississippi. *Spears v. Shropshire*, 11 La. Ann. 559, 66 Am. Dec. 208.

In *LePrince v. Guillemot*, 1 Rich. Eq. 187, the validity and effect of stipulations in a marriage contract whereby parents of the husband and wife respectively agreed to advance a stipulated marriage portion, payable at their (the parents') pleasure, but bearing interest until paid, were determined by the law of France, where the contract was executed and the parties were domiciled. The question arose between the husband and wife on one side and the creditors of the wife's father on the other. It was held, according to the law of France, that the contract made the husband and wife creditors of the father for the marriage portion.

In *McLeod v. Board*, 30 Tex. 238, 94 Am. Dec. 301, the court, referring to an antenuptial settlement which provided that upon the death of the wife without having disposed of her separate estate certain slaves, which were settled upon her, should be distributed according to the law of South Carolina, where the contract was made and the original matrimonial domicile established, said: "We see no reason why the *lex loci contractus* may not, by positive agreement, be made the rule for determining the parties who shall take as heirs or distributees on the failure of the wife to dispose of the

property by will or otherwise, as well as to govern the construction of the contract in all other respects, and especially in respect to its control in the partition and disposal of property acquired after a change of domicile from that of the marriage." This point, however, was not decided.

In *Heine v. Mechanics' & T. Ins. Co.* 45 La. Ann. 770, 13 So. 1, however, it was held that a provision of an antenuptial contract made in France, where the parties were domiciled, which permitted the wife to sell her property, but required that the proceeds should be reinvested in a prescribed manner, was to be construed, so far as it affected immovable property in Louisiana, with reference to the law of Louisiana, and not to the law of France; and it was held, in accordance with the law of Louisiana, that such provision of the contract did not impose any duty on the purchaser of such property with reference to reinvestment of the proceeds.

So, in *Richardson v. DeGilverville*, 107 Mo. 422, 17 S. W. 974, it was held that the question whether a separate estate in real property in Missouri, owned by the wife at the time of the marriage, was secured to her by an antenuptial contract executed in France, the original matrimonial domicile, was to be determined by the law of Missouri rather than the law of France. This decision was upon the ground that the contract contained no agreement as to the rights of the husband to the wife's property during the marriage, but merely provided that the property owned by her at the time of the marriage should not fall into the community, and that at her death he should, during his life, have the whole or the half of the income arising therefrom, accordingly as there should or should not be children living of the marriage. The court said that the question was whether such an agreement secured to the wife a separate estate as understood by the laws of Missouri.

And it was held in *Suares v. DeMontigny*, 12 Misc. 259, 33 N. Y. Supp. 292, that a marriage settlement executed in a foreign country, the matrimonial domicile, relating to real and personal property in New York, and appointing a trustee who resided in New York, would be construed according to the law of New York. This was upon the ground that it was obviously contemplated that the contract was to be performed in New York.

And in *Viditz v. O'Hagan*, 68 L. J. Ch. N. S. 553 [1899] 2 Ch. 560, an antenuptial contract in English form, entered into between an English woman and a foreigner outside the United Kingdom, will, relatively to property in England, be construed and enforced by the courts of England according to the English law.

In *Hicks v. Skinner*, 71 N. C. 539, 17 Am. Rep. 16, it was held that the necessity of registration of an antenuptial contract entered into in New York, where the marriage was cele-

brated, between a woman domiciled in New York and a man domiciled in North Carolina, was to be determined by the law of New York, rather than by the law of North Carolina, and it was accordingly held that registration in accordance with the laws of North Carolina was not necessary to protect personal property of the wife which, by the terms of the contract, was to continue hers notwithstanding the marriage, from the husband's creditors after its removal to North Carolina. In this case, however, it is expressly stated in the opinion that there was no evidence that the parties contemplated, or contracted in reference to, any particular domicile or place of residence after marriage, and, as a matter of fact, the parties did not go to North Carolina until about a year after the marriage. These facts are important in view of the position of the court that the exception to the rule of *lex loci contractus* or *actus*, when it is contemplated that the contract is to be performed elsewhere, is based on the supposed intent of the parties to be governed by the law of the place of performance.

In *Lapice v. Gereadeau*, Walk. (Miss.) 480, it was held that a mortgage executed by a husband and wife, resident in Mississippi, upon lands situated in that state, was binding, and the wife could not avoid it by setting up a marriage contract executed in Louisiana, where the marriage was celebrated, by which they agreed that the property acquired should be governed by the laws of Louisiana. The decision in this case, however, was upon the ground that the wife was estopped by the execution of the mortgage.

In *McVey v. Holden*, 15 La. Ann. 317, it was held that comity did not require a court of Louisiana to enforce a postnuptial contract, which was invalid according to the law of that state, executed in Mississippi, whereby a trust in certain slaves, acquired while the domicile was in Louisiana, was created for the benefit of the wife, notwithstanding that the parties were residing in Louisiana at the time of its execution. The court apparently recognized that the ordinary rules of international law would make the law of Mississippi the test of the validity of the contract, but it was evidently regarded that the facts that the property was acquired while the parties were domiciled in Louisiana, that the domicile there had been resumed before the litigation arose, and that, under the law of Mississippi, the wife at most only took an equitable interest which could not be enforced in a court of law, were sufficient to justify the court in refusing to enforce the contract. The court said that the question might possibly have been different if the rights of the parties had been fixed by the dissolution of the marriage while they were resident in Mississippi, or if the property conveyed had not belonged to the community under the law of Louisiana.

VII. Summary.

The foregoing review of the authorities seems to warrant the following propositions:

(1) In the absence of an express contract, the effect of marriage upon real property, or immovables, is determined by the law of the place where the property is situated (*lex rei sitæ*), irrespective of the place of the marriage, or of the matrimonial domicile. *Supra*, II. a.

(2) With respect to personal property, or movables, as between the law of the place where the property is found, or that of the forum, and the law of the marital domicile, the latter governs. *Supra*, II. b.

(3) The character of property as real or personal,

within the foregoing rules, is determined by the law of the place where it is found (*lex rei sitæ*). *Supra*, II. c.

(4) With respect to personal property, or movables, in the absence of an express contract, as between the law of the matrimonial domicile (*lex domicilii*) and that of the place where the marriage was celebrated (*lex loci*), the former governs. *Supra*, III., IV.

(5) If there be no determinate domicile of either the husband or wife at the time of the marriage, the parties will be deemed to have contemplated the place of the marriage as the place of the matrimonial domicile, and its law will therefore govern with respect to personal property, or movables, owned at the time of the marriage, or subsequently acquired during the continuance of the matrimonial domicile at that place. *Supra*, IV. If the husband and wife have different domiciles at the time of the marriage, the parties will be deemed to have contemplated the husband's domicile as the matrimonial domicile in the absence of circumstances showing a contrary intent; and the law of that place will therefore govern with respect to personal property, or movables, owned at the time of the marriage, or acquired during the continuance of the domicile at that place. *Supra*, IV. If the parties at the time of the marriage intended to establish the marital home at a place different from that where the marriage was celebrated, or that where either of the parties was previously domiciled, and that intention was carried out in a reasonable time, the place so chosen will be regarded as the matrimonial domicile, whose law will, in the absence of a marital contract, govern with respect to personal property or movables owned at the time of the marriage or acquired prior to a change of domicile. *Supra*, IV.

(6) Personal property, or movables, owned at the time of the marriage, or acquired before a change of the matrimonial domicile, continue, so far as the respective rights of husband and wife are concerned, subject to the law of the original domicile after the change, although removed to the new domicile. *Supra*, V. a.

(7) But personal property, or movables, acquired after the change, are, in the absence of an express contract to the contrary, governed by the law of the new domicile, that is, by the law of the place where the domicile was established at the time the property was acquired. *Supra*, V. b.

(8) When there is an express antenuptial contract, it governs with respect both to real and personal property within its scope; but while it acts directly on personal property wherever situated, with respect to real property in a foreign country it confers only a right of action to be enforced according to the jurisprudence *rei sitæ*. *Supra*, VI.

(9) The location of the property is, except as stated in the last paragraph, immaterial if it was clearly within the contemplation of the parties in making the contract. *Supra*, VI.

(10) Property owned at the time of the marriage, or acquired during the continuance of the original matrimonial domicile, will be presumed to have been within the contemplation of the parties, and will therefore be governed by the contract, even after a change of domicile and the removal of the property to the new domicile. *Supra*, VI.

(11) But to bring future acquisitions, after a change of domicile, within the contract, it must have been expressly provided for, or the intention that it should be governed by the contract must be manifest. *Supra*, VI. Otherwise, the rule that prevails in the absence of

contract will apply, and the property will therefore be governed by the law of the new domicile. *Supra*, V. b.

(12) All of the foregoing rules are subject

to the qualification that they will not be enforced if their enforcement would be contrary to the law, or public policy, of the forum.

G. H. F.

VERMONT SUPREME COURT.

BANKERS' LIFE INSURANCE COMPANY OF NEW YORK

v.

Fred A. HOWLAND *et al.*

(73 Vt. 1.)

1. In computing the reserve of a life insurance company under a statute requiring it, in order to be entitled to do business in the state, to have, in addition to its capital, assets equal in amount to its outstanding liabilities, reckoning the premium reserve on its life risks based on the actuaries' tables of mortality, with interest at 4 per cent, as a liability, the expenses of securing the first year's business may be deducted from the amount it receives as premiums for that year by providing that a policy shall be valued as a term policy for one year and a life policy afterwards.
2. One taking a policy of life insurance which provides that it shall, for the purpose of computing the reserve, be valued as a term policy for one year and a life policy afterwards, is estopped from repudiating that provision of the contract.
3. Under a statute requiring insurance commissioners to issue licenses to a foreign insurance company to do business in the state, if satisfied with its statement showing its financial condition and standing, they have no authority to question the method of computing the reserve set forth in the statement, or to enter upon an independent valuation of such reserve.
4. A statute forbidding a life insurance company to discriminate between insureds of the same class in premiums, rates, dividends, other benefits or terms and conditions, does not prevent the issuing of one-year term policies with the privilege of taking a whole life policy at the end of the first year, for the purpose of appropriating a larger portion of the premium to expenses and less to the reserve fund.
5. Mandamus is a proper remedy to compel insurance commissioners to grant a license to do business in the state to a foreign insurance company which has complied with the statutory requirements, which license they refuse because they require a reserve computed on a wrong basis.

(January 30, 1901.)

PETITION for a writ of mandamus to compel defendants to grant petitioner a license to do business within the state. *Granted*.

The facts are stated in the opinion.

Messrs. B. F. Fifield and Seneca Haselton for petitioner.

Messrs. Dillingham, Huse, & Howland and John Young for petitioners.

Taft, Ch. J., delivered the opinion of the court:

In February, 1900, the Bankers' Life Insurance Company of New York applied to the insurance commissioners of Vermont for a license to do business therein. Such license was refused, and the company bring their petition for a mandamus to order and direct the commissioners to issue such license. A foreign joint-stock life insurance company cannot do business in this state unless it has paid-up capital invested in securities, readily convertible into cash, of at least \$100,000, not less than one half of which is invested in cash securities other than mortgages of real estate, nor unless such company has, in addition to such capital, assets equal in amount to its outstanding liabilities, reckoning the premium reserve on its life risks based on the actuaries' tables of mortality, with interest at 4 per cent as a liability. Vt. Stat. § 4178. It cannot then transact business unless it first obtains a license of the insurance commissioners authorizing it so to do. Before receiving such license, the company shall file with the secretary of state a certified copy of its charter and by-laws, and a statement, under oath, of its president and secretary, showing its financial condition and standing. Vt. Stat. § 4181. If, upon the filing of such copies and statements, the commissioners are satisfied with them, and further satisfied that the company has complied with the title relating to insurance, they shall grant a license authorizing it to do business, etc., and such license may be renewed annually so long as the company complies with the requirements aforesaid, and the commissioners regard the company as safe and entitled to public confidence. Vt. Stat. § 4182.

Thus, under our statutes, a foreign life insurance company is entitled to do business in this state if it has the requisite capital, properly invested, and assets equal to its absolute liabilities, and the required premium reserve. Upon presentation of the petitioner's statement to the commissioners no question was made in respect to the capital stock of the petitioner, as it had the neces-

NOTE.—For other cases in this series as to restrictions on business of foreign insurance company, see *State ex rel. Richards v. Ackerman* (Ohio) 24 L. R. A. 298, and *note*; *People ex rel. Stephens v. Fidelity & C. Co.* (Ill.) 26 L. R. A. 295; *Rose v. Kimberly & C. Co.* (Wis.) 57 L. R. A.

27 L. R. A. 556; *Hoadley v. Purifoy* (Ala.) 30 L. R. A. 351; *Parker v. Lamb* (Iowa) 34 L. R. A. 704; *Daggs v. Orient Ins. Co.* (Mo.) 35 L. R. A. 227; and *Travelers' Ins. Co. v. Fricke* (Wis.) 41 L. R. A. 557.

sary amount invested in United States government bonds of the par value of \$100,000, and, according to its statement, had assets equal to its capital stock, its absolute liabilities, like unadjusted death claims, etc., and its premium reserve. Upon this showing, the reserve being certified by the insurance department of New York, the petitioner was, upon the face of the statement, entitled to a license. But the petitioners contend that the petition should be dismissed. They claim that the computation of the reserve was erroneous, and was, in fact, so much larger than the amount shown by the statement that there was a deficiency of assets, under the requirements of our statutes. This depends upon the mode of computing the reserve upon the first year of the policies issued by the company. It is the disagreement upon this question that the parties wish determined by the court, and that is the only question in the case. It is claimed by the petitioners that the petition should be dismissed, for that the petitioner did not furnish them the amount of the premium reserve computed in the manner which the petitioners claim is the legal mode of calculating it. If the petitioners are correct in their claim as to the mode of valuation, the point would be well taken, but, if wrong, then that fact is immaterial; so that this point is involved in the main question, and is determined by it, and the main question is, In what manner should the premium reserve be computed? A life insurance company is chargeable with what is called "a premium reserve," representing what it must have in hand to meet its ultimate liabilities upon its policies. Under our statutes, it should have assets enough, at any time, which, invested at 4 per cent interest, reckoning the lives of its policy holders by the actuaries' tables of mortality, together with the future premiums payable to it under its policies, will enable it to meet all policy obligations. What such obligations will ultimately prove to be partakes of the nature of speculation, for a great part of the liabilities of any company are contingent. No one can foretell the time of death. Mortality tables must be constructed, and some rate of interest taken, and with all calculations and estimates the result is not certain. The premium reserve is no test of a company's actual solvency. Mr. Elizur Wright, cited by the petitioners' counsel as "the father of the net reserve valuation system and the most distinguished exponent of the principles of estate supervision of life insurance," says the net valuation system was originally incorporated into the law, not as determinant of the actual solvency of a company, which it never can be, but to compel the company to conduct its business on the lines tacitly assumed in its contracts. Equity between the members, not actual solvency, was, according to Mr. Wright, the primary object of the law. Protection against insolvency was simply a result which would naturally follow its application.

While it is true that the valuation of a
57 L. R. A.

company's policies must rest substantially on the tables of mortality and the rate of interest, there are other matters proper to consider in determining the actual standing of a life insurance company. It is shown by the record that the expenses of a life insurance company in granting a policy absorb the greater part of the premium for the first year, substantially three fourths or more of it, and that the expenses the first year of a policy are ten times greater than for any subsequent year. As a witness for the petitioner stated, they "practically absorb the greater part, perhaps nearly the whole, of the first year's premium of the annual life policy." The record shows that, of the companies doing business in this state in 1899, the largest, the Mutual Life of New York, reports that it paid 68.3 per cent in commissions alone upon its first-year premiums. All the companies average over 50 per cent. One company, doing industrial business, reports that it paid 100 per cent cost of collection on new business, and still another that it paid 95.2 per cent in commissions alone on its new business. No company can successfully do business unless it pays commissions as large as the leading companies in the country, and then is often at a disadvantage from being small. As the witness Stone stated: "It is the larger companies that set the pace in such matters. Small companies have . . . to meet the competition or make no progress."

A new company to begin business, and a small company to continue, in order to succeed, must pay "what companies in general pay." We quote Mr. Wright again, *vis.*: "New companies, planted within the shadow of flourishing old ones, cannot be expected to get into successful operation without expending on their machinery more than the premium receipts for one, two, or perhaps three, of the first years." *Mass. Ins. Coms. Repts.* (1859-65) 115. The petitioners' testimony shows that no company can organize and succeed without contributions from some source,—gifts to it from either stockholders, in case of a stock company, or from the world at large, in the case of a mutual company,—and it is well to note that the largest companies in the world were organized as mutual companies. The supposition that philanthropists are to be found to make rich gifts to a life insurance company is too absurd to be entertained. If a new company does pay the usual commissions upon its business, one of the petitioners concedes that "the company when beginning would be at once insolvent, and there can be no dispute about it." The term "solvency," in this connection, means a statutory one, *viz.*: A compliance with the conditions upon which it is permitted to do business.

Applying the rule of valuation contended for by the petitioners, no new company, stock or mutual, can organize and successfully begin business, and no small company can so continue without becoming at once insolvent in a statutory sense. This is conceded by the commissioners. If a company could be born with a large surplus, it might

struggle for an existence, but without one its first attempt to breathe would be death. The visits of the midwife and the undertaker would be simultaneous, and their different offices might be combined. A company, like an individual, must first be an infant, and there is little hope of life when you smother it in its swaddling clothes.

Now, what construction shall be given to the statute relating to the premium reserve? It should be construed liberally, for, as said by Mr. Wright: "Insurance seeks breadth of basis, and cannot be safely cooped within narrow local limits. State laws tending to impose limits should be construed liberally, and state officials, especially, should never step beyond the law in the direction of exclusion." *Mass. Ins. Coms. Repts. (1859-65)* 177. The state has made no attempt to regulate the details of the insurance business, save that the companies must use, in computing the reserve, the actuaries' tables of mortality, and the 4 per cent rate of interest. A net valuation is important in determining just what a company must have in hand as a matter of equity between the old and the new members,—the past and the future. If the standard is not correct, either the past or the future members are benefited at the expense of the other class.

The premium reserve is to be computed with reference to the life of the policies. A policy may terminate in a year, and may not in four score years. Mr. Wright states, in speaking of the premium reserve: "Solvency is not the only question. . . . There is a question of equity as well. . . . The question is not how much of the past and present burden can be thrown on the future, but what will probably be as fair for one as the other." This directly recognizes the principle that the rule may be varied in the direction contended for by the petitioner. The same learned writer says that any company, if it can get on "with expenses less than the excess of its actual over its net premiums, has a future resource against a present deficiency, and is not necessarily insolvent because its cash assets do not equal the net value of its policies;" and, further: "This provision or premium reserve may have a more or less important bearing on the ultimate solvency of the company, according to the greater or less margin of the actual premiums."

The matter of expenses is a potent factor in determining the solvency or standing of a company. As Mr. Wright says: "Neither the net value of the policies by itself, nor the ratio of its cash assets to that net value, decides the condition of the company without reference to the actual premiums receivable. . . . Two companies, by a net valuation of their policies, may be found to have exactly equal liabilities, and their cash assets may be equal, and yet their prospects for the future may be different from their having different actual premiums." *Mass. Ins. Coms. Repts. (1859-65)* 179. Mr. Wells, actuary of the Connecticut Mutual Life Insurance Company, one of the petitioners' two witnesses, in his testimony

says: "If we have reference to the actual commercial solvency of the company, rather than to the statutory legal solvency, we would have to take account of the gross premiums." The object of all legislation is to produce as a result the actual commercial solvency of the company. He further states that the one-year term plan does not make the policy an unsafe one if the gross premium is large enough to leave a sufficient margin.

Is not this a plain recognition of the important part the actual premiums and the expenses play in determining the standing of a company? When these principles were first enunciated, the expenses of the first year of a policy were but twice or thrice the expenses of any subsequent year, while it appears they are now more than ten times as great. Much more, then, ought the principle to be applied in valuing the first year of the policy when the expenses absorb nearly the whole premium. In making the valuation, the rule, as claimed by the petitioners, is to let the net premium follow the gross premium, and, by the ordinary plan of computing the reserve, the net premium is generally understood to be a uniform percentage of the gross premium. What objection can there be to regarding the amount the company actually receives, less commissions, as the gross premium, and taking a uniform percentage upon that as the net? It is, in effect, what is contended for by the petitioner, and it does not appear that there is any practical objection to it. The question is not one of actuarial science, but of legislation. Tell the actuary how to compute the reserve, and he will give you the result; but the views of an actuary may be helpful in determining what the construction of a statute shall be, for an actuary can judge of the result by applying different rules to the same company. It is well to see what their views are.

Dr. Sprague, of Edinburgh, president of the British Institute of Actuaries, the petitioners show "is regarded as the highest living [actuarial] authority," and is so termed by Dr. McClintock, hereafter mentioned, and he says there is nothing unsafe nor unsound in the proposition, *i. e.* to let "the sum remaining in the company's hands, after the payment of the expenses of the first year and the cost of insurance, be accumulated as the reserve at that time, . . . provided the policy holder be made secure by the requirement of a sufficient reserve in the future." Dr. Emery McClintock, the actuary of the Mutual Life Insurance Company of New York, which boasts of being the largest financial institution in the world, and who is styled by the witness Wells as "the most prominent and the leading actuary in this country," writes: "If a young company were free to compute its own reserve, and make due publication of the details, it would not impair its security by beginning its reserves on ordinary life policies the second year, or by holding reduced first-year reserves on other forms of policies." And the late Mr. Whiting, who

was not only an eminent actuary, but a lawyer of the clearest judgment, indorsed the same view, i. e., that the principle was sound, and legal as well. Mr. Macaulay, an eminent actuary, and president of the Actuarial Society of America, says the principle is a sound one, and approves of the method; and so does Mr. Wolfe, an actuary employed by various state departments.* So much for the views of the leading actuaries of the world.

Such computation is permitted by all our sister states, save Massachusetts, and when it is seen that under a different ruling no new company can be organized and do business, nor any small company exist, it is not considered possible that our lawgivers ever intended such a construction as that contended for by the petitioners to be given any statute we have on the subject. It would create such monopolies that the modern trusts would blush for their departing laurels. The company has the right to compute its premium reserve in the manner contended for by the petitioner, basing it, in effect, for the first year, upon the amount it receives as premiums, deducting expenses. We have no hesitation in so holding when we fail to find that any claim is made in argument, and no reference in the record, to the fact that any company ever became insolvent for the reason that its reserve was so computed, and we do not think it possible that this method in the computation of the reserve could ever cause the failure of a company.

An important feature in the consideration of this case is brought to mind by the questions asked by the petitioners of the witnesses improved by them. There were two witnesses only, both actuaries, presumably of high standing, of companies that in amount of assets hold the sixth and seventh rank in the United States. They, in effect, were asked what was the practical objection to the reserve computation making the first year terminal. Mr. Wells, before referred to, answered that there were two,—the first, that "the public do not know upon what basis the policies are valued." How forcible is this objection? Do not the public know as much under one system as the other? The actuaries' tables of mortality and the 4 per cent rate of interest are used in both cases. What the system is that is pursued in the reserve calculation can be required by the department to accompany every statement, so that any person seeing the amount of the reserve could learn at the

same time the system upon which it was calculated. The fact that the public are ignorant of the manner of computing the reserve can never affect the commercial solvency of a company, and besides equities between the insured to maintain that solvency, we consider the main object of state supervision of insurance companies. Mr. Wells's second objection was that, while that system of valuation would "increase the surplus which could be used for expenses," the old and large companies, he should expect, would increase their commissions, and so the small companies would be no better off than they are now. This is hardly a practical objection to the plan,—a conjecture that a company with a large surplus, which belongs to their policy holders, would take it and use it for improper purposes, i. e., to provide for a reserve on policies of new members, for they could not increase their commissions without doing it. The law presumes that their acts will be legal, although the presumption is rather violent, in view of the past practice of that kind, which enabled them to pay, with their surplus, commissions, far in excess of what were legitimate. Mr. Wells concedes the question in issue when he states that the reserve on an ordinary life policy might begin at the end of the third year, and the contract be made good, but that the tendency would be unsafe.

Mr. St. John, actuary of the *Ætna*, answers at length, and says: "The practical objection to the first-year term form of policy depends to some extent as to how you are going to employ it." That it might be admissible for a company in the successful course of business, with a desire for a greater income, "to call a halt," and ascertain what its then existing condition was, and it might be that it was expending in commissions and expenses so much it might assume it was expending all of the first premium, and ask, "Let us see where that leads?" or they might not make any assumption in the matter, but would employ a method of valuation that might correspond with the one-year term valuation. That in applying it to new companies, of unknown standing, it ought to be defined by statute what net premiums are, for you may have an indefinite number of net premiums in your gross premium. You must have a statutory standard, and adhere to it. If you accept the Englishman's doctrine, that it is every man's business to look after his own business, and not the part of the state to control, you have a different principle. And he concludes by saying he has been informed that in Germany the companies tried and dropped the practice for the alleged reasons that it led to an increase of expenses for procuring business. Whether a comparison with the German companies is useful is not clear. The witness stated he did not know what the German laws, nor the provisions of the German insurance contracts, were. Whether the American and German companies are similar or dissimilar does not appear, and a comparison between them, with

*By Chief Justice Taft: Since this opinion was written, our attention has been called to an article read on October 25, 1900, before the Actuarial Society of America by Walter S. Nichols, for many years an editor of the *Insurance Monitor*, the pioneer and leading insurance journal in America, and since its establishment editor of the *Insurance Law Journal*. Mr. Nichols is an able actuary, one of the old members of the Actuarial Society, and thoroughly discusses the question from an actuarial and legal standpoint, fully vindicating the first-year term valuation theory in the lines indicated herein, save that of public policy.

all knowledge of them nothing but hearsay, is not of value. There is not a hint from either of the witnesses of a bona fide practical objection, so far as the commercial or statutory solvency of a company is concerned, to valuing a policy for the first year as a term policy. The last-named witness stated that his company, the *Ætna*, issued a policy for the term of ten years, with options on the part of the insured for further terms and for future insurance during life, and that the Massachusetts department valued them as term policies until converted into life policies, which was at the option of the insured,—the very principle contended for by the petitioner; the only difference in the facts being that the gross premiums in the *Ætna* were not level.

The petitioners argue that the policies are so framed to avoid and defeat the statute; that it is the avowed purpose on the part of the petitioner to evade the spirit of the law. No doubt the policies were framed with a provision that they should be valued as term policies for the first year in order to have them so valued; but whether it was to evade the spirit of the statute can be better determined when one knows what the statute requires. It may have been done to evade an erroneous ruling of an insurance department. It undoubtedly was to avoid a requirement of holding too heavy a reserve the first year of the policy. This must be apparent to anyone. This plan of valuation is necessary only in case of a new or small company,—one that has not accumulated a surplus. As the witness Wells stated, the plan is followed by "a few comparatively new and comparatively small companies." No company with a surplus needs the plan of valuation, and no company without a surplus can compete with one that has. Whether it is in accord with good policy to permit the accumulation of a mammoth surplus is questionable, for the reason that with it a company can enter into undue competition, and become heedlessly extravagant in the payment of commissions and salaries, and rob one class of policy holders to pay another. A large surplus permits large expenditures, and its danger was pointed out by Mr. Wright with a prophetic eye when he wrote, nearly forty years since: "The great danger of large expenditures to create business is the establishment of a permanent overpayment of the function of management, and the turning loose upon society of that unscrupulous parasitic industry which is content, or even ambitious, to live upon others without returning any equivalent benefit." *Mass. Ins. Coms. Repts.* (1859-65) 333. That the evils he foresaw followed is plainly seen when the salaries of some of the officials, the result of a mammoth surplus, equal that of the President of the United States.

We say but little as to the effect of the provision in the policy that it may be valued as a term policy the first year, holding that the company have the right to so value it, irrespective of the agreement, but, as Mr. Wright says, the net valuation aims to

settle the equities between the old and the new members, and as, in computing the reserve, all above a *quantum sufficit*—a correct amount—belongs to the old members, why then cannot a new member consent to such a valuation? And is he not estopped from repudiating the contract in that respect when he has accepted it with such a provision? We hold he is, and note the policy holder is not the one complaining here.

Take a policy called a preliminary term one. The common sense and the religion of the thing is this: During the first year of the policy it is a term policy, no different from any term policy. It is true, at the end of the year the policy holder has a right to renew; so he has under a life policy. If he does not renew the preliminary term policy, he has had a term policy for one year.

"Only this and nothing more."

If he does renew, he obtains such rights as he is entitled to under his renewed contract. It is immaterial whether the premium for the first year is the same or more or less than the subsequent premiums. No state has ever attempted to regulate the amount of a premium which should be charged by a company, save indirectly, by requiring the net premium to be sufficient to produce the requisite reserve at the maturity of the policy.

To illustrate the effect of the commissioners' ruling, by their plan of computing the reserve, a new company, with \$1,000,000 capital stock, issuing the first-year policies of a like amount, and saving from the business of the year only the amount of the reserve calculated upon the first-year term basis, is insolvent in the sum of \$11,710, although it has more assets than the face of its policies. If this is not *reductio ad absurdum*, pray tell us what can be. The term "net valuation" is nowhere used in our statutes, and we have no statutory definition of it. The phrase in our law is the "premium reserve," which may be regarded as its synonym, but its generally accepted meaning is that it is the amount the company must have in hand, which, with its future premiums, will enable it to meet its policy obligations. The statute makes no attempt to regulate the manner in which the net value shall be determined, save by requiring the use of actuaries' tables of mortality and the 4 per cent rate of interest. In determining how much this amount shall be, are the lines so rigidly drawn that no consideration should be given to the expenses of the company, whether they are 10 per cent of its income or absolutely the whole? To the fact that the assets produce a 2 per cent income, or a 6 per cent one, or whether the company have millions of assets which produce no income? Does the statute intend that these two rules shall be all there is of a valuation? If so, is an asset like a 2 per cent or a 4 per cent government bond, upon which less than 4 per cent interest can be realized, or millions of assets non-income producing, a proper item

to be included in the assets? Are all these considerations to be regulated by the state, or left to the management of the company?

The argument that the development of the first-year term idea might result in breaking down the statutory valuation system by giving the insurer the power to treat subsequent years of the policy in the same manner is not sound; for it entirely ignores the element of expenses, and the actual or gross premiums, and the time would soon come when the future premiums would not be sufficient to provide for the reserve,—when the gross premium will not equal the mathematical premium.

It has been the prevailing custom for the insurance department of every state, save Massachusetts, to follow the valuation of the state under which a company is organized, and this is the spirit of our law; for while the statute gives the commissioners power to compute the "reinsurance reserve," whatever that may be, of a domestic company (Vt. Stat. § 4204), it gives no like power in the case of a company from another state (Vt. Stat. § 4178). The practice is highly approved of by Mr. Wright, and he advocated an arrangement to that effect. Mass. Ins. Coms. Repts. (1859-65) 170. Comity between the states has sanctioned the custom for a generation. It would be an absolute impossibility for the commissioners to do any appreciable part of the valuation of companies doing business in Vermont, but organized under some one of our sister states, for three of such companies each have an insurance of over \$1,000,000,000, with an aggregate amount of \$5,682,000,000. It would be like the mouse, not going to the hillock, but to the Himalayas. No state, save Massachusetts, denies the right to the company of computing its premium reserve as claimed by the petitioner. The propriety of the right in that state is shown by their legislation when they permit certain assessment companies, upon their being converted into old-line companies, to so value their policies for a term of 3½ years. This is enough to show that there is no practical objection to the plan. Besides, equity between the members of a company, the reason of the law requiring the accumulation of a premium reserve, is for one purpose only, and that is to "enable the company to carry out its contracts, . . . to be able to fulfil its obligations according to what it has promised," or, as the witness St. John stated it, "that the company shall carry out and perform all its definite obligations."

There is nothing in the case to show, or that has any tendency to show, that valuing a policy, taking into account the expenses, and considering the actual gross premiums, ever affected the standing or solvency of a company, in any respect, in regard to its ability to carry out its contracts and to fulfil its financial obligations to the letter. § Vt. Stat. § 4182, provides that "if the commissioners are satisfied with such copies and statements, and that the company has complied with the provisions of this title 57 L. R. A.

[relating to insurance] they shall grant a license." This section does not give the commissioners power to arbitrarily refuse the license, but if the copies and statements are in accord with the statute it is their duty to issue a license. The question is not so much whether the commissioners are satisfied with such copies and statements as it is, "Ought they to be satisfied with them?"

In the case at bar, the only question they make is that the premium reserve was not calculated upon the correct basis, and that was the reason why they refused a license, and, as they erred in this respect, there was no reason why the license should not have been issued; the case showing that, with the reserve valued in the manner contended for by the petitioner, the company complied with the statutory requirements in this state. The action of the commissioners was ministerial, not judicial. It is not considered that the commissioners are invested with judicial powers in the examination of foreign insurance companies. To determine the net reserve of the companies would require a force of actuaries for months, a comparison of the valuation sheets with the policy registers, a clerical force without number, and a valuation of the assets of the companies scattered through many states, amounting to some \$1,500,000,000, would be required, all to be done within the first three months of the year. To simply state what would be required of them to judicially determine the reserve and value the assets of the companies is enough to show the commissioners' duties are ministerial, and that nothing else was ever intended by the statute. Indeed, the commissioners do not claim otherwise. If it were, this court would have no power to revise their action. It was the understanding between the parties that the question should be determined in a legal way. Their position is shown by their report (1899, p. 9), when, upon a former ruling, they suggested that the company against whom the ruling was made "and the department co-operate to have the matter tested in the courts." Upon this point, however, no question is made by the petitioners. An instructive case upon the subject is *State ex rel. Drake v. Doyle*, 40 Wis. 175, 22 Am. Rep. 162, q. v.

The precise question in the case is, Has the petitioner the right to compute its reserve by taking a sum equal to the reserve on a term policy for the first year? We hold it has, and that it was entitled to license, the case showing that their statement was a full compliance with the statute. There is no law in this state relating to the mode of computing the premium reserve for a foreign life insurance company, save that it must be based upon the actuaries' tables of mortality and interest at the rate of 4 per cent. There is nothing that forbids the company taking for the first year's reserve the premium paid, less the expense of obtaining the policy. They can value it as a term policy if they wish, not necessarily because such is the contract between the policy holder and the company, but because

the company in administering its affairs can compute the reserve, taking into consideration the expenses of obtaining the policy in such a way as they deem best to work justice and equity among the members, provided they do not disregard the tables of mortality nor the rate of interest.

Taking into consideration the various views presented in regard to the construction of the statute, we are all agreed that as the words of the statute do not require the construction contended for by the petitioners; that as such construction would tend strongly to the creation of monopolies by an absolute prohibition of the establishment of new companies, either stock or mutual; that, as there is no practical objection to the one-year term plan, which, in no event, of itself, would ever affect the actual solvency of a company, and as, in the case before us, the plan is in harmony with the rights of the policy holders who have consented thereto,—we hold that the right claimed by the petitioner is in strict accord with the words and spirit of the statute.

In issuing the first-year term policy, with the privilege of taking a whole life policy at the end of the first year, there is no violation of Vt. Stat. § 4218, which forbids a company from discriminating between insureds of the same class, in premiums, rates, dividends, other benefits, or terms and conditions. The policy, although it is a term policy if not renewed, is not in its entirety the equivalent of a simple term poli-

cy. The contracts are not the same, and the insured are not of the same class.

The record shows that the petitioner had a surplus of more than \$100,000; that its reserve had been computed by the insurance department of its own state in the manner contended for by the petitioner; and, as the company had the right to so compute it, its refusal to furnish the reserve upon the basis called for by the respondents was immaterial. The petitioner has no remedy, save by mandamus. The petitioners declined to grant it a license, saying, "We cannot legally do so." There is no way to compel them, except to issue the writ as prayed for. It ought not to issue in cases of doubtful right (*Free Press Asso. v. Nichols*, 45 Vt. 7); but it always issues if the petitioner has a clear legal right, and no other adequate remedy (*Sabine v. Rounds*, 50 Vt. 74). A case analogous to this in principle is *Peck v. Poicell*, 62 Vt. 296, 19 Atl. 227. The legal question presented was whether the petitioner was entitled to certain fees as city judge, which the petitioners, as state auditor, refused to allow. This court held that the petitioner was entitled to them, and ordered a mandamus to issue, directing the auditor to allow them. The petitioner was entitled to a license.

The judgment is that the prayer of the petition be granted, and that a mandamus issue directing the commissioners to grant the petitioner a license as prayed for in the petition, with costs.

VIRGINIA SUPREME COURT OF APPEALS.

P. H. BOISSEAU to Use of Jennie M. ROBINSON, *Appt.*,

v.

Thomas J. PENN, Admr., etc., of R. T. Bass, Deceased.

(.....Va.....)

1. The interest of the assured in a twenty-year distribution policy of insurance on his life, which will cease on his failure to pay premiums, is not an estate within the meaning of a statute making an execution a lien from the time it is placed in the hands of the officer on all the personal estate of or to which the judgment debtor is, or may afterwards and before the return day of the writ become, entitled.

2. A provision in a life-insurance policy for the issuance of a paid-up policy proportioned to the premiums paid, upon its surrender before default in payments, cannot be enforced at the instance of a judgment creditor of the assured after the latter's death and the right to the proceeds has passed to his personal representative, so

as to make his execution available against the policy.

(January 30, 1902.)

APPEAL by plaintiff from a judgment of the Corporation Court of Danville in favor of defendant in an action to enforce an execution against the proceeds of a policy of life insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. James H. Guthrie and William Leigh, for appellant:

The court erred in deciding that the execution was not a lien on the policy of insurance.

Va. Code, § 3601.

The insurance policy is a chose in action, and is governed by the same principles applicable to other agreements involving pecuniary obligations, and is personal estate.

Bliss, Life Ins. 508, 553; *Uhlman v. New York L. Ins. Co.* 109 N. Y. 421, 17 N. E. 363; *Hooker v. Sugg*, 102 N. C. 115, 3 L. R. A. 217, 8 S. E. 919; *Talcott v. Field*, 34

NOTE.—For another case in this series discussing the question as to whether the lien of an execution can attach to personal property, the interest of the execution debtor in which is merely contingent, see *Wiant v. Hays* (W. Va.) 23 L. R. A. 83.

As to garnishment of proceeds of insurance 57 L. R. A.

policy, see *Brown v. Balfour* (Minn.) 12 L. R. A. 373; *Stone v. Mutual F. Ins. Co.* (Md.) 14 L. R. A. 684; *Chipman v. Carroll* (Kan.) 25 L. R. A. 305; *Anoka Lumber Co. v. Fidelity & C. Co.* (Minn.) 30 L. R. A. 689; and *Ellis v. Pratt City* (Ala.) 33 L. R. A. 264.

Neb. 611, 52 N. W. 400; *White v. Smith*, 2 Tex. App. Civ. Cas. (Willson) § 399, p. 439.

The fl. fa. was a lien on the insurance policy from the time it went into the hands of the officer, and so continued, and the lien thus secured could have been kept alive for an indefinite time, and was alive and in full force at the death of the said R. T. Bass, and when this suit was instituted.

Va. Code, § 3601; *Purvey v. Taylor*, 12 Gratt. 401; *Evans v. Greenhow*, 15 Gratt. 153; *Charron v. Boswell*, 18 Gratt. 216; *Trevillian v. Gearrant*, 31 Gratt. 525; *Wiant v. Hays*, 38 W. Va. 681, 23 L. R. A. 82, 18 S. E. 807; *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562.

The effect of the lien given by § 3601 is that the fl. fa. binds all the personal estate of the debtor.

Shirley v. Long, 6 Rand. (Va.) 735.

As Mr. Holland had no insurable interest in Mr. Bass's life an assignment of the policy to a greater extent than the indebtedness of Bass to him would have been void.

Roller v. Moore, 86 Va. 512, sub nom. *Roller v. Beam*, 6 L. R. A. 136, 10 S. E. 241; *Long v. Meriden Britannia Co.* 94 Va. 594, 27 S. E. 499; *Beatty v. Downing*, 96 Va. 451, 31 S. E. 612; *New York L. Ins. Co. v. Davis*, 96 Va. 737, 44 L. R. A. 305, 32 S. E. 475; *Tate v. Commercial Bldg. Assn.* 97 Va. 74, 45 L. R. A. 243, 33 S. E. 382.

The word "estate" is broad enough to cover every description of vested right attached to or growing out of property.

Comegys v. Vasse, 1 Pet. 193, 7 L. ed. 108; *Williams v. Lord*, 75 Va. 390; *Norfolk & W. R. Co. v. Prindle*, 82 Va. 122; *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052; *Roberts v. Drinkard*, 3 Met. (Ky.) 309; *Russell v. Clingan*, 33 Miss. 535; *Hanover F. Ins. Co. v. Connor*, 20 Ill. App. 297; *Wiant v. Hays*, 38 W. Va. 681, 23 L. R. A. 82, 18 S. E. 807; *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 56; *Anthraxite Ins. Co. v. Sears*, 109 Mass. 383; *Re McKinney*, 15 Fed. 538; *Re Smith*, 12 Week. Rep. 534; *Shenk v. Franke*, 10 Lanc. Bar. 146.

Mr. E. E. Bouldin, for appellee:

Bass had parted with all his interest and the company owed him no debt or obligation.

This assignment to Holland, in the very words of the statute, is excepted from the lien of Robinson's execution. Being an assignment to Holland, as to the surplus Holland holds the legal title as trustee for Bass's estate, for the creditors, and then for his distributees.

Avery v. Equitable Life Assur. Soc. 117 N. Y. 451, 23 N. E. 3.

Holland was a trustee, and held the surplus for the benefit of those then entitled to it.

Page v. Burnstine, 102 U. S. 664, 26 L. ed. 268; *Roller v. Moore*, 86 Va. 515, sub nom. *Roller v. Beam*, 6 L. R. A. 136, 10 S. E. 241.

Mcneers. Peatross & Harris, also for appellee:

This policy did not, until the death of 57 L. R. A.

Bass, constitute a present or existing indebtedness. It was not like a note or bond, which contains a present, absolute, or unconditional promise to pay a given sum at a future day.

The lien of the fl. fa. of the appellant under § 3601 of the Code of Virginia only extended to personal estate of the judgment debtor, not capable of being levied on, and that had existence as such, and of or to which the judgment debtor was possessed or entitled before the return day of the fl. fa.

Hicks v. Roanoke Brick Co. 94 Va. 741, 27 S. E. 596; *Freeman*, Executions, §§ 164, 165; 10 Va. L. J. pp. 4, 5; *Drake*, Attachm. 6th ed. § 551; *Misc. Notes*, 3 Va. Law Reg. p. 381; *Day v. New England L. Ins. Co.* 111 Pa. 507, 56 Am. Rep. 297, 4 Atl. 748; *May*, Ins. 3d ed. §§ 459 F, 459 H; *Wentworth v. Whittemore*, 1 Mass. 471.

Harrison, J., delivered the opinion of the court:

The bill in this case alleges that Jennie M. Robinson on the 6th day of March, 1899, recovered a judgment in the corporation court of the city of Danville against one R. T. Bass for the sum of \$1,500, with interest and costs; that on the 22d day of March, 1899, an execution was issued on this judgment and delivered to the appellant, as sergeant of said city, to be executed; that said execution was returnable to the first day of the May term of the court from which it issued, and was duly returned by the sergeant, indorsed, "No effects." It is further alleged that at the time the execution was delivered to the appellant the judgment debtor was the owner of a policy taken out on his life, payable to himself, in the Mutual Life Insurance Company of New York, and dated the 15th day of October, 1887, for the sum of \$3,000; that the insured departed this life on the 2d day of May, 1900; and that Thomas J. Penn, the appellee, had qualified as his administrator. The bill charges that the execution, from the time it was delivered to the appellant, was a subsisting and continuing lien on all the personal estate of the debtor, including the life insurance policy mentioned, and that, by virtue of such lien, appellant is entitled to recover the amount thereof from the Mutual Life Insurance Company of New York; that his right to collect such insurance policy, to the extent of the execution in favor of Jennie M. Robinson, is paramount and superior to the right of the administrator of R. T. Bass to collect the same. The bill prays that the several parties in interest be enjoined from collecting the policy, that a receiver be appointed to collect and hold the same subject to the order of the court, and for general relief. An injunction was granted, an answer filed by the appellee, and subsequently a decree entered dissolving the injunction. From that decree this appeal has been taken.

It is suggested in the bill, and is established by the record, that R. T. Bass, in his lifetime, on the 16th day of March, 1899, assigned and transferred the policy in ques-

tion to C. L. Holland to secure the payment of \$650 obtained by the assured from him. It is not disputed that C. L. Holland has a prior claim upon the policy to the extent of his debt.

The question presented by the record is whether or not, under § 3601 of the Code, Jennie M. Robinson, the execution creditor, had, by virtue of her execution in the hands of the appellant, a lien upon the policy here involved. In other words, was the policy such personal estate as a *fi. fa.* lien would fasten upon, in contemplation of the section mentioned?

That section provides that every writ of *feri facias* shall, in addition to the lien it has, under § 3577 of the Code, on what is capable of being levied on under that section, be a lien, from the time it is delivered to a sheriff or other officer to be executed, on all the personal estate of or to which the judgment debtor is, or may afterwards and before the return day of the said writ become, possessed or entitled, and which is not capable of being levied on under the said section, except as to exempted property, and except, also, as against certain persons. Code, § 3601. And this lien continues so long as the judgment can be enforced. § 3602.

Conceding to this statute the most comprehensive scope, and that every species of personal estate or interest therein is contemplated, the question remains whether or not the policy under consideration is such an estate or interest as can be reached or converted into a benefit to the execution creditor.

The policy is known as a "twenty-year distribution policy." A premium of \$29.22 had to be paid quarterly, on the 15th day of January, April, July, and October in every year, during the continuance of the contract, until premiums for twenty full years had been paid to the company. Until the twenty years had expired, the interest or estate of the assured in the policy was wholly contingent, depending upon his completion of the contract by the payment of the premiums therein provided for. The payment of these premiums was a condition precedent to the right of the assured to any claim against the company, and such payment was entirely voluntary. No power could compel the assured to pay them. If the payments ceased, the assured forfeited all those previously made, and the company was discharged from all liability. This policy or contract of insurance did not constitute a present, fixed liability upon the company to pay the assured anything; nor did it create any present indebtedness that the assured could demand within the twenty years. The assured died before the expiration of the twenty years, and before the payment of all the premiums. Until his death, which occurred after the return day of the execution against him, the policy was liable to be forfeited by the nonpayment of premiums to accrue thereon. It was therefore altogether contingent whether an obligation to pay any sum to the assured would

57 L. R. A.

ever rest upon the company by reason of such policy.

When a debt has a present existence, although payable at some future day, it is subject to the lien of a *fi. fa.*, and may be reached by garnishment or other appropriate proceeding; but the rule is otherwise where the debt rests upon a contingency that may or may not happen, and over which the court has no control.

In *Freeman, Executions*, the learned author says: "Debts which are due contingently and which therefore may never become due, are not subject to garnishment."

It is well settled in England, under the process of foreign attachment, that no lien can be acquired upon a debt the very existence of which is dependent upon a contingency, for the very satisfactory reason that it is no debt." 1 *Freeman, Executions*, § 164.

Again the same author says: "Where a policy of life insurance has issued, the insurer cannot be garnished during the existence of the life of the assured, because it is not certain whether any sum will ever become due on the policy." § 164a.

After laying down the well-recognized rule of law that an existing debt, not due at the service of the writ, but which is certain to become due at a future period, may be reached both under execution and attachment, it is said: "This rule has no application to future contingent liabilities, nor to any case where the liability of the defendant to the garnishee depends upon the performance by the latter of some condition precedent, or upon his full compliance with the terms of some unperformed agreement or contract. The debt itself must be in existence at the time of the service of the writ, free from any contingency, and it may so exist though the time stipulated for its payment be very remote." *Freeman, Executions*, § 165.

In *Drake, Attachm.* § 551, it is said: "The debt from the garnishee to the defendant, in respect of which it is sought to charge the former, must, moreover, be absolutely payable, at present or in future, and not dependent on any contingency. If the contract between the parties be of such a nature that it is uncertain and contingent whether anything will ever be due in virtue of it, it will not give rise to such a credit as may be attached; for that cannot properly be called a debt which is not certainly and at all events payable either at the present or some future period." *Brockenbrough v. Ward*, 4 Rand. (Va.) 352; *Baltimore & O. R. Co. v. McCullough*, 12 Gratt. 595; *Baltimore & O. R. Co. v. Gallahue*, 14 Gratt. 503; *Metropolitan L. Ins. Co. v. Rutherford*, 95 Va. 773, 30 S. E. 383; *Case v. Dewey*, 55 Mich. 116, 20 N. W. 817, 21 N. W. 911; *Wood v. Buxton*, 108 Mass. 102; *Godfrey v. Macomber*, 128 Mass. 188; *Edwards v. Roepke*, 74 Wis. 571, 43 N. W. 554; *Day v. New England L. Ins. Co.* 111 Pa. 507, 56 Am. Rep. 297, 4 Atl. 748.

In the case last cited it was held that a policy of life insurance, payable to the legal

representative of the assured, is not the subject of an attachment execution during the life of the assured. In the case cited the policy was payable to the assured, his executors or administrators, for the benefit of his widow, if any. The wife died in the lifetime of the assured; thus making the policy, which was an ordinary life policy, payable to the legal representatives of the assured at his death. The court said: "No action could by any possibility have been maintained for the recovery of the money by the deceased in his lifetime, nor by any other persons, except upon the condition that he had first died. His death was simply and absolutely indispensable to the existence of any right of action on the policy. More than this, if the assured had voluntarily surrendered the policy at any moment before his death, or if it had become forfeited by breach of condition, no right of action would ever have existed, even in his legal representatives. Still more, at no time during his life could the proceedings upon the attachment have been brought to final judgment in favor of the attaching creditor, because it could never be known until the death of the assured had actually transpired whether any money would become due upon the policy. The law regarding attachments contemplates and provides for actual proceedings resulting in judgment for one party or the other, not for an entire suspension of proceedings for an indefinite and uncertain period. A policy effected at the age of twenty-one, payable at death, might not become payable in fact for sixty or more years. Can it be that an attaching creditor, upon such a policy, could demand the judgment of a court against the company as garnishee, payable at the death of the assured, or, as an alternative, claim that the court should suspend all proceedings until the assured shall die? It is incredible. No judgment could be given in advance of death, because no court could possibly know for what amount the judgment should be rendered, nor whether any amount would ever become due."

In that case, like the one at bar, there was no existing indebtedness that could be reached and fastened upon by an execution lien. The condition precedent in each case was that the assured pay the premiums during the time specified in the contract, which made the right to demand anything wholly contingent, because the payment of such premiums rested upon the voluntary action of the assured, and therefore might never be made.

The lien of an execution can affect only such subjects as exist when it is alive. It is impossible to conceive the existence of a lien without a subject for it to operate upon. This proposition seems so self-evident that we deem it unnecessary to consider it further.

There are only two authorities among those cited by appellant that appear to be in conflict with the principle we have been discussing and to these we shall briefly allude:

In the case of *Hicks v. Roanoke Brick Co.* 57 L. R. A.

94 Va. 741, 27 S. E. 596, one of the questions involved was the right of priority of certain execution creditors of a contractor, by reason of their *fi. fa.* liens upon a fund in the hands of the city of Roanoke; it being 15 per cent of the cost of certain work which the city had the right to retain until the entire work was completed; the work not being then finished. In delivering the opinion of the court, Judge Riely says that the executions were liens on the amount due by the city to Patterson, although the same could not be enforced until the completion of the work. The learned judge seems to have treated the fund in question as a debt in *presenti solvendum in futuro*. It does not appear from the opinion that the question was raised as to whether the liability of the city rested upon a contingency. Be that as it may, the decision is not approved, to the extent that it may be regarded as authority for the proposition that a future liability which depends wholly upon a contingency that may or may not happen is subject to the lien of an execution.

The case of *Anthracite Ins. Co. v. Sears*, 109 Mass. 383, is also particularly relied on by appellant. That was a proceeding in equity to subject, during the lifetime of the assured, a policy to the payment of a debt, under a statute which provided for such a proceeding where the subject could not be reached by attachment or taken on execution. An important distinction between that case and the one at bar is that it was there admitted, as one of the agreed facts in the case, that the insurance company was in the habit of taking up policies, like the one there involved, when the company and the holder of the policy could agree upon terms; giving it, as stated by the court, a present market value. No such fact is admitted in the case at bar. On the contrary, we have nothing before us but the policy, under which, as already pointed out, there was no existing indebtedness. If, however, that case can be relied on as contravening the well-settled rule to which we have adverted, we must decline to follow it.

In the case at bar the premiums had been paid for more than three years, and the appellants rely upon the following provision of the policy as vesting in the assured a present interest that could be demanded: "Paid-Up Policy. After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof, before default in payment of any premium, or within six months thereafter, issue a nonparticipating policy for paid-up insurance, payable as herein provided, for the proportion of the amount of this policy, which the number of full-year premiums paid bears to the total number required."

To avail of the terms of this stipulation of the policy would involve, not merely a change of the contract, but the making of a new contract between the assured and the company. Ordinarily a creditor can only subject to his benefit such contract as exists in favor of his debtor. He cannot compel his debtor to change his contract, or make a new and different one, in order that he

may reach and subject it to the payment of his debt. But if it were conceded that the surrender contemplated by that clause of the policy could be made by anyone other than the assured, it will be observed that no steps were taken in the lifetime of the assured to carry out that provision, and upon his death any such inchoate right was merged in the higher right of the personal representative of the assured to demand the full face value of the policy. In other words, the conditions necessary to enable the execution creditor to avail himself of the provision, if, indeed, he could have done so under any circumstance,—as to which we express no opinion,—did not arise. This suit was not brought until after the death of the assured, when it was too late to invoke the aid of a court of equity to carry out that stipulation for the benefit of a creditor, because, under the terms of the policy, the time had then passed when that provision was operative for any purpose.

For these reasons, we are of the opinion that the *fi. fa.* in the hands of the appellant did not operate as a lien upon the policy in question, because, under the terms of the policy, there was no existing indebtedness against the company in favor of the assured to which such a lien could attach.

The decree appealed from must therefore be affirmed.

Cardwell, J., concurs in result. Buchanan, J., absent.

J. O. HUTCHINSON *et al.*, *Appts.*,

v.

Clark MAXWELL *et al.*

(.....Va.....)

1. An equitable life estate which shall be free from the debts of the beneficiary cannot be created where the statute provides that estates of every kind, holden or possessed in trust, shall be subject to debts and charges of the persons to whose use, or to whose benefit, they are holden or possessed, as they would be if those persons owned the like interest in things holden or possessed, as in the uses or trusts thereof.

2. In jurisdictions where spendthrift trusts are illegal, creditors may subject to their claims personal property in which the beneficiary in such an attempted trust is given an absolute equitable estate, and the rents, profits, and income of real and personal estate, which the beneficiary could have claimed under a direction to the trustee to use them for his proper and comfortable support and maintenance, although the

trustee has a discretion as to what amount shall be so applied.

3. A bill filed in behalf of all creditors "who are entitled to become parties to this suit," to reach the interest of a beneficiary in a spendthrift trust, is not open to the objection that it embraces nonlien creditors as complainants.

4. An allegation of the return of the execution "No property found" is not necessary to support a bill in equity to reach assets of the execution debtor.

5. A bill to reach assets of a judgment debtor is sufficient if, when read in connection with exhibits filed, it will enable defendant to make defense, and the court to decree upon the case made.

6. A bill to reach an execution debtor's interest in a spendthrift trust is not rendered multifarious by allegations in an amendment tending to show that the property originally bequeathed to the judgment debtor, and was conveyed and reconveyed under a plan to defraud creditors, where the whole frame and scope of the amendment show, not an effort to have the deeds set aside as a fraud on creditors, but to subject the debtor's interest in the trust to the payment of his debts.

(January 30, 1902.)

A PPEAL by plaintiffs from a decree of the Corporation Court of Winchester in favor of defendants in a suit to subject certain alleged interests of Clark Maxwell to the payment of his debts. *Reversed.*

The facts are stated in the opinion.

Messrs. Samuel J. C. Moore, C. Kownslar, M. McCormick, and Robert M. Ward, for appellants:

Section 2428 of the Code of 1887 embraces all descriptions of property, real and personal.

Clayton v. Anthony, 6 Rand. (Va.) 308; *Findlay v. Toncray*, 2 Rob. (Va.) 377.

A devise, bequest, or conveyance of property, real or personal, by a legal or equitable estate or interest, for life, to a person *sui juris*, together with the power to dispose of the same, or, if not disposed of by the exercise of the power, to his heirs at law,—gives him the absolute ownership, with all its incidents.

Riddick v. Cohoon, 4 Rand. (Va.) 547; *Madden v. Madden*, 2 Leigh, 377; *Burwell v. Anderson*, 3 Leigh, 355; *Brown v. George*, 6 Gratt. 424; *Nixon v. Rose*, 12 Gratt. 429; *May v. Joynes*, 20 Gratt. 692; *Missionary Soc. of M. E. Church v. Calvert*, 32 Gratt. 357; *Curr v. Effinger*, 78 Va. 197; *Cole v. Cole*, 79 Va. 251; *Hall v. Palmer*, 87 Va. 354, 11 L. R. A. 610, 12 S. E. 618; *Bowen v. Bowen*, 87 Va. 438, 12 S. E. 885; *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810; *Davis v. Heppert*, 96 Va. 775, 32 S. E. 467.

NOTE.—For earlier cases in this series on the subject of spendthrift trusts, see *Lampert v. Haydel* (Mo.) 2 L. R. A. 113, and *note*; *Wales v. Bowdish* (Vt.) 4 L. R. A. 819; *Slattery v. Wason* (Mass.) 7 L. R. A. 393; *Haycraft v. Bland* (Ky.) 9 L. R. A. 599; *Billings v. Marsh* (Mass.) 10 L. R. A. 764; *Ghormley v. Smith* (Pa.) 11 L. R. A. 565; *Bull v. Kentucky Nat. Bank* (Ky.) 12 L. R. A. 37; *Day v. Slaughter* (Va.) 13 L. R. A. 212, and *note*; *Roberts v. 57 L. R. A.*

Stevens (Me.) 17 L. R. A. 266; *Leigh v. Harrison* (Miss.) 18 L. R. A. 49; *Van Osdell v. Champlain* (Wis.) 27 L. R. A. 773; *Wetmore v. Wetmore* (N. Y.) 33 L. R. A. 708; *Brown v. McGill* (Md.) 39 L. R. A. 806; *Schenck v. Barnes* (N. Y.) 41 L. R. A. 895; *Seymour v. McAvoy* (Cal.) 41 L. R. A. 544; *Scott v. Keane* (Md.) 42 L. R. A. 359; *Wilson v. Anderson* (Pa.) 44 L. R. A. 542; and *Murphy v. Delano* (Me.) 55 L. R. A. 727.

The ownership of property includes the right to alien it, and imposes on it a liability for the debts of the owner. An attempt to divest it of these incidents is repugnant to the estate, and therefore void.

Wms. Real Prop. *18, 59; 1 *Lomax's Digest*, pp. 13, 223; *Butler v. McCann*, 4 Leigh, 632; *Nickell v. Handly*, 10 Gratt. 345; *Nixon v. Rose*, 12 Gratt. 429; *Camp v. Cleary*, 76 Va. 140; *Garland v. Garland*, 87 Va. 758, *sub nom.* *Day v. Slaughter*, 13 L. R. A. 212, 13 S. E. 478.

In no state are restraints on alienation permitted, where a fee-simple estate, or the absolute ownership, is vested in the party holding the property.

Gray, *Restraints on Alienation of Property*, §§ 113, 115, pp. 99, 101; *J. S. Menken Co. v. Brinkley*, 94 Tenn. 721, 31 S. W. 92; *Barker's Estate*, 159 Pa. 518, 28 Atl. 365, 368; *Mebane v. Mebane*, 39 N. C. (4 Ired. Eq.) 131.

A spendthrift trust must be a pure gratuity. If the *cestui que trust* gives any consideration for it, it will be in fraud of his creditors and voidable at their option.

J. S. Menken Co. v. Brinkley, 94 Tenn. 721, 31 S. W. 92.

Even in the case of a power of appointment, which is general and absolute, and is exercised, whether by deed or will, in favor of volunteers, a court of chancery will consider the property appointed as assets, subject to the claims of creditors in preference to the claims of the appointees.

18 Am. & Eng. Enc. Law, p. 986; *Johnson v. Cushing*, 15 N. H. 298, 41 Am. Dec. 705.

It is only in cases where the happening of the event has divested the devisee of all interests in the property that the courts have said there was nothing that could be reached by creditors.

Bland v. Bland, 90 Ky. 400, *sub nom.* *Huycraft v. Bland*, 9 L. R. A. 599, 14 S. W. 423; *Rudd v. Hagan*, 86 Ky. 159, 5 S. W. 416; *Marshall v. Rash*, 87 Ky. 116, 7 S. W. 879; *Bull v. Kentucky Nat. Bank*, 12 Ky. L. Rep. 536, 12 L. R. A. 37, 14 S. W. 425.

If the beneficiary has parted with, or is required to part with, something of value in consideration of receiving the benefit of a devise or legacy, then it cannot be made inalienable by him, nor exempted from seizure by his creditors.

Bank of Commerce v. Chambers, 96 Mo. 459, 10 S. W. 38.

Messrs. Barton & Boyd, for appellees:

An execution constituting a lien is *prima facie* satisfaction thereof, and suspends all other remedies.

Walker v. Com. 18 Gratt. 43, 98 Am. Dec. 631; *Rhea v. Preston*, 75 Va. 757; 2 Barton, Law Pr. 854; *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 350; *Freeman, Executions*, § 269; 7 Am. & Eng. Enc. Law, p. 157; *Melledge v. Boston Iron Co.* 5 Cush. 158, 51 Am. Dec. 63.

Garland v. Garland, 87 Va. 760, *sub nom.* *Day v. Slaughter*, 13 L. R. A. 212, 13 S. E. 478, only differs from this case in two particulars: 1. In the *Garland Case* the whole

income went directly to Burr Garland without the interposition of the discretion of a trustee. That is what the bill avers these deeds do, but which they do not in fact, and yet in the *Garland Case* the spendthrift trust was sustained. 2. In the *Garland Case* the property was to pass, at the death of Burr Garland, to Charles Y. Morris in trust for the separate use of his wife, Pauline B. Morris, and her children.

A power, whether naked or coupled with an interest, which is vested in one who has no ownership of, but only a limited estate in, property, to appoint the remainderman, is absolutely inconsistent with any property interest vesting in the person who is clothed with the power to appoint.

Nickell v. Handly, 10 Gratt. 336.

If the trustee is vested with a discretionary power of applying the trust estate to the use of the *cestui que trust*, the creditors cannot subject it to the payment of their claims.

J. S. Menken Co. v. Brinkley, 94 Tenn. 721, 31 S. W. 92; *Nichols v. Eaton*, 91 U. S. 716, 23 L. ed. 254; *Lampert v. Haydel*, 96 Mo. 439, 2 L. R. A. 113, 9 S. W. 780; *Smith v. Towers*, 69 Md. 77, 14 Atl. 497, 15 Atl. 92; *Leigh v. Harrison*, 69 Miss. 923, 18 L. R. A. 49, 11 So. 604; *Roberts v. Stevens*, 84 Me. 325, 17 L. R. A. 266, 24 Atl. 873; *Bull v. Kentucky Nat. Bank*, 12 Ky. L. Rep. 536, 12 L. R. A. 37, 14 S. W. 425; *Billings v. Marsh*, 153 Mass. 311, 10 L. R. A. 764, 28 N. E. 1000; *People's Sav. Bank v. Denig*, 131 Pa. 241, 18 Atl. 1083; *Seymour v. Mo-Avoy*, 121 Cal. 438, 41 L. R. A. 544, 53 Pac. 946.

When a provision for support and maintenance is a gift, then the beneficiary has for such a gift parted with nothing that his creditors could have subjected. Parting with something that his creditors cannot subject to the payment of his debts does not constitute a valid consideration for anything which he has accepted by it.

Nichols v. Eaton, 91 U. S. 716, 23 L. ed. 254; *Chahoon v. Com.* 21 Gratt. 822; *Tate v. Tate*, 75 Va. 522.

One may have the power to appoint whom he may see proper, without any sort of property interest being in him.

Davis v. Heppert, 96 Va. 775, 32 S. E. 407; *Missionary Soc. of M. E. Church v. Calvert*, 32 Gratt. 357; *Randolph v. Wright*, 81 Va. 608.

By reason of express limitation in the first taker, he can have no absolute estate growing out of a power to appoint the successor.

Machir v. Funk, 90 Va. 284, 18 S. E. 197; *Mosby v. Mosby*, 9 Gratt. 570; 18 Am. & Eng. Enc. Law, p. 887; *Johnson v. Cushing*, 15 N. H. 298, 41 Am. Dec. 704.

Buchanan, J., delivered the opinion of the court:

This suit was instituted to reach and subject the rights and interests of Clark Maxwell, the debtor, in certain real and personal estate conveyed by his wife to a trustee, to the payment of the debts of the appellants,

which had been reduced to judgment, and upon which execution had issued.

The object of the conveyances of the wife to the trustee was, as is stated in the deeds, to provide "an estate and fund for the maintenance, support, and enjoyment of the said Clark Maxwell, the husband of the said party of the first part, at the same time securing the same against his improvidence, without being alienable by him, or in any wise subject to or chargeable with his past, present, or future debts or liabilities."

The estate conveyed to Scott H. Hansbrough, trustee, by one of the deeds, consisted of horses, wagons, carts, harness, silverware, pictures, etc., and the right to the use and occupation of, and to the rents and profits arising from, a certain farm lying in part in the county of Clarke and partly in the county of Frederick, containing 333 acres, during the natural life of the husband, reserving to the grantor the remainder in the farm.

The estate conveyed by the other deed consisted:

First. Of one half, in value, or a moiety, of the capital or principal sum of all the properties, moneys, investments, choses in action, and estate, real, personal, or mixed, in the charge, custody, and management of one George M. Saunders, of London, England, the attorney and agent of the wife; and,

Second. The net income, rents, profits, and interest arising out of and derived from the other moiety of the property held by said agent and attorney, during the life of the husband.

The estate or interest of the husband in the horses and other personal property conveyed by the first-named deed is limited as follows:

"The said Scott H. Hansbrough shall, immediately upon the execution and delivery of this indenture, take possession of the personal property aforesaid, mentioned in clause 1, and hold the same as trustee aforesaid, free from all debts or liabilities of the said Clark Maxwell, and without any right or power in the said Clark Maxwell to dispose of, alien, or charge or encumber the same, but for the free use and enjoyment of said Clark Maxwell, as provided in the trust herein contained, with power only to said trustee to sell and dispose of the same when and as he may see fit, in accordance with, and for the purposes of, the trust herein established."

As to the farm, the deed provides that the trustee, "out of the rents and profits arising from said farm, after paying all taxes, insurance, and necessary expenses of administering said trust, shall apply the same, so far as is necessary, in his discretion and judgment, to the proper and comfortable support and maintenance of said Clark Maxwell, paying therefrom from time to time, or from week to week, only so much of said rents and profits proportionately in such sum or sums as to said trustee may seem proper to be paid, without the right or power of said Clark Maxwell to assign or antic-

pate the same; and any residue thereof, remaining after the payment of said taxes, costs of insurance, and other expenses aforesaid, and the said support and maintenance of said Clark Maxwell, shall be safely invested from time to time by said trustee as other trust funds are required by law to be invested and held in trust, as a capital sum.

"The annual interest or income from which shall be expended for the maintenance and support of said Clark Maxwell as aforesaid, and such capital sum shall at or after the death of said Clark Maxwell be paid to such person or persons as said Clark Maxwell shall nominate and appoint by his last will and testament, and in default of such appointment the same shall pass and belong to the heirs at law of said Clark Maxwell."

By the terms of the other deed, which conveys the property in the hands of Saunders, agent and attorney, it is provided that the property thereby conveyed shall be held in trust, "and free from the control and ownership and power of said Clark Maxwell and his assigns, and in no respect or manner subject to any contract, debt, or liability of said Clark Maxwell, but upon the further trust that out of so much of said income, rents, and profits as, in the discretion and judgment of said trustee, shall be necessary therefor, the said trustee shall provide for the proper and comfortable support of said Clark Maxwell, payable to or for the said Clark Maxwell from week to week, or from time to time, proportionately, so much of said income, rents, and profits in sum or sums as may, to said trustee, seem proper to be paid therefor; and any residue thereof not so expended by said trustee shall be by him safely invested from time to time, and held in trust as a capital sum, along with the aforesaid capital or principal sum derived from the moiety of said properties, money," etc. It further provides that "the said trustee, upon the death of said Clark Maxwell, shall pay the principal sum in his hands to such person or persons as Maxwell shall nominate and appoint by his last will, and in default of such appointment the same shall pass and belong to his [Maxwell's] heirs at law."

Upon appellant's contention, two questions arise: First, whether the interest or estate conveyed by the deeds was a gift, or was based upon a valuable consideration; second, if a gift, whether or not the provisions of the deeds that it should not be liable for the donee's debts are void, because repugnant to the nature of the estate conveyed.

If the conveyances were based upon a valuable consideration, the second question does not arise, as it is conceded by appellees' counsel that, if the *cestui que trust* paid a consideration for the property conveyed, the provisions of the deed that it should not be liable for his debts would be a fraud upon the rights of his creditors, and could not be upheld.

The deeds in question, upon their face, purport to convey the estate or interest

which passes to the grantee as gifts, and the record does not show that the conveyances were based upon considerations deemed valuable in law.

Being gifts, the next question is, Are the provisions of the deeds, declaring that the donee's estate or interest therein should not be liable for his debts, void?

It is conceded that the question of the liability for debt of *cestui que trust's* interest in property, out of the income of which he is to be supported for life, had not been passed upon by this court prior to the case of *Garland v. Garland*, 87 Va. 758, *sub nom. Day v. Slaughter*, 13 L. R. A. 212, 13 S. E. 478. Numerous cases had been before this court in which trusts making somewhat similar provisions were involved, but they were either cases in which it was not necessary to pass upon the question now under consideration, or cases where the provisions were for the benefit of two or more beneficiaries; and the question was whether or not their interests could be severed, or whether they were so connected that no part of the trust fund could be reached for the debts of any one of them. Among these cases are *Markham v. Guerrant*, 4 Leigh, 279; *Nickell v. Handly*, 10 Gratt. 336; *Camp v. Cleary*, 76 Va. 140.

But it is claimed that in the case of *Garland v. Garland*, 87 Va. 758, *sub nom. Day v. Slaughter*, 13 L. R. A. 212, 13 S. E. 478, the validity of such trusts was upheld, and that the question is no longer an open one in this state.

The opinion of the court in that case does so hold, but the construction which the court placed upon the will did not, we think, require a decision of the question. It construed the will as giving to the testator's brother Burr Garland the mere right to a decent and comfortable support out of the profits of an estate, the legal title to which, as well as the profits, he (the testator) was careful to confer upon the trustee. Burr Garland was dead, and the property sought to be subjected were profits unexpended at the time of his death.

Having placed this construction upon the will, the court says: "On behalf of the appellees, it is insisted that the testator, by his will, gave to Burr Garland the profits therein mentioned absolutely, and that the exemption of the profits from liability for Burr Garland's debts is void, because they say that it is a fundamental doctrine of the English chancery, and that the same rule prevails in America, that no such estate can be deprived of the incident of alienability or liability for the debts of the owner."

"But this argument seems to me to be beside the mark."

"In this case the devisee and legatee, Burr Garland, did not take any absolute property in the profits of the estate which he might have assigned or aliened, but, on the contrary, he acquired the mere, although exclusive, right to a reception of so much of said profits as would furnish a decent and comfortable support for himself; and this was so qualified and limited as to fence out

all his creditors, except those who furnished him supplies for his support. Had he undertaken to expend these profits in any other way, he would have been guilty of a breach of trust; for there was, in the eye of a court of equity, as complete a trust in him to apply these profits in this one direction as there was in the trustee to hold the legal title. And while he, Burr Garland, took this qualified right, which we think it is a misnomer to call property, the remaindermen took a vested remainder in all the surplus or unexpended profits."

If Burr Garland acquired no property rights under the will of his brother in the profits sought to be subjected in that case, as the court, in effect, held, then there was, of course, nothing for his creditors to subject, and there was no necessity or occasion for the court expressing any opinion upon the validity or invalidity of such provisions where the *cestui que trust* did take a property interest under the trust. That expression of opinion was therefore a mere *dictum*, and cannot be regarded as an authoritative decision of the question under consideration.

It is well settled in this country and in England, from which country we derive the principles of our jurisprudence, that a gift or grant of a beneficial estate, in fee or absolutely, whether legal or equitable, has certain legal incidents of which the estate cannot be divested, and all conditions adopted for that purpose are necessarily repugnant and void. Among those incidents are the donee's or grantee's power of alienating such estate, and its liability for his debts. Co. Litt. 223a; *Brandon v. Robinson*, 18 Ves. Jr. 429; 2 Minor, Inst. 4th ed. 287, 288; Gray, *Restraints on Alienation of Property*, 2d ed. §§ 105, 134.

The reason of this doctrine or principle is the repugnancy of such restraints upon the ordinary rights of property, and that property would thereby be withdrawn from the ordinary rules and channels of commerce and trade.

In Co. Litt. 223a, in discussing conditions against alienation, it is said: "The like law is of a devise in fee upon condition that the devisee shall not alien, the condition is void; and so it is of a grant, release, confirmation, or any other conveyance whereby a fee simple doth pass. For it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest or propertie therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and propertie is out of him, so as he hath no possibility of a reverter; and it is against trade and traffique and bargaining and contracting between man and man."

The case of a settlement upon a married woman, or in reference to coverture, is an exception, or apparent exception, to the general rule that conditions restraining the

power of alienation and exempting property from the liability for the debts of the owner are repugnant and void. But the whole doctrine of the equitable separate estate of a married woman is the creature of equity,—the invention of the chancellors,—and sets at naught many of the principles of the common law. 2 Minor, Inst. 4th ed. 648.

"When this court," said Lord Cottenham in *Tullett v. Armstrong*, 4 Myl. & C. 377, "first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the laws of property, supported the validity of the prohibition against alienation." *Buckton v. Hay*, L. R. 11 Ch. Div. 645.

It is also well settled in England that the right of alienation and liability for debts are inseparable incidents of a life estate, whether limited by way of trust or otherwise, except in cases where there is a termination or limitation over of the estate dependent upon attempted alienation or seizure by creditors. *Brandon v. Robinson*, 18 Ves. Jr. 429; *Graves v. Dolphin*, 1 Sim. 66; *Kochford v. Hackman*, 9 Hare, 475; Gray, *Restraints on Alienation of Property*, § 134.

It is also equally well settled in this country, even in those jurisdictions where "spendthrift trusts" are upheld, that liability for debts is an inseparable incident of a legal life estate. In the case of *Hahn v. Hutchinson*, 159 Pa. 138, 139, 28 Atl. 167, in the supreme court of Pennsylvania, where such trusts seem to have had their origin, it was held, following prior decisions, that, "in order to protect the estate from creditors, the legal estate must be in the hands of a trustee, and, if the equitable estate became merged in the legal, it could be immediately seized in execution by creditors." Prof. Gray, who has given this subject the most thorough investigation, in his work on *Restraints on Alienation*, says there is not a shred of authority on either side of the Atlantic in favor of the doctrine that a life tenant of the legal estate in land can be restrained from alienation. Sections 138, 134. In our investigation, we have found no case holding a contrary doctrine, unless it be some Illinois cases referred to by Prof. Gray. At least, the overwhelming current of authority is that a legal life estate is subject to the legal incidents of property, one of which is that it is liable for the owner's debts. *Ehrisman v. Sener*, 162 Pa. 577, 29 Atl. 719; *Wellington v. Janvrin*, 60 N. H. 174; *McCleary v. Ellis*, 54 Iowa, 311, 37 Am. Rep. 205, 6 N. W. 571; *Maynard v. Cleaves*, 149 Mass. 307, 21 N. E. 376.

If liability for debts is an inseparable incident of a legal life estate, as it unquestionably is, why should it not be an inseparable incident of a like estate in equity?

One reason why it is an inseparable incident of property at common law is that it is against public policy that a man "should have an estate to live on, but not an estate to pay debts with." Does not this reason apply as much to equitable estates as to legal? A restraint on alienation and freedom from liability for debt are as much against public policy in the one case as in the other. The English chancery courts recognized this, and applied the rule of the common law to equitable estates. They did not ingraft any new doctrine on the common law, as is suggested in some of the cases which uphold spendthrift trusts; but, as Prof. Gray shows conclusively, "they walked scrupulously in the ancient ways of the law, and it is these late cases which have departed from the principles of the common law as much as they have from the precedents in equity." "The common law," as he says, "held that legal estates of freehold, whether in fee simple or for life, should not be inalienable; and chancery held the same of equitable estates of freehold. The common law held that a legal life estate might be made determinable on alienation, and chancery held the same of an equitable life estate." Section 256.

Not only did courts of equity, in the furtherance of a wise public policy, recognize the fact that equitable as well as legal estates should not be withdrawn from commerce, and should be liable for the obligations of the owner, but at an early day, very soon after we had severed our connection with the mother country, the lawmaking power of this state, by an act regulating conveyances, which went into effect January 1, 1787, and which, with some verbal changes, is found in § 2428 of the Code of 1887, declared that "estates of every kind, holden or possessed in trust, shall be subject to debts and charges of the persons to whose use, or to whose benefit, they are holden or possessed, as they would be if those persons owned the like interest in the things holden or possessed, as in the uses or trusts thereof." 12 Hen. Stat. chap. 62, p. 157; 1 Rev. Code 1819, chap. 99, § 30.

This statute makes the equitable estate of the *cattui que trust* liable for his debts to the same extent as if he were the legal owner of the same. If a condition is annexed to a legal life estate that it shall not be liable for the owner's debts, it is void. Why, then, is not a like condition annexed to an equitable life estate void also?

The legislation of the state shows that it was the object and policy of the legislature to make all estates, where the owners are *sui juris*, liable for debt, whether legal or equitable, except such as might be exempt by express statutory provisions. The effect of upholding spendthrift trusts would be to encourage idleness and lessen enterprise, and to foster a class who become more and more reckless and indifferent to their honest debts, from a sense that they are hedged in

by the law beyond the reach of their creditors.

The decisions of the American courts upon this question are conflicting, and the reasoning of the cases which uphold spendthrift trusts is unsatisfactory, and, as it seems to us, at war with well-settled principles of law as to the incidents of property, whilst the English courts of chancery, and the American cases which follow them, even if our statute did not make a debtor's equitable property liable for his debts to the same extent as if he were the legal owner, seem to us to be sustained by the better reason, and in furtherance of a wise public policy. Whatever rights, whether legal or equitable, a person *sui juris* has in property, ought to be, and we think are, liable for his debts, except so far as is exempt therefrom by statute. Whatever rights of property the *cestui que trust* can demand from his trustees, his creditors ought to have the right to subject to the payment of their debts, unless his rights are so connected or blended with the rights of others that they cannot be subjected without prejudice to the latter's rights. *Nickell v. Handly*, 10 Gratt. 336, 339.

Having reached this conclusion, the provisions in the deed of Mrs. Maxwell must be held to be void in so far as they declare that the property rights which her husband acquired under the deeds shall not be liable for his debts.

The next question is, What rights of property did the husband acquire by the deeds?

By the first-mentioned deed, filed with the bill, and marked "Exhibit B," he acquired an absolute equitable estate in the horses and other personal property described in clause numbered 1 of that deed, or in the proceeds thereof, in the event the trustee sold the same, as he had authority to do under the provisions of the deed. Under that deed, and the other deed filed with the bill, marked "Exhibit C," he was entitled to what, in the judgment and discretion of the trustee, would be a proper and comfortable support and maintenance out of the rents and profits of the farm conveyed by the first-named deed, and out of the income, rents and profits of the property conveyed by the second-named deed, after paying taxes, insurance, and necessary expenses of administering the trust, and which were made prior charges upon the profits and income received by the trustee from the farm and from the property conveyed by the other deed. And the husband was further entitled, under the provisions of the first-named deed, to the annual interest or income on so much of the rents and profits of the farm as were not necessary for the said proper and comfortable support and maintenance of the husband, and which the trustee was required by the deed to invest as a capital sum or interest-bearing fund.

We are of opinion, therefore, that the appellants have the right to have subjected to the payment of their debts, so far as may be necessary, the horses and other personal property conveyed by clause numbered 1 of

the deed marked "Exhibit B," and filed with the bill, or the proceeds thereof, if that property has been sold by the trustee, and so much of the rents, profits, and income derived by the trustee from the other property conveyed by, and also the fund invested under, the two deeds, after paying the prior charges of taxes, insurance, etc., charged thereon, as the husband would be entitled to receive for his proper and comfortable support and maintenance under the provisions of the said deeds.

It is true, there is a discretion vested in the trustee by the deeds as to what amount of the rents, profits, and income arising from the property conveyed shall be applied to the husband's support and maintenance; but it seems to be settled that where trustees are directed to apply the income of a trust fund for the support and benefit of the debtor, and for other purposes, but have no right to exclude the debtor, then the assignee and the creditors can claim from the trustee the amount which the debtor could have claimed should have been applied to his benefit. *Page v. Way*, 3 Beav. 20; *Kearsley v. Woodcock*, 3 Hare, 185; *Rippon v. Norton*, 2 Beav. 63; *Wallace v. Anderson*, 10 Beav. 533; and *Gray, Restraints on Alienation of Property*, 159.

Upon cross appeal, the action of the court in overruling the demurrer to the bill and amended bill is assigned as error by the appellees.

The first objection is that the bill was filed in behalf of all creditors, when it could be filed on behalf of all lien creditors.

The bill is in behalf of complainants, and "in behalf of all creditors of Clark Maxwell who may be entitled to become parties to this suit." As only lien creditors were entitled to become parties to the suit,—*Armstrong v. Pitts*, 13 Gratt. 235, 243,—the bill must be construed as showing on its face that it was filed in behalf of such creditors only. The complainants were lien creditors, and none other than lien creditors became parties to the suit.

The next objection urged to the bill is that it alleges that the complainants had sued out execution and obtained a lien upon the property sought to be subjected, without showing that they had exhausted their remedy at law.

It was necessary, under the decision of *Armstrong v. Pitts*, 13 Gratt. 235, 243, that the creditors should have a lien upon the property sought to be subjected, before they could come into a court of equity; but it was not necessary that they should have alleged a return of "No property found" upon the executions as a condition precedent to filing their bill. *Freedman's Sav. & T. Co. v. Earle*, 110 U. S. 710, 28 L. ed. 301, 303, 4 Sup. Ct. Rep. 226; *Lewin, Tr.* 795.

The third objection is that its allegations are indefinite and uncertain. The bill, when read in connection with the exhibits filed, and which are made a part of it, is not, in our opinion, subject to the objection made, but states the complainants' case with such a degree of certainty and consistency as would

enable the defendants to make defense, and the court to decree upon the case made, and that is sufficient.

The fourth ground of demurrer is that the bill and amended bill are multifarious.

The object of the original bill was to subject the interest of the debtor in the trust subject to the payment of his debts, notwithstanding the provisions of the deeds creating the trust declared that it should not be so liable, upon the ground that such provisions were void. In addition to the facts alleged in the original bill, the amended bill alleges that the interest of the debtor in the trust subject was not a gift, but that the deeds conveying it were founded upon a valuable consideration. The amended bill, it is true, further alleges that the property settled by the wife upon the debtor husband had been originally conveyed by him to her, with all his other property, and that these conveyances of the husband to the wife, and afterwards of the wife for the benefit of the husband, were executed in pursuance of a plan to hinder, delay, and defraud the creditors of the husband; but

in the same paragraph in which that allegation is made it is alleged that the deeds of the wife vest in the husband the equitable title to all the property conveyed to the trustee, in trust for the former's use and benefit, and that such equitable interests are subject to and liable for the payment of his debts. It is apparent from the whole frame and scope of the amended bill that it was not filed to have the deeds in question set aside and annulled upon the ground that they were made to hinder, delay, and defraud the creditors of the husband, but to subject the debtor's interest in the trust subject to the payment of his debts,—the same object for which the original bill was filed.

We are of opinion that there was no error in the court's overruling the demurrer to the bill and amended bill upon either of the grounds assigned.

The decree appealed from must be reversed, and the cause remanded to the corporation court for further proceedings to be had in accordance with the views expressed in this opinion.

WASHINGTON SUPREME COURT.

John HERRMAN, *Appt.*,

GREAT NORTHERN RAILWAY COMPANY, *Resp't.*

(.....Wash.....)

1. A person resorting to a railroad depot to purchase a ticket for transportation over a railroad which makes use of the depot to receive and discharge passengers is not bound to show that the person at the ticket window is the agent of the company, and not a mere broker, to avoid the application of the rule that a railroad company is not liable for the condition of premises where its tickets are sold by a broker in whose hands they have been placed.
2. A railroad company is not relieved from liability for injury to its passenger by reason of the unsafe condition of the depot premises unless the passenger must use to reach its trains, by the fact that the premises are used by, and in possession of, a union depot company or its receiver, with whom the railroad company contracts for terminal facilities.

(March 4, 1902.)

NOTE.—As to duty of railroad company to keep in safe condition platform connecting its station with that of another company, and liability for injury to passenger while on platform, though defect causing injury is in that portion of platform belonging to other company, see *Louisville, N. A. & C. R. Co. v. Lucas* (Ind.) 6 L. R. A. 193, and note, as to duty of railroad company to keep its platforms and approaches in safe condition.

For other cases in this series as to duty of carrier in respect to condition of station generally, see *Walker v. Vicksburg, S. & P. R. Co.* (La. Ann.) 7 L. R. A. 111; *Delaware, L. & W. R. Co. v. Trautwein* (N. J. L.) 7 L. R. A. 435; *Pennsylvania Co. v. Marlen* (Ind.) 7 L. R. A. 57 L. R. A.

A PPEAL by plaintiff from a judgment of the Superior Court for Spokane County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Mount & Merritt and Hand, Taylor, & Graves, for appellant:

Where a railroad company uses a depot and the walks around it and the approaches thereto, and stops its trains there, unloads its passengers, express, and baggage, and keeps its tickets on sale, then the person at the ticket window of such depot may be an agent, and may be a broker, but the knowledge that he is acting as a broker must be brought home to the person dealing with him, and he must be in fact a broker.

Turner v. Great Northern R. Co. 15 Wash. 213, 46 Pac. 243.

Common carriers cannot, by means of any lease or other contract for the operation of their means of transportation or the management and control of their tracks and right of way, relieve themselves from liability for violation of contracts, or the pub-

687; *Redigan v. Boston & M. R. Co.* (Mass.) 14 L. R. A. 276; *Johns v. Charlotte, C. & A. R. Co.* (S. C.) 20 L. R. A. 520, and note; and *Jordan v. New York, N. H. & H. R. Co.* (Mass.) 32 L. R. A. 101.

As to liability for injury caused by icy condition of steps of elevated railroad station, see *Kelly v. Manhattan R. Co.* (N. Y.) 3 L. R. A. 74, and note as to duty to furnish safe approaches, platforms, etc., generally.

For a case holding that ticket agent of union depot is agent of a railroad company using depot, for the purpose of receiving service of process, see *Hilary v. Great Northern R. Co.* (Minn.) 32 L. R. A. 448.

lie law, or for torts committed by their lessees or the parties with whom they specially contract.

Cogswell v. West Street & N. E. Electric R. Co. 5 Wash. 51, 31 Pac. 411; 1 Redf. Railways, 5th ed. p. 616; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 83, 25 L. ed. 950, 952; *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 445, 21 L. ed. 875; *Texas & P. R. Co. v. Reich* (Tex. Civ. App.) 32 S. W. 819.

As between the person injured and the lessee or occupant, the latter is liable, even though the landlord or lessor may also be liable on his covenant to keep in repair.

Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295.

The fact that the Union Depot Company was in the hands of and under the control of a receiver cannot change the rule.

Bennett v. Louisville & N. R. Co. 102 U. S. 577, 26 L. ed. 235; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Buenemann v. St. Paul, M. & M. R. Co.* 32 Minn. 390, 20 N. W. 379; *Collins v. Toledo, A. A. & N. M. R. Co.* 80 Mich. 390, 45 N. W. 178; *Cross v. Lake Shore & M. S. R. Co.* 69 Mich. 363, 37 N. W. 361.

If it were the duty of the receiver to keep the property in a safe condition for the public it was equally the duty of the defendant and the O. R. & N. Co., and all other companies using the said premises to do the same. All are jointly and severally liable for the tort caused by the negligence of its or their agent.

19 Am. & Eng. Enc. Law, p. 899; 16 Am. & Eng. Enc. Law, pp. 471-473; *Turner v. Great Northern R. Co.* 15 Wash. 213, 46 Pac. 243; *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72; *Tompkins v. Clay Street R. Co.* 66 Cal. 163, 4 Pac. 1165; 1 Rorer, Railroads, pp. 477, 478.

Messrs. Will H. Thompson and M. J. Gordon for respondent.

Hadley, J., delivered the opinion of the court:

This is an action for damages brought by appellant against respondent. The complaint alleges that the respondent is in the possession of a certain depot and depot grounds within the city of Spokane, which it operates and controls, on the line of its railroad passing through said city; that the respondent, for its own convenience, and for the convenience of its passengers, did, on the 13th day of December, 1898, maintain a sidewalk upon its said line of road, and in front of said depot; that on said date the respondent negligently and carelessly permitted snow and ice to accumulate and remain upon said walk, and in front of said depot, and carelessly and negligently permitted its engines to exhaust steam upon said snow and ice, and thereby caused said sidewalk to become slippery and icy on top of the snow, and dangerous to the public and persons having business with respondent.

ent at that place; that at about the hour of 6 o'clock in the evening of said day appellant, desiring to travel upon respondent's regular passenger train going east, went to said depot for the purpose of purchasing a ticket for passage upon said train, and that upon inquiry he was informed by the agent in charge of the depot that the train would not leave until the next morning, and thereupon he purchased a ticket for passage over respondent's road from Spokane to Milan, Washington, and at once left the depot for the purpose of going to his lodging in the city of Spokane; that while walking upon said sidewalk on the depot grounds in a careful manner, being compelled to walk upon the snow and ice which had accumulated as aforesaid, he, without any fault of his own, slipped upon the snow and ice, and was violently thrown to the ground, falling in such a manner as to sprain and bruise the ankle of his left leg and break the bones thereof, by reason whereof he was unable to stand upon his feet, and it became necessary that he should be taken from said place to the hospital in Spokane for treatment, which was done; that the said injuries were and are permanent, and by reason thereof appellant will be permanently crippled for life; that he was confined to his room in the hospital for about thirty-five days, and has suffered, and now suffers, great physical and mental pain by reason of said injuries, and is thereby permanently disfigured and deprived of the power he would have had but for said injuries to engage in profitable employment during the remainder of his life; wherefore he asks recovery in damages. The answer of respondent denies the allegations of the complaint, and further affirmatively pleads contributory negligence on the part of appellant, and alleges that appellant was a trespasser upon the property described in the complaint, and had no right to be thereon at the time mentioned in the complaint; that he was not invited by the respondent to pass along the place where he claims to have been injured, and that respondent owed him no duty whatever in respect to any of the matters alleged in the complaint; that whatever risk there may have been or which attended his passing along the premises described in the complaint, was a risk which the plaintiff well knew, and could have, by the exercise of ordinary care and caution, avoided. The cause was tried before a jury, resulting in a verdict for respondent. Appellant moved for a new trial, which was denied, and judgment was thereupon entered that appellant shall take nothing by his said action, and that respondent shall recover its costs. From said judgment this appeal was taken.

Respondent moves to strike the statement of facts, for the reason, as urged, that the court has settled two separate and complete statements which are inconsistent and conflicting with each other. From the record it appears that appellant duly filed a proposed statement. The evidence is not set out in the form of questions and an-

swers as taken by the stenographer, but is set forth in narrative form, and purports to contain all the material facts, matters, and proceedings which occurred at the trial. In due time respondent filed what is denominated an amended statement of facts, proposed by respondent as a substitute for the original statement proposed by appellant. In the latter proposed statement the evidence is also set out in narrative form, and purports to be a complete statement of all the evidence, and of all that occurred at the trial. The certificate of the court is to the effect that the matters and proceedings embodied in the appellant's proposed statement, and in the respondent's proposed amended statement, combined, are matters and proceedings which occurred in the cause and they are made a part of the record. The court, in its certificate, also refers to the combined statements as "the foregoing statement," thus treating them as a unit, and as comprising one statement in the case. Respondent contends that appellant's proposed statement is distorted, garbled, and incomplete; and appellant makes a like charge against the amended statement proposed by respondent. It is manifest that this court has no means of determining the accuracy of the respective contentions, and must rely upon the certificate of the trial court. That certificate recites, in effect, that the contents of each of the proposed statements are truthful accounts of matters which occurred at the trial, and both are therefore approved and made a part of the record. It was doubtless the court's view that omissions in one proposed statement were supplied by the other. In any event, respondent's motion to strike the whole statement as settled seems to us inconsistent, since the motion includes respondent's own proposed amended statement, submitted by itself for certification, which purports to be complete in itself, and which the court has made a part of the record. Moreover, we are unable to find in the record any objection made in the court below to the signing of the court's certificate as it was signed, making both proposed statements a part of the record. For the foregoing reasons we must treat that which the court has made a part of the record as constituting the statement of facts for the case, and the motion to strike is denied.

The assignments of error are based upon the court's instructions, and upon its refusal to instruct as requested by appellant. Counsel differ materially as to the law applicable to the facts in issue in this case. The testimony discloses that the appellant is a farmer, who resides in the country, 17 miles distant from Spokane. On the day he received his injuries he drove a team of horses from his home to Spokane, expecting to attend to some business there, attend a lodge in Spokane that night, and the next day drive with his team from Spokane to Milan, Washington, where he desired to attend to some business. On the way to Spokane one of his horses became lame, and upon reaching there he took his team to a stable and decided to leave them there and

go to Milan the next day by the respondent's railroad. He inquired of persons at the stable at what time the train would leave for Milan, but they were unable to inform him. He then went to the depot to ascertain the time the train would leave. He inquired of the agent in charge at the depot, who informed him that the train would leave about 8 o'clock the next morning. He then asked the agent for a ticket to Milan, and purchased from him at that time a round-trip ticket from Spokane to Milan. He immediately passed out of the depot building, and was returning by way of the sidewalk before mentioned when he received the injuries aforesaid. The evidence also disclosed that the depot and grounds thereto attached did not belong to the respondent company, but did belong to a corporation known as the "Union Depot Company of Spokane Falls." The property of the Union Depot Company consisted of the depot, with platform and walks, and some tracks and side tracks. At the time appellant received his injuries the property of the Union Depot Company was in charge of a receiver acting under direction of the United States circuit court. By arrangement between the respondent company and said receiver, the passenger trains of respondent arrived and departed from said depot, and the passengers, baggage, and express matter of said trains at Spokane were received and discharged at said depot. The agent in charge, and who sold appellant his ticket, was employed by the receiver, and sold tickets for passage over respondent's line and also over other lines using the same depot, as well as over all other railway lines in the country. No other agent was stationed at said depot to sell tickets over respondent's line. The evidence is conflicting as to the condition of the sidewalk at the time. Respondent's witnesses testified that it was kept clear of snow and ice, while appellant's testimony is supported by that of other witnesses. We will not inquire into this conflict of testimony, but will leave that to the jury, since it belongs to them to determine that matter. The verdict should not be disturbed unless it appears that the court has submitted the case to the jury under instructions which embody an erroneous view of the law.

It is the contention of respondent that it was not in possession or control of the depot premises at the time; that the ownership of the premises was in another company, and the possession and control thereof were in a receiver of that company, who was operating it as an independent property, distinct from the management and operation of respondent's railroad; that the respondent had no agent in charge, and had no connection with the premises other than to receive and discharge at that place its passengers, baggage, and express matter; that respondent's duties and relations to the public and its patrons at that place were confined to the times of the arrival and departure of its trains, and that, since appellant did not go there with the purpose of taking the train at that time, but only to

ascertain the time the train would leave, and to purchase a ticket from the agent of the depot company, his business was therefore entirely with the depot company, and no negligence can be attributed to respondent for the condition of the premises at that time. It is further urged that respondent was under no obligation to sell its own railroad tickets, but had the right to place such tickets in the hands of any person or corporation, and that such person or corporation undertaking the sale of such tickets must assume the duty of providing safe premises for the sale of the same, and under such circumstances respondent is under no duty to a ticket purchaser upon which negligence as to the condition of the premises where tickets are sold can be founded. This view seems to have been adopted by the trial court. The court gave the following instructions: "Any person or corporation selling or offering to sell to the general public any article, such as a railroad ticket, assumes the duty of providing, during reasonable business hours, reasonably safe premises upon which to transact such business, and if necessary, reasonably safe ways to and from said place of business." "I charge you, however, that the defendant did not necessarily have to sell its own railroad tickets, but had the right to place its said tickets for sale in the hands of any person or corporation who, under such circumstances, would assume the duty of providing safe premises for the sale of same. If you should find from the evidence that at the time plaintiff was injured, if he was injured, his only business at said depot was to buy a railroad ticket for a trip on defendant's road, and you should further find from the evidence that said tickets were then and there being sold by some other person or corporation, then and in that case the plaintiff cannot recover from the defendant, and you should find for the defendant." "A railway ticket is property which may be lawfully sold by anyone in whose hands it is placed by the railway company with authority to dispose of the same, and the railway company will not necessarily be required to keep the premises where such persons may conclude to sell such tickets, or the approaches to such places, in repair. I instruct you that the mere fact, if it is a fact, that the defendant railway company allowed a receiver of the United States court, by himself or by his agent, to have possession of the defendant company's tickets, and to sell them to persons desiring to take passage upon its railway line, would not of itself necessarily make it a duty of the defendant railway company to keep the premises occupied by the receiver in the sale of such tickets, or the walks or approaches to the place where such tickets were so sold by such receiver or his agents, in repair." The foregoing instructions would undoubtedly be correct as applied to a mere ticket broker, and to one purchasing from him who had knowledge that he was only such broker. It will be observed that the instructions are wanting in any requirement that the purchaser shall have knowledge

that he is dealing with a broker only. One dealing with a broker, knowing him to be such broker only, and as selling tickets upon his own account, could certainly not charge respondent with negligence for not providing safe premises at the place where he applies to purchase a ticket. Here is a case, however, where a railroad company uses a depot, the walks around it, and the approaches thereto. It stops its trains, unloads and receives its passengers, baggage, and express there, and its tickets are there kept on sale. Under such circumstances the person at the ticket window, and who has charge of the sale of tickets, may be an agent, or he may be a mere broker, but knowledge that he is a mere broker should be brought home to the purchaser. It is a matter of common knowledge that it is the ordinary rule for a railroad company to maintain depots where its tickets are kept on sale at a ticket window, and one desiring to purchase a ticket for passage over respondent's line, seeing some person at the ticket window in the depot where respondent's trains are accommodated, would naturally suppose that such person was the agent of the company whose tickets he was selling, and would not suppose, without actual knowledge, that such person was a mere broker, and not the agent of respondent. The above instructions, therefore, place the burden upon the ticket purchaser and patron of respondent to first ascertain whether he is dealing with a broker or an agent of respondent, before he may assume that respondent is obligated to furnish a safe approach to and from its depot over which he must travel when he wishes to purchase a ticket. Such a rule we do not think is just or reasonable, and we therefore think the instructions erroneous in the particular mentioned. In *Turner v. Great Northern R. Co.* 15 Wash. 213, 46 Pac. 243, it was held that a ticket seller in a union depot, whose business it is to sell tickets over various lines of railway whose trains enter and depart therefrom, is such an agent of any company furnishing tickets to be sold there which are accepted by the conductors of its trains as its tickets, that the company is bound by any of the declarations of such ticket seller as to the running of its trains.

The evidence shows, and respondent so concedes in its brief, that appellant went to the depot for the purpose of ascertaining at what time the train would leave, and also to purchase a ticket. He had made inquiry uptown as to the train time, but, not getting the desired information, what was more reasonable than that he should go to the depot from which the train would start, in the expectation that someone representing the respondent company would there give him authoritative information? Again, from whom could he expect more accurate information upon that subject than the person at the ticket window? He sought the information from that person, received it, and then purchased his ticket. It is certainly reasonable that someone should be stationed at the place where respondent's

trains arrive and depart to give information to the public upon as important a matter as the time of the arrival and departure of trains. If the ticket agent was in no sense the agent of respondent, but only the agent of the receiver of the depot company, then from whom could appellant have procured authoritative information upon so important a subject? Certainly the relations of respondent to the public must be such that someone in charge is authorized to speak, and who can more properly do so than the person who sells the tickets and receives the money which is the consideration for the patron's passage over the line? Appellant sought authoritative information which could only be had from someone having authority to speak for respondent, and such a one he might reasonably expect he would find at the depot. To that extent, at least, it would seem that his business at the depot was with respondent company, and not with the depot company, or its agent, as a ticket broker. The real question is, Is the respondent liable to its patrons for the negligence of the Union Depot Company to keep the premises used by respondent reasonably safe where the depot company has control of the premises, but which by common consent are used as a depot for passenger, express, and baggage business by the respondent company? As bearing upon this subject the court further instructed the jury as follows: "You are instructed that if you find from the evidence in this case that the sidewalk or platform upon which plaintiff fell and was injured, if you find that he did fall and was injured, was at that time in the exclusive possession and control of the receiver of the United States court, then your verdict must be for the defendant. You are instructed that the gist of this action is negligence; that is to say, the plaintiff charges that the defendant carelessly and negligently permitted snow and ice to accumulate upon a sidewalk, platform, or approach to its depot in the city of Spokane, and I charge you that unless you find from the evidence that the defendant was at that time in the possession and control of such sidewalk, platform, or approach, then your verdict must be for the defendant. You are instructed that, to entitle the plaintiff to recover in this action, it is not enough that you should believe from the evidence that the plaintiff, at or about the time alleged in the complaint, fell upon the sidewalk, platform, or approach mentioned in the complaint in this action, and was injured thereby, unless you further find that the plaintiff was at that time exercising ordinary and reasonable care for his own safety, and also that his fall was a result of the snow and ice upon the platform or approach at the place where the plaintiff sustained such fall; and also that such sidewalk, platform, or approach was, at the time plaintiff fell, within the possession or under the control of the defendant." Thus it will be seen that the court left the jury to find for the respondent if they found that the premises were under the control of another, without re-

gard to whether respondent used the premises for its depot purposes. This, we think, was error. In *Cogswell v. West Street & N. E. Electric R. Co.* 5 Wash. 46, 31 Pac. 411, this court, at page 51, 5 Wash., and page 412, 31 Pac., said: "It is a well-established principle of the law governing common carriers, which obtain certain rights or franchises from the public by either special or general legislation on the part of the state or municipal corporations, and upon whom in return therefor are cast the burden of certain duties, that they cannot, by means of any lease or other contract for the operation of their means of transportation or the management and control of their tracks and right of way, relieve themselves from liability for violations of contracts or the public law, or for torts committed by their lessees or the parties with whom they specially contract." Again, on pages 52, 53, 5 Wash., and page 413, 31 Pac., the court further said: "Out of a great number of cases which were cited to our attention by both sides, we find but two which are directly pertinent upon this point. The first is *Cunningham v. International R. Co.* 51 Tex. 503, 32 Am. Rep. 632. In that case a passenger was carried by a construction train operated by independent contractors for the building of the road, without the knowledge of the railroad company, and against its express prohibition, and it was held that the railroad company was not liable. The other case is that of *Lakin v. Willamette Valley & Coast R. Co.* 13 Or. 436, 57 Am. Rep. 25, 11 Pac. 68, which is a case on all fours with this one, with the exception that there the railroad was an ordinary steam railroad. The court said: 'The defendant may contract for the construction of its road, but it cannot escape liability for injuries to passengers caused by the negligence of another which it permits or allows to use its road for the purposes of traffic. In such case, as regards the public, those who operate the road must be regarded as the agents of the corporation. This doctrine is in accordance with sound public policy; for it would certainly be against the public interest to allow corporations, invested by the state with important franchises and privileges, and incorporated to discharge a public duty as well as to subserve a private benefit, to shirk its responsibilities or shift its duties and liabilities to other, perhaps, irresponsible parties. Except as authorized by statute, it cannot relieve itself from responsibility for the exercise of its corporate powers and franchises.' The two cases referred to, it seems to us, express the correct principle applicable in such instances, and under that principle there was no error on the part of the court as to the point in discussion." The defense in the above case was that of negligence of a construction company employed to equip the road with electric appliances, but passengers were being carried upon the same car that carried the construction material, and it was held that the company could not be relieved from liability because the negligence was

primarily that of the construction company. Culling from the first quotation the statement of a general principle which seems particularly applicable here, we have the following: "They cannot by means of any . . . contract for the operation of their means of transportation . . . relieve themselves from liability for violations of contracts or the public law, or for torts committed by . . . the parties with whom they specially contract." Respondent had a contract or arrangement with the depot company by which its "means of transportation" were to be operated upon the depot premises. To these premises the traveling public were invited and induced by respondent, to come and take passage upon its cars. Whether it kept one it called its own agent to sell tickets there or not, yet the fact remains that the public were invited and induced to come there. The tickets were there to be sold, and the ordinary traveler would expect to buy his ticket upon those premises, and without knowledge to the contrary would suppose that in so doing he was dealing directly with respondent through its duly authorized agent. For all the purposes of operating its means of transportation upon those premises and of dealing with the public as is usual at a railroad depot, the respondent was the occupant of the premises, whatever may have been its contract or arrangement with the depot company. In the case of *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 580, 26 L. ed. 235, 236, the court said: "The facts disclosed by the pleadings, and by the demurrer conceded to exist, seem to bring this case within the rule—founded in justice and necessity, and illustrated in many adjudged cases in the American courts—that the owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation." There a railroad company and a steamboat company used the same premises for depot and landing purposes. A passenger in going to take a steamboat at night was injured by reason of negligently kept premises. The premises belonged to the railroad company, but the passenger's business at that particular time was not with the railroad company, but with the steamboat company upon whose steamer he then sought passage. The railroad company was held liable, within the principle above stated, that by invitation, express or implied, it induced the public to come upon the premises. Likewise did the respondent in this case, by its relations to the depot premises as an occupant for traffic purposes, invite and induce its patrons to come upon those premises; and it therefore came within the above rule. The same principle would doubtless have been

applied to the steamboat company in the case cited as an occupant and user of the premises for traffic purposes, although not the owner; but the relief seems to have been sought against the railroad company alone.

Respondent is not relieved from liability on account of unsafe premises because the premises may at the time have been under the control of a receiver of the depot company. Respondent used the premises voluntarily, and it became its duty to provide a reasonably safe place for its patrons. If the receiver neglected to maintain safe premises, his negligence became the negligence of the respondent, because in law he was the agent of respondent, whose duty it was to maintain safe walks upon its depot grounds. In *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141, a passenger purchased from a railroad company a ticket over its line, and at the same time from a palace car company a ticket entitling him to a berth in one of its sleeping cars constituting a part of the train of the railroad company. In the course of transportation he was injured by the falling of a berth in the sleeping car in which he was at the time riding. It was held that, for the purposes of the contract with the railroad company for transportation, and in view of its obligation to use only cars that were adequate for safe conveyance, the palace car company, its conductor and porter, were in law the servants and employees of the railroad company, and that the negligence of either of them as to any matters involving the safety or security of passengers was that of the railroad company. In *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 445, 21 L. ed. 675, where a railroad company was being operated jointly by a receiver of a part of it and by a lessee as to the remaining part, the railroad company was held liable for injuries committed by a servant of the parties working it upon the person of a passenger whom such servant improperly expelled from a car into which the passenger had entered, the railroad corporation having allowed tickets to be issued in its own name in the same form as it had done before the road was leased, and the passenger, for aught that appeared, not knowing that the railroad corporation was not itself managing the road. In *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559, it was held that, where a railway company allows another company to use and operate its road, no other negligence than that of the corporation using the track need be alleged or proved in order to fix the liability of the owner company. The negligence of the lessee company is treated the same as its own. In *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72, it was held that all the property of a railroad company, including its depots and adjacent yards and grounds, is its private property, on which no one is invited or can claim the right to enter except those persons who have business with the railroad, which class embraces, not only passengers, but protectors and friends attendant upon their de-

parture or awaiting their arrival; that to the class of persons thus having business the railroad company is under obligation to keep in safe condition all parts of its platforms, with the approaches thereto, to which the public do or would naturally resort, and of the portions of the station grounds reasonably near to the platform where passengers would be likely to go, and to provide safe waiting rooms, and to keep the depot and platform well lighted at night. A building in the city of Montgomery, known as the "Union Depot," with the yards or grounds annexed, was the property of the two railroad companies known as the South & North Alabama and the Louisville & Nashville, but the Montgomery & Eufaula Railway Company, having acquired by lease the right to use the property in common with the others for the arrival and departure of its trains, with the use of its waiting rooms, ticket office, baggage room, etc., was held to be liable to passengers and the public generally in relation to the property as if it were the owner in fee. It is true it was held that the plaintiff in that case could not recover because of his contributory negligence, but the principle announced by the court is particularly pertinent to the discussion here. It thus seems clear that, as between respondent and its patrons and those having business with it at said depot, the duty rested upon respondent to see that the depot premises were safe as fully as though the premises had been owned by respondent. That such is the duty of a railroad company owning and using the premises there can be no doubt. "A railroad corporation is bound to make the approaches to their own depots and premises safe and convenient for passengers, and the public having business at such premises; and is bound to keep the same, and their landing places, in a reasonably safe condition for the convenient use of all who use their cars as a means of conveyance, and others who have a rightful occasion to resort there." 1 Rorer, Railroads, 476. Numerous cases are cited by the author. See also *Buenemann v. St. Paul, M. & M. R. Co.* 32 Minn. 390, 20 N. W. 379; *Collins v. Toledo, A. A. & N. M. R. Co.* 80 Mich. 390, 45 N. W. 178; *Cross v. Lake Shore & M. S. R. Co.* 69 Mich. 363, 37 N. W. 361; *Texas & P. R. Co. v. Reich* (Tex. Civ. App.) 32 S. W. 817.

We therefore think the instructions of the court heretofore set out were erroneous in the particulars herein discussed. The jury should have been instructed to the effect that respondent is not relieved from liability by the mere fact that another may have owned and controlled the depot premises; that if the respondent used and occupied the premises for depot purposes the duty rested upon it to see that such premises were safe.

The judgment is therefore reversed, and the cause remanded, with instructions to the court below to grant the motion for a 57 L. R. A.

new trial, with costs taxed against respondent.

Reavis, Ch. J., and Fullerton, Dunbar, Anders, and White, JJ., concur.

Henry GEORGE, *Appt.*,

v.

Mary M. BUTLER *et al.*, *Interveners*,
Respts.,
and

W. E. GAYNOR *et al.*, *Defendants.*

(26 Wash. 456.)

1. A grantee of mortgaged premises who is not obliged to pay the debt secured is not precluded from pleading the statute of limitations against foreclosure by the fact that the mortgagor has been continuously absent from the state, so that as to him the limitation period has not run.
2. The fact that a mortgage is given to secure payment of an entire sum which is payable in instalments does not prevent the running of the statute of limitations against each instalment as it becomes due.
3. A covenant in a mortgage to pay the whole debt will not prevent the statute of limitations from running against each instalment as it becomes due, if the covenant is to pay according to the terms of the notes secured.
4. A purchaser of mortgaged property cannot, in the absence of express contract, be charged, in a proceeding to foreclose the mortgage against him, with the interest provided for by the notes, where the rate named in the recorded mortgage is much less.

(December 4, 1901.)

A PPEAL by plaintiff from a judgment of the Superior Court for Snohomish County in his favor for a less amount than demanded in an action to foreclose a mortgage. *Affirmed.*

The facts are stated in the opinion.

Messrs. Whitney & Headlee, for appellant:

The action to foreclose this mortgage and each and every part of it was not barred when this action was commenced, even had the mortgagor been a resident and remained in the state at all times after its maturity.

A mortgage is a lien on real estate to secure the payment of money.

Ballinger's Anno. Codes & Statutes, § 4522; *Parker v. Dacres*, 2 Wash. Terr. 446.

NOTE.—As to effect of absence from the state when right of action accrues on statute of limitations, see *Stanley v. Stanley* (Ohio) 8 L. R. A. 333, and *note*; *Mason v. Union Mills Paper Mfg. Co.* (Md.) 29 L. R. A. 273; and *Hogg v. Hartley* (W. Va.) 54 L. R. A. 215.

For a case in this series holding that when an action to foreclose a mortgage has become barred by limitations as against a purchaser who assumes the mortgage it is also barred as against the mortgagor, see *Mulvane v. Sedgley* (Kan.) 55 L. R. A. 552.

7 Pac. 893; *Brundage v. Home Sav. & L. Asso.* 11 Wash. 285, 39 Pac. 666.

The statute begins to run where the mortgage is given for a lump sum payable at different times, and contains a promise in the mortgage itself to pay the whole debt, when the whole debt is due.

At common law so long as the relation of mortgagor and mortgagee existed the statute would not begin to run in favor of either.

Jones, *Mortg.* 4th ed. §§ 1195, 1208, 1211; Wood, *Limitation of Actions*, §§ 224, 226, 229.

No presumption of payment arises under the limitations created by the statutes of the several states in this country; such limitations relate to the remedy alone. The right or obligation remains the same after the bar occurs as before.

Wood, *Limitation of Actions*, § 222; Jones, *Mortg.* 4th ed. § 1203; *Lord v. Morris*, 18 Cal. 482; *Low v. Allen*, 26 Cal. 141; *McCarthy v. White*, 21 Cal. 503, 82 Am. Dec. 754; *Grant v. Burr*, 54 Cal. 301; *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. 225; 13 Am. & Eng. Enc. Law, p. 703.

The running of the statutory six years on any part due for more than that time does not satisfy that much of it; nor does it pay it.

Moulton v. Williams (Idaho) 55 Pac. 1019.

Neither the action to foreclose the mortgage, nor the action on the notes, was barred, because of the absence of the mortgagor from the state.

The statute of limitations never began to run in this case against the mortgage debt or any part of the same, because of the absence and nonresidence, and continued absence and nonresidence, of the debtor.

Ballinger's *Anno. Codes & Statutes*, § 4808; *Denny v. Sayward*, 10 Wash. 431, 39 Pac. 119; *Weber v. Yancy*, 7 Wash. 84, 34 Pac. 473; Jones, *Mortg.* 4th ed. § 1202.

So long as the debt as between the original parties is kept alive the action to foreclose the mortgage will never be barred.

Clinton County v. Coa, 37 Iowa, 570; *Brown v. Rockhold*, 49 Iowa, 282; *Mahon v. Cooley*, 38 Iowa, 479; *Waterson v. Kirkwood*, 17 Kan. 9; *Clift v. Williams*, 20 Ky. L. Rep. 1261, 49 S. W. 328, 21 Ky. L. Rep. 551, 51 S. W. 821; *Cook v. Union Trust Co.* 21 Ky. L. Rep. 454, *sub nom.* *Cook v. Bramel*, 45 L. R. A. 212, 51 S. W. 600; *Flewel-ten v. Cochran*, 19 Tex. Civ. App. 499, 48 S. W. 39; *King v. Brown*, 80 Tex. 276, 16 S. W. 39; *Robertson v. Stuhlmiller*, 93 Iowa, 326, 61 N. W. 986; *Emory v. Keighan*, 88 Ill. 488; *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Ft. Scott v. Schulenberg*, 22 Kan. 658; *Sibert v. Wilder*, 16 Kan. 176, 22 Am. Rep. 280; *Pears v. Wilson*, 23 Kan. 346; *Smith v. Perkins*, 10 Kan. App. 577, 63 Pac. 297; *Mo-Lane v. Allison*, 7 Kan. App. 263, 53 Pac. 782; *Balch v. Arnold*, 9 Wyo. 17, 59 Pac. 438; *Lau v. Spence* (Idaho) 48 Pac. 283; 57 L. R. A.

Heyer v. Pruyn, 7 Paige, 465, 34 Am. Dec. 355.

Having notice of the mortgage, the purchaser is presumed to have notice of its contents.

Wade, *Law of Notice*, 2d ed. § 15; 1 *Warvelle, Vendors*, pp. 269, 270; *Acer v. Westcott*, 46 N. Y. 384, 7 Am. Rep. 355; *Reeder v. Barr*, 4 Ohio, 446, 22 Am. Dec. 762; *Gibson v. Winslow*, 46 Pa. 380, 84 Am. Dec. 552.

Mr. Francis H. Brownell, for respondents:

A mortgage does not pass the fee. It is a mere lien upon the land.

Brundage v. Home Sav. & L. Asso. 11 Wash. 284, 39 Pac. 666.

The mortgage follows the note or notes to secure which it is given.

Any defense to the notes is a defense likewise to the mortgage, and when the notes become barred by the statute of limitations the mortgage is likewise barred.

Lord v. Morris, 18 Cal. 482; *Duty v. Graham*, 12 Tex. 427, 62 Am. Dec. 534; *Gower v. Winchester*, 33 Iowa, 303; *Kyger v. Ryley*, 2 Neb. 28; *Emory v. Keighan*, 88 Ill. 482; Jones, *Mortg.* § 1207.

A mortgage becomes outlawed when the note is outlawed.

Damon v. Leque, 17 Wash. 573, 50 Pac. 485; *Stubblefield v. McAuliff*, 20 Wash. 442, 55 Pac. 637.

Statutes of limitation apply equally to promissory notes payable in instalments and to mortgages given to secure notes payable at separate times.

Wood, *Limitation of Actions*, § 224, p. 454; *Parker v. Banks*, 79 N. C. 480; *Bush v. Stowell*, 71 Pa. 208, 10 Am. Rep. 694; 13 Am. & Eng. Enc. Law, p. 725.

Suspension of the statute as to Gaynor does not likewise suspend it as to these respondents, who bought his interest in the mortgaged land, and as against whom, therefore, an entirely different cause of action exists.

Anderson v. Baxter, 4 Or. 105; *Fowler v. Wood*, 78 Hun, 304, 28 N. Y. Supp. 976; *Davis v. Clark*, 58 Kan. 454, 49 Pac. 665; *Wood v. Goodfellow*, 43 Cal. 185; *Damon v. Leque*, 17 Wash. 573, 50 Pac. 485; *Stubblefield v. McAuliff*, 20 Wash. 442, 55 Pac. 637.

Subsequent purchasers are only bound to pay the rate of interest stipulated in the mortgage as recorded.

Whittacre v. Fuller, 5 Minn. 503, Gil. 401; Jones, *Mortg.* 4th ed. § 565; *Gardner v. Emerson*, 40 Ill. 296; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; 20 Am. & Eng. Enc. Law, p. 599; *Ritchie v. Griffiths*, 1 Wash. 429, 12 L. R. A. 384, 25 Pac. 341; *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746.

Hadley, J., delivered the opinion of the court:

This is an action foreclosing a mortgage. It appears by the complaint that on the 16th day of February, 1892, the defendant W. E. Gaynor executed and delivered to Wyatt J. Rucker and Bethel J. Rucker certain

promissory notes as follows: One note for \$3,000, due eighteen months after date; and one for \$1,666.67, due two years after date. By the terms of the notes each drew interest at the rate of 8 per cent per annum from date until maturity, and after maturity at the rate of 3 per cent per month, payable monthly. On the same day the notes were executed the said defendant executed a mortgage upon certain real estate in the city of Everett to secure the payment of the notes. No part of said notes has been paid except the sum of \$583.34, which was paid upon the last-mentioned note on the 24th day of February, 1894. It is alleged that on the 12th day of November, 1895, the said payees and mortgagees assigned and transferred the said notes and mortgage to the plaintiff in this suit, and that he is now the holder thereof. The complaint alleges that the defendant Gaynor, the maker of said notes and mortgage, was absent from the state of Washington at the time said notes became due, and that he has not returned to this state since right of action upon the notes and mortgage accrued. The respondents Lucy A. Friedlieb and Mary M. Butler subsequently, by deed, became the owners of separate portions of the mortgaged premises. Said respondents demurred to the complaint by way of general demurrer, and also by way of interposing the statute of limitations. The demurrer was by the court overruled. Respondents then answered the complaint, denying certain allegations therein, and alleged affirmatively, among other things, their ownership of portions of the mortgaged premises, and that the action was not commenced within the time limited by law as to said \$3,000 note, in that no payments were ever made upon said note, and more than six years elapsed since the maturity thereof before this action was commenced. The reply denies the affirmative allegations of the answer. Upon these issues the cause was tried by the court, and decree entered denying any recovery on the said \$3,000 obligation, and granting a recovery upon the other note for the amount of its face less the said payment thereon, with interest computed at the rate of 8 per cent per annum until the date of the decree. The plaintiff appeals, and assigns as error: (1) That the court erred in refusing to allow the full amount of said \$3,000 note, together with 8 per cent per annum interest, and 3 per cent per month thereafter, compounded; (2) that the court erred in refusing to allow upon the other note interest at 3 per cent per month, compounded after maturity; (3) that the court erred in concluding, as a matter of law, that appellant was not entitled to have his mortgage foreclosed for the principal and interest due on the \$3,000 note.

The \$3,000 note matured August 16, 1893, and the other one matured February 16, 1894. On the 16th day of August, 1899, six years had elapsed since the maturity of the \$3,000 note, and on the 16th day of February, 1900, a like period had elapsed since the maturity of the other one. This action ap-
57 L. R. A.

pears to have been commenced between the two last-mentioned dates. It is clear that under any view of the statute of limitations the smaller note was not barred at the time this suit was commenced, and the right of action to foreclose the mortgage, as far as said note was concerned, was not barred. Appellant urges that the \$3,000 note was not barred by reason of the absence of the maker of the note from this state. It is true, under the showing in this record the note was not barred as to Gaynor, the maker, and consequently the right of action to foreclose the mortgage was not barred if Gaynor had remained the owner of the mortgaged premises. Respondents are, however, subsequent grantees of the mortgaged premises, and they have interposed the plea of the statute of limitations as to a right of action against them for the foreclosure of the mortgage.

The principal question involved here is, Can the subsequent grantee of a mortgagor not obligated to pay the debt plead the statute of limitations against an action to foreclose a mortgage when the statute has not run, as against the mortgagor and maker of the note secured by the mortgage, by reason of his continued absence from the state? This precise question seems never to have been directly passed upon by this court. The relation of a subsequent grantee of a mortgagor to the running of the statute of limitations has not been the subject of harmonious decision among the courts that have considered it. Certain phases of the subject have heretofore been considered by this court. In *Damon v. Leque*, 17 Wash. 573, 50 Pac. 485, a subsequent execution purchaser under a judgment against the mortgagor was made a party defendant in an action which was held to be one in foreclosure. The court in that case said: "The case turns upon the question of the right of the mortgagor to revive the mortgage after the bar of the statute had become complete as against another party who had purchased the lands, but was not obligated to pay the debt. The authorities are conflicting upon this question, but the great weight sustains the defendants on the proposition. The mortgagor could no more revive the mortgage in such a case than he could give a new mortgage upon the land." Again, in the case of *Stubblefield v. McAuliff*, 20 Wash. 442, 55 Pac. 637, it was held that, where a note was secured by a mortgage executed by a man and wife upon community realty, payments of principal or interest thereon made by the husband without the authority of the wife, after maturity, will not extend the time of the running of the statute of limitations as against the wife. The theory upon which the first case was decided was that, when the right of action as against the debt secured by the mortgage is barred, the right of action upon the mortgage itself is also barred. The latter case was decided upon the theory that part payment by one person, being equivalent to a new contract based upon an old consideration upon which a cause of action accrues at the time of payment, binds only the per-

son making the payment, or one whom he has authority to bind by a new contract to pay the balance. In the case of *Presbyterian Bd. of Church Erection Fund v. First Presby. Church*, 19 Wash. 455, 53 Pac. 671, the opinion contains a statement that may upon first reading appear to put the case in conflict with *Damon v. Leque*, 17 Wash. 573, 50 Pac. 485, which had been previously decided. A similar state of facts existed in the two cases. In the later case the grantee of the mortgagor sought to raise the defense of the statute of limitations in this court. The defense had not been pleaded in the court below by way of answer, and the demurrer was only upon the ground that the complaint did not state facts sufficient to constitute a cause of action. It was held that, when the attention of the court is intended to be directed to the subject of the statute of limitations by way of demurrer, it must be so specially designated in the demurrer; that being a distinct and separate ground of demurrer as provided by statute. In discussing this subject the opinion states: "In the first place, a pleading of the statute of limitations is a privilege which is accorded by the law to the defendant,—in this case the Presbyterian Church,—and it can avail itself of that privilege, or answer upon the merits, or default, just as it pleases. It is not a right which defendant Walter Morgan can receive the benefit of." The further discussion of the subject, however, shows clearly that the court did not adjudicate the question of the statute of limitations, for the reason that it was not raised in the record. The case was in fact determined upon other grounds. There is, therefore, no conflict between that case and *Damon v. Leque*. On the authority of the latter case it must be considered, therefore, at the outset of the consideration of this subject as settled by this court, that, when a debt secured by a mortgage is barred by the statute of limitations, the mortgage is also barred, and the mortgage cannot be revived by the act of the mortgagor as against a subsequent grantee without his consent. In the case at bar the full statutory period had run against the mortgage debt if the debtor had remained within the state. Section 4808, 2 Ballinger's Anno. Codes & Statutes, provides as follows: "If the cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited after the return of such person into the state, or after the time of such concealment; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action." By reason of the above provision the operation of the statute of limitations was suspended during the absence of the debtor from the state and it is therefore clear that the right of action against him is not barred. The stat-

ute having been suspended as to the right of action against the debtor, was it for that reason suspended as to the right of action upon the mortgage against the subsequent grantee of the mortgaged land? The rule adopted by this court, as far as it has passed upon the right of a grantee to interpose the defense of the statute of limitations against an action to foreclose a mortgage, seems to be in harmony with that adopted by the supreme court of California. In *Wood v. Goodfellow*, 43 Cal. 185, a question similar to the one involved here was under consideration. The court there held that there is no difference in principle between the suspension of the running of the statute of limitations resulting from an express waiver and one caused by voluntary act in absenting one's self from the state. In order that the views and reasoning of the California court may more fully appear, we quote extensively from the opinion in said case, as follows: "If Goodfellow still held the equity of redemption, and if the action was against him alone, it is evident his absence from the state would afford a sufficient answer to the plea of the statute of limitations. So long as he retained the equity of redemption, and no other rights had intervened by reason of subsequent liens or encumbrances, he had the power, by written stipulation, under the statute, to extend the time within which the debt should not be barred, or he might suspend the running of the statute by his absence from the state. So long as his rights only were to be affected, it was within his power to suspend the operation of the statute either by a written stipulation or by absenting himself from the state. But this court has repeatedly decided that as against subsequent encumbrancers, or a subsequent holder of the equity of redemption, the mortgagor has no power by stipulation to prolong the time of payment, or in any manner increase the burdens on the mortgaged premises. *Lord v. Morris*, 18 Cal. 482; *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754; *Lent v. Morrill*, 25 Cal. 500; *Low v. Allen*, 26 Cal. 141; *Lent v. Shcar*, 26 Cal. 361; *Barber v. Babbel*, 36 Cal. 11; *Sichel v. Carrillo*, 42 Cal. 493. . . . The argument [of counsel] assumes that a subsequent holder of the equity of redemption or a subsequent encumbrancer stands in the shoes of the mortgagor, and cannot invoke the aid of the statute in the given case, because he could not. But it is the settled doctrine of this court, as will be seen from the authorities above cited, that when third persons have subsequently acquired interests in the mortgaged property they may invoke the aid of the statute as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection; and we see no difference in principle between a suspension of the running of the statute resulting from an express waiver and one caused by his voluntary act in absenting himself from the state. In either case it is the sole act of the mortgagor, performed at a time when he had lost his rightful control

over the property, and when other interests had intervened, which ought not to be dependent for their protection on the conduct of the mortgagor. When the mortgagor has parted with his title to the property, and ceased to have any interest therein, those who have succeeded to his rights stand in the same relation to the mortgagee as if they had originally made the mortgage on their own property to secure the debt of the mortgagor. The mortgagor has no interest in the property, nor are they under obligation to pay his debt. Their property, however, is bound as collateral security for its payment, under the mortgage, which is a contract in writing, by which the property is pledged as a security for the debt. The mortgage, in such a case, has the same effect in law as if it had been originally made, as a separate instrument, by the parties succeeding to the rights of the mortgagor to secure his debt." In *Anderson v. Baxter*, 4 Or. 105, a similar rule was announced. The court in that case observed: "If the relief sought had been a decree *in personam*, the analogy would be sufficiently complete, and the period of such absence not be included as any part of the time limited. Such absence in that case would suspend, or at least affect, the party's remedy, which is the only reason for the exception. In this case the plaintiff can claim no remedy, except to have the property in question adjudged to be sold to satisfy the debt secured thereby. It was, in effect, a proceeding *in rem*, and the absence of the mortgagors did not interfere with the prosecution of his remedy, or render it less effectual. If the absence of the mortgagors in this case prevented the statute of limitations from running, then the same result would have followed if the premises had been sold to defendant the next day after the execution of the mortgage, and he had gone into possession and remained in possession thereof; and in fact the statute would never run so long as the mortgagors should remain away from the state. Where a personal obligation is sought to be enforced, the provisions of [Civil Code Proc.] § 16, referred to, would undoubtedly apply; but where the only remedy is against the property, which has a fixed situs, the construction contended for would be unreasonable." It is suggested that the last-named case should be distinguished, because the remedy there was against the land alone, there being no personal obligation to pay the debt; and that, when the mortgagor had conveyed the property, there was no longer any cause of action against him, and necessarily, his absence from the state could not affect the running of the statute. We are not, however, impressed with the distinction sought to be made. If a personal obligation exists, and the maker thereof leaves the state, the remedy under the mortgage remains against the property, and may be enforced at any time when the obligation is due. It is with this remedy against the property alone that the grantee of the mortgaged premises is concerned. It is further suggested that the

case of *Anderson v. Baxter*, 4 Or. 105, is inconsistent with *Cross v. Allen*, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67, which was a case that went up to the Supreme Court of the United States from Oregon, and involved the consideration of the laws of Oregon on certain phases of the statute of limitations. The supreme court of Oregon had determined that under the statutes of that state a payment made upon a note after maturity by one joint obligor had the effect to bind the co-obligor or surety, and the question before the Supreme Court of the United States was the effect of the state law as construed by the supreme court of the state. We do not see that the cases are necessarily inconsistent. *Cross v. Allen* involved the question of the power of one obligor by his act to continue an obligation against a co-obligor, who was bound equally with himself on the original obligation. But in *Anderson v. Baxter* the question was whether the act of the debtor in absenting himself from the state could affect the rights of one who was never in any way bound with him on an obligation. The difference was such that the supreme court of Oregon might adopt the two views as applied to the different facts without any inconsistency. This court, in *Stubblefield v. McAuliff*, 20 Wash. 442, 55 Pac. 637, declined to follow *Cross v. Allen*, as declaring a rule applicable to this state. In *Fowler v. Wood*, 78 Hun, 304, 28 N. Y. Supp. 976, the supreme court of New York seems to have announced a rule in harmony with the California and Oregon cases. The opinion says: "Nothing appears in the evidence to arrest the operation of the statute as to the appellant, except the fact that before the expiration of twenty years Ferris removed from the state. This act suspended the running of the statute as against him. Whether it also suspended the statute as to the cause of action against the owner of the mortgaged property is a question that, so far as my examination goes, has not, prior to this case, been decided in this state. . . . The Code of Civil Procedure provides (§ 381) that an action upon a sealed instrument must be commenced within twenty years after the cause of action accrued; but if, after a cause of action has accrued against the person, he departs from the state, etc., the time of his absence is not a part of the time limited for the commencement of the action. (§ 401.) This provision very plainly has reference solely to a cause of action against the person who departs from the state. It does not suspend the operation of the statute as to a person liable on the same cause of action, who continues to reside within the state; nor was it intended to extend the time generally within which an action might be brought for the debt or the enforcement of a security collateral to the debt. It affects the remedy solely against the person who departs from the state." We are not aware that the above case was ever reviewed by the court of appeals of New York. We are aware, as heretofore indicated, that some

other courts have adopted a different rule from that announced in the above cases. But viewing the subject, as we do, in connection with prior decisions of this court, we do not find it necessary to review those cases here. This court having already adopted the same view as that of the supreme court of California,—that a debtor cannot revive a debt once barred as against a subsequent grantee of mortgaged premises without his due consent thereto,—we are disposed to adopt here the reasoning of that court in *Wood v. Goodfellow*, 43 Cal. 185, as applied to the effect of the mortgagor's absence from the state upon the running of the statute of limitations. It is there held, as shown above, that there is no difference in principle between a suspension of the statute by express waiver and that caused by the mortgagor's voluntary act in absenting himself from the state; that in either case it is the sole act of the mortgagor, performed at a time when he had lost his rightful control over the property, and when other interests had intervened, which ought not to be dependent for their protection upon the conduct of the mortgagor. This is an action to foreclose a mortgage, and it therefore comes within the provisions of 2 Ballinger's Anno. Codes & Statutes, § 4798, subd. 2, which limits the period to six years for bringing "an action upon a contract in writing or liability, express or implied, arising out of a written agreement." More than six years having elapsed between the date of the \$3,000 note and the commencement of this suit, the action is therefore barred as to the amount represented by said note, unless, for further reasons urged, it is excused from the operation of the statute. These we will now examine.

Appellant further urges that this mortgage was given to secure the payment of an entire sum, payable by instalments, and that the action upon the mortgage is not barred as to any portion of the debt until the statute has fully run against the last instalment. It is also suggested that the mortgage contains a covenant to pay the whole debt. The covenant is, however, limited to payment according to the terms of the notes. In this state a mortgage is a mere lien upon the land to secure the payment of the debt. The debt secured in this case was evidenced by certain promissory notes or obligations described in the mortgage, which severally matured at different times. Each note was the foundation for a separate cause of action, and suit might have been brought upon each note as it matured without foreclosure, or the mortgage might have been foreclosed as to each note at any time after its maturity. 2 Ballinger's Anno. Codes and Statutes, § 4796, provides: "Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued." We think the rule of limitation must be held to apply to each note as it matures. The mortgage being a mere incident to the note, and its only purpose being to secure the same, it has fulfilled its purpose, as far as the debt represented by

57 L. R. A.

the note is concerned, when there is no longer a right of action upon the note. We think, therefore, that this action is barred as to the \$3,000 note, and we need not discuss other objections urged as to why appellant cannot maintain an action thereon.

The remaining question is, Did the court err in refusing to allow interest in the full sum demanded by appellant? As heretofore stated, the notes were made to draw 3 per cent per month after maturity, compounded monthly. Respondents' counsel assert that the rate named is the equivalent of 65.7 per cent per annum. The mortgage contains no reference to any increased rate of interest. It describes the notes as bearing 8 per cent interest from date. 1 Ballinger's Anno. Codes & Statutes, § 4535, provides as follows: "All deeds, mortgages, and assignments of mortgages shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world." We think a reasonable deduction from the language of the above statute is that subsequent purchasers, who are notified of the existence of the mortgage by its record, have a right to rely upon the terms of the mortgage so recorded. We are not called upon to pass upon this question as between the maker of the notes and the mortgagee. No judgment in *personam* is here sought. Judgment in foreclosure against the lands in the hands of the grantees is all that is demanded. We therefore think the just rule is that the mortgaged lands in the hands of subsequent purchasers are not bound for a greater rate of interest than that stipulated in the mortgage as recorded, unless the purchaser may have assumed and agreed to pay a greater rate than may be stipulated in the notes, but not shown in the mortgage as recorded. 20 Am. & Eng. Enc. Law, p. 599; *Whittacre v. Fuller*, 5 Minn. 508, Gil. 401; *Gardner v. Emerson*, 40 Ill. 296; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250.

In this case the court allowed the amount of interest as shown by the mortgage of record, which, we think, was right.

The judgment is affirmed.

Reavis, Ch. J., and Fullerton, Dunbar, White, Anders, and Mount, JJ., concur.

C. B. LIVERMORE, *Respt.*,

v.

Charles E. CRANE, *Appt.*

(26 Wash. 529.)

Refusal to comply with a contract to purchase real estate, by reason of which the broker who negotiated the sale is de-

NOTE.—For other phases of the law as to rights of brokers, see the following notes in this series:

As to real-estate broker's commissions as af-

prived of his commissions, will render the intending purchaser liable for the damages thereby inflicted on the broker, although he had agreed to look to the seller for his commissions.

(December 10, 1901.)

APPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover damages which plaintiff was alleged to have suffered because of defendant's breach of contract to purchase certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Stratton & Powell, for appellant:

Plaintiff is suing the wrong person.

The only interest plaintiff had in the matter was to entitle himself to his commissions, and he earned his commissions whenever defendant entered into a contract satisfactory to the seller. His rights as a broker, whatever they were, were fixed when the contract between the parties was executed.

Greene v. Hollingshead, 40 Ill. App. 195; *Rice v. Mayo*, 107 Mass. 550; *Hodgkins v. Mead*, 29 N. Y. S. R. 671, 8 N. Y. Supp. 854; *O'Toole v. Tucker*, 16 Misc. 485, 38 N. Y. Supp. 969, *Affirmed* in 17 Misc. 554, 40 N. Y. Supp. 695; *Scott v. Clark*, 3 S. D. 486, 54 N. W. 538; *Brown v. Helmuth*, 2 Misc. 566, 21 N. Y. Supp. 615; *Barnes v. German Sav. & Loan Soc.* 21 Wash. 449, 58 Pac. 569.

It is not perceived how the plaintiff would have lost any rights, even admitting that defendant failed to keep his contract with the seller.

The circumstance, if true, that payment of plaintiff's commissions was contingent upon payment by the defendant of the purchase price, was wholly immaterial.

1 Sedg. Damages, 8th ed. § 201, pp. 216-218; *Snell v. Cottingham*, 72 Ill. 163.

There was performance of the terms of the original memorandum, and an end of the broker's relation to the matter.

Greene v. Hollingshead, 40 Ill. App. 195; *Rice v. Mayo*, 107 Mass. 550.

Defendant was not in default, even upon his contract with the seller. Plaintiff called defendant as a witness, and proved by him that after the original contract was made the seller and defendant entered into a new agreement whereby the seller, in consideration of a payment of the sum of \$300, released defendant from further obligation under the old contract, and allowed him an option on the property for a year. This was a substituted performance, as it is called in some cases, or an accord and satisfaction, and terminated the original contract.

Leete v. Norton, 43 Conn. 219; *Merry v. Allen*, 39 Iowa, 235; *Babcock v. Hawkins*, 23 Vt. 561; *Woodward v. Miles*, 24 N. H.

affected by the negligence, fraud, or default of the principal and a defective title, see *note* to *Brackenridge v. Claridge* (Tex.) 43 L. R. A. 593.

As to when real-estate broker is considered as the procuring cause of the sale or exchange 57 L. R. A.

289; *Allison v. Abendroth*, 108 N. Y. 470, 15 N. E. 606; *Tomlin v. M'Chord*, 6 J. J. Marsh. 4.

And the plaintiff's right to his commission from the seller then became absolute, even under the terms of his contract with her.

Parker v. Walker, 86 Tenn. 566, 8 S. W. 391; *Shainwald v. Cady*, 92 Cal. 83, 28 Pac. 101; *Greene v. Hollingshead*, 40 Ill. App. 195; *Bishop v. Averill*, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024.

Mr. H. B. Huntley, for respondent:

The plaintiff's cause of action rests upon the written memorandum of an agreement to buy if certain terms could be met, and when these terms were secured by Mr. Livermore the memorandum became a binding contract.

1 Parsons, Contr. §§ 450 *et seq.*; *Goodpastor v. Porter*, 11 Iowa, 161; *Willets v. Sun Mut. Ins. Co.* 45 N. Y. 45, 6 Am. Rep. 31.

If this memorandum ever became a binding contract between plaintiff and defendant the plaintiff has a cause of action against the defendant, Crane, for its breach.

The plaintiff performed his part of the contract when he secured the terms specified from Mrs. Brittain.

A part of the consideration which induced the plaintiff to act was that the defendant would make the payments as stated. He had a right to rely on this; he did rely upon it; and if he has been damaged by the defendant's nonperformance, he can recover.

Cavender v. Waddingham, 2 Mo. App. 551; *Atkinson v. Pack*, 114 N. C. 597, 19 S. E. 628.

The principle in our case is the same as where an agent procures an enforceable contract for his principal, and then the principal voluntarily releases the party bound. The principal is liable for the commission.

Granger v. Griffin, 43 Ill. App. 421; *Foster v. Wynn*, 51 Ill. App. 401.

Damages are given on breach of contract for gains prevented, as well as for losses incurred.

Heinemann v. Heard, 50 N. Y. 37; *Messmore v. New York Shot & Lead Co.* 40 N. Y. 422; *Fox v. Harding*, 7 Cush. 522; *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 327, 14 L. ed. 166.

Reavis, Ch. J., delivered the opinion of the court:

The complaint, in substance, alleges that in May, 1898, defendant agreed in writing with plaintiff, who is a real-estate broker: That defendant would purchase certain property in Seattle from Mrs. Brittain, and pay for it on the following terms, if plaintiff would procure such terms from the owner, to wit: The full purchase price to be \$11,000; \$200 to be paid at the time of making the contract of purchase, \$800 payable in sixty days, \$1,000 payable in ninety days,

effected, see *note* to *Hoadley v. Savings Bank* (Conn.) 44 L. R. A. 321.

As to performance by real-estate broker of his contract to find a purchaser or effect an exchange of his principal's property, see *note* to *Lunney v. Healey* (Neb.) 44 L. R. A. 593.

\$3,000 payable in one year, \$3,000 payable in two years, and \$3,000 payable in three years from the date of the contract, with interest on deferred payments at 8 per cent per annum. At the time of making the agreement it was understood and agreed that plaintiff was to get his commission of \$500 for making the sale from the owner, Mrs. Brittain. That plaintiff, relying upon the agreement with defendant, performed services and induced the owner to sell the property for the price upon the terms proposed, and plaintiff by his efforts brought about a meeting of the defendant and the owner of the property, and procured a written contract satisfactory to both parties to be executed by them, by which, among other things, Mrs. Brittain agreed to sell, and the defendant to buy, the property upon the terms and for the price hereinbefore stated, and the sum of \$200 was paid as the first payment at the execution of the contract. At the time plaintiff induced Mrs. Brittain to sell the property upon the terms and conditions mentioned, she agreed to pay the plaintiff \$500, as his commission on the transaction; \$50 of said amount to be paid at the time of the execution of the contract, \$200 at the time provided for the second payment, and the remainder, \$200, after the third payment should be made by defendant as provided in the contract. That plaintiff has kept and performed all the terms and conditions of his contract with the defendant and the owner of the property, and Mrs. Brittain has kept and performed all of the conditions of the contract of sale by her to be performed, and has been ready at all times, and still is ready, to convey the property to the defendant, but the defendant has failed, refused, and neglected to purchase or pay for the property as he agreed to do. That the plaintiff has been damaged by defendant's failure and breach of the contract to purchase in the sum of \$450, and that plaintiff has lost the remainder of the commission which he should have received from the owner of the property if the contract had been performed. A demand has been made upon defendant for the payment of said \$450. Defendant filed a general demurrer to the complaint, which was overruled, and a jury having been waived, the trial was before the court.

The evidence adduced is sufficient to support the findings of fact. The effect of the findings is to sustain the allegations of the complaint. With this view of the record, the only question arising is upon the demurrer to the complaint,—Did the complaint state a cause of action? It is urged by counsel for appellant that plaintiff has mistaken his remedy and sued the wrong person, that the only interest plaintiff had in the contract of sale was his commission, which was earned when the contract was executed. But it will be observed that the contract with Mrs. Brittain was that she should pay plaintiff's commission in accordance with the performance of the contract of sale by the defendant. The essence of plaintiff's action here is the claim for damages sustained

by him because of defendant's breach of the contract to purchase the premises from Mrs. Brittain. A pertinent discussion of some of the phases of this case may be found in *Bishop v. Averill*, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024. Of the authorities to which we have been referred, only two seem to be directly in point. One is that of *Cavendar v. Waddingham*, 2 Mo. App. 551. In that case the defendant employed plaintiffs to purchase for him real estate from Messrs. Scudder for a stated price, and it was understood that plaintiffs' commissions were to be a certain per cent of the purchase price, but it was stipulated by defendant that this should be paid by the Messrs. Scudder. The purchase of the real property was made in accordance with defendant's direction, and thereafter defendant refused to pay the purchase price and receive the deed. Plaintiffs lost their commission. The court observed: "The first question to which our attention is directed is whether, upon the facts stated, the plaintiffs had any right of action against the defendant. It is argued that they had none, because it was expressly stipulated that their commissions were to be paid by the Messrs. Scudder, and not, in any event, by the defendant; that this is an attempt to hold a party responsible for violating his contract, not with the party suing, but with a third party,—the defendant here having violated none except that made through the plaintiffs, Messrs. Scudder. But this argument ignores the prominent fact that there were two distinct contracts. One was made by defendants through his agents, in the purchase of the property. The other was made with the agents, in securing their services to bring about the purchase. The latter is the subject of the present suit." The second case mentioned is *Atkinson v. Pack*, 114 N. C. 597, 19 S. E. 628, where it was, in effect, determined that a real-estate broker negotiating a sale of land for a person who agreed with him in writing to convey it to the intending purchaser, from whom he was to receive his commission, may maintain an action for breach of contract upon refusal of such person to convey, upon showing that the purchaser was ready to take and pay therefor. It was said in this case: "There were plainly two contracts made by plaintiffs, the one with defendant, the effect of which was that plaintiffs would provide a purchaser of the land at the agreed price, commissions to be paid by the purchaser; the other with the purchaser, that he would pay the plaintiffs' commissions upon the conclusion of the sale. If through the negotiation of plaintiffs the parties had been brought together, and had concluded the trade between them, the plaintiffs would have been entitled to their commissions from Harding the purchaser according to the terms of the contract. But this action is for damages. The gravamen of the charge is that defendant committed the wrong and injury upon plaintiffs by a refusal, without cause, to comply with his contract with plaintiffs to sell the land to plaintiffs' principal, with the distinct un-

derstanding that plaintiffs were to be compensated by the purchaser. The natural effect and consequence of this refusal by defendant was the loss by plaintiffs of their commissions." It would seem to be immaterial whether in the original negotiation or the sale the plaintiff was the agent of the vendor or the purchaser. The complaint here is for the violation of the contract to purchase, from which violation damages directly result to plaintiff.

The judgment is affirmed.

Dunbar, Anders, and Mount, JJ., concur.

Walter J. REED *et al.*, Appts.,
v.
Thomas JOHNSON *et al.*, Respts.

(.....Wash.....)

1. Specific performance will not be enforced of an agreement to convey an interest in land to one for services in securing the location of a railroad depot thereon, where he has agreed to divide with certain officials of the road all money received by him from sales of land during the construction of the road, since its tendency is to induce the officers of the corporation to disregard their duties to it, and it is therefore against public policy.
2. The right to insist on the illegality of a contract of which specific performance is sought is not waived by failure to plead it.
3. Validity cannot be given to an illegal contract by estoppel.
4. No recovery can be had for losses which have arisen under an illegal contract.

(December 24, 1901.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Kittitas County in favor of defendants in an action for an accounting and partition of certain real estate in which a cross complaint was filed for an accounting and a conveyance of a portion of the real estate. *Reversed in part.*

The facts are stated in the opinion.

Messrs. Graves & Englehart, for appellants:

Specific performance of a contract will not be enforced, unless it is reasonable, certain, legal, mutual, is based on a valuable or meritorious consideration, and the party seeking specific performance has been prompt in asserting his rights.

Darling v. Cumming, 92 Va. 521, 23 S. E. 880; 22 Am. & Eng. Enc. Law, 1st ed. p. 1006; *Barton v. Spinning*, 8 Wash. 458, 36 Pac. 439.

One of the elements of an enforceable con-

NOTE.—As to right to enforce contract by railroad company to maintain depot at particular place, see, in this series, *Florida C. & P. R. Co. v. State ex rel. Tavares* (Fla.) 20 L. R. A. 419.

For another case as to contract by railroad company to maintain depot, see *Texas & P. R. Co. v. Scott* (C. C. App. 5th C.) 37 L. R. A. 94, 57 L. R. A.

tract is that it binds all of the parties, and is capable of specific performance and enforcement against all.

Barton v. Spinning, 8 Wash. 458, 36 Pac. 439; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955; *Norris v. Fox*, 45 Fed. 406.

Equity will not assume jurisdiction to compel the specific performance of a contract that is illegal in any of its features. The least taint of illegality or want of equity will preclude a decree.

22 Am. & Eng. Enc. Law, 1st ed. p. 1014.

All contracts which tend to place the officers of a corporation under an inducement to disregard their duties to it, and to decide questions affecting the action of the corporation from a standpoint other than that of its best interests, are illegal.

Woodstock Iron Co. v. Richmond & D. Extension Co. 129 U. S. 643, 32 L. ed. 819, 9 Sup. Ct. Rep. 402; *West v. Camden*, 135 U. S. 507, 34 L. ed. 254, 10 Sup. Ct. Rep. 838; *Jackson v. McLean*, 35 Fed. 213; *Holladay v. Patterson*, 5 Or. 177; *Fuller v. Dame*, 18 Pick. 472; *Bestor v. Wathen*, 60 Ill. 138.

Nonenforcement of illegal contracts is a common matter of public interest, and a party thereto cannot at any time waive his right to set up the defense of illegality in an action thereon by the other party.

Embrey v. Jemison, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Coppell v. Hall*, 7 Wall. 542, 19 L. ed. 244; *Cardozo v. Swift*, 113 Mass. 250; *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. 724.

The defendants may set up the defense of illegality, though such defense was not specifically pleaded.

Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 266, 26 L. ed. 542; *Sheldon v. Pruesner*, 52 Kan. 579, 22 L. R. A. 709, 35 Pac. 201; *Craig v. Missouri*, 4 Pet. 426, 7 L. ed. 909; *Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 131; *Wight v. Rindskopf*, 43 Wis. 344.

Even when the defendants do not set up the defense of illegality, but such illegality appears from the case as made by either the plaintiffs or the defendants, it becomes the duty of the court *sua sponte* to refuse to entertain the action.

Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539; *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. 724; *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735; *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068; *Schmidt v. Barker*, 17 La. Ann. 261, 87 Am. Dec. 527; *Bowman v. Gonegal*, 19 La. Ann. 328, 92 Am. Dec. 537; *Clafin v. United States Credit System Co.* 185 Mass. 501, 43 N. E. 293; *Fowler v. Scully*, 72 Pa. 456, 13 Am. Rep. 699.

Where a contract is brought before the supreme court for construction and adjudication its validity is necessarily involved, and the court will consider its validity and hold it void, even though the question was not presented below, and was allowed by

counsel on both sides to pass without discussion in the supreme court.

Richardson v. Buhl, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *Glofin v. United States Credit System Co.* 185 Mass. 501, 43 N. E. 203.

Validity cannot be given to an illegal contract through any principle of estoppel.

1 Warvelle, Vendors, p. 162; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; *Durkee v. People ex rel. Askren*, 155 Ill. 354, 40 N. E. 626; *Brown v. First Nat. Bank*, 137 Ind. 655, 24 L. R. A. 206, 37 N. E. 158; *Re True*, 120 Cal. 352, 52 Pac. 815.

An option of purchase, or a unilateral contract for the purchase of land, confers upon the party purchasing no interest or estate in the land, and the right granted must be exercised within the time specified in the agreement, and the conditions precedent, if any, must be faithfully and punctually observed. Time is always of the essence of such a contract.

1 Warvelle, Vendors, p. 187; 28 Am. & Eng. Enc. Law, 1st ed. p. 77; *Waterman v. Banks*, 144 U. S. 394, 36 L. ed. 479, 12 Sup. Ct. Rep. 646; *Richardson v. Hardwick*, 106 U. S. 252, 27 L. ed. 145, 1 Sup. Ct. Rep. 213; *Bastwick v. Hess*, 80 Ill. 138; *Longfellow v. Moore*, 102 Ill. 289; *Steele v. Bond*, 32 Minn. 14, 18 N. W. 830; *Dennstaldt v. Smith*, 51 N. Y. 628.

Where a contract grows immediately out of, and is connected with, an immoral or illegal act, a court of justice will not lend its aid to enforce it.

Barton v. Port Jackson & U. F. Pl. Road Co. 17 Barb. 397; *Deans v. McLendon*, 30 Miss. 343; *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415; *Branch v. Haas*, 16 Fed. 53; *Wooten v. Miller*, 7 Smedes & M. 380; *Gunter v. Leckey*, 30 Ala. 591; *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253; *Scott v. Duffy*, 14 Pa. 18; *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 564; *Reynolds v. Nichols*, 12 Iowa, 398; *Hale v. Henderson*, 4 Humph. 199; 15 Am. & Eng. Enc. Law, 2d ed. 992; *Barile v. Nutt*, 4 Pet. 184, 7 L. ed. 825.

Contracts to influence the action of corporate officers are void as against public policy.

Bliss v. Matteson, 52 Barb. 335; *Berryman v. Cincinnati Southern R. Co.* 14 Bush, 755; *Cook v. Shipman*, 24 Ill. 614, 51 Ill. 316; *Bermudez Asphalt Paving Co. v. Critchfield*, 62 Ill. App. 221; *Hutchen v. Gibson*, 1 Bush, 270; *Devlin v. Brady*, 32 Barb. 518.

Meers. Charles F. Munday and E. E. Wager, for respondents:

The fact that an agreement is optional as to one of the parties, and obligatory as to the other, does not destroy its mutuality.

Cherry v. Smith, 3 Humph. 19, 39 Am. Dec. 150; *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372.

Where the owner of lands gives to another an option of purchase, and imposes certain conditions upon the party to whom the option is given, which have been by him duly observed and performed, the performance of

the conditions amounts to an acceptance, and creates a mutuality and a consideration for the agreement to convey.

1 Warvelle, Vendors, 187, 188.

Mere lapse of time will not bar a decree for specific performance, when it has not been made material by the agreement.

Louisville & N. R. Co. v. Illinois C. R. Co. 174 Ill. 448, 51 N. E. 824; *Harrigan v. Smith*, 57 N. J. Eq. 635, 40 Atl. 13, 42 Atl. 579; *Love v. Watkins*, 40 Cal. 547, 6 Am. Rep. 624.

Hrdley, J., delivered the opinion of the court:

Appellants are now, and prior to the 13th day of July, 1886, were, husband and wife. On and prior to the date above named they were the owners of certain real estate situated in Kittitas county, Washington; and on said date they executed and delivered to the respondent Thomas Johnson a written instrument, denominated a "bond for deed," which was of the following tenor and effect: In consideration of the sum of \$1, and the further efforts of said Johnson to secure the establishment of a railroad depot by the Northern Pacific Railway Company upon section 26 in township 20 N., range 15 E., W. M., the appellants obligated themselves to convey unto said Johnson by good and sufficient warranty deed, a one-half interest in the real estate to which reference was first above made. They further obligated themselves that within ten days after said Johnson should give them reasonable assurance of the establishment of such depot within the boundaries of said section, and after the platting of the whole or any portion of the land described in the written instrument into residence and business lots and blocks, they would convey to the order of said Johnson each alternate quarter block of lots so platted. They further agreed that at any time within one year from the surveying and platting of the first part or parcel they would, upon notice from Johnson, in like manner convey each alternate quarter block of lots that should within that time be platted, in addition to the part that should be first laid out. The expense of surveying, platting, and recording was to be borne by Johnson, and appellants were to continue the occupancy and use of those portions of the land which should remain unplatted. On or about the 26th day of July, 1886, about 65 acres of the tract covered by the aforesaid agreement was platted under said agreement, and designated as the "Town of Cle Elum." Thereafter, on the 2d day of August, 1886, a further agreement was executed and signed by appellant Walter J. Reed and respondent Thomas Johnson, as follows: "For the mutual advantage and accommodation of the parties hereto, it is hereby agreed that for ninety days from and after this date, and so much longer as may be mutually agreeable to the parties concerned, the division of lots, by quarter blocks, in the town of Cle Elum, Wash. Terr., contemplated and provided for in that certain bond for deed, executed and deliv-

ered by Walter J. Reed and Barbara A. Reed, his wife, to Thomas Johnson, shall be, and hereby is, deferred, and that pending the termination of this agreement through lapse of time or mutual consent the sale of lots in the town aforesaid shall be conducted indiscriminately; the proceeds being divided equally between the said Walter J. Reed and Thomas Johnson, their heirs, legal representatives, or assigns. Upon termination of this agreement as above provided, the division of lots provided for, by quarter blocks or fractional parts thereof, shall then be made, in so far as practicable, according to the terms and conditions of the bond for deed hereinbefore referred to." The appellants brought this suit against respondent, and in the complaint allege that the lands platted as above stated, and known as the "Town of Cle Elum," are the only lands that have been platted under the said contracts between the parties. It is also averred that appellants, since the execution of said contracts, have paid out large sums of money from their own personal funds for the maintenance and benefit of the town site so platted, which sums have not been repaid to them by anyone or in any way, and which are a charge against said platted town site and the proceeds thereof; that appellants have advanced said Thomas Johnson large sums of money at divers times since July 26, 1886, on account of the interest of respondents in said town site under said contracts, which amounts were to be charged against the interests of respondents therein, and the same have not been paid; that said Thomas Johnson has received large sums of money from the sales of lots in said town site, and from other sources in connection therewith, said sums being in excess of his just proportion, and for which excess he is now indebted to appellants, the same being a just and proper charge against the interests of respondents; that appellants have at all times been ready and willing to comply with all the terms and conditions of said contracts to be by them performed, and have frequently demanded of respondent Thomas Johnson that the accounts between him and them on account of the said town-site transactions be balanced and closed; that the lands be divided according to the terms of said contracts, and that the contracts be terminated; that said Johnson refuses to make a settlement of said accounts, or permit a division of said lots to be made according to the terms of said contracts, and wrongfully holds said contracts as a cloud on the title to all of the lands described in said original agreement, whether the same are platted and subject to said agreement, or whether they are unplatted and not subject thereto, all of which is alleged to be to the great injury and detriment of appellants. It is alleged that the respondent Ann Johnson claims some interest in said property under said contracts as the wife of said Thomas Johnson. The complaint prays that an accounting be taken between the parties; that the accounts thereof be set-

tled, stated, and closed; that a proper division and partition of the lots in said platted town site be made; and that said contracts be terminated and canceled. The respondents answered the complaint by way of denials, and also by way of an affirmative defense and cross complaint. In the cross complaint it is alleged, in addition to the facts alleged in the complaint concerning the contracts and the platting of lands thereunder, that on the 30th day of April, 1888, and on the 9th day of May, 1899, respectively, further and additional plats were filed upon other portions of said lands not included in the first plat, which is the only one described in the complaint. It is also alleged that, since the execution of said agreement and said original plat and supplemental plat, appellants have made sales of a large portion of the lots and blocks in the town of Cle Elum, have made conveyances thereof, and have received large sums of money therefor; that portions of the moneys so received have from time to time been paid to the respondent Thomas Johnson, but much less than his just proportion thereof; that said Johnson has paid out on account of said lands large sums of money for taxes, surveying, and platting, and other expenses incident thereto, which sums have not been repaid, and are a charge against said lands and the proceeds thereof; that said Johnson has at various times since July, 1886, advanced to appellant Walter J. Reed large sums of money. It is alleged that respondent Thomas Johnson has at all times been ready to comply with all the conditions of said agreement and supplemental agreement to be by him performed, and has demanded of appellant Walter J. Reed that the accounts between them be settled, and that said lands, both platted and unplatted, be divided according to the terms of said agreement, which demand has been refused by said Reed. The cross complaint asks an accounting, and also a conveyance to respondents of one half of all unsold portions of said land, both platted and unplatted. The answer to the cross complaint denies many of these allegations, and affirmatively pleads the statute of limitations as to all demands stated in the cross complaint which do not relate to the cause of action, and demands arising out of the original plat described in the complaint as the "Town of Cle Elum." Upon the issues thus formed the parties went to trial. The cause was tried by the court without a jury, and resulted in a decree to the effect that upon the issue raised by the respective demands for an accounting there was no balance owing to either party, but that respondents are entitled to a conveyance of one half of all the unsold lots and blocks included within the three plats named, and also one half of the unplatted portion of said lands. From said decree this appeal is prosecuted.

No error is assigned as to the finding of the court on the question of accounting. It is assigned as error that the court granted the demands of respondents as to any lands outside of the original plat of the town site

of Cle Elum, and also that the court refused to find that respondents were barred by the statute of limitations as to any demands concerning lands outside of said original plat. We will, however, confine ourselves to the discussion of the following assignment of error: "The court erred in decreeing the conveyance of any of the lands mentioned in the contract on July 13, 1886, for the reason that said contract is void because of uncertainty, lack of mutuality, want of consideration, and as being against public policy." It will be remembered that the consideration for the original agreement between the parties was stated to be the efforts of respondent Thomas Johnson to secure the establishment of a railroad depot by the Northern Pacific Railway Company within the boundaries of the same section which included the lands of appellants. The respondent Johnson stated in his testimony that he had an agreement with three officers of the Northern Pacific Railway Company by which each was to receive a one-fourth interest in the proceeds of whatever lots appellants would convey under their said agreement with Johnson. The consideration for the agreement between these officers and Johnson was that the officers were to cause the depot to be established within the section above named. This arrangement between Johnson and the officers of the railroad company was entered into before the contract between Johnson and appellants was executed. Johnson testified as follows:

Q. In regard to the interest which Huson and Buckley and Bullock had,—how did that in any way affect the interest of Mr. Reed?

A. It didn't affect him any.

Q. In whose interest did they have an interest?

A. In mine. I gave them one eighth of all the money that I got until after the railroad was complete, in '88, for their services in the railroad line and putting the depot at Cle Elum.

Q. Mr. Johnson, what was the consideration which you gave Mr. Reed for entering into this contract?

A. I gave him consideration that I would have a depot there established. I would have the railroad line changed from the west side on the south over on that side, which I did, and had to pay for it, though.

Q. Now, who had any interest in this, besides yourself, in this deal with Reed?

A. During all that time, Mr. Bogue and Huson.

Q. Anyone else?

A. Mr. Bullock.

Q. And you accounted to them for half of the money that you got?

A. I accounted to them for one eighth of the money,—each one of them.

Q. Mr. Johnson, you stated that certain gentlemen connected with the Northern Pacific Railroad Company had an interest with you in those lots. Has that interest been extinguished?

57 L. R. A.

A. They had no interest in the lots with me; they had an interest in the money that I got for the sale of lots at the time they were building the railroad.

Q. They had an interest for whatever lots you should sell while they were building?

A. While they were building, they got their money on it.

Q. That is all the interest?

A. That is all the interest they had.

Q. Whether that would be one lot or ten lots, they should have an interest in whatever money?

A. Each one of them had an interest in one eighth of the money that we took in for the sale of the lots.

Q. Did you make this agreement before or after you made your contract with Reed?

A. I think it was before.

Q. Did they have any interest in any unplatted portions of this land?

A. They had no interest in any of the ground, but the money that we sold lots for. If we sold the whole thing, they got, each of them, an eighth.

Q. That was the extent of the contract? In other words, they took you for one half of the money,—all your interest from the sale of lots during the time the railroad was being constructed?

A. No; they didn't take my half of the money, at all.

Q. One half of the interest?

A. They took—My interest was divided into four parts. The sale of lots was divided into four parts, and the money was divided.

Q. During the time the railroad was being constructed from where?

A. To Tacoma, from where it was already built to.

Q. The amount of their interest depended upon the length of time they were to keep the railroad building?

A. We were not very particular about it. We didn't stick them right down to it. They got a good deal of money after the railroad was built.

The above testimony was undisputed. Appellants proposed the following finding of fact based upon said evidence: "That the agreement hereinbefore mentioned was entered into by the said Thomas Johnson for and on behalf of certain officers of the Northern Pacific Railroad Company, who then had charge of the construction of the line of railway of the Northern Pacific Railroad Company through and near said lands, and that the consideration of said contract was that said officers having charge of the location of said line of railway should locate the depot of said railway company within the limits of said tract of land." Said proposed finding was by the court refused, and exception thereto was taken. Appellants also proposed the following conclusion of law: "That said agreement aforesaid having been made for and on behalf of the officers of a public corporation known as the Northern Pacific Railroad Company, and whose duty it was to locate

depots at such points as would suit the public needs and convenience, and the sole consideration for said agreement being the location of said depot for the use of the public upon the above-described lands, the said agreement was and is without consideration and void." Said proposed conclusion was refused, and exception was thereto taken. In refusing to make said finding and conclusion, we think the court materially erred. The respondents by their cross complaint were asking for a specific performance of the contract, by decreeing a conveyance to them of the lands claimed by them under their contract. Before they are entitled to the relief of specific performance, it must appear that the contract which they seek to enforce has all the elements of an enforceable contract. If the contract is illegal and void for reasons of public policy, specific performance will not be enforced. "Equity will not assume jurisdiction to compel the specific performance of a contract that is illegal in any of its features. If the nature of the contract is such that its enforcement would be in violation of public policy, specific performance will not be granted. The least taint of illegality or want of equity will preclude a decree." 22 Am. & Eng. Enc. Law, 1st ed. p. 1014, ¶ 4. Was the contract between the parties here such as is contemplated in the above statement of the law? It is a general rule that contracts which tend to place the officers of a corporation under an inducement to disregard their duties to the corporation, and to decide questions affecting the action of the corporation from a standpoint other than that of the best interests thereof, are illegal and void. The evidence in this case discloses that certain officers of the Northern Pacific Railway Company, in consideration that they should receive a portion of the proceeds of sales of appellants' lands, agreed to so locate the line of said road that it would run through the section 26 described in the contract between these parties, and further agreed to erect a depot within said section. The testimony of Johnson is to the effect that the company contemplated building its line upon another route, but, by reason of the inducement above stated, the officers having in charge the location of the line and depot determined to change the route and locate both the tracks and depot upon said lands. It is manifest that such a personal inducement acted upon by the officers of the company, having in view their private gain, would not leave them free to act in all respects as might best subserve the interests of the corporation with whose interests they were intrusted. It is urged by respondents that the officers of the company were not parties to this contract. It is true, they are not named in the contract; but it appears from the evidence in the case that before Johnson made the agreement with appellants these officers had negotiated with Johnson to the effect that, if he should procure such a contract from appellants, they would in consideration of sharing in its benefits, make the location of

the depot within said section. Johnson had no power to make the location. The persons who held that power agreed to make it if Johnson would procure certain specified compensation for them from appellants. In making the contract, Johnson, in effect, occupied the position of one simply acting between the principal parties concerned. In the arrangement that was made, Johnson stood in the position of a trustee for the officers, since he was to account to them for a specified share of the proceeds of all lands sold. We believe the relations of the officers of the company to this contract were such as cast upon it the taint of illegality, and rendered it void as being against public policy, under the authorities we shall hereinafter discuss. This is true even though the contract, upon its face, appears to have been made with Johnson alone. The officers' interests in the results of the contract aggregated three times as much as the interest of Johnson, and from that fact, together with the further fact that the necessary power to act in the premises resided with the officers, it follows logically that Johnson must have been entirely under the control and direction of the officers, and he therefore became *particeps criminis* in the illegality of the transaction.

In the case of *Bestor v. Wathen*, 60 Ill. 138, a contract was involved which was similar to the one here under consideration. The construction firm that was building the railroad, together with the president of the railroad company and another of its directors, and also its construction agent, entered into a contract with the owners of 160 acres of land situated where the road then in process of construction was expected to cross the Illinois Central Railroad, by the terms of which the owners agreed to sell the first-named parties an interest in the land. No money was to be paid by the purchasers, but the land was to be laid out into town lots and sold. The first proceeds of the same, to the amount of \$4,800, were to be retained by the owners, and when this sum was received they were to convey to the other parties an undivided half of the residue of the land. The only consideration for the agreement was that the so-called purchasers should "aid, assist, and contribute to the building up of a town on said land." Precisely as is sought by the cross bill in this case, the so-called purchasers in that case brought suit against the owners of the land, asking for an account of sales, and for conveyance of an undivided half of the lots unsold. The court refused to enforce the contract and dismissed the bill. The language of the court in discussing the principle involved is of great emphasis and weight. The necessary space forbids an extensive quotation from the opinion, but the following extract is particularly pertinent: "A court of equity will not enforce a contract resting upon such official delinquency, or even tending to produce it. Such is the character of the contract before us. If we enforce it, we lend the sanction of the court to a class of

contracts the inevitable tendency of which is to make the officers of these powerful corporations pervert their trusts to their private gain at the price of injury at once to the stockholders and to the public. Rendered into plain English, the contract in this case was a bribe on the part of Wathen and Gibson to the president and other officers of the railway company, and to the contractors who were building the road, of an undivided half of 160 acres of land, in consideration of which the road was to be constructed on a certain line, and a depot built at a certain point. . . . In this particular case no wrong may have been done, and yet public policy plainly forbids the sanction of such contracts, because of the great temptation they would offer to official faithlessness and corruption." The principle adopted in the above case is sustained by the following authorities: *Fuller v. Dame*, 18 Pick. 472; *Holladay v. Patterson*, 5 Or. 177; *Bliss v. Matteson*, 52 Barb. 335; *Berryman v. Cincinnati Southern R. Co.* 14 Bush, 755; *West v. Camden*, 135 U. S. 507, 34 L. ed. 254, 10 Sup. Ct. Rep. 838; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 643, 32 L. ed. 819, 9 Sup. Ct. Rep. 402. In the last-named case the court said: "The business of the extension company was one in which the public was interested. Railroads are for many purposes public highways. They are constructed for the convenience of the public in the transportation of persons and property. In their construction without unnecessary length between designated points, in their having proper accommodations, and in their charges for transportation, the public is directly interested. Corporations, it is true, formed for their construction, are private corporations; but, whilst their directors are required to look to the interests of their stockholders, they must do so in subordination to and in connection with the public interests, which they are equally bound to respect and subserve. All arrangements, therefore, by which directors or stockholders or other persons may acquire gain by inducing those corporations to disregard their duties to the public, are illegal and lead to unfair dealing, and, thus being against public policy, will not be enforced by the courts." It will be noted that the language of the above opinion not only applies the rule to directors or stockholders, and declares that all arrangements by which they may acquire gain by inducing these corporations to disregard their duties to the public are illegal, but also applies the same rule to "other persons;" the words being particularly applicable to the claim made in this case that Johnson, not being an officer of the railway company, is entitled to have his contract enforced. Further addressing ourselves to the last-named point, we refer to the case of *Embrey v. Jenison*, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776. The contract involved in that case was a wagering contract, and it was held that the broker who negotiated between the parties for the purpose of entering into the illegal agreement was

particeps criminis, and could not recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction. In the case of *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468, the following instruction was given to the jury below: That where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it; and if the contract be in fact only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it. The instruction was sustained by the Supreme Court of the United States in an opinion rendered by Mr. Chief Justice Marshall. The learned jurist says the law was correctly stated by the trial court. To the same effect are the following cases: *Barton v. Port Jackson & U. F. Pl. Road Co.* 17 Barb. 397; *Deans v. McLendon*, 30 Miss. 343; *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415; *Branch v. Haas*, 16 Fed. 53; *Gunter v. Leckey*, 30 Ala. 591; *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 564; *Bartle v. Nutt*, 4 Pet. 184, 7 L. ed. 825; 15 Am. & Eng. Enc. Law, 2d ed. p. 992.

It cannot be successfully urged that appellants have waived objection to the illegality of this contract by not specially pleading the same. The nonenforcement of illegal contracts is a matter of common public interest, and a party to such contract cannot waive his right to set up the defense of illegality in an action thereon by the other party. It is not necessary to specially plead the defense of illegality, but, when the same is made to appear to the court at any stage of the case, it becomes the duty of the court to refuse to entertain the action. The above statements of the law are sustained by the following cases: *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Coppell v. Hall*, 7 Wall. 542, 19 L. ed. 244; *Cardozo v. Swift*, 113 Mass. 250; *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. 724; *Sheldon v. Pruessner*, 52 Kan. 579, 22 L. R. A. 709, 35 Pac. 201; *Craig v. Missouri*, 4 Pet. 410, 7 L. ed. 903; *Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 131; *Wight v. Rindskopf*, 43 Wis. 344; *Krcamer v. Earl*, 91 Cal. 112, 27 Pac. 735; *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068; *Schmidt v. Barker*, 17 La. Ann. 261, 87 Am. Dec. 527; *Claffin v. United States Credit System Co.* 165 Mass. 501, 43 N. E. 293; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 102. The appellants are not estopped to raise the illegality of the contract because of their course of dealing with respondents under the contract. Validity cannot be given to an illegal contract through any principle of estoppel. 1 Warvelle, Vendors, p. 162, § 4; *Durkee v. People ex rel. Askren*, 155 Ill. 354, 40 N. E. 626; *Brown v. First Nat. Bank*, 137 Ind. 655, 24 L. R. A. 206, 37 N. E. 158; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808. While one is not estopped to raise the illegality of a contract, yet he is not enti-

tled to recover for losses thereunder. In *Houcell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415, the court said: "The law leaves the parties to such a contract where it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practised fraud, which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from one to the other, or to equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws."

The trial court found that neither party was entitled to recover anything upon an accounting, which was right. But in the

light of the foregoing authorities, that portion of the court's findings and judgment which awarded and decreed specific performance in favor of respondents must be set aside. *To that extent the judgment is reversed*, and the cause remanded, with instructions to the lower court to modify the judgment to the extent of decreeing that the contracts between appellants and respondents dated, respectively, July 13, 1886, and August 2, 1886, shall be canceled and terminated, and shall be removed and extinguished as a cloud upon the title of appellants to the unsold portions of the lands described therein.

Reavis, Ch. J., and Fullerton, Dunbar, Anders, and Mount, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Marianna VIETH

v.

HOPE SALT & COAL COMPANY, Plff. in Err.

(.....W. Va.....)

- *1. Where one places a steam boiler upon his premises, and operates the same in lawful business with care and skill, so that it is no nuisance, in the absence of proof of fault or negligence in him, he is not liable for damages to his neighbor occasioned by the explosion of the boiler.
2. A presumption of negligence does not arise from the mere fact of the explosion of a steam boiler used by one engaged in lawful business. Negligence on his part must be shown.
3. While two special questions covering the same inquiry should not be put to a jury, yet if one covering some matter of another is so drawn as to more definitely and pointedly inquire as to a particular matter controlling the case it should be given.

(March 8, 1902.)

ERROR to the Circuit Court for Mason County to review a judgment in favor of plaintiff in an action brought to recover damages for injuries caused by the explosion of a boiler. *Reversed.*

The facts are stated in the opinion.

Messrs. John U. Myers and H. R. Howard, for plaintiff in error:

The precaution that everyone in conduct-

*Headnotes by BRANNON, J.

NOTE.—As to injury to adjoining property by escape of water from standpipe on premises, see *Defiance Water Co. v. Olinger* (Ohio) 32 L. R. A. 736.

As to negligence in escape and explosion of gas, see *Ohio Gas Fuel Co. v. Andrews* (Ohio) 29 L. R. A. 337, and *note*; *Schmeer v. Gaslight Co.* (N. Y.) 30 L. R. A. 653; *Consolidated Gas Co. v. Crocker* (Md.) 31 L. R. A. 785; *Consumers' Gas Trust Co. v. Ferrego* (Ind.) 32 L. R. A. 57.

ing a business is bound to observe is measured by what in the known course of things is likely to occur as the natural and probable consequence of the doing or not doing of an act.

No one is bound to foresee or anticipate an injury that may result from accidents remotely possible.

An accident resulting in injury to another may be remotely possible, as distinguished from accidents resulting in injury to others as the natural and probable consequences of the acts causing such accidents.

Evansville & T. H. R. Co. v. Welch, 25 Ind. App. 308, 58 N. E. 88.

No one who uses machinery is a guarantor of its safety. He is only bound to use ordinary and reasonable care in the selection, arrangement, and care thereof. He has a right to provide and use such as the experience of trade and manufacture sanctions as reasonably safe.

Stringham v. Hilton, 111 N. Y. 188, *sub nom. Stringham v. Stewart*, 1 L. R. A. 483, 18 N. E. 870; *Laffin v. Buffalo & S. W. R. Co.* 106 N. Y. 141, 60 Am. Rep. 433, 12 N. E. 599; *Burke v. Witherbee*, 98 N. Y. 562.

When an appliance or machine not obviously dangerous has been in use for a long time, and has uniformly proved adequate, safe, and convenient, its use may be continued without the imputation of imprudence or carelessness.

Stringham v. Hilton, 111 N. Y. 188, *sub nom. Stringham v. Stewart*, 1 L. R. A. 483, 18 N. E. 870; *Burke v. Witherbee*, 98 N. Y.

R. A. 146; and *Pine Bluff Water & Light Co. v. Schneider* (Ark.) 33 L. R. A. 366.

As to liability for injury to person near railroad from explosion of locomotive boiler, see *Louisville, N. A. & C. R. Co. v. Lynch* (Ind.) 34 L. R. A. 293.

As to explosion of generator of refrigerating machine, see *Ryan v. Los Angeles Ice & Cold Storage Co.* (Cal.) 32 L. R. A. 524.

562; *Laffin v. Buffalo & S. W. R. Co.* 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; *Lofthus v. Union Ferry Co.* 84 N. Y. 455, 38 Am. Rep. 533.

No one engaged in a lawful business is an insurer against unavoidable accidents.

Huff v. Austin, 46 Ohio St. 387, 21 N. E. 864; *Loose v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Spencer v. Campbell*, 9 Watts & S. 32; *Marshall v. Welwood*, 38 N. J. L. 339; *Walker v. Chicago, R. I. & P. R. Co.* 71 Iowa, 658, 33 N. W. 224; *Young v. Bransford*, 12 Lea, 232; *Cosulich v. Standard Oil Co.* 122 N. Y. 118, 25 N. E. 259; *Benedick v. Potts*, 88 Md. 52, 41 L. R. A. 478, 40 Atl. 1067.

The act which caused the explosion must be shown to be a negligent one, and this it cannot be unless it is shown that it was one which ordinary and reasonable care would have enabled the person who did it to have foreseen and provided against it.

Voight v. Michigan Peninsular Car Co. 112 Mich. 504, 70 N. W. 1103; *Schaum v. Equitable Gaslight Co.* 15 App. Div. 74, 44 N. Y. Supp. 284; *Marshall v. Welwood*, 38 N. J. L. 339, 20 Am. Rep. 394; *Earle v. Arbogast*, 180 Pa. 409, 36 Atl. 923; *Louisville, N. A. & O. R. Co. v. Lynch*, 147 Ind. 165, 34 L. R. A. 293, 44 N. E. 997, 46 N. E. 471; *Nitro-glycerine Case*, 15 Wall. 524, 21 L. ed. 206; 2 Thomp. Neg. 1227; *Black, Proof & Pleading*, p. 23; *Elliott, Railroads*, 1299; *Racine v. New York C. & H. R. R. Co.* 70 Hun, 453, 24 N. Y. Supp. 388; *Quill v. Empire State Teleph. & Teleg. Co.* 159 N. Y. 1, 53 N. E. 680; *John Morris Co. v. Southworth*, 154 Ill. 118, 39 N. E. 1099; *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707.

If one does a lawful act upon his own premises he cannot be held responsible for injurious consequences that may result from it, unless it is so done as to constitute actionable negligence.

4 Wait, Act. & Def. 701; *Rockwood v. Wilson*, 11 Cush. 221; *Johnson v. Burns*, 39 W. Va. 659, 20 S. E. 686; *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 489; *Williams v. Michigan C. R. Co.* 2 Mich. 259, 55 Am. Dec. 59; *Fahn v. Reichart*, 8 Wis. 255, 76 Am. Dec. 237; *Spencer v. Campbell*, 9 Watts & S. 32; *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864; *Cosulich v. Standard Oil Co.* 122 N. Y. 118, 25 N. E. 259.

Messrs. W. R. Gunn and Charles E. Hogg, for defendant in error:

The explosion of a boiler is within the doctrine, *res ipsa loquitur*,—the thing itself speaks.

Illinois C. R. Co. v. Phillips, 55 Ill. 194; *Young v. Bransford*, 12 Lea, 232; *Rose v. Stephens & C. Transp. Co.* 20 Blatchf. 411, 11 Fed. 438; *Posey v. Scoville*, 10 Fed. 140; *Snyder v. Wheeling Electrical Co.* 43 W. Va. 661, 39 L. R. A. 499, 28 S. E. 733; *Barnowsky v. Helson*, 15 L. R. A. 33, note, 89 Mich. 523, 50 N. W. 989; *Judson v. Giant Powder Co.* 107 Cal. 549, 29 L. R. A. 718, 40 Pac. 1020; *Houser v. Cumberland & P. R. Co.* 57 L. R. A.

80 Md. 146, 27 L. R. A. 154, 30 Atl. 906; *Illinois C. R. Co. v. Houck*, 72 Ill. 285.

The proximate cause of the injury alleged in the declaration is the defective boiler owned and operated by the defendant,—a boiler in bad condition and repair. Is it material whether it was in such condition when the defendant began its use, or whether it became so while it was using it?

Cincinnati, H. & I. R. Co. v. Revalee, 17 Ind. App. 657, 46 N. E. 352; *Lee v. Southern P. R. Co.* 116 Cal. 97, 38 L. R. A. 71, 47 Pac. 932; *Platz v. McKean Twp.* 178 Pa. 601, 36 Atl. 136; *Texas & P. R. Co. v. Williams*, 10 C. C. A. 463, 23 U. S. App. 379, 62 Fed. 440; *Folsom v. Lewis*, 85 Ga. 146, 11 S. E. 606; *Rayburn v. Central Iowa R. Co.* 74 Iowa, 637, 35 N. W. 606, 38 N. W. 520.

Brannon, J., delivered the opinion of the court:

In an action of trespass on the case in the circuit court of Mason county, brought by Marianna Vieth against Hope Salt & Coal Company, the plaintiff recovered a verdict and judgment against the defendant, and it has brought the case up to this court.

The ground of the action was that the defendant company carrying on the business of manufacturing salt, and using a boiler in its work, inflicted injury upon the plaintiff by damage done to her residence from the explosion of said boiler. We see at once that the case involves a conflict or clash between two plain rights vested in the parties to the suit. The right of the company is the right to use its own premises in legitimate lawful business. This is a constitutional right of liberty, and of the plainest import. The right of Mrs. Vieth is the right to abide upon her own premises in peace and security, free from hindrance or disturbance by anyone. She received injury from the defendant's act. Does that alone, without more, give her the right by law to call upon the company for reparation? Upon first impression we would likely answer this question in the affirmative. The plaintiff has received damage, without fault on her part, from the act of her neighbor, and it would seem plausible to say that this neighbor must make her whole. And such is the law under some decisions very well considered in England, particularly the case of *Fletcher v. Rylands*, L. R. 1 Exch. 265, where a party constructed a water reservoir upon his land, and the water burst through into some coal shafts which had been made by another party, not known to the owner of the reservoir. The owner of the reservoir was held liable for damages, upon the ground that anyone who for his own purposes brings upon his own land anything that may do mischief, or does mischief, does so at his peril, and, if injury results therefrom to another, he is prima facie answerable for all damage therefrom. But such is not the American law. That law says that the English rule detracts from the right of the owner of land to use it in legitimate business, detracts from the effi-

cacy of that ownership, cripples a plain right of ownership, and makes that owner an insurer against harm to others resulting from mere accident in the lawful use of his property. The American law does not make the mere damage a *prima facie* cause of action, but requires negligence on the part of him who inflicts the injury. That latest and best work on the subject of negligence, Thompson's Commentaries on the Law of Negligence (in vol. 1, § 14), lays down the law thus: "If, in the prosecution of a lawful act, a casualty purely accidental happens, and one which cannot be ascribed to any want of due care or skill on the part of the party sought to be made liable therefor, no matter how grievous, no action can be supported for the damage arising therefrom. The meaning is that where a man, proceeding in a lawful business, exercises reasonable care, the law does not make him an insurer of others against those consequences of his actions which reasonable care and foresight could not have prevented. The law justly ascribes such consequences to inevitable misfortune, or the 'act of God,' and leaves the harm resulting from them to be borne by him upon whom it falls. The contrary would obviously be against public policy, because it would impose so great a restraint upon freedom as materially to check human enterprise. In such cases, therefore, the law contents itself with inquiring whether any other person than the sufferer was at fault, and, if so, it requires him to reimburse the sufferer for the loss he has sustained, unless the sufferer himself was also at fault. This doctrine, however, is predicated only of unforeseen accidents, which result from the doing of lawful acts. If a person do an act which is wrongful *per se*, or in the nature of a public nuisance, he becomes, in respect of it, an insurer of the public, and is liable for any injury which may happen in consequence of it to a person in the exercise of ordinary care, irrespective of any question as to the degree of skill or diligence exercised by himself, his agents, or servants, to prevent such injury." In the notable case of *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, the case of injury from the explosion of a boiler to property of a neighbor was fully considered, and the court adopted this syllabus: "Where one places a steam boiler upon his premises, and operates the same with care and skill, so that it is no nuisance, in the absence of proof of fault or negligence upon his part, he is not liable for damages to his neighbor occasioned by the explosion of the boiler." In the case of *Cosulich v. Standard Oil Co.* 122 N. Y. 118, 25 N. E. 259, this subject is fully considered, and the results stated that one conducting lawful business is not under obligation of saving others harmless from it by inevitable accident, and he performs his duty when he uses reasonable care to save others from injury, and that he who alleges negligence as a foundation of his right to recovery must point out by evidence the defendant's fault, as the presump-

tion is, until the contrary appears, that every man has performed his duty. Thus it clearly appears that the plaintiff must show, not simply injury to her property from the explosion of the boiler, but must add to the fact of injury evidence of some negligence by the defendant. There is some evidence tending to show defect in the original construction of the boiler by reason of insufficient stay, because of the use of railroad iron for the purpose of stays; but the declaration never mentions defects in the construction of the boiler as a ground of action. A declaration for tort must specify with reasonable certainty the main or primary act of omission or commission constituting the negligence, and it cannot state one act as the cause of the damage and then allow the plaintiff to prove another. This declaration charges two acts constituting the negligence,—one that the defendant allowed the boiler to become dangerous and out of repair, and the other that the defendant misoperated the boiler, but does not charge defects in original construction. If the declaration so charged, there is no evidence to show that the defendant knew or could have known of this defect. The engine had been in use a good while and operated well. Numerous engines of the same character were used in like work in the same neighborhood. The law is as expounded in *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, that if the explosion came from defect in the manufacture of the boiler the owner is not liable, in the absence of proof that such defect was known to him, or discoverable upon examination, or by the application of known tests, and that the fact that the boiler was purchased of reputable manufacturers is proper to be considered as tending to justify its use. This boiler was carefully examined before its purchase and found to be good. It took the place of an old boiler. A witness for the plaintiff, claiming to have some knowledge of boilers, said that the boiler looked to be all right. The defendant was not bound to use in his business the very safest and best machinery. *Berns v. Gaston Gas Coal Co.* 27 W. Va. 285, 55 Am. Rep. 304. There is absolutely no evidence at all to show mismanagement of the boiler.

But the plaintiff would sustain her case on the theory that without any proof of negligence she can succeed. It is contended for her that the mere explosion of the boiler, alone and *per se*, creates, at least *prima facie*, a presumption of negligence, calling upon the defendant to repel such presumption under the doctrine known in law as *res ipsa loquitur*,—the thing itself speaks. This subject is discussed in *Snyder v. Wheeling Electrical Co.* 43 W. Va. 661, 39 L. R. A. 499, 28 S. E. 733. But does this case fall under that doctrine? Is it possible that every operator of the millions-using boilers is thus a guarantor of them against all latent defects? There is a division of authority here it is true; but the reason and the preponderance of authority are against the doctrine that the mere ex-

plosion of a boiler, without proof of some negligence, imposes upon its owner liability. The Supreme Court of the United States in *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, denied this doctrine, and held that the plaintiff must establish negligence to impose a liability for damage resulting from the explosion of a boiler. In the above-cited case of *Cosulich v. Standard Oil Co.* it was held that no presumption of negligence arises from the explosion of an oil tank in the yard of the defendant's petroleum factory causing oil to flow through a pipe and set fire to plaintiff's vessel. The court held that there is a distinction between actions for negligence where a contract relation exists between the parties, and those in which the defendant owes to the plaintiff no other duty than to use such ordinary care as the nature of the business demanded to avoid injury to others, and that in the latter class of cases, the mere fact that an accident happened to the plaintiff, without more, will not amount to prima facie proof of negligence on the part of the defendant. Such a rule as that contended for would be very dangerous, as it would make every user of a boiler an insurer against accident, and would almost put an embargo on the use of boilers in legitimate business. Much authority can be cited to support this proposition. *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864; *Young v. Bransford*, 12 Lea, 232; *Marshall v. Welwood*, 38 N. J. L. 339, 20 Am. Rep. 394. Under these principles it was error in the court to refuse the following instruction, because it propounds good law, and was vital in the case, as presenting to the jury the law put to it on the defendant's side of the case: "The jury are instructed that they cannot infer negligence from the mere explosion of the boiler. The plaintiff must prove, in addition to such explosion, such facts and circumstances as will logically raise an inference of negligence on the part of the defendant before they can find for the plaintiff. The presumption of law is that persons in the performance of a lawful act have done their duty, and this presumption continues until the contrary is proved." Without that instruction the defendant's theory of the law of the case was not presented to the jury.

The defendant asked the court to put to the jury eight special questions: "(1) Was the boiler which exploded and caused the alleged injury out of repair and defective at the time of the explosion? (2) If it was out of repair and defective at the time of the explosion, in what particular was it out of repair, and what caused it to be out of repair? (3) If it was out of repair at the time of the explosion, did it so imperil the boiler as to cause the explosion by being out of repair? (4) What caused the boiler to explode? (5) Did the defendant, by its servants and employees, operate and manage said boiler in such unreasonable manner as to cause the explosion; if so in what did the unreasonable conduct and acts of the defendant, its servants and employees, con-

sist, causing the boiler to explode? (6) If the boiler exploded by reason of defects therein, what were the defects that caused such explosion? (7) If the boiler was out of repair and defective, so as to cause it to explode, was the want of repair and defective condition occasioned by the negligent conduct of the defendant, its servants and employees? (8) If the boiler did explode by reason of being out of repair, and in a defective condition by reason of being out of repair, did the defendant know, prior to the explosion, or could it have known by the exercise of ordinary and reasonable care and inspection, of such defects in the boiler which caused the explosion?" The court put to the jury questions 1, 6, and 8, but refused the others. It seems to us that some of these questions were repetitions of others. Number 2 is fairly covered by number 6, and therefore there is no error in refusing it. Number 3 should have been given. It squarely puts the question whether the boiler was out of repair so far as to cause the explosion. That question is not squarely put by numbers 1 or 6. If answered in the negative, it would overrule the general verdict, and was therefore material. *Bess v. Chesapeake & O. R. Co.* 35 W. Va. 492, 14 S. E. 234. There was no question submitted that made the direct explicit inquiry made by this question. As held in *Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co.* 35 W. Va. 666, 14 S. E. 237, the object of a special question is to call the jury's special attention to a careful, deliberate investigation of a particular fact, distinct from other facts, and one controlling the case. Where is there any reason against number 4? It involved the pith of the case. There is no error in refusing question 5, as the court told the jury that it could not find for the plaintiff on the theory of mismanagement of the boiler. We think it was error to refuse to put question number 7.

We do not see that the evidence of Glesencamp was incompetent. He had had a long practical experience with boilers.

For these reasons we reverse the judgment, set aside the verdict, grant a new trial, and remand the case to the Circuit Court.

Fred JUDY

v.

C. G. LASHLEY, Mayor of Davis.

(50 W. Va. 628.)

*1. The police power of a municipal corporation depends upon the will of the legislature, and a city, town, or village can only exercise such police power as is fairly

*Headnotes by POFFENBARGER, J.

NOTE.—For other cases in this series as to constitutionality of ordinance making offense against city what a statute makes offense against state, see *People v. Detroit White Lead*

included in the grant of powers by its charter.

2. Section 28 of chapter 47 of the Code, by vesting in the councils of municipal corporations power and duty "to protect the persons and property of the citizens of such city, town, or village, and to preserve peace and good order therein," does not confer power to punish acts made criminal by the state law, and fully covered thereby, except such as would be attended with circumstances of aggravation not included in the state law. Such power must be specifically and expressly given by the legislature, before it can be exercised by such corporation.
3. The carrying of deadly weapons, being an offense fully provided for and punished by law, and being an act not in itself amounting to a breach of the peace, cannot be made an offense and punished by a municipal ordinance, unless expressly authorized by the municipal charter.
4. Prohibition lies to restrain the mayor of a town incorporated, under the provisions of chapter 47 of the Code, from imposing a fine upon a person for carrying deadly weapons, and from collecting the same, under an ordinance making such act an offense, and punishing it by fine and imprisonment, as such ordinance is void, and the mayor is without jurisdiction in the premises.

(March 1, 1902.)

APPPLICATION for a writ of prohibition to restrain defendant from proceeding against applicant for violation of an alleged ordinance forbidding the carrying of deadly weapons. *Awarded.*

The facts are stated in the opinion.

Mr. W. H. Kelly for petitioner.

Messrs. Cunningham & Stallings for respondent.

Poffenbarger, J., delivered the opinion of the court:

Fred Judy presented his petition June 9, 1900, praying a writ of prohibition restraining C. G. Lashley, mayor of the town of Davis, from proceeding against the petitioner on a charge of carrying a deadly weapon, and from attempting to collect a fine of \$25 imposed upon him for said offense. There is some controversy between counsel as to whether said proceeding by the mayor was under the ordinances of the town, in his capacity as mayor, or under the state statute; the mayor being, by law, *ex officio* a justice of the peace. Code, chap. 47, § 39. The transcript of the mayor's proceedings is not with the papers, but it seems to be conceded that there is nothing in it to indicate that the proceeding was under the statute; the record showing only that as mayor he tried petitioner, and found him guilty, and assessed the fine against him.

Sections 26 and 52 of the ordinance of the town concerning offenses and their punishment reads as follows: "It shall be un-

lawful for any person to carry about his person any revolver of other pistol, dirk or bowie knife, razor, slung shot, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character, nor shall any person sell or furnish any such weapon as is hereinbefore mentioned, to a person whom he knows, or has reason, from his appearance, or otherwise, to believe to be under the age of twenty-one years; but nothing herein contained shall be so construed as to prevent any person from keeping or carrying about his dwelling house or premises such revolver or other pistol, or from carrying the same from the place of purchase to his dwelling house, or from his dwelling house to any place where repairing is done, to have it repaired, and back again. If any person commit any of the offenses prohibited or enumerated in any of the sections of the foregoing ordinance, he shall forfeit and pay a fine of not less than one, nor more than thirty dollars, and may, in the discretion of the mayor, be imprisoned not exceeding thirty days, except for a violation or an offense as provided in § 26, when the party shall be fined not less than \$25, nor more than \$200, and may, at the discretion of the mayor, be confined in prison not less than one, nor more than twelve, months. And if any male person so convicted and fined, under any of the sections of this chapter, shall fail or refuse to pay said fine and costs, the mayor may sentence said offender to work same out upon the streets of said town, or other work in said corporation, at the rate of \$1 per day and board until such fine and costs are paid, under the direction of such officer or person as the mayor may select, and may provide for his safe keeping while performing such work, and if deemed necessary, shall provide a ball and chain to be attached to his person for such purpose as is provided in chapter 36, § 11, of the Code of 1891."

It is urged for the petitioner that chapter 47 of the Code does not authorize a municipal corporation to punish acts already made criminal under the state law, and that the ordinance making the carrying of deadly weapons an offense punishable by the municipal authorities is void. It is further contended that the mayor, in taking cognizance of the offense, is acting without jurisdiction. In passing upon these questions, it becomes necessary to look to the source and extent of municipal criminal jurisdiction and power. On this subject it is said in Tiedeman, Pol. Power, § 212, that "a large part of the police power of the state is exercised by the local governments of municipal corporations, and the extent of their police power depends upon the limitations of their charters. They are creatures of the state, and the superior control of the state is almost without limit. The police power of a municipal corporation

Works (Mich.) 9 L. R. A. 722; Thelsen v. McDavid (Fla.) 26 L. R. A. 234; *Ex parte Fagg* (Tex. Crim. App.) 40 L. R. A. 212; and *Greenville v. Kemmlis* (S. C.) 50 L. R. A. 725.

57 L. R. A.

As to how far proceedings for violation of ordinances are to be regarded as prosecutions for crime, see *note* to *State v. Robitschek* (Minn.) 33 L. R. A. 33.

must depend upon the will of the legislature, and in order that a city, town, or county may exercise a particular police power, it must be fairly included in the grant of powers by the charter." The soundness of this proposition cannot be questioned. Looking now to the powers delegated by the legislature to municipal corporations of this state, it is found in § 28 of chapter 47 of the Code that it is the duty of the councils of such corporations, among other things, "to protect the persons and property of the citizens of such city, town, or village, and to preserve peace and good order therein." Section 29 of said chapter further provides that "to carry into effect these enumerated powers, and all others conferred upon such city, town, or village, or its council, by this chapter or by any future act of the legislature of this state, the council shall have power to make and pass all needful orders, by-laws, ordinances, resolutions, rules, and regulations, not contrary to the Constitution and laws of this state, and to prescribe, impose, and enact reasonable fines, penalties, and imprisonments in the county jail or the place of imprisonment in said corporation, if there be one, for a term not exceeding thirty days, for a violation thereof. Such fines, penalties, and imprisonments shall be recovered, and enforced under the judgment of the mayor of such city, town, or village, or the person lawfully exercising his functions." The offense in question here is clearly an offense against the peace. It is not only so regarded, but is so classed by chapter 148 of the Code. Unless the ground taken by the petitioner that the power thus delegated by the legislature does not include the right to punish acts already made criminal under the state law is tenable, it is manifest that the town may by ordinance declare the carrying of deadly weapons an offense, and punish it, for it is expressly given power to preserve peace and good order within its limits. On this question there is much conflict in the decisions of the various states. In New York and Alabama and Missouri, and some other states, it has been held that under a general authority delegated by the legislature, such as to preserve the peace and regulate the police, a municipal corporation may impose penalties for the commission of acts which by the state law are declared to be crimes. *Rogers v. Jones*, 1 Wend. 261, 19 Am. Dec. 493; *Mobile v. Allaire*, 14 Ala. 400; *Mobile v. Rouse*, 8 Ala. 515; *Greensboro v. Mullins*, 13 Ala. 341; *Amboy v. Sleeper*, 31 Ill. 499; *State v. Crummeys*, 17 Minn. 72, Gil. 50; *Brownville v. Cook*, 4 Neb. 101; *Levy v. State*, 6 Ind. 281; *St. Louis v. Bentz*, 11 Mo. 61; *State v. Gordon*, 60 Mo. 383. In some of the cases it is further held that a conviction under an ordinance may be pleaded in bar of a prosecution in the state court for the same act. *State v. Cowan*, 29 Mo. 330. This is on the ground that the Constitution forbids that a person shall be twice punished for the same offense. There is another class of cases which hold that the party may be pun-

ished under both the state and the municipal law. *Fox v. Ohio*, 5 How. 410, 12 L. ed. 213; *Moore v. Illinois*, 14 How. 13, 14 L. ed. 306; *Slaughter v. People*, 2 Dougl. (Mich.) 334, note. In some other states it is held that a state cannot punish by ordinance what is already an offense by the statute. *State v. Keith*, 94 N. C. 933; *Re Sic*, 73 Cal. 142, 14 Pac. 405; *Menken v. Atlanta*, 78 Ga. 668, 2 S. E. 559. Cooley, Const. Lim. 239, says: "Nor will conferring a power upon a corporation to pass by-laws and impose penalties for the regulation of any specified subject necessarily supersede the state law on the same subject, but the state law and the by-law may both stand together, if not inconsistent. Indeed, an act may be a penal offense under the laws of the state, and further penalties, under proper legislative authority, be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the enforcement of the other." It will be noticed that Judge Cooley says these penalties may be imposed under proper legislative authority. From this it is clear that he does not mean to say that such corporations have any inherent power, or power of themselves, to punish acts which are punishable under the state law. He does not pursue the question as far as does Judge Dillon, who says at § 367 of the fourth edition of his *Work on Municipal Corporations*: "Questions of difficulty have arisen in consequence of grants of power to municipal corporations to make ordinances respecting matters and acts already regulated by general statute, and, if criminal in their nature, punishable under the laws of the state. Hence, the same act comes to be forbidden by general statute and by the ordinance of a municipal corporation, each providing a separate and different punishment. The same transaction may, if complex in its nature, be in one part of it an offense against the general law, and in another against the by-law; but such cases present no difficulty. But can the same act be twice punished, once under the ordinance and once under the statute? The cases on this subject cannot be reconciled. Some hold that the same act may be a double offense,—one against the state and one against the corporation. Others regard the act as constituting a single offense, and hold that it can be punished but once, and may be thus punished by whichever party first acquires jurisdiction." In the next section the author presents his own conclusion deduced from the authorities, as follows: "Where the act is in its nature one which constitutes two offenses,—one against the state and one against the municipal government,—the latter may be constitutionally authorized to punish it, though it be also an offense under the state law; but the legislative intention that this may be done ought to be manifest and unmistakable, or the power in the corporation should be held not to exist. Where the act or matter covered by the charter or ordinance and by the state law is not essentially criminal in its nature, and is one which is

generally confided to the supervision and control of the local government of cities and towns, but is also of a nature to require general legislation, the intention that the municipal government should have power to make new, further, and more definite regulations, and enforce them by appropriate penalties, will be inferred from language which would not be sufficient were the matter one not specially relating to corporate duties, and fully provided for by the general laws. Such are the general principles to be extracted from the authorities."

It is evident that the exercise of such municipal power cannot extend to the whole range of acts made criminal by the state law. There must be a limit, and, in the cases holding that double punishment may be inflicted, under an indefinite delegation of power, the acts in question were generally those constituting the milder offenses under the state law. Usually they are such as bear a direct relation to, or are fairly to be included within the terms of, the power delegated to preserve peace and good order. This is well stated by Lumpkin, J., in *Savannah v. Hussey*, 21 Ga. 86, 68 Am. Dec. 452: "Can a municipal corporation legislate *criminaliter* upon a case fully covered by a state law? I am aware that decisions may be found to support the affirmative of the foregoing proposition. *Rogers v. Jones*, 1 Wend. 237, 19 Am. Dec. 493; *Mobile v. Allaire*, 14 Ala. 400; *Mobile v. Rouse*, 8 Ala. 515; *Zylstra v. Charleston*, 1 Bay, 382; *St. Louis v. Bentz*, 11 Mo. 61; *Marsh v. Com.* 12 B. Mon. 25. Without stopping to investigate the applicability of these precedents to the point under inquiry, I ask, What limit will you set to this power? If it may legislate by an ordinance for any one offense, may it not for every crime embraced within the Penal Code? Arson in a town or city is provided for by the public law. Why not pass a by-law prescribing another mode of trial, and a different punishment for the same offense, if committed within their limits? So of the crimes of forgery, counterfeiting, perjury, etc. Such, I am sure, has not been the understanding of the country. Under the general grant of power delegated by the act of 1849, the city authorities may cover all cases not provided for by the paramount authorities of the state. Their Code already fills a volume of some five hundred pages. All those ordinances regulating cemeteries, commons, markets, vehicles, fires, exhibitions, lamps, licenses, waterworks, watch, police, city taxes, city officers, health, nuisances, etc., are legitimate and proper. Nay, I might go further, and concede that where the state law defines an offense generally, and prescribes a punishment, without reference to the place where it is committed, in town or country, and the act, when committed in the streets and public places of the city, would be attended with circumstances of aggravation, such as an affray, for instance, the corporate authorities, with a view to suppress this special mischief, might probably provide against it by ordinance, because that ingredient or concomitant of the crime

might not be supposed to be included in the state law. And this is going quite far enough." This seems to be a conservative position on the question, and one which extends to municipal corporations all power that is necessary, supplemented by the state law, which extends throughout all cities, towns, and villages of the state, to fully protect the interest and give complete exercise of all the police power of the state within municipal corporations. What more is needed? What good reason can be assigned for extending greater power, when the statute does not specifically and expressly grant it? So remote from a breach of the peace is the carrying of weapons, that at common law it was not an indictable offense, nor any offense at all. 5 Am. & Eng. Enc. Law, 2d ed. p. 729. The legislature has empowered the municipal corporations of this state to preserve peace and good order therein, but the carrying of weapons, although having a remote tendency to a breach of the peace, is more objectionable on the ground of its danger to life and limb of the citizens of the state. It is probably on that account, more than any other, that it is made a statutory offense in nearly all of the states of the Union. It seems to be of such character as to be clearly without the limited and indefinite power conferred upon municipal corporations in this state. It would be just as reasonable to say that that power extends to the punishment of petit larceny and arson, under the power given to protect the property of the citizens, but no such authority is claimed or exercised by our municipal corporations. It is left to the jurisdiction and cognizance of the state courts. For these reasons, and under these principles, the ordinance of the town of Davis in reference to the carrying of deadly weapons, and punishment therefor, must be held invalid, and the mayor is without jurisdiction to take cognizance, as mayor, of the offense charged. This position must not be confounded with the position announced in *Moundville v. Fountain*, 27 W. Va. 182, and *Jelly v. Dils*, 27 W. Va. 267, holding that municipal corporations may punish for unlawful retailing of spirituous liquors, etc. The statute expressly gives power to such corporations to impose license taxes upon the privilege of making such sales, from which it results that the council must have power to enforce its regulations. That is a very different matter from the case under consideration.

But it is insisted that the writ of prohibition should not go, for the reason that, being *ex officio* a justice of the peace, the mayor may take cognizance of the offense and punish it under the statute. This position would be well taken if it appeared that the mayor was proceeding in that way. But it does not appear, except from the argument of his counsel. In the absence of any affirmative showing to the contrary, it appearing that the town has this ordinance, the presumption must be that the mayor is proceeding under the ordinance, and not under the statute. Such an ordinance cannot be permitted to be enforced in that way.

The mayor cannot enforce the ordinance until his authority to do so is questioned, and then say he is acting, not as mayor, but as a justice of the peace. By such proceeding every city and town in the state could pass and enforce such an ordinance, except in particular cases. But on this question of the authority by which the mayor claims to be proceeding, his answer is conclusive, for it sets out the ordinances, and claims their validity, and his right and power and jurisdiction to take cognizance of the offense under them; and it does not deny the allegation in the petition that he is so proceeding, and that the petitioner has been by him convicted, under the ordinance.

On the demurrer it was argued that the town of Davis should have been made a respondent. The town is not a necessary party where the defendant is a governmental agent, and the matter involved is purely public in its nature. Neither the state nor the municipality, having power and authority delegated by the legislature, is a necessary party. "When the suit complained of is brought by a private person, he may be joined as a defendant. But when it is a suit or prosecution on behalf of the government, the writ of prohibition can go to the court only." *Smith v. Whitney*, 116 U. S. 167, 176, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; 3 Bl. Com. 112; *Ex parte Braudlacht*, 2 Hill, 367, 38 Am. Dec. 593; *Thomson v. Tracy*, 60 N. Y. 31; *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50, 34 Am. Rep. 338. In the last case it is said: "A writ of prohibition, like a writ of mandamus or of certiorari, is properly sued out in the name of the Crown or the state. The only necessary defendant is the tribunal whose proceedings are sought to be restrained, controlled, or quashed."

All questions in the case having been disposed of, except that of costs, the next inquiry is whether the petitioner is entitled to costs. "The judge of the inferior court, although the record party, cannot be taxed with the costs." 16 Enc. Pl. & Pr. 1143; *State ex rel. Cummings v. King County Super. Ct.* 5 Wash. 518, 32 Pac. 457, 771.

For the reasons hereinbefore given, the writ prayed for must be awarded, but without costs to the applicant.

E. E. WHITE, Admr., etc., of James A. White, Deceased, Appt.,

v.

Thomas B. COOK et al.

(.....W. Va.....)

*1. A contract between a sheriff and his deputy, providing that the deputy

*Headnotes by POFFENBARGER, J.

NOTE.—For another case in this series holding that a contract by a sheriff and tax collector to pay a commission to other person for collecting taxes is in violation of a statute forbidding the sheriff to let to farm his county or any part of it, see *Causler v. Penland* (N. C.) 48 L. R. A. 441.

57 L. R. A.

shall collect all the taxes, with slight exceptions, and do all the work of the sheriff's office in one district, and attend the sessions of the court during stated portions of the time each year, and is to have all the fees and commissions allowed by law upon the work done by him, and is to pay the sheriff \$100 a year, violates § 5 of chapter 7 of the Code, prohibiting the sale or farming, in whole or in part, of any office under the laws of this state.

2. When such contract provides that the payment of the sum agreed to be paid by the deputy shall be paid out of the fees and commissions, it is not in violation of said statute; but when the contract provides for the payment of such sum, without specifying that it shall be paid out of the fees and commissions, it is a contract to pay at all events, and amounts in law to a purchase of the office in part, and is therefore illegal.

3. A bond given by a deputy, conditioned for the faithful performance of his duties as deputy sheriff, and containing in one of its clauses a reference to said contract, is void as to the private interest of the sheriff and his deputy, so far as it may relate to them, and no recovery can be had thereon for any fees or commissions or the sum specified in said contract to be paid by the deputy.

4. But the sheriff may recover thereon the taxes, fines, other public dues, and money received by the deputy on executions and other process, although he may have satisfied the state, county, district, and creditors as to such fund, and such recovery only operates to reimburse him; for these funds came into the hands of the deputy as a *de facto* officer, by virtue of the law as much as by reason of the contract, and primarily belong to the public and innocent private individuals, and said statute is not allowed to so operate as to imperil the interests of the public or innocent persons.

5. Public policy demands protection of public funds in the hands of *de facto* officers, as well as prohibits the sale or farming of public offices; and although ordinarily, where a contract grows immediately out of, or is connected with, a contemporaneous or prior illegal contract, the illegality of such contract enters into the contemporaneous or subsequent contract, and vitiates it, from considerations of public policy that rule is not applicable when the illegal part of the contract can be severed from the balance of it, and it is necessary to do so to protect funds which, in their nature and primarily, belong to the public and persons unconnected with the illegal contract.

6. A sheriff cannot maintain a bill in equity for an account against his deputy without showing, by sufficient allegations, special circumstances entitling him to discovery as necessary to complete and adequate relief, or that the accounts are complicated and intricate.

(March 22, 1902.)

For public policy in respect to transfer of an officer's salary generally, see *Schwenk v. Wyckoff* (N. J. Eq.) 9 L. R. A. 221; *Bowery Nat. Bank v. Wilson* (N. Y.) 9 L. R. A. 706, and note; and *State v. Williamson* (Mo.) 21 L. R. A. 827.

APPEAL by plaintiff from a decree of the Circuit Court for Mercer County in a suit for an accounting by defendant Cook as deputy sheriff. *Affirmed.*

The facts are stated in the opinion.

Mr. J. W. Hale, for appellant:

This contract simply divides or defines the duties of White as sheriff and Cook as deputy sheriff in Rock district in Mercer county, and fixes and adjusts the salary or compensation which each shall have for the services performed.

Noel v. Fisher, 3 Call (Va.) 215; *Salling v. M'Kinney*, 1 Leigh, 46.

In the absence of any authority directly holding this contract invalid, the presumption of the law is that it is valid.

15 Am. & Eng. Enc. Law, 2d ed. p. 990.

Though the court should hold that the said contract is void, still Cook and his sureties are bound by their bond, which is not void.

Messrs. A. M. Sutton and C. W. Smith, for appellees:

The contract constituted a sale or transfer to the deputy of a part of the powers, duties, privileges, and emoluments of the sheriffalty. It was the sale of a deputation or farming of a part of the office. This could not be done.

9 Am. & Eng. Enc. Law, 2d ed. p. 377; *Grant v. McLester*, 8 Ga. 554; *Hall v. Gavitt*, 18 Ind. 390; *Outon v. Rodes*, 3 A. K. Marsh. 433, 13 Am. Dec. 193; *Meredith v. Ladd*, 2 N. H. 519; *Carleton v. Witcher*, 5 N. H. 196; *Ferris v. Adams*, 23 Vt. 136; *Candler v. Penland*, 125 N. C. 578, 48 L. R. A. 441, 34 S. E. 683; *Greenhood*, Pub. Pol. p. 340; *Mott v. Robbins*, 1 Hill, 21, 37 Am. Dec. 286; *Lewis v. Knox*, 2 Bibb, 453; *Becker v. Ten Eyck*, 6 Paige, 68; *Noel v. Fisher*, 3 Call (Va.) 215; *Godolphin v. Tudor*, 2 Salk. 468, 1 Bro. P. C. 135; *Greenville v. Atkins*, 9 Barn. & C. 462; *Foott v. Bullock*, 4 U. C. Q. B. 480; *Reg. v. Moodie*, 20 U. C. Q. B. 389; 1 Bishop, Crim. Law, 7th ed. § 471; 1 Hawk. P. C. 6th ed. chap. 67, § 3.

When a statute fixes a penalty for an act, a contract in violation of the statute is held void unless a different legislative intent can be inferred from the language or subject-matter of the statute, although the contract was valid at common law.

15 Am. & Eng. Enc. Law, 2d ed. p. 939; *Harris v. Runnels*, 12 How. 97, 13 L. ed. 909; 1 Parsons, Contr. 5th ed. 458, and note.

If the fixing of a statutory penalty for a common-law offense can give validity to a contract made in aid of crime, then our legislature has given validity to a wide range of contracts made in aid of both felonies and misdemeanors, for it is well established that all such contracts are void at common law.

Greenhood, Pub. Pol. rule 451; *Jackson v. Walker*, 5 Hill, 27; *Cantur v. Bennett*, 39 Tex. 303; *Russell v. De Grand*, 15 Mass. 35; *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523; 15 Am. & Eng. Enc. Law, p. 935; *Capehart v. Rankin*, 3 W. Va. 571, 100 Am. 57 L. R. A.

Dec. 779; *Brown v. Wylie*, 2 W. Va. 502, 99 Am. Dec. 781; *Dodson v. Swan*, 2 W. Va. 511, 98 Am. Dec. 787.

Had the contract gone no farther than assign a part of the unearned fees of the office, it would have been void.

Bowery Nat. Bank v. Wilson, 122 N. Y. 478, 9 L. R. A. 706, 25 N. E. 855; *Bliss v. Laurence*, 58 N. Y. 442, 17 Am. Rep. 273; 15 Am. & Eng. Enc. Law, 2d ed. p. 964; *Greenhood*, Pub. Pol. 351; *Field v. Chipley*, 79 Ky. 260, 42 Am. Rep. 215; *Flarty v. Odlum*, 3 T. R. 681; *Davis v. Marlborough*, 1 Swanst. 74; *Stone v. Lidderdale*, 2 Anstr. 533; 1 Parsons, Contr. 5th ed. 225; *Bangs v. Dunn*, 66 Cal. 72, 4 Pac. 963; *Beal v. McVicker*, 8 Mo. App. 202; 2 Story, Eq. Jur. 1040d; *National Bank v. Fink*, 86 Tex. 303, 24 S. W. 256; *Hunter v. Gardner*, 6 Wilson & S. 618.

The sheriff has no interest in taxes and levies until collected, and an assignment of his uncollected commissions is to that extent a sale of the public revenues.

Hinchman v. Morris, 29 W. Va. 673, 2 S. E. 863.

If an ante-election arrangement, made at the instance of a part of the electors of Rock district, existed, it was without consideration, too indefinite to be enforced, and merged in the contract here sued on.

Even stronger reasons may be urged against such contracts when made before election, as the tendency to corrupt elections would be greater.

O'Rear v. Kiger, 10 Leigh, 622; 15 Am. & Eng. Enc. Law, 2d ed. p. 983.

The bond sued on was given to insure on Cook's part the performance of his contract with White. That contract was its only consideration; it is expressly made a part of the bond. The law makes the bond a part of the contract.

Davis v. Baker, 45 W. Va. 456, 32 S. E. 239; *Hall v. Gavitt*, 18 Ind. 391; *Love v. Buckner*, 4 Bibb, 506; *Davis v. Hull*, 1 Litt. (Ky.) 9; *Waldron v. Evans*, 1 Dak. 10, 46 N. W. 607; *Swift v. Beers*, 3 Denio, 70; *Batten v. Faulk*, 49 N. C. (4 Jones, L.) 233; *Nourse v. Pope*, 13 Allen, 87; *Greenhood*, Pub. Pol. rule 17.

The money in Cook's hands was the primary fund for paying the balances due the county and district, and the plaintiff should not be permitted to collect funds to which the public is entitled, and which Cook by the terms of his contract was to settle, until he was in default in paying the same.

State v. Hays, 30 W. Va. 107, 3 S. E. 177; *St. George Dist. Bd. of Edu. v. Parsons*, 22 W. Va. 314; *Licking Dist. Bd. of Edu. v. Parsons*, 22 W. Va. 580; *Spencer Dist. Bd. of Edu. v. Cain*, 28 W. Va. 758; *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26.

A court of equity has no jurisdiction of the case.

Lafever v. Billmyer, 5 W. Va. 33; 1 Barton, Ch. Pr. & Pl. 260; *Davis v. Baker*, 45 W. Va. 455, 32 S. E. 239; *Petty v. Fogle*, 16 W. Va. 497.

Poffenbarger, J., delivered the opinion of the court:

James A. White was elected sheriff of Mercer county in 1896, and in January, 1897, with the consent of the county court of said county, he appointed T. B. Cook his deputy. The contract of service made between them is dated January 1, 1897, and, after reciting the election and qualification of the sheriff and appointment of the deputy, it reads as follows: "Now, therefore, this agreement witnesseth that the party of the second part agrees to do and perform all the work to be done by the sheriff of Mercer county, as the law requires, in the district of Rock of said county; to attend upon the sessions of the courts of said county his proportional part of the time, but in no event to exceed one third of the time of said courts; and to pay to said party of the first part one hundred (\$100) dollars per annum. The party of the first part reserves, however, in the collection of the taxes of said Rock district, the tax ticket against E. W. Clark *et al.*, trustees. The party of the first part agrees that the party of the second part shall have all the fees and commissions arising from all work and labor so performed by him in and about his duties as such deputy sheriff of Mercer county in the said district of Rock, except the commissions of the said tax ticket of E. W. Clark *et al.*, trustees, reserved as aforesaid. But in no event is the said party of the second part to have or receive any commissions on any sums not collected by him." The sheriff took a bond from said deputy in the penalty of \$25,000, and with numerous sureties. The condition of the bond reads as follows: "The condition of the above obligation is such that whereas, the said James A. White was duly elected sheriff of Mercer county, W. Va., on the 3d day of November, 1896, whose term of office begins on the first day of January, 1897; and whereas, said White, with the consent of the county court of said county, entered of record, has appointed the above-bound T. B. Cook deputy sheriff for said county within Rock district, said county, who is to perform said duties within said district and receive such compensation and reward as is set forth in a written contract this day executed by and between said White and said Cook, and which is made a part hereof: Now, therefore, if the said T. B. Cook shall well and truly perform his duties as such deputy sheriff within said Rock district, and perform such work in court as set forth as above mentioned, then this obligation to be void; otherwise to remain in full force and virtue."

White died in September, 1900, and Cook served as deputy until after the date of the death of White, but just how long does not appear. Taxes and other demands, amounting to a large sum of money, went into his hands for the years 1897, 1898, and 1899, and no final settlement has been made between him and the administrator of White. In the year 1900, E. E. White, as adminis-

trator with the will annexed of James A. White, deceased, instituted a suit in equity against Cook and all his sureties on the bond, alleging that the accounts between said decedent and the defendant Cook were mutual, that Cook was indebted to the estate of White on account of his deputyship in the sum of \$7,500, and that discovery on the part of Cook was necessary to complete and adequate relief. The circuit court sustained a demurrer to the bill, being of the opinion that the bond and contract exhibited therewith were made in violation of the statute and public policy of the state, and are void. Leave was granted the plaintiff to amend his bill, and, after the amended bill had been filed, the court sustained a demurrer to it on the same ground, and dismissed it. The amendment consisted of an allegation that there was a sort of ante-election agreement between said sheriff and the voters of said Rock district that, in case of the election of White to the office of sheriff, he would appoint Cook deputy for that district, and that in pursuance of such understanding Cook was appointed.

It is insisted here, as it was in the court below, that the contract between White and Cook amounted to a sale or farming of a part of the office of sheriff. Undoubtedly this contract falls within the exact terms used in *Godolphin v. Tudor*, 2 Salk. 468, decided under the reign of Queen Anne, which is everywhere considered the leading case on the subject. On a writ of error to the House of Lords the judgment was affirmed. 1 Bro. P. C. 135. In the report of the case found in Salk. it is said: "The court held that where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a lesser sum out of the salary, it is good. So if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a sum certain out of the fees and profits of the office, it is good, for in these cases the deputy is not to pay unless the profits rise to so much; and, though a deputy by his constitution is in place of his principal, yet he has no right to the fees; they still continue to be the principal's; so that as to him it is only reserving a part of his own, and giving away the rest to another. But where the reservation or agreement is not to pay out of the profits, but to pay generally, a certain sum, it must be paid at all events, and such bond is void by the statute." The statute referred to is 5 & 6 Edw. VI. chap. 16. *Godolphin*, being the auditor of Wales, made Toudor his deputy, and they entered into an agreement by which the deputy was to have all the fees, and in consideration thereof pay his principal £200 *per annum* and save him harmless. In *Greville v. Atkins*, 9 Barn. & C. 462, the same conclusion is reached under Stat. 49 Geo. III. chap. 126. Other English cases bearing on the subject of sales of offices are *Parsons v. Thompson*, 1 H. Bl. 322; *Garforth v. Fearon*, 1 H. Bl. 327; *Lockner v. Strobe*, 2 Ch. Cas. 48, as explained by Lord Loughborough in *Garforth v. Fearon*; *Juxon v. Morris*, 2 Ch. Cas. 42; *Blachford*

v. *Preston*, 8 T. R. 89; *Hanington v. Du-Chatel*, 1 Bro. Cn. 124. A careful examination of these cases leads to the conclusion that the whole doctrine of the English law concerning sales of offices and deputations is based upon Stat. 5 & 6 Edw. VI. chap. 16, and other statutes which forbid and make illegal the sales of certain offices. There is no clear intimation that by the English common law the sale of an office or deputation was illegal. Lord Kenyon said in *Blachford v. Preston*: "Up to a certain extent the legislature have interfered and prohibited, by the Stat. 5 & 6 Edw. VI. the sale of some offices; but whether or not that act of Parliament were necessary for the purpose I will not now inquire." In *Garforth v. Fearon*, in which the customer of a port, having before his appointment, agreed to hold the office in trust for another party, and appoint such deputies as the other party should nominate and would empower, said other party to receive the profits of the office to his own use, an action of assumpsit was brought on the agreement. The contract was held to be void, and Lord Loughborough said: "I should therefore not find much difficulty to conclude, if there were nothing more in the case, that the common law would not support an assumpsit on such an agreement. But I think it is clearly void by positive law respecting this office. The appointment of any customer by any means contrary to Stat. 12 Rich. II. chap. 2, is a misdemeanor. That statute, though very ancient, is certainly not obsolete. It is the statute under which they are sworn in the exchequer. It not only prohibits the appointment, but goes on to say that 'none that pursueth, by him or by others, privily or openly, to be in any manner of office, shall be put in the same office or in any other,' and the 5 & 6 Edw. VI. chap. 16, makes void all promises, bonds, and assurances, as well on the part of the bargainer as the bargainee."

The English rule is generally recognized and applied by the American courts. Throop, Pub. Off. § 579; 9 Am. & Eng. Enc. Law, 2d ed. p. 376. In Georgia, Kentucky, North Carolina, New Hampshire, and Virginia the courts have applied the English statute of 5 & 6 Edw. VI. chap. 16, and the doctrine of the English courts. *Grant v. McLester*, 8 Ga. 553; *Outon v. Rodes*, 3 A. K. Marsh. 433, 13 Am. Dec. 193; *Love v. Buckner*, 4 Bibb, 506; *Davis v. Hull*, 1 Litt. (Ky.) 9; *Baldwin v. Bridges*, 2 J. J. Marsh. 8; *Noel v. Fisher*, 3 Call (Va.) 216; *Meredith v. Ladd*, 2 N. H. 517; *Carleton v. Whitchoer*, 5 N. H. 196; *Cardigan v. Page*, 6 N. H. 182; *Haralson v. Dickens*, 4 N. C. (2 Car. Law Reps.) 66. In other states statutes have been passed founded upon that of 5 & 6 Edw. VI. chap. 16, notably New York, Virginia, and Wisconsin. *Becker v. Ten Eyck*, 6 Paige, 68; *Tappan v. Brown*, 9 Wend. 175; *Mott v. Robbins*, 1 Hill, 21, 37 Am. Dec. 286; *Addington v. Seaton*, 17 Wis. 328, 84 Am. Dec. 745; *Salling v. McKinney*, 1 Leigh, 42, 19 Am. Dec. 722; *O'Rear v. Kiger*, 10 Leigh, 622; 1 Va. 57 1 A. R. A.

Rev. Code 1819, p. 559, chap. 145; Rev. Rep. chap. 12.

The tenacity with which the courts adhere to the English rule where they recognize the English statute, and it has not been modified in any way, will be seen by reference to some of the cases cited. In *Grant v. McLester* the clerk of an inferior court appointed a deputy, agreeing to give him for compensation all the fees and costs already accrued and which were thereafter to accrue, and the deputy agreed to pay his principal \$500 out of the fees and costs thereafter to accrue and gave his notes to secure the payment of the same. The court held that it was an agreement to pay the \$500 at all events, and was not limited to payment out of the fees, and was therefore void. In *Ferris v. Adams*, 23 Vt. 136, the action was upon a note for \$30, given by a deputy sheriff to his principal upon the occasion of his being appointed to the office, and the court held the contract void, basing its decision upon the English cases and many of the American cases here cited. In *Noel v. Fisher*, 3 Call (Va.) 215, the action was debt upon a bond given by a deputy sheriff, in the condition of which it is recited that for the perquisites and benefits of the office the deputy agrees and binds himself to pay the sum of £35 on specified days, and the court held that the contract was void under the British statute of 5 & 6 Edw. VI.

The contract between White and Cook, in so far as it relates to the amount which Cook agreed to pay White, is clearly within the principles of law against the farming of offices. But the principal question in the case is whether the action may be maintained upon the bond for the recovery of the taxes and other moneys which went into the hands of Cook by virtue of his deputyship. It is insisted here that, the contract of appointment to the office of deputy being illegal and void, all contracts and transactions in pursuance and furtherance thereof are void. This contention is borne out by some of the American cases. No English case is recalled in which that question arose. They were all actions or suits differing very materially in their facts and legal status of the parties from this case. In *Leavis v. Knox*, 2 Bibb, 453, the court held that the bond taken for a sum given for the sale and purchase of an office is void; but whether it was intended to hold in that case that the bond was void for all purposes, or only as to the illegal consideration, does not appear. In the opinion it is said: "So far as the condition of the bond to perform the duties of the office of sheriff and keep the principal indemnified, there is clearly nothing in it illegal. For, as the sheriff may lawfully appoint a deputy, it would be unreasonable not to permit him to take security for his indemnity against any violation of the duties of the office by the deputy." But in *Love v. Buckner*, 4 Bibb, 506, the court met the point squarely, and decided that the bond was invalid for any purpose and in all respects. The court said: "The bond we suppose not to be of the char-

acter of those declared void by the statute, 5 & 6 Edw. chap. 16. That statute more properly applies to bonds securing the payment of anything agreed to be given for an office, and should not be construed to embrace bonds conditioned exclusively for a faithful discharge of the duties of an office. But, although there is no stipulation in the bond repugnant to the provisions of the statute, yet as, by a recitation in the condition, the deputation of the office appears to have been sold by Love to Buckner, it becomes material to inquire whether, upon common-law principles, the bond can be sustained. The sale of the deputation must have caused the execution of the bond, and, as the sale is expressly interdicted by the statute, the consideration of the bond is against law, and consequently the bond itself inoperative." In *Davis v. Hull*, 1 Litt. 10, the action was on the bond of a deputy sheriff for breaches of its condition for the faithful performance of the duties of the deputy, and a plea was interposed alleging that Davis, the sheriff, on the day of the date of the bond, sold the deputation of the office to Hull for the sum of ——— dollars, and it was held that the facts alleged in the plea formed a valid bar to the plaintiff's action on the bond. Another case, which goes probably further than any of these, is *Canaler v. Penland*, 125 N. C. 578, 48 L. R. A. 441, 34 S. E. 683, decided in December, 1899. There the sheriff, being the tax collector of the county, made a contract with another person by which it was agreed that the latter should collect the taxes for the years 1891 and 1892, and receive a commission of 2½ per cent for making the collections. The tax list was delivered to him, and he collected the taxes, and in 1894 the sheriff brought an action against him, and recovered a judgment for \$93.02. On appeal the judgment was reversed, on the ground that the contract was illegal. A circumstance which distinguishes this case from all the Kentucky cases is that the party who was employed to collect the taxes, and to whom the sheriff endeavored to delegate his authority in that respect, does not appear to have been appointed a deputy. However, the decision does not seem to rest upon that circumstance. The court regarded it as an unauthorized delegation of authority, amounting to a farming out of the office. Redfield, J., in *Ferris v. Adams*, refers to the Kentucky case of *Love v. Buckner*, in which the court held the bond given to indemnify the sheriff void, and says: "We should not, perhaps, be prepared to go to that length." There is no Virginia case in which the bond given by a deputy, conditioned for the faithful performance of his duties and to indemnify the sheriff, has been held invalid, as to the indemnity, on the ground of a sale of the deputation. On the contrary, in *Salling v. M'Kinney*, 1 Leigh, 42, 19 Am. Dec. 722, the court virtually repudiated the English doctrine, in so far as it relates to sales of deputation in the office of sheriff. That was the first case involving the question

of the sale of a deputation, in which the purpose of the action was to recover for breaches of the condition to faithfully perform the duties of the office and indemnify the sheriff against loss. *Hoge v. Trigg*, 4 Munf. 150, was an action by a deputy sheriff against his principal for damages on the contract between them for removing the plaintiff from his office in violation thereof. *Noel v. Fisher* was for the recovery of the purchase money of the deputation. *O'Rear v. Kiger* was an action brought by Kiger against O'Rear's administrator for the breach of an agreement by O'Rear, in consideration of money, to appoint Kiger his deputy. In *Hoge v. Trigg* the declaration showed that Hoge, by their agreement, was to pay Trigg for the fees and profits of his office \$100. Several pleas in bar were interposed, and, among others, that Hoge had been guilty of certain misfeasances and improprieties in office, which was held to be a bar to his action. On a writ of error to this judgment it was affirmed. The supreme court of appeals waived the question whether the contract was void because of the agreement to pay the sheriff a certain sum of money for the fees and profits of the office. This case was decided twelve years later than that of *Noel v. Fisher*.

Salling v. M'Kinney, 1 Leigh, 42, 19 Am. Dec. 722, arose after the passage of the Virginia statute found in 1 Rev. Code 1819, taken from the British statute of 5 & 6 Edw. VI., and it was held that the sale of deputation of a sheriff's office was not within the inhibition of that statute. That statute provided, in § 3, that "every such bargain, sale, promise, bond, covenant, agreement, and assurance, as before specified, shall be utterly void and of no effect;" but it also contained in the 4th section this proviso: "Provided, always, that nothing in this act contained shall be so construed as to prohibit the appointment, qualification, and acting of any deputy clerk, or deputy sheriff, who shall be employed to assist their principals in the execution of their respective offices." Judge Carr said, in his dissenting opinion, that this proviso did not so operate as to take the sale of a deputation in the office out of the statute. But Green, J., and Brooke, P., while admitting that such sale was clearly within the terms of the 1st section of the act, held that the proviso did so operate. The former said, after discussing the statute: "These considerations would incline me strongly to the opinion, if we were not to look beyond the terms of the statute itself, that the sale of the deputation of the offices of clerk and sheriff was not embraced by the statute. Other circumstances lead to the same conclusion." The principal one of these considerations was stated as follows: "The only case in which a deputation of the office could come within the enacting clause is that where the deputy paid or agreed to pay for it a gross sum at all events, and independently of the amount of the fees, and if the proviso does not except such a case it has no effect whatever." He then re-

views the history of the sheriff's office in Virginia, and, among other things, says: "The office of sheriff, devolving on them (the justices) in succession, generally comes to them at an advanced age, and when they are unfitted from that cause, as well as from their previous course of life and other occupations, to discharge in detail the duties of the office, or even to superintend personally the discharge of those duties by others; and they have, as was to be expected, almost invariably, so far as I am informed, and as, indeed, is perfectly notorious, farmed their offices to others, without being conscious of violating any law, either municipal or moral. This practice must have been well known to the legislature which enacted the law in question. And this induces a belief that the proviso was intended to except the deputation of this office from the general terms of the statute." The reasoning of Brooke, P., was much the same. The law as settled by this case so remained until 1849, when the revisers recommended that the office of deputy sheriff be expressly excepted from the statute prohibiting sales of offices and deputations thereof, saying: "More than one hundred years ago, when a deputy sheriff, who had given bond to the high sheriff to indemnify him and pay him 1,500 pounds of tobacco, pleaded the statute of 5 & 6 Edw. VI., and averred the tobacco to be for the deputation, the plea was adjudged in Virginia to be bad. *Goodloe v. Dudley*, Jeff. (Va.) 59. And more recently the practice which prevails in Virginia of farming the sheriffalty was sanctioned in *Salling v. M'Kinney*, 1 Leigh, 42, 19 Am. Dec. 722. This being the case, it is deemed better to make the statute conform to the practice, and the adjudications sanctioning that practice, than to retain merely the language of the 4th section of the act in 1 Rev. Code, p. 559." Rev. Code, p. 49. It will be seen by reference to Code 1860, chap. 12, § 6, that, in pursuance of this recommendation, the office of deputy sheriff was expressly excepted from the general statute, § 5 of the same chapter, against selling or farming of the offices or deputations thereof. This exception became a part of the law of this state, and so remained until 1868, when said section was stricken out, and § 5 amended so as to read as follows: "If any person holding or expecting to hold any office under the laws of this state, sell the same, or let it to farm, either in whole or in part, or contract to do so, such person and the person who may buy, take to farm, or contract to do so, shall be thereby disabled from holding said office." Our present statute on the subject is in the same terms, and it is worthy of notice that it is a substantial modification of § 5 of chapter 12 of the Code of 1860, in this, that the words, "or the deputation thereof," found in the old statute, are omitted from our present statute. How much weight this omission is entitled to in the construction of that statute it is difficult to say. But, if the process of reasoning adopted in *Salling v.*

M'Kinney should be applied here, it would probably lead to the conclusion that it was the intention of the legislature in so doing to except from the operation of that section contracts relating to the compensation of deputy sheriffs. The public policy of the state of Virginia, as shown by its legislation and the interpretation thereof by its highest courts, carried down into the jurisprudence of this state, as has been shown, undoubtedly warrants and commands on the part of this court, in the construction of that statute, a relaxation, in respect to contracts between a sheriff and his deputy, of the strictness of the English rule as enforced by the courts of Kentucky and North Carolina. Even in Kentucky, when the English rule was enforced to the very letter, as has been shown, in more than one case, and carried perhaps even beyond any English precedent, public sentiment blotted it out about the same time it was abrogated in Virginia, as will be seen from an examination of the case of *Baldwin v. Bridges*, 2 J. J. Marsh. 7, where it is said: "This opinion of the impolicy and injustice of invalidating the bonds of deputies for indemnifying their principals is fortified by public sentiment. An act of 1820 (2 Dig. 1146) declares that such bonds shall be obligatory, even when executed in consideration of sale to the deputy." Our statute no longer provides, as did the statute of 5 & 6 Edw. VI., and the early Virginia statute, both of which have been supplanted by it and are not now law in this state, that every bond, covenant, agreement, and assurance for any vote or appointment to office shall be utterly void, and this provision undoubtedly had great weight in the construction put upon those statutes by the courts. They further provided that persons guilty of making such contracts should be forever disabled from holding such post or deputation. That, also, has been eliminated from our statute, which says only that they "shall be thereby disabled from holding said office," which language has been construed by this court in *Dryden v. Swinburne*, 20 W. Va. 89, to mean that they shall be disabled only from holding the particular term of the office in respect to which the illegal contract was made.

Where an officer has the right, under the law, to appoint a deputy, and is at liberty to contract with his deputy in respect to compensation, as a sheriff may do in this state, the reason for the distinction between the effect of a contract by which the deputy is to have all the fees and perquisites of the office, and pay his principal a sum certain out of the fees, and a contract by which he is to pay a sum certain, without limiting it to payment out of the fees, is not in all respects satisfactory, although that distinction is hoary with age, and too well settled to be disturbed. With us, in the selection of deputy sheriffs, the law is so lax as not to require the application of the principle to *detur digniori*. The sheriff has full latitude to select, not the most meritorious and competent man to perform

the duties of deputy sheriff, but the man who will perform that duty for the least money, subject only to the limitation that the county court must consent to the appointment. He may permit his deputy to take all the fees and commissions for his services, and in consideration thereof pay to his principal any amount of money they may see fit to agree upon, provided only that it be specified that the money so to be payable shall be paid out of the fees and commissions. If the only object of the law is to prevent trafficking and dealing between the sheriff and his deputy in respect to his compensation, whereby the deputy may take his appointment for such meager compensation as to make it necessary for him to oppress the people and extort from them what he is not legally entitled to, it clearly falls far short of accomplishing that purpose. It is difficult to conceive of any circumstances under which a man would engage to perform the services of a deputy sheriff, and take upon himself great financial responsibility and risk, in consideration of the fees and commissions, and at the same time agree, in consideration of the premises, to pay his principal more money than he could reasonably expect to realize out of the fees and commissions. The law, as settled and as applied for centuries, stands upon an assumption of facts which it is difficult to imagine ever existed in any case. With all due respect to the learned and illustrious men who laid its foundations, it must be said that the distinction seems to be more technical and fictitious than real. Taking the contract between the parties in this case as a whole, holding it up by its four corners, it imports nothing more than an agreement between the sheriff and his deputy whereby the latter undertakes to perform all the services of the sheriff in a certain district, except the collection of a certain tax ticket, for all the fees and commissions arising from the work, except \$100, which he agrees to pay to the former. Had they said the deputy should have all the fees and commissions, less the sum of \$100, the contract would be good, under the authority of all the cases cited. However, as has been said, the law is too well established to be overthrown, however devoid of sound reason it may appear to be. From this it results that no recovery can be had upon the bond or otherwise for the money which the deputy agreed to pay his principal.

But it does not follow that the plaintiff is precluded from recovering the taxes, fines, and other moneys which went into the hands of the deputy by virtue of his office, as was held in Kentucky and North Carolina, unless that part of the contract which is forbidden by the law is such that it cannot be severed from the other. It is argued here that the illegal contract between White and Cook, which the statute says disabled both of them from holding the office, disabled Cook from doing any official act as deputy. If so, then by the same means White was also disabled from doing

any official act. But it is an admitted fact that both of them continued to perform the functions of sheriff and deputy sheriff, respectively, in their county. The state, county, and district revenues, executions on judgments and decrees, fines and other dues, public and private, went into their hands. Is it possible that because the contract between them, in reference to the appointment of Cook, was such as is prohibited by the law and resulted in the forfeiture of their offices, the state, county, districts, and private individuals must lose the large sums of money which went into their hands? Whether legal or illegal, they held the offices. If not officers *de jure*, they were officers *de facto*. Code, chap. 7, § 15. These funds that went into their hands were put there by the law, and not solely by their illegal contract. If it be possible to ascertain what those funds amount to, why should they not be separated from the illegal consideration of the appointment, and a recovery thereon allowed? What difficulty stands in the way of such severance? How much of the state money, county money, district money, what fines, what collections on executions, are in the hands of Cook are easily ascertainable, and they bear no relation whatever to the illegal \$100 which Cook agreed to pay, except that by reason of the agreement Cook was enabled to obtain the position by virtue of which these funds came into his hands. It is claimed for that reason alone the bond of indemnity is vitiated, and Cook must be allowed to escape with all the money which went into his hands except what he has seen fit to pay over. The same law which permits the appointment of a deputy sheriff and allows the sheriff to contract with him for his compensation requires the sheriff to give a bond for the faithful performance of his duties. To allow a deputy sheriff to squander or appropriate to his own use the public funds for which the sheriff is responsible, and thereby inflict great loss upon the sureties of the sheriff himself and possibly upon the public, simply because the contract between the sheriff and his deputy in respect to his appointment, which is clearly severable from the public duty, faithfulness in respect to which is secured by the deputy's bond, is illegal, certainly was never intended by the legislature, nor is there any evidence that the law pronounces such disastrous results except the three or four cases which have been mentioned.

The principle of severance, where part of the contract is illegal and can be separated from the balance, is perhaps as "rock-ribbed and ancient" as any other principle of the law. In *Pigot's Case*, 11 Coke, 26b, it is said: "If some of the covenants in an indenture, or of the conditions indorsed upon a bond, are against law, and some good and lawful, . . . the covenants or conditions which are against law are void *ab initio*, and the others stand good." It is there said that this was unanimously agreed in 14 Hen. VIII. 25, 26, etc. *Gaskell v. King*, 11 East, 165, was decided almost

100 years ago, and it is there held that "a distinct covenant in a lease, whereby the tenant bound himself to pay the property tax and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by Stat. 46 Geo. III. chap. 65, § 115, will not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, etc., generally; for such general words will be understood of such taxes as the tenant might lawfully engage to defray." *M'Allen v. Churchill*, 11 J. B. Moore, 483, was an action of assumpsit on a contract whereby the plaintiff agreed to purchase the defendant's interest in a lease and pay for the fixtures on certain terms, and it appeared on the face of the agreement that it contained a clause whereby the defendant agreed that he would not, directly or indirectly, take, occupy, or carry on the business of a publican or victualer within five years from the time of making the agreement. This clause was admittedly illegal and against public policy, being in restraint of trade; but Best, L. C. J., dismissed the objection by saying: "But are we to say that every agreement is wholly bad because it may happen to contain an illegal clause?" *Filson v. Himes*, 5 Pa. 452, 47 Am. Dec. 422, was an action of assumpsit to recover the balance for the sale of a store and its contents. But it appeared from the plaintiff's testimony that he sold the store for a certain amount, and in consideration of the defendant's promise to procure the removal of a postoffice to the plaintiff's place of business, and that he should be appointed postmaster. There was judgment for the defendant in the lower court. The question principally discussed in the appellate court was whether the procurement of the postoffice should be severed from the rest of the consideration, the court holding that if that were possible the plaintiff should be permitted to recover. In determining whether the illegal part of the contract should be separated from the balance of it, Gibson, Ch. J., said: "The value of the goods could be ascertained from the bills, but the value of the lease could not be reduced to certainty by any process, and, even if it could, no one could say how much the want of the postoffice, to say nothing of the direct income of it, might take from the defendant's business. Had a price been put on the illegal part of the consideration, it might have been deducted, and the contract apportioned, as it was in *Frazier v. Thompson*, 2 Watts & S. 235, in which the consideration was goods purchased at several times, including spurious bills; and in *Yundt v. Roberts*, 5 Serg. & R. 139, in which it was goods sold and a prohibited tavern bill." In *Rand v. Mather*, 11 Cush. 1, 59 Am. Dec. 131, it is held that, "if part of agreement is contrary to statute, this does not avoid or annul other parts of the agreement which are separable from the bad part, and not founded upon it, unless the statute expressly or by necessary implication declares the whole bad." *Page v. Monks*, 5 Gray, 495, holds that "a contract is not necessarily void, or wholly inoperative, because it consists in part of promises and engagements for the breach or disregarding of which the statute neither affords nor allows any remedy by an action at law. In such cases, whether any of those promises or engagements can be enforced must depend upon the manner and extent of their connection and combination with the rest. If the contract is in its nature entire, and its parts are incapable of separation or division, then, though some of its stipulations are not if others of them are affected by the statute, no action can be brought or maintained upon it. But it is otherwise if the parts are severable." While there are many cases which hold that where a contract grows immediately out of, and is connected with, a prior illegal contract, the illegality of such contract will enter into the new contract and render it illegal, and that if the connection between the original illegal contract and the new contract can be traced it cannot form the basis of a recovery. 15 Am. & Eng. Enc. Law, 2d ed. p. 992. But it must be remembered that the funds which went into the hands of Cook, as deputy sheriff, although their reception by him followed the illegal contract as one of its consequences or results, were public funds. He was a *de facto* public officer, and it was by virtue of the law, as well as in consequence of the illegal contract, that these funds came into his hands. Moreover, while technically and directly they are due to White, they are still, in some sense, public funds, and to allow the illegal contract, in reference to his appointment, to vitiate the security for these funds, would, under some circumstances, as has been shown, result in the loss of public funds. So far as these funds are concerned, the contract between White and Cook may be regarded as a contract between private individuals, but it is nevertheless a contract relating to public funds, and in so far as it may affect them it is severable from the balance of the contract, and, to the end that the public interest may be protected, it is necessary that it be held good as to such funds. In all the cases hereinbefore referred to in which the principle of separating the good from the bad in contracts has been discussed, the matters involved and affected were purely private in their nature. Here the subject-matter of the contract of indemnity, which is said to be vitiated by the illegal part of the contract, is a large amount of money which does not belong to either of the contracting parties in point of fact, but consists of public revenues and money of individuals in the custody of the law. This is a most important distinction, and one which imperatively demands, as well as justifies, the separation of the good from the evil in the contract, and permits a recovery of the money. While public policy forbids the sale of an office in whole or in part, it requires the protection and faithful application of the public revenues, and no statute should be so construed as to permit or effect the loss of public funds or the funds of

innocent persons in the hands of public officers, whether they be officers *de jure* or officers *de facto*. On this point, therefore, the conclusion is that, so far as the contract and bond relate to the private interests and rights of the sheriff and his deputy, they are illegal and void, and the courts cannot enforce them as to either of the parties; but in so far as the bond relates to the moneys, public and private, which went into the hands of Cook, and which it was his duty as an officer to collect, and which were lost by his unfaithfulness or negligence, if there be any such funds, the bond is valid, and recovery thereon may be had against Cook and his sureties. But such recovery will not include any commissions or fees, for they fall within, and belong to, the private interests in the office which are the subject-matter of the illegal contract. As to these matters, the law will leave the parties in the situation in which they have put themselves, refusing aid to either of them. The principles announced in the following cases seem to fully sustain this view: *Faikney v. Reynous*, 4 Burr. 2089; *Farmer v. Russell*, 1 Bos. & P. 296; *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732; *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. ed. 473; *McBlair v. Gibbes*, 17 How. 232, 15 L. ed. 132; *Bly v. Second Nat. Bank*, 79 Pa. 453.

Another objection to the bill is that there is no equity in it, and this objection is undoubtedly well taken. The court properly dismissed the bill, but gave an insufficient reason for so doing. This bill is substantially like the one in the case of *Lafever v. Billmyer*, 5 W. Va. 33. Lafever was the sheriff of Berkeley county, and Billmyer was his deputy for the years 1859 and 1860, and the bill showed that there had been no settlement between the sheriff and his deputy, and alleged that the accounts between them were complicated and intricate, as this bill does. It also prayed for discovery, as is the case here, and the court held that the accounts were not mutual, and that equity had no jurisdiction unless proper ground for discovery appeared in the allegations of the bill. Judge Moore discussed that case at great length, and came to the conclusion that there was no ground for discovery. The only thing in this bill that seems to suggest the necessity of discovery is the allegation that White, in his lifetime, delivered to Cook sundry orders, amounting, in the aggregate, to the sum of \$1,058.25, which White himself had paid, and that the plaintiff does not know the amounts, numbers, or character of the orders, but that Cook does know all about them, and when and under what circumstances they were delivered to him, and that he is the only person that does know. These orders seem to have been given to Cook for the purpose of making the annual settlements between White and the county court and board of education; for the bill alleges that they were used in the settlements, and that it is impossible to ascertain which orders, so filed and used, are those paid and turned over by White to Cook. This is merely

colorable, and no real ground for discovery, for the reason that, if these orders are credited to White in his settlement as alleged in the bill, White has received credit for them and has no right to charge them to Cook. It is not pretended that there is any difficulty about ascertaining what taxes, fines, and executions went into the hands of Cook, and mere allegations of such difficulty, without facts to support them, such as that records had been burned or destroyed or lost, would be utterly insufficient. The tax books on file in the sheriff's, county clerk's, and auditor's offices show the taxes for the district of Rock undoubtedly. All these taxes for certain years went into the hands of Cook for collection, except what were retained for collection by White, and there seems to be no dispute about what portion of the taxes White retained for collection. The license taxes, fines, and executions are all matters of record. Therefore, as to these matters, no discovery is necessary. After ascertaining what Cook is chargeable with, which is easy of accomplishment, so far as shown by this bill, it devolves upon Cook to show that he has accounted for according to law, by payment to White in money or orders, either actually delivered to him, or paid by Cook and credited to White in his settlements, or paid to the state, execution creditors, or other persons legally entitled to receive it. He is entitled to credit for all proper disbursements made by him. Such are undoubtedly the views held by Judge Moore in the *Lafever v. Billmyer* case, for he says: "In all those matters of execution and administration the records would enable the plaintiff to designate with absolute certainty the parties and their claims." In matters of account, as to legal demands, a court of equity rarely, if ever, has concurrent jurisdiction unless discovery is necessary, except where the accounts are mutual. *Lafever v. Billmyer*, 5 W. Va. 33; *Yates v. Stuart*, 39 W. Va. 124, 19 S. E. 423; *Thompson v. Whittaker Iron Co.* 41 W. Va. 580, 23 S. E. 795. If accounts between sheriffs and their deputies can be drawn into a court of equity upon such allegations as are contained in this bill, other matters, of a similar nature, would follow, and but a short time would be required to utterly break down and obliterate the line of demarcation between law and equity jurisdiction where matters of account are involved.

Another objection to the bill is that no order has been made by the county court or board of education requiring Cook to pay over the balances due, respectively, to the county court and the board of education. This position is untenable. While these funds in the hands of Cook are public in their nature, and primarily belong to the county and district funds, and possibly other funds, Cook is but the agent or representative of White, and the funds must reach their ultimate destination and application and settlement through White, the principal, or his personal representative, he being dead. Any order that may be made

in respect to them would be directed to White, and not to Cook. Prior to the making of such order, White's personal representative has the right and power to compel Cook to pay over these funds, to the end that they may be in hand and ready when the order is made. *State v. Hays*, 30 W. Va. 107, 3 S. E. 177; *St. George's Dist. Bd. of Edu. v. Parsons*, 22 W. Va. 314, 580; *Spencer Dist. Bd. of Edu. v. Cain*, 28 W. Va. 758,—have no application here, for they were all suits against the sheriff himself, and not actions by the sheriff against his deputy. An action by White's administrator against Cook and his sureties upon the bond is not a proceeding by the state, county court, or board of education, but is a proceeding by the sheriff against his agent for money which, according to the allegations of the bill, is due and payable.

It appearing that there is no equity in the bill, and that the plaintiff has brought his suit in the wrong court, the decree of the court below, sustaining the demurrer and dismissing the bill, is affirmed.

STATE of West Virginia
v.

W. M. GILLILAN, *Plff. in Err.*

(.....W. Va.....)

- *1. 'Courts of record have a discretionary jurisdiction, in case of conviction for a gross common-law misdemeanor, punishment for which has not been prescribed by statute, to require of the defendant sureties for good behavior. To this extent only, the principles announced in *State v. Gould*, 26 W. Va. 258, are overruled.
2. Such jurisdiction does not exist when the conviction is for a statutory misdemeanor, or a common-law misdemeanor for which punishment is prescribed by statute.
3. The simple selling of intoxicating liquors is a statutory offense.

(March 29, 1902.)

ERROR to the Circuit Court for Greenbrier County to review a judgment requiring defendant to give bond for good behavior after conviction of having unlawfully sold intoxicating liquors. *Reversed.*

A decision was originally reached and an opinion handed down in this case on March 30, 1901, but a rehearing was granted, and the opinion (printed herewith) handed down supersedes the former one, and makes its publication immaterial.

The facts are stated in the opinion.

Messrs. Gilmer & Gilmer for plaintiff in error.

Messrs. Romeo H. Freer, Attorney General, and *Alexander Dulin*, for defendant in error:

*Headnotes by *POFFENBARGER, J.*

NOTE.—As to the adoption of the common law in the United States, see *McKennon v. Winn* (Okla.) 22 L. R. A. 501, and note. 57 L. R. A.

The criminal courts under the common law possess such power as was exercised in this case.

4 Bl. Com. p. 352; 4 Burn, Justice of the Peace, p. 62; *Dunn v. Queen*, 12 Q. B. 1031; *Estes v. State*, 2 Humph. 496; *State v. Gould*, 26 W. Va. 266.

All common law of the country extends as well to crime as to civil wrong.

1 Bishop, *Crim. Law*, §§ 35-40.

Poffenbarger, J., delivered the opinion of the court:

At the November term, 1899, of the circuit court of Greenbrier county, W. M. Gillilan, upon the trial of an indictment charging him with having unlawfully sold, offered, and exposed for sale, at retail, spirituous liquors, wine, porter, ale, beer, and drinks of a like nature, without a state license therefor, was convicted; and the court, in addition to imposing a fine of \$15 and costs, further ordered "that said Gillilan be required to give bond, with good security, in the penalty of \$500, conditioned to be of good behavior towards all the citizens of this state, and not to sell intoxicating drinks contrary to law for the period of twelve months," and the defendant was committed to the custody of the sheriff until the bond should be given. The court having overruled his motion to set aside so much of the judgment as required this bond, he excepted, and has brought the case here on a writ of error and supersedeas.

The indictment charges a statutory offense. The simple selling of intoxicating drinks is not a common-law crime or offense. Bishop, *Statutory Crimes*, § 984. An ale house, if not disorderly, is, under the common law, lawful; no license being required to keep it. 1 Bishop, *Crim. Law*, § 505, citing *King v. Ioyes*, 2 Show. 468. This indictment is under § 1, chap. 32, of the Code; and the punishment for the offense is prescribed by § 3 of said chapter, and is a fine of not less than \$10 nor more than \$100, and, at the discretion of the court, imprisonment in the county jail not exceeding three months. As the selling of intoxicating liquors was not an offense at common law, there is no common-law punishment for it. The only punishment, therefore, must be that prescribed by the statute. But if there had been common-law punishment for the selling of liquors, it would be repealed by the statutory provision in reference thereto. "We can always separate the offense from the punishment. So that, for example, a statute which provides a new punishment for an old offense repeals by implication only so much of the prior law as concerns the punishment; leaving it permissible to indict an offender either under the old law, whether statutory or common, and inflict on him, upon conviction, the punishment ordained by the new, or under the new, statute, at the election of the prosecuting power." Bishop, *Statutory Crimes*, § 166. In addition to this, we have a statute which prohibits the infliction of any other than statutory punishment, when

it exists. "A common-law offense, for which punishment is prescribed by statute, shall be punished only in the mode so prescribed." Section 3 of chapter 152 of the Code. Hence, if the selling charged in the indictment were a common-law offense, it could be punished only under § 3 of chapter 32 of the Code. However, this is not conclusive of the question, unless it appear that the requisition of sureties is punishment. There was a discretionary jurisdiction at common law in the court trying a person charged with misdemeanor to bind the accused, after conviction, and as a part of the judgment, to good behavior for a time, and that jurisdiction was not statutory. It was a jurisdiction inherent in every court of record having criminal jurisdiction. In addition to this, there were statutes under which persons not convicted of any offense might be required to enter into recognizances to keep the peace and be of good behavior. They were the same in principle and in substance as the provisions found in chapters 148 and 153 of the Code. "If a person have been convicted of a misdemeanor, it is usually part of the judgment that he shall find security for his good behavior for some time." 9 Bacon, Abr. p. 309. "This requisition of sureties has been several times mentioned before as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors; but there, also, it must be understood rather as a caution against the repetition of the offense, than any immediate pain or punishment." Bl. Com. bk. 4, chap. 18, p. 251. "Binding to the good behavior was a discretionary judgment at the common law, given by a court of record, for an offense at the suit of the King, after a common-law conviction by a verdict of twelve men." 4 Burn, Justice of the Peace, p. 268. "I shall observe in general that for crimes of an infamous nature, such as petit larceny, perjury, or forgery, at common law, gross cheats, conspiracy not requiring a villainous judgment, keeping a bawdy house, bribing witnesses to stifle their evidence, and offenses of the like nature against the first principles of natural justice and common honesty, it seems to be in great measure left to the prudence of the court to inflict such corporal punishment, and also such fine, and lien to the good behavior for a certain time, etc., as shall seem most proper and adequate to the offense, from the consideration of the baseness, enormity, and dangerous tendency of it; the malice, deliberation, and wilfulness, or the inconsideration, suddenness, and surprise with which it was committed; the age, quality, and degree of the offender; and all other circumstances which may any way aggravate or extenuate the guilt." 2 Hawk. P. C. p. 633. It is said by Bl. Com. bk. 4, p. 252, that this jurisdiction falls under the title of preventive justice, and he there discriminates between preventive justice and punishing justice. But this certainly does not mean that a judgment requiring such recognizance is not punishment. All punishment belongs,

in some sense, to the same title. "And, indeed, if we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past, since, as was observed in a former chapter, all punishments inflicted by temporal powers may be classed under three heads: Such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example; all of which conduce to one and the same end,—of preventing future crimes, whether that be effected by amendment, disability, or example." *Ibid*. He then proceeds to a discussion of the statutory provisions by which surety for the peace or good behavior is taken when no offense has been committed, and says in those cases such requisition is not meant as any degree of punishment. From this, as well as from his saying the requisition of sureties upon conviction for the misdemeanor is a part of the penalty inflicted, it is to be inferred that in such case the order or judgment requiring the convicted person to enter into bond for good behavior is punishment. The quotations from Hawkins, Bacon, and Burn all indicate that it was regarded by the authors of those works as punishment. It would be difficult to class it as anything other than punishment. When the bond is required and not given, the consequence is imprisonment. It is required under pain of imprisonment. How could it be anything else than punishment? Here the judgment was that the defendant enter into a recognizance for his good behavior for one year, and in default of his doing so he was committed to the custody of the sheriff. How long he was to remain in custody was in the discretion of the court, and it might have been for the whole year. The statute only permits an imprisonment of three months. Hence the punishment attempted to be inflicted was more severe than the statute itself prescribes.

The existence, nature, and extent of this jurisdiction are discussed at great length by Judge Green in *State v. Gould*, 26 W. Va. 258, and the conclusion of the court, as announced by him, is, that the court, in rendering judgment against a defendant in any case upon the conviction of him of any misdemeanor, has no right to add to its judgment, as a part thereof, an order requiring the defendant to give a bond, with approved security, to keep the peace or be of good behavior, and in default thereof to be imprisoned till such bond is given. In that opinion, however, it is admitted that the jurisdiction existed at common law in respect to conviction of common-law misdemeanors. But it is pointed out that the taking of such recognizance had never been the practice in this state or in Virginia, and it is argued that, as the evidence adduced in the trial of an indictment for misdemeanor is not such as is required in a proceeding for the purpose of requiring sureties for the peace or good behavior, there is no evidence upon which the court can base a judg-

ment requiring such surety. From a careful examination of the authorities cited and others, it seems that, notwithstanding the want of evidence of threats or bad character on the part of the accused, the English courts did exercise such jurisdiction and require such recognizances. While the Virginia and West Virginia Reports do not disclose any case in which the jurisdiction is recognized, that fact does not preclude its existence. And as it has been shown that it did exist at common law, and the common law obtains in this state, so far as it has not been repealed and is not repugnant to the laws of this state, it cannot be blotted out by mere argument. But it cannot be exercised as to purely statutory offenses, nor in cases of common-law offenses for which punishment is prescribed by statute. Hence it can only exist as to common-law offenses, for which common-law punishment only can be inflicted. As to these cases the jurisdiction does exist, and to that extent the principles announced in *Gould's Case* must be overruled. For the reasons herein given, the view taken by the court in *Estes v. State*, 2 Humph. 496, cannot be adopted.

The conclusion, therefore, is that there is error in the judgment, and it must be reversed.

L. J. PETERS, *Plff. in Err.*,
v.
Johnson JACKSON *et al.*

(50 W. Va. 644.)

- *1. A verdict in an action of trespass on the case reading, "We, the jury, find for the defendants" (the plea being not guilty), is good.
2. Though, in an action sounding in damages, there is an order at rules for an entry of damages, yet a plea of the general issue, or other issuable plea, filed in term, annuls that order; and the jury is properly sworn to try the issue, and not to inquire of damages.
3. The general rule is that damages for which a party is liable in tort are such, and only such, as are the reasonable and probable consequence of his acts.
4. Only the parties to a contract can sue for damage from its breach; but where, in executing it, things of imminently dangerous character are used, from which injury may probably happen to others, the law places him who executes the contract under duty to so perform it as not to injure strangers to it, and such strangers may sue for damage coming to them from its negligent performance.

*Headnotes by BRANNON, J.

NOTE.—As to liability of druggist to third person for injuries caused by negligence in sale of drug, see cases in *note* to *Craft v. Parker*, W. & Co. (Mich.) 21 L. R. A. 139; also, in this series, *Wise v. Morgan* (Tenn.) 44 L. R. A. 548, and *Smith v. Middleton* (Ky.) 56 L. R. A. 484.

As to liability of manufacturer or seller of dangerous article to person thereby injured, 57 L. R. A.

5. Apothecaries, druggists, and all persons engaged in manufacturing, compounding, or selling drugs, poisons, or medicines, are required to be extraordinarily skillful, and to use the highest degree of care known to practical men to prevent injury from the use of such articles and compounds.
6. Where a merchant sells a poisonous drug to one person, for a medicine which is harmless, by mistake, and it is taken for medicine, without negligence, by a third person, the seller is liable to such third person for damage resulting to him therefrom, notwithstanding there is no privity of contract between the merchant and such third person.

(March 1, 1902.)

ERROR to the Circuit Court for Ritchie County to review a judgment in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by defendants' mistake in filling an order for drugs. *Reversed.*

The facts are stated in the opinion.
Mr. Sherman Robinson, for plaintiff in error:

This verdict is not sufficient. It is not responsive to the issue in this case.

Tyler's Stephen, Pl. p. 117.

An individual holding himself out to the public as a dealer in a certain line of goods or drugs assumes all the risk incident to such business; and if, by reason of his negligence or carelessness, injury results to another without fault on the part of the injured party, he who makes the sale is liable, and the party injured can recover.

Where an individual or a firm is engaged in the sale of any article or drug there is an implied warranty, with every sale of such article or drug, that it is of the kind and character asked for by the buyer and sold by the seller.

Craft v. Parker, W. & Co. 96 Mich. 245, 21 L. R. A. 139, 55 N. W. 812; *Hoover v. Peters*, 18 Mich. 51; *Rosicel v. Vaughan*, Cro. Jac. 16; *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; *Sinclair v. Hathaway*, 57 Mich. 60, 58 Am. Rep. 327, 23 N. W. 459; *Copas v. Anglo-American Provision Co.* 73 Mich. 541, 41 N. W. 690; *Brown v. Marshall*, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392; *Walton v. Booth*, 34 La. Ann. 913; *Barnowsky v. Helson*, 89 Mich. 523, 15 L. R. A. 33, 50 N. W. 989; *Fox v. Spring Lake Iron Co.* 89 Mich. 387, 50 N. W. 872; *Morse v. Union Stock Yards Co.* 21 Or. 289, 14 L. R. A. 157, 28 Pac. 2; *Benjamin*, Sales, 686.

Messrs. B. F. Ayres and Homer Adams, for defendants in error:

The verdict is in the usual form.

Hogg, Pl. & Forms, 2d ed. p. 226; *Lewis*

where there is no privity of contract between them, see *Schubert v. J. R. Clark Co.* (Minn.) 15 L. R. A. 818, and *note*; *Helzer v. Kingsland & D. Mfg. Co.* (Mo.) 15 L. R. A. 821; *State use of Hartlove v. M. Fox & Son* (Md.) 24 L. R. A. 679; *Lewis v. Terry* (Cal.) 31 L. R. A. 220; *Ives v. Welden* (Iowa) 54 L. R. A. 854; and *McCaffrey v. Mossberg & G. Mfg. Co.* (R. I.) 55 L. R. A. 822.

v. *Childers*, 13 W. Va. 1; 2 Barton, Law Pr. 697; 28 Am. & Eng. Enc. Law, p. 404.

Mr. P. W. Morris also for defendants in error.

Brannon, J., delivered the opinion of the court:

This is an action of trespass on the case, brought in the circuit court of Ritchie county by L. J. Peters against the firm of Johnson Jackson & Co. The declaration alleges that the defendants sold to the plaintiff, through his agent, by mistake, saltpeter, for Epsom salts, and that the plaintiff, having taken the saltpeter, believing it to be Epsom salts, became sick, and suffered great impairment of health. The jury in the case found for the defendants.

One error relied upon is that the verdict reads, "We, the jury, find for the defendants," whereas it ought to read, "We, the jury, find the defendants not guilty." The argument is that, as the plea was, "Not guilty," the verdict should have responded to the issue. Plainly, there can be nothing in this point. The verdict does meet the issue. How could the jury find for the defendants, if they did not find them not guilty? It, in effect, says they found the issue for the defendants, thus responding to it. Many verdicts are in this form, and are always regarded as good,—just as good as the other form. Verdicts are to be favorably construed, and, if the point in issue is substantially decided by the verdict, it is good; and when the meaning of the jury can be satisfactorily collected from the verdict, upon matters involved in the issue, it ought not to be set aside for irregularity or want of form in its wording. *Lewis v. Childers*, 13 W. Va. 1; Hogg, Pl. & Forms, 2d ed. p. 227.

Another objection to the verdict is that the jury was sworn wrong, as the record simply says it was sworn "the truth to speak upon the issue joined," whereas, as there had been an inquiry of damages at rules, the jury ought to have been sworn to well and truly find the amount, if any, which the plaintiff was entitled to recover. How can such a point as this be colorably made, when there was in court a plea of not guilty, which annulled the rule order for inquiry of damages?

The declaration avers that the plaintiff sent by an unnamed agent to the store of the defendants for Epsom salts, and that they wrongfully and negligently sold to the plaintiff, by his agent, saltpeter, which, being taken, sickened and inflicted lasting injury upon him. The contest in the trial court seems to have been upon the question whether the sale was in fact made to the plaintiff or to McGary. The plaintiff had been sick or indisposed at McGary's house for some three weeks, and wanted salts for medicine, and, as he claims, procured the son of McGary (a boy) to go for him to the store of the defendants for the salts; whereas the defendants claimed that the plaintiff neither sent the boy, nor bought or paid for them, but that Mrs. McGary, being informed

that the salts which they usually kept in the house were exhausted, sent the boy herself to the store, and bought them herself. The circuit court seems to have acted, in its instructions, upon the erroneous theory that if the sale was in fact to McGary, and not to Peters, Peters could not recover. This theory rests upon the reasoning that there was no sale to Peters, no contract, no relation between the plaintiff and defendants, and therefore there was no duty upon the defendants to the plaintiff, the breach of which could give rise to an action. But the law will not sustain this line of reasoning. Can a druggist, from incompetency or negligence, sell to one person the wrong, poisonous article as medicine, which, being taken by such person lying sick in the purchaser's house, inflicts injury upon such third person, without any liability upon that druggist to answer to that third person? The law says he is liable to that third person. We know that drugs and medicines are kept in homes, and may, and probably will, be used by other persons than the one buying. Such is the probable, usual case. Is it possible that there is no reparation to this third person for irreparable harm to him from such incompetency or negligence? Considering the frightful dangers lurking in drugs, poisons, and medicines, this would be a disastrous rule. Is there no duty upon a seller of medicine, as to persons who may use them, beyond the immediate purchaser, simply because there is no contract between the seller and the third person? Where the action is only for the breach of a contract, only the parties to it, or their privies, can maintain it. Strangers cannot sue for its negligent breach. *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621; 1 Shearm. & Redf. Neg. § 116; 2 Jaggard, Torts, § 260. But where, in a given transaction, the law puts upon a person the duty to so act that he does not harm others, independent of a contract, he is liable to third parties, even though executing a contract made with a particular person, if he harms others by negligence. The question is, Has the defendant broken a duty apart from the contract? If he has simply broken his contract, none can sue him but a party to it; but, if he violated a duty to others, he is liable to them. The single question in a given case is, Was there a duty on the part of the defendant to the person suing him? Whence does duty come? The general rule is that damages only come from what is the natural, reasonable, and probable consequence of an act. If harm may come reasonably and probably to anyone from another's action, there is duty on him so to act as to avoid such injury. Now, where a druggist sells medicine to one, is it not probable that it may be taken by others than his immediate vendee; and if the wrong article, and dangerous, is it not probable that others will receive injury? If, under the facts, a common-law duty to third persons exists, a party may be sued by such persons for negligence, incapacity, or misfeasance in

performing his contract with another. This is particularly so in respect to a dangerous thing sold. 2 Jaggard, Torts, § 261; 1 Shearn. & Redf. Neg. § 116; note to *Trenlon Mut. Life & F. Ins. Co. v. Perrine* (N. J. L.) 57 Am. Dec. 401. "Apothecaries, druggists, and all persons engaged in manufacturing, compounding, or vending drugs, poisons, or medicines, are required to be extraordinarily skilful, and to use the highest degree of care known to practical men to prevent injury from the use of such articles and compounds." *Hovew v. Rose*, 55 Am. St. Rep. 251, and note, 13 Ind. App. 674, 42 N. E. 303; *Craft v. Parker, W. & Co.* 96 Mich. 245, 21 L. R. A. 139, 55 N. W. 812; *Walton v. Booth*, 34 La. Ann. 913 (where one sold sulphate of zinc for Epsom salts, and was held to a high standard of liability). Such persons are liable for the slightest negligence, and for ignorance and incapacity. They handle things dangerous to human life and health, and must be most alert to avoid mistakes, and they are bound to have adequate skill. 2 Shearn. & Redf. Neg. §§ 689, 690. In Kentucky the rule is that a druggist must know what he sells, and if he departs from the prescription, or ignorantly sells wrong and poisonous or hurtful drugs, he is an absolute guarantor, and cannot plead that he has been extraordinarily careful in general. *Fleet v. Hollenkemp*, 13 B. Mon. 219, 56 Am. Dec. 563. This excludes the question of negligence or ignorance, as irrelevant, and bases the position on the tremendous and imminent danger to the public from the sale of poisons and medicines. It can hardly be said to lay down too rigid a rule, looking to the safety of life; but the authorities generally do admit the question of negligence as material, but they demand the utmost caution and skill above stated. Certainly this duty is demanded as between the parties to the sale, and, upon principles above stated, this duty exists between the seller and third persons also. A few cases will show this. The leading case is *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, holding that a manufacturing druggist selling a poisonous drug labeled as harmless is liable to a person who relying on the erroneous label, and without carelessness, takes the drug as medicine, on the ground of breach of public duty, whether the person injured is the immediate customer or not. The druggist, Winchester, sold wholesale to Aspinall, and he to Foord, and Foord sold by retail to Mrs. Thomas. Winchester was held liable to her. The court said: "The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label." The court distinguished between articles of imminently dangerous character and those not of such character, in saying: "The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution; or that the exercise of that caution was a duty only to

his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business, and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinall. The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinall . . . and afterwards used as the extract of dandelion by some person then unknown. The owner of a horse and cart who leaves them unattended in the street is liable for any damage which may result from his negligence. *Lynch v. Nurdin*, 1 Q. B. 29; *Illidge v. Goodwin*, 5 Car. & P. 190. The owner of a loaded gun who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge. *Dixon v. Bell*, 5 Maule & S. 198. The defendant's contract of sale to Aspinall does not excuse the wrong done to the plaintiffs. It was a part of the means by which the wrong was effected. The plaintiffs' injury and their remedy would have stood on the same principle if the defendant had given the belladonna to Dr. Foord without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale on the faith of the label." That case is recognized as sound law, almost without dissent. It is approved in *National Sav. Bank v. Ward*, 100 U. S. 204, 25 L. ed. 621, where it is held that "such an act of negligence being imminently dangerous to the lives of others, the wrongdoer is liable to the injured party, whether there be any contract between them or not. Where the wrongful act is not immediately dangerous to the lives of others, the negligent party, unless he be a public agent, . . . is, in general, liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract." This distinction between things imminently dangerous and things not so is drawn in *Thomas v. Winchester*, cited, and *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543. In *Norton v. Sevall*, 106 Mass. 143, 8 Am. Rep. 298, it was held that if one sell negligently a poison for a harmless medicine to A, who buys it to administer it to B, and gives a dose to B, which kills him, an action lies for B's estate. Gray, J., said: "This finding includes a violation of duty on the part of the defendant and an injury resulting therefrom to the intestate, for which the defendant was responsible, without regard to the question of privity of contract between them. The case is within that of *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, which has often been recognized and approved by this court." The same in *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350. *Blood Balm Co. v. Cooper*, 83 Ga. 457, 5 L. R. A. 612, 10 S. E. 118, approves *Thomas*

v. *Winchester*, and holds that one who sells dangerous medicines to a druggist, to be resold, is liable to third parties, as if he himself had sold to them. In *Langridge v. Levy*, 2 Mees. & W. 519, 4 Mees. & W. 337, A bought a defective gun, which was warranted, and gave it to B, who was hurt by its explosion. It was held B could sue the seller. The principle was applied to persons contracting to build scaffolds to repair buildings, by holding them liable for defects to workmen using these scaffolds, not employed by such contractor, though there was no privity of contract between them. *Coughtry v. Globe Woolen Co.* 56 N. Y. 124, 15 Am. Rep. 387; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 315. So where a mechanic made a bad repair to a gas meter, which injured a servant in the house. *Parry v. Smith*, L. R. 4 C. P. Div. 325, cited in note in 42 Am. Rep. 315. The text-books lay it down as law. 1 Thomp. Neg. § 817; Cooley, Torts, 82; Wharton, Neg. § 91; 2 Jaggard, Torts, § 261. There are cases sometimes cited in this connection where there is no mistake, but the seller knew the article to be defective or dangerous, and put it on the market, and he was held liable to third parties injured. Where one sold to another a bad ladder, knowing it to be bad, and a third party using it in work was injured, he was allowed to recover against the seller. *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L. R. A. 818, 51 N. W. 1103. The knowledge of the seller seemed to govern in that case. There will be found some cases where a seller to one party knows the article is to be used by another. In such case we can base the right on the theory that the third party is the real purchaser,—a party to the contract made for his benefit,—so that he can sue. *Paducah Lumber Co. v. Paducah Water Supply Co.* 89 Ky. 340, 7 L. R. A. 77, 12 S. W. 554, 13 S. W. 249. Such is the case of *George v. Skivington*, L. R. 5 Exch. 1, where a husband bought a hair wash for his wife, represented to be good for the purpose, and she was allowed to recover. The case is often cited in this connection; but it seems to me to stand on the ground that the seller sold it knowing that it was to be used by the wife, she being a party to the contract, as it was made for her use. The opinions in the case turn it on this knowledge. The seller's representation was also for her use. The seller also knew the character of the article. A number of cases hold the seller liable to strangers to the contract when he knows of defects, but does not disclose them. They are not apposite in this case. One making bad coal oil, knowing its defect, was held liable in *Elkins v. McKean*, 79 Pa. 403. Same principle in *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64. Our case in hand is the case of one selling by mistake the wrong article, by negligence or incompetency, as is claimed,—selling a hurtful drug for medicine, when a harmless medicine was called for,—and injury resulting to a stranger to the sale. Many authorities hold that one who sells provisions for consumption that are bad 57 L. R. A.

and hurtful is liable. *Craft v. Parker*, W. & Co. 96 Mich. 245, 21 L. R. A. 139, 55 N. W. 812. Much more in the case of hurtful drugs! Would you limit the liability for selling foul food to only him who made the contract of purchase, and leave others at the table—wife, child, boarder, guest—without remedy against the first author of the harm? If one contracts to prepare a supper for a ball or festival, and furnishes sickening victuals, ought not anyone injured to go to him for reparation? Under the facts, is he not under duty to everyone present, in addition to his duty to his contracting party? It was held that he was in *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154. Why not, also, one selling drugs? We must distinguish cases, and not carry the principle of allowing strangers to the contract to sue for damages in every case. We cannot say that everyone injured from defects in a railroad car or carriage or machinery can sue the maker or seller. This would be saying that any stranger could sue for injury for breach of a contract, resulting in injury to him. Who would sell under such a rule? The explosion of a defective cylinder of a threshing machine did not give action to a person operating it, against the manufacturer, for want of privity of contract. If the manufacturer knew of the defect, he would be liable; but, if he did not, it would be otherwise, though guilty of negligence in manufacturing and testing. *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L. R. A. 821, 19 S. W. 630. A contracted with the government to furnish a coach for carriage of mail, and B contracted with the government to furnish horses to draw it, and B hired C to drive, and C was injured from a breakdown of the coach. C was denied recovery from A for defect in the coach. *Winterbottom v. Wright*, 10 Mees. & W. 109. What is the test or criterion always applicable? Hardly any. Each case involving this nice principle must be largely its own arbiter. We may say that, as the authorities cited show, a third party, a stranger to the sale, can only sue when the thing used or the negligent act is very dangerous to human life, and injury may reasonably be expected to happen to others therefrom.

Contrary to these principles, the court instructed the jury that, if the sale of the salt-peter was in fact made to McGary, the plaintiff could not recover; and therefore instructions of the defendant numbered 1, 4, 5, 6, and 7 are bad. I think defendants' instructions 4 and 12 are bad, because they say that only reasonable or ordinary care was demanded. The greatest care is demanded of one who sells dangerous drugs. So, also, is high skill,—certainly ample skill. If one sells them who is not skilled, but incapable of the business from ignorance or want of experience, he must not sell them. He does so at his peril. He assumes the obligations and risks incident to his chosen business. Salt-peter and Epsom salts not being drugs prohibited from sale, except as allowed in § 9, chap. 150, Code 1890, it is not unlawful for a merchant to sell

them, and instructions 2 and 3 were not objectionable. There is no objection to defendants' instructions 8 and 9, as to contributory negligence. My understanding is that instruction 7 of plaintiff was given, as it ought to have been. Plaintiff's instruction No. 9, saying that no one but a licensed druggist can sell saltpeter, and that its sale was prima facie negligence, was properly rejected. Whether so selling would be ground for treating him as engaged in the business of a druggist without license is one question; but it would raise no presump-

tion, on that ground alone, for the inference of negligence. Of course, it will be understood that whether the defendant in fact did sell the pulverized saltpeter, and whether it was of a highly dangerous character, as also the question of negligence and unskilfulness, will be matters for the jury, under the evidence and law, on another trial.

For these reasons, *we reverse the judgment*, set aside the verdict, grant a new trial, and remand the cause to the Circuit Court.

KENTUCKY COURT OF APPEALS.

Mat JONES, Appt.,
v.
COMMONWEALTH of Kentucky.

(.....Ky.....)

There may be sufficient force to constitute robbery, in grabbing a purse from one's hand so quickly that he has no opportunity to resist.

(February 12, 1902.)

NOTE.—What force is sufficient to constitute robbery.

- I. Introductory, 432.
- II. Actual force.
 - a. Snatching.
 1. When there is resistance, 432.
 2. When there is no resistance, 433.
 3. When property is attached to the person so as to afford resistance, 437.
 - b. When the taking is without knowledge of the person robbed, 438.
- III. Constructive force.
 - a. In general, 439.
 - b. Demand with overwhelming numbers or demonstrations of force, 439.
 - c. Threatening to charge with crimen innotinatum, 440.
 - d. Other threats of prosecution, 441.
- IV. Force used to obtain property under color of right or claim of ownership, 443.
- V. Force employed as a means of escape, or to prevent a recaption of property taken without force, 443.
- VI. Decisions under special statutes, 445.
- VII. Miscellaneous cases, 446.
- VIII. Résumé, 447.

I. Introductory.

The force, by means of which robbery is committed, may be divided into two classes, actual and constructive; under the former is included all violence inflicted directly on the person robbed; under the latter, all demonstrations of force, menaces, and means by which the person robbed is put in fear sufficient to suspend the free exercise of the will, or prevent resistance to the taking.

Cases where the question of the sufficiency of the force is not decided, except by the fact that convictions of robbery were had, are not included in this note.

57 L. R. A.

APPPEAL by defendant from a judgment of the Circuit Court for Harrison County convicting him of robbery. *Affirmed.*

The facts are stated in the opinion.

Mr. W. T. Lafferty for appellant.

Mr. Morrison Breckinridge, for appellee:

To snatch a pocketbook forcibly from another's hand is robbery.

Williams v. Com. 20 Ky. L. Rep. 1850,

II. Actual force.

a. Snatching.

1. When there is resistance.

Snatching property from the person of another, if met with resistance, however slight, and that resistance is overcome, is robbery. *Davies's Case*, 2 East, P. C. 709; *Com. v. Davis*, 23 Ky. L. Rep. 1717, 66 S. W. 27.

Where a satchel containing money was snatched from the owner's hand with such force as to throw her down the court said: "While it may be true that mere taking unaware, or a sudden snatching a thing from the hand of another, is not robbery, if the snatching be accompanied with violence or such demonstrations or threats as to create a reasonable apprehension of bodily injury, or create resistance, however slight, the offense is committed." *Evans v. State*, 80 Ala. 4.

And where the evidence showed that the accused forcibly wrenched a pocketbook out of the owner's hand, the court held that the crime of robbery was committed, and said: "While it requires an exercise of the muscle to pick up an article, or to take from a pocket, this is not force sufficient to constitute robbery; it would be theft; but where there is resistance to the taking, and this resistance is overcome by force, it is a forcible taking, or a taking accompanied by violence, and constitutes robbery. It is not necessary that a blow should be struck, or the party be injured, to be a violent taking; but if the robber overcomes resistance by force he is guilty." *Williams v. Com.* 20 Ky. L. Rep. 1850, 50 S. W. 240.

State v. Moore, 106 Mo. 480, 17 S. W. 658, was a case where a man grabbed at a woman's pocketbook lying on top of some packages in her arm, and at the same time the woman caught hold of it, whereupon the man struck her a blow in the breast and wrested the pocketbook from her. The court affirmed a judgment of conviction of robbery, stating that the pocket-

50 S. W. 240; *Davis v. Com.* 21 Ky. L. Rep. 1295, 54 S. W. 959.

Guffy, Ch. J., delivered the opinion of the court:

The appellant was indicted, tried, and convicted in the Harrison circuit court under an indictment for robbery. The specifications in the indictment are as follows: "Did feloniously take a pocketbook and seven dollars in money, the personal property of Esaw Eckler, from his presence, and against his will, by violence, and putting him in fear of some immediate injury to his person." A jury trial resulted in a verdict and judgment sentencing the appellant to the penitentiary for two and one-half years. The verdict reads as follows: "We, the jury, find the defendant guilty, and fix his punishment at two and one-half years in the penitentiary. Dow Holten, Foreman."

book was taken by force, against the will, and with intent to steal, citing *State v. Broderick*, 59 Mo. 318. (See II. a, 3, *infra*.)

In *Usom v. State*, 97 Ga. 194, 22 S. E. 899, a man tried to snatch a satchel which was hanging on the "front gate" of a wagon in which a woman was riding. She also took hold of it and tried to keep him from getting it, but he wrenched it from her, breaking the handle, and ran away. The court affirmed a judgment of conviction of robbery.

Where, a person's watch chain being snatched, he started backward and his hat fell, the court stated: "It is a close question whether such taking constituted robbery or grand larceny. That question was dependent upon the absence or presence of the use of force in the taking, and . . . was for the jury;" and reversed a judgment of conviction of robbery. *People v. Church*, 116 Cal. 300, 48 Pac. 125. The quick backward motion, at the time of the snatching, was certainly some evidence of resistance.

One person went up to another, who was intoxicated, and "kept fooling around" his overcoat, and the latter said that he had nothing belonging to the other, and took out his money intending to put it into his purse, when the thief grabbed it and ran. The judgment of conviction of robbery was affirmed on the ground that some resistance was shown. *Burke v. State*, 74 Ga. 372.

One man demanded of another an article of value in the hands of the latter, and, upon a refusal to deliver, declared: "I will take it anyway," accompanying the words with a forcible snatching of and running off with the article. It being done against the actual consent of the person in possession of it, the court held that the offense of robbery was committed, if there was a felonious intent. *McDow v. State*, 110 Ga. 293, 34 S. E. 1019.

And where a man snatched hold of a valise carried by a small boy, wrenching it from his hands by force, and, putting his hand in his pocket, threatened the boy, a judgment of conviction of robbery was affirmed. The court states: "But whenever the taking is resisted, and the resistance is overcome by violence, the offense is committed. . . . Or, if resistance is prevented by threats of actual violence, creating a reasonable apprehension of it, the offense is complete." *Jackson v. State*, 69 Ala. 249.

Bond v. State, 20 Tex. App. 421, and *Leonard v. State*, 20 Tex. App. 442, are companion 57 L. R. A.

The grounds relied upon for a new trial are because the court misinstructed the jury, or refused to properly instruct the jury, and because the verdict was against the law and evidence. At the conclusion of the testimony for the commonwealth the appellant asked for peremptory instruction, which was refused by the court. No evidence was offered by the defendant. The court, in its first instruction, substantially instructed the jury that "if, from all the evidence, they believed beyond a reasonable doubt that the defendant, before the finding of the indictment, and prior to March 1, 1901, did feloniously take a pocketbook and \$7 in money, or any part thereof, the personal property of Esaw Eckler, from his presence, and against the will of said Eckler, by violence or putting said Eckler in fear of some immediate injury to his person, they should find the defendant guilty,

cases, being prosecutions against confederates for the same crime. Judgment of conviction of robbery was affirmed in each instance. The facts were: A farmer, having been in town all day and drinking some, met some men in an upper room who wanted him to play poker. He declined, but they passed him some checks, saying that he had ordered them and should pay for them. He did so, and then started down stairs, whereupon one of the men remarked "You have no money is the reason you won't play." At that, the farmer exhibited a pocketbook containing \$52, and immediately the lights were put out and the men seized him and wrenched his pocketbook from him. He held on to it as long as he could, but the strength of the others prevailed over him.

In *People v. Foley*, 27 N. Y. Week. Dig. 217, it is said: "When the property is taken by force the degree of force is immaterial. This is the rule now whatever it may have been heretofore."

In *Thompson v. State* (Tex. Crim. App.) 26 S. W. 1081, two men came up to another, and, one of them trampling on his feet, he put his hand in his pocket and caught hold of his money to hold it, whereupon the thief grabbed hold of him, and, when the other took his hand out of his pocket still holding onto his money, and tried to push him away, the thief caught his hand and twisted the money away, handing it to the confederate, and the two ran off. The court held that there was evidence of violence, and might be of fear, and that the question of robbery was properly submitted to the jury.

It is said in *Gallagher v. State*, 34 Tex. Crim. Rep. 306, 30 S. W. 557, that, "In this latter case [larceny from the person] the property must be taken from the person without his knowledge, or so suddenly as not to allow time to make resistance, and this must be done by privately stealing the property. . . . If force or violence is used, or the assaulted party is put in fear of life or bodily injury and the property is thus taken, it is robbery." A conviction of robbery was affirmed.

State v. West, 106 La. 274, 30 So. 848, holds that an attempt to rob, under § 811, La. Rev. Stat., by "cutting or tearing the clothes, or thrusting the hand into the pockets, or otherwise," includes an attempt to rob by violently snatching away the property from the hands of another.

2. When there is no resistance.

The force that is used merely to snatch or 28

and fix his punishment at confinement in the penitentiary for not less than two years nor more than ten years, in their discretion, governed by the proof." The second instruction was in regard to petit larceny. The third instruction was to the effect that, if the jury believed the defendant guilty beyond a reasonable doubt, but entertained a reasonable doubt as to the degree of his guilt, they should find him guilty of petit larceny only. The fifth instruction was to the effect that if, upon the whole case, the jury entertained a reasonable doubt of the guilt of the defendant having been proved they should acquit him. The contention of appellant is that there was no evidence tending to prove that the appellant committed the offense of robbery. The evidence as to the taking of the pocketbook in question was given by Esaw Eckler, and is in words

as follows: "I am acquainted with Mat Jones, the defendant. I have known him for several years. Some time in December, 1900, shortly before Christmas,—I think it was on court day,—Mat Jones came up to me at the corner of Main and Pike streets, in Cynthiana, Harrison county, Kentucky, about 4 o'clock in the afternoon. I think it was about that time, for the 4 o'clock train was just blowing. I asked Jones if he had seen my son James Eckler. He said that he had, and that he knew right where he was, and he would take me to him if I would go. I told him I would, as I wanted to get him, and go home. We then walked north on Main street a short distance below where the new church was being built, and to the head of the alley. Jones then asked me if I would change a quarter for him, and I told him I thought I could, and

take property from the person of another without any resistance on his part is not sufficient to constitute robbery. *Spencer v. State*, 106 Ga. 692, 32 S. E. 849; *Anderson's Case*, 1 N. Y. City Hall Rec. 163; *Bonsall v. State*, 35 Ind. 400; *Routt v. State*, 61 Ark. 594, 34 S. W. 262; *Wilson v. State*, 3 Tex. App. 63; *Jackson v. State*, 114 Ga. 826, 40 S. E. 1001; *Doyle v. State*, 77 Ga. 513; *Reg. v. Walls*, 2 Car. & K. 214; *King v. Macauley*, 1 Leach, C. L. 287; *King v. Baker*, 1 Leach, C. L. 290; *Steward's Case*, 2 East, P. C. 702; *Robin's Case*, 1 Leach, C. L. 290, note; *Danby's Case*, 2 East, P. C. 702; *Rex v. Grey*, 2 East, P. C. 708; *Horner's Case*, 2 East, P. C. 703; *Chick's Case*, 2 East, P. C. 703.

Brennon v. State, 25 Ind. 403, and *Hall v. People*, 171 Ill. 540, 49 N. E. 495, are not cases of snatching, but are cases of taking without resistance from intoxicated persons. The court reversed a judgment of conviction of robbery in each instance, with a dissenting opinion in *Brennon v. State*. These cases are set out more at length under II. b. *infra*.

In *Territory v. McKern*, 2 Idaho, 759, 26 Pac. 123, a charge as to robbery, "that if a man stealthily flich from the pocket of another the force necessary to remove the property is all the force that the statute requires," was held error.

In *Rex v. Gnosll*, 1 Car. & P. 304, it is stated that to constitute robbery the force used must be either before or at the time of the taking, and must be of such a nature as to show that it was intended to overpower the party robbed and prevent his resisting, and not merely to get possession of the property stolen. In this case a man laid hold of another's watch, and with considerable force jerked it from his pocket; a scuffle then ensued, and the thief was secured. The court held that the facts constituted larceny only.

This case is commented on and followed in *State v. John*, 50 N. C. (5 Jones, L.) 163, 69 Am. Dec. 777, where the facts are very similar, only the thief escaped after the struggle. The court states that "violence may be used for four purposes: (1) To prevent resistance; (2) to overpower the party; (3) to obtain possession of the property; (4) to effect an escape. Either of the first two makes the offense robbery. The last, I presume, will be conceded does not. The third is a middle ground. In general, it does not make the offense robbery, but sometimes, according to some of the cases it does." It is stated also that later English cases held that the law was now settled that unless there

was some struggle to keep the property, and it was forced from the hand of the owner, it was not robbery. The judgment of conviction of robbery was reversed.

Where a thief slipped his hand into a lady's outside pocket and furtively took therefrom a purse of money, but before he got the purse entirely out she felt the hand and tried to seize it, but the thief had succeeded, and the purse was gone, the court held that the facts did not constitute robbery. *Fanning v. State*, 66 Ga. 167.

It was held a taking in an artful, secret manner, and not robbery, where a man accosted a country boy as an acquaintance, at the same time seizing him around the waist and by fumbling around him at length succeeded in picking his pocket of an empty pocketbook. *Davis's Case*, 2 N. Y. City Hall Rec. 32.

It is stated in *State v. Miller*, 83 Iowa, 291, 49 N. W. 90, that the "force and violence . . . must be designed, not merely to take the property stolen if there be no resistance, but to prevent or overcome resistance to the taking." This was a taking of a jug from the floor of a hack in the presence of the owner with felonious intent. Judgment of conviction of robbery was reversed.

A man slyly put his hand into another's pocket and took his purse without knowledge of the latter until just as it was drawn from the pocket, and it was held merely larceny from the person, in *Norris's Case*, 6 New York City Hall Rec. 86.

Where one man, with his arm around another's neck, put his hand into the latter's pocket and drew therefrom money and a knife, but returned the knife without his companion's trying to prevent him, and yielding neither to force nor fear, the court held that robbery was not proved. And a charge that the same degree of violence that would constitute an assault and battery in any case would be sufficient violence to constitute a robbery was held error. Judgment of conviction of robbery was reversed. *McCloskey v. People*, 5 Park. Crim. Rep. 299.

People v. McGinty, 24 Hun, 62, is a case where, in a saloon, accused knocked a pocketbook out of a man's hands onto the bar, and another picked it up; and accused then grabbed the owner and put him out of doors. The court states that there is error in holding that any physical act to the person which resulted in the taking was violence within the meaning of the statute, and that violence "generally implies the overcoming, or attempting to over-

took my pocketbook from my pocket, which was a leather pouch, or 'ridicule,' as I called it, closing by means of a draw string. I held the book in my left hand, and put my right hand into it and drew out a dime, and just as I was putting my hand in the book a second time Jones reached over and took the book from my hand, and ran up the alley. I called to him to stop with my pocketbook, but he didn't stop. I had about \$7 in the book and my tax receipt. I had paid my taxes that day." On cross-examination Eckler testified as follows: "I was holding my pocketbook in my left hand, and had my right hand in it, and Jones grabbed it out of my hand, and ran up the alley." There was other testimony tending to show that the appellant really had the pocketbook in his possession, but no witness testified about the transaction of tak-

ing except Eckler. Counsel for appellant cites many authorities showing that there must be some force used in the taking of the property, or that the injured party must have been put in some fear. It may be conceded that the authorities sustain this contention of appellant, but it is the contention of appellee that the facts and circumstances proved in this case sustain the verdict, and that the jury were authorized under the evidence to find the defendant guilty of the charge of robbery, and cites several decisions of this court in support of his contention. In *Williams v. Com.* 20 Ky. L. Rep. 1850, 50 S. W. 240, the court had under consideration the law governing the offense of robbery. The injured party in this case testified as follows: "I was standing with my back to this colored man, and he came behind me and wrenched the

come, an actual resistance, or the preventing such resistance through fear." The judgment of conviction of robbery was reversed. Another justice concurs in the result, but states that the decision should not be deemed conclusive as to whether seizure of complainant and forcibly putting him out might not, on a new trial, furnish the element of force or fear necessary in robbery.

Also, where one of two confederates snatched money from another's hand and ran, while his companion held the victim so that he could not pursue the thief, it was held not to be robbery, and that the violence will not make a precedent taking, effected clandestinely or without either violence or putting in fear, amount to a robbery. *Shinn v. State*, 64 Ind. 13, 31 Am. Rep. 110.

To the same effect, and with very similar facts, is *Johnson v. State*, 35 Tex. Crim. Rep. 140, 32 S. W. 537, where one of two confederates snatched a purse from a man, who grabbed him, but the other confederate drew a pistol, and the man, through fear, let go. A judgment of conviction of robbery was reversed. The opinion states that the authorities seem to indicate that where there is no fear excited prior to the act of robbery there must be force or violence used to the person robbed; and that the authorities, except *State v. Carr*, 43 Iowa, 418, appear to hold that the mere snatching of property from another's hand is not such force as will constitute the offense of robbery.

If the violence to the person in a case of snatching was accidental and unintentional, it is not robbery, as in *Queen v. Edwards*, 1 Cox, C. C. 32, where a woman was returning from market in a wagon with a basket tied onto the seat by her side, and the prisoner and another, both armed with broom knives, endeavored to lift off the basket by stealth, but, seeing the string, cut it through with the knife just at the same moment when the woman perceived their intention and stretched out her arm to lay hold of the basket and thus received a wound on the wrist from the knife, which caused her to withdraw her hand and leave the thieves in possession of the basket. This was held to be simple larceny, for in robbery force must not only be employed by the party charged, but it is necessary to show that the force was used with the intent to accomplish the robbery, and that in this case the wound seems to have been inflicted undesignedly and by mere accident.

A case under the same principle is *Com. v. Ordway*, 12 Cush. 270, where in a sudden

snatching the thief touched the hand of the owner. The court held that there was no intentional touching of the person amounting to an assault, and that a conviction upon an indictment for robbery ought not to be rendered.

Upon an indictment for robbery in *State v. Harris*, 119 N. C. 811, 26 S. E. 148, where the evidence showed only that a woman snatched a purse of money out of the hands of a man as he stood under a city lamp, counting it, the prosecution abandoned the charge of robbery and requested a verdict of larceny, which was given and affirmed on appeal. Otherwise than as stated, the question of sufficiency of the force to constitute robbery did not come in question.

It was contended that it was an attempt to commit robbery where a man attempted to snatch from the hands of a girl a bag containing money, but the court affirmed a conviction of an attempt to commit grand larceny. *State v. Sommers*, 12 Mo. App. 374.

But *State v. Carr*, 43 Iowa, 418, is a case which is often cited as contrary to the prevailing doctrine. The evidence on the part of the state tended to show that defendants, or one of them, had hold of prosecutor at the time the money was snatched. Prosecutor himself testified that both of them took hold of him and would not let go. Evidence contradictory of this was from a witness, who testified that he saw no violence used, and that prosecutor handed one of defendants his pocketbook. The court instructed the jury as follows: "You will observe that robbery may be committed by force or violence, or by putting in fear. Now, if in this case you believe from the evidence that the Bohemian [prosecutor] took the money from his pocket and voluntarily handed it to one of the defendants, there was no robbery however he may have been deceived. If you believe from the evidence that the Bohemian, without being put in fear, took his money from his pocket and held it in his hand, and the defendants, without using any other force, snatched it from his hand, this is no robbery. If, however, the defendants seized the Bohemian and held him, and while they held him he took out his money and they snatched it, and one made off with it while the other held him, this is robbery. It is not necessary to constitute robbery that any injury should be inflicted on the person; and it is not necessary that the means used to put a party in fear should be such as to put in fear a man used to the ways of the world. If the defendant took hold of the Bohemian, and this was cal-

pocketbook out of this [left] hand; and, of course, he being stronger than I, I had to give way to him, and let him have it." On cross-examination she said: "No, because you don't no more than just take it from your hand. That man took it by main force from my hand." The court, in discussing the testimony, said: "The crime of robbery in this state is the same as at common law. The statute does not attempt to define the crime; only provides the penalty. We are clearly of the opinion the testimony of the commonwealth, if true, showed that the crime of robbery had been committed." In *Davis v. Com.* 21 Ky. L. Rep. 1295, 54 S. W. 959, this court again had under consideration the offense in question. In discussing the case it said: "It will be observed that the snatching of the money from Parton's hand was excluded from the jury by the second instruction, as evidence of actual violence. We think this fact was evidence to go to the jury, and they should have been instructed to convict if the money was taken against Parton's will by actual

force." In *Blanton v. Com.* 22 Ky. L. Rep. 515, 58 S. W. 422, the court, in discussing the offense of robbery, said: "The taking must be by violence, or by putting the owner in fear; but both of these circumstances need not concur. *Williams v. Com.* 20 Ky. L. Rep. 1850, 50 S. W. 240. Under the rule announced in this case and the authorities there cited the indictment is sufficient. It was held in the same case that to snatch a pocketbook forcibly from another's hand was robbery, and in *Snyder v. Com.* 21 Ky. L. Rep. 1538, 55 S. W. 679, it was held that, if the victim is pushed or shoved about by the pickpocket or his associate for the purpose of diverting his attention, and the crime is then accomplished, it is robbery, even if the victim is at the time unaware of his loss." This court, in the recent case of *Com. v. Davis*, 23 Ky. L. Rep. 1717, 66 S. W. 27, had under consideration the crime of robbery. After stating the case, the court said: "The prosecuting witness testified that she was walking along Fourth street about 1 o'clock in the day-

culated to put such a man as he in fear, by means of which robbery was committed, this is sufficient." This court on appeal, said: "We think the instruction right in principle,—clearly so; and that there was evidence to which it was applicable." So far, the decision is in harmony with the uniform doctrine. But the court below refused to give the following instruction: "No sudden taking of anything unawares from the person or out of the hand, as by snatching the same, is sufficient to constitute robbery, unless some injury be done to the person of the party from whom the property is taken, or unless there appears to have been a previous struggle for the property;" and such refusal this court commends, saying: "It may well be that a person might be put in fear, and money suddenly snatched from his hand or person." And then the court makes the following additional statements, which make this case outside the prevailing doctrine: "Nor are we prepared to admit that a sudden snatching of a purse from the hand is not the use of such force as to constitute robbery. On the contrary, with due deference to the authority cited by counsel, we hold that a sudden snatching from the hand or person of another constitutes the force and violence sufficient, under our statute, to constitute robbery." Whether this is a carefully considered statement expressing the court's mind on this subject, or whether, as might be inferred from his indorsement of the above instruction, the court has not said exactly, or all that he meant to say, is doubtful. In any event, it is an exceptional case.

Davis v. Com. 21 Ky. L. Rep. 1295, 54 S. W. 959, is another case which verges on the doctrine stated in *State v. Carr*, 43 Iowa, 418. The evidence showed a demand for a loan, made in a "positive, rough tone of voice," and that when the money was produced defendant snatched it out of the other's hands. The court instructed the jury that there was not sufficient evidence to convict the defendant of robbery by forcibly taking the money from Parton, the prosecuting witness; and unless they believed from the evidence, beyond a reasonable doubt, that the defendant obtained the money from Parton by the use of threats, menaces, or demonstrations of violence, such as to induce in the mind of a man of ordinary courage the fear of immediate injury to his person, they

could not convict. So the question on this appeal was solely whether there was any evidence to go to the jury of threats, menaces, or demonstrations of violence sufficient to put in fear. The snatching of the money from Parton's hand was excluded from the jury as evidence of actual violence by the above instruction. This court held that the evidence was not sufficient to sustain a conviction by putting in fear, and reversed judgment of conviction; and held, also, that the fact of the snatching was evidence of actual violence to go to the jury, and they should have been instructed to convict if the money was taken against Parton's will by actual force. *JONES v. Com.* cites *Davis v. Com.* 21 Ky. L. Rep. 1295, 54 S. W. 959, and seems to follow *State v. Carr*, 43 Iowa, 418, where the opinion states: "In fact, the snatching or grabbing and jerking of the pocketbook out of the witness's hand was probably done so quickly that he had no chance to actively resist; and, if this be true, we think such taking or snatching must be construed as taking by violence or force." This decision goes farther than any of the authorities cited to sustain it, except *Davis v. Com.* In the other cases cited in the opinion there was something besides a mere snatching; for instance, in *Williams v. Com.* 20 Ky. L. Rep. 1850, 50 S. W. 240, there was resistance which was overcome; in *Blanton v. Com.* 22 Ky. L. Rep. 515, 58 S. W. 422, there was actual force sufficient to tear the button holes and buttons off, under cover of which force the property was taken. (See this case under II. b. *infra*.) *Snyder v. Com.* 21 Ky. L. Rep. 1538, 55 S. W. 679, is a similar case to that last-mentioned: actual force was used for the purpose of diverting the owner's attention, and the property then taken. (See II. b. *infra*.) In *Com. v. Davis*, 23 Ky. L. Rep. 1717, 66 S. W. 27, a boy grabbed a purse a woman was carrying, and, although she "resisted with all her force," he succeeded in wrenching it from her. (See II. a. 1, *supra*.) This decision in *JONES v. Com.* seems to be one to be placed by the side of *State v. Carr*, and possibly *Davis v. Com.* as exceptions to the general rule.

Cases of snatching are prosecuted under a charge of larceny or theft from the person where the facts show that the taking was so sudden as to allow no time for resistance. For

time; that she saw two boys in a yard of an empty house; that, after she passed them one of them slipped up behind her, grabbed a purse, which she was carrying in her hand, that she resisted with all her force, but that he slipped one of his hands over her wrist, and wrenched her pocketbook out of her hand with his other hand; and that it contained \$10; and that the boy ran off with it, she pursuing." The court then proceeded to refer to the facts which in law constitute robbery, which are stated substantially as contended for by appellant. The court then said: "It is not so much the extent and degree of violence which makes the crime as the success thereof. Any force which is sufficient to take the property against the owner's will is all that is necessary to make up the crime of robbery." Under the Civil Code of Practice this court cannot reverse a judgment of conviction if there be any evidence tending to establish the guilt of the accused. In this case it must be conceded that the snatching of the pocketbook from the hand of Eckler re-

quired some force or violence, and the jury might perhaps infer from all the statements of the witness that he was put in some fear, else he would have made greater effort to recapture his money; hence it seems to us that, taking all the testimony introduced in this case, there was evidence tending to show that the appellant took the pocketbook and money by violence, and probably put the witness in some fear. It is true that the witness did not state that he was put in fear, nor that he tried to hold onto the pocketbook; he does not appear to have been asked specifically on these points; in fact, the snatching or grabbing and jerking of pocketbook out of the witness's hand was probably done so quickly that he had no chance to actively resist; and, if this be true, we think such taking or snatching must be construed as taking by violence or force. It results from the foregoing that the court did not err in respect to the giving or refusing of instructions.

For the reasons indicated, the judgment is affirmed.

a few examples, see *Clemmons v. State*, 39 Tex. Crim. Rep. 279, 45 S. W. 911, where it is said that the crime of larceny from the person is complete if the property is taken so suddenly as not to allow time for resistance; that it need not be taken without the knowledge of the owner, if the taking be so sudden as to allow no time for resistance. Other cases stating a similar doctrine are *Kerry v. State*, 17 Tex. App. 178, 50 Am. Rep. 122; *Green v. State*, 28 Tex. App. 493, 13 S. W. 784; *Mathis v. State* (Tex. Crim. App.) 65 S. W. 523. These cases are not entirely relevant, but are inserted here to show that when there is a quick snatching with no resistance the courts generally look upon it as larceny, and not robbery.

3. When property is attached to the person so as to afford resistance.

The force used to take or snatch property attached to a person in such a manner as to afford resistance is sufficient to constitute robbery. *King v. Moore*, 1 Leach, C. L. 335; *Rex v. Lapler*, 2 East, P. C. 557.

A recognized authority on this point is *Rex v. Mason*, Russ. & R. C. C. 419, where a thief snatched at a man's watch, but was prevented from immediately taking it by a steel chain which went around the owner's neck and was fastened to the watch, but, by pulling and two or three jerks, he succeeded in breaking the chain, and made off with the watch. The court held that in this case there was a sufficient degree of previous violence to constitute the crime of robbery, and that, although there was no actual injury to the person, yet, as force was necessary to separate the thing stolen from the person, it appeared to the court unlike the cases of snatching which have been held not to be robbery.

In *Rex v. Lapler*, 2 East, P. C. 557, above cited, a thief snatched at a woman's earring and tore it from her ear, which was held robbery.

In a case where a man grabbed with both hands a hand bag hanging on the arm of a woman, and jerked it off with such force as to break the handle, as she believed; and she testified that her arm was bruised and lame for several days after,—the court held that the tak-

ing was clearly by force, and that the act was robbery. *Klein v. People*, 113 Ill. 596.

And where a watch in a vest pocket, attached to a silk-ribbon watch guard, about ½ inch wide, passing around the owner's neck, was snatched by a thief, who had one arm through the arm of the owner, and who, at the time of snatching, exclaimed "D— you! I will have your watch," and fled with it, breaking the ribbon,—it was held robbery on the ground that the taking was effected by force. The court states that the facts shown make this a clear case of a taking by open violence, as distinguished from a secret taking, or a mere taking by surprise from the hands of another. *State v. McCune*, 5 R. I. 60, 70 Am. Dec. 176. See also extensive note on *What constitutes robbery*, attached to this case.

Also, where a man seized another's watch chain, and in doing so broke it loose from the watch and the button hole, and, upon the owner's endeavoring to recover it, the thief struck him and ran, it was held to be robbery on the ground that the taking was effected by force. In the opinion the court said: "The violence used was sufficient to overcome the resistance of the chain and break it from the watch and straighten out the hook which fastened it on the button hole. The violence was open, and the property was retained by force, for the prosecutor was struck by defendant at the very time when he made an attempt to snatch the chain out of defendant's hands." *State v. Broderick*, 59 Mo. 818.

In *Reg. v. Simpson*, 29 Eng. L. & Eq. 530, a man took a watch out of another's pocket and forcibly drew the chain out of the button hole, but his hand was seized by the latter's wife, and it then appeared that, although the chain and watch key had been drawn out of the button hole, the point of the key had caught upon another button and was thereby suspended. The court held that the facts constituted robbery, and not an attempt to commit robbery. The point was whether there was a sufficient asportation, and the court held that there was, as the watch and chain were in the possession of the thief, and severed from the person of the owner, for the interval of time after the key was drawn out of the button hole and before it caught on the button. This case is pertinent to the question of sufficiency of force only

by reason of the facts and the decision of the court that they sustain a conviction of robbery.

But in *United States v. Simms*, 4 Cranch, C. C. 618, Fed. Cas. No. 16,290, where one snatched a watch from another's side pocket, it being fastened around his neck by a ribbon which was broken at the first snatch, it was held that the force was not sufficient to constitute robbery, and the court intimated that the law was correctly stated in *Rex v. Gnosil*, 1 Car. & P. 304. (See II. a, 2, *supra*.)

And another case which differs from the prevailing doctrine is *People v. Hall*, 6 Park. Crim. Rep. 642, where a marshal and E. came up to a man, asked him if he had E.'s watch, and requested to see what ones he had: upon the man's showing him two, one of which was fastened around his neck by a cord, E. snatched them both, breaking the cord. The court held that it was error for the judge to refuse to charge that mere snatching of the watch would not constitute robbery; and then criticised *Lapler's* and *Mason's Cases*, and stated that when there is nothing to inspire fear, there must be superior force, and the property must be relinquished upon a struggle and upon compulsion; and that there must be such force employed, and such degree of force, as shall overcome the free agency or power of resistance of the person despoiled. A conviction of robbery was reversed.

b. When the taking is without knowledge of the person robbed.

If the taking is accomplished by actual force, although the person is unaware at the time that he is being robbed, it is nevertheless robbery.

As in *Com. v. Snelling*, 4 Binn. 379, where one man jostled against another in the street, and, when the other begged his pardon, he turned, looked, and swore at him, and followed him until the latter ran up against a house, then seized him by the cravat and leaned upon him, and while so doing took the man's watch. At the time this was occurring the owner thought the thief meant to beat him, but had no idea he was being robbed, and did not know it until after the thief had gone out of sight. The court stated that it was clear that the prisoner's violence was the cause of the loss of the watch; that the fear of being beaten diverted the owner's attention from his property, and the fear was produced by force, so that in truth the property was taken by force; and that, if it was the prisoner's intent to obtain the watch under cover of this violence without the knowledge of the owner, it was to be construed a taking by violence. There was a conviction of robbery.

In *Mahoney v. People*, 3 Hun. 202, Affirmed in 59 N. Y. 659, the facts show that as a man was entering a horse car an accomplice of the accused crowded him against the door, while accused threw his arms around the man's neck and removed a wallet from his pocket. The court cites *Com. v. Snelling*, 4 Binn. 379, with approval, but states that this case is unlike that one because the hand which grasped the pocket book was felt and the theft discovered, but states that if it was robbery in that case it was equally so in this, and also remarks that "the force which a thief uses to and upon the person of his victim, to consummate a robbery, if successful, is as much the successful force which robs when exerted to bewilder and confuse, as when used and exerted directly upon the main object. In either, the taking would be the result of force, though in one case indirectly applied and in the other directly." 57 L. R. A.

And the court states that *Com. v. Snelling*, 4 Binn. 379, determines the principle as follows: That when force is employed to divert the owner's attention, while he is unconsciously deprived of his property, the taker is guilty of robbery, though, by means of the force which distracts the attention, the larceny is artfully and unknown to the owner completed. The court approved such rule, saying it was sound sense and good law. The judgment of conviction of robbery was affirmed.

In *State v. Gorham*, 55 N. H. 152, one man said he wanted to whisper to another, and, putting his left arm around the other's neck and his mouth to the other's right ear, and pretending to whisper, with his right hand he took a roll of money from the other's vest pocket and handed it to a confederate who was standing near. The court affirmed a conviction of robbery, and stated that any forcible taking of property from the possession of another by means which overcomes resistance, however slight, is the taking by the infliction of actual injury, and so is by assault.

And while to pick one's pocket without the use of some force or violence or putting in fear is said in *Snyder v. Com.* 21 Ky. L. Rep. 1538, 55 S. W. 679, which was a case of picking a pocket while jostling the owner, not to be robbery, yet it is held that if the victim is being pushed or shoved about by the pickpocket or his associates, and the crime is then accomplished, it is robbery, even if the victim is at the time unaware of his loss.

It is decided in *Anonymous*, 1 Lewin, C. C. 300, that running against a person to divert his attention, and then picking his pocket, is force sufficient to constitute robbery, if the force is used with felonious intent.

Where three men, acting in concert, picked a man out, pushed him through the crowd down the pavement for some distance, one being at his back, and the others at his right and left, and one of them took a pocketbook from the victim's pocket, passed it to one of the confederates, and they all disappeared in the crowd, the court held that the evidence was sufficient to sustain a conviction of robbery. The court gives the following illustration: "Suppose three men observe a person approaching upon the highway, and agree to take his money from him if he has any; suppose, as they meet, the three, without saying a word, push the man backward till he is crowded against a fence or building, and during the time while his attention is thus distracted draw from his pocket his money. How shall we say the money was taken? Is it taken by force, violence, or how? Take away the violence used in the case, and what other means are left by which the money could have been seized?" *Seymour v. State*, 15 Ind. 288.

In *Blanton v. Com.* 22 Ky. L. Rep. 515, 58 S. W. 422, the facts appear that one man grabbed hold of another, pulled open his overcoat, tore the buttonholes and buttons off, and also pulled his vest open; that they scuffled while the one seized was trying to get loose, and soon after getting loose he found that his pocketbook had been stolen from his pants pocket. The court cites *Com. v. Snelling*, 4 Binn. 379, and sustains conviction of robbery.

In *People v. Glynn*, 54 Hun. 332, 7 N. Y. Supp. 555, Affirmed in 123 N. Y. 631, 25 N. E. 953, the captain of a schooner lying in a river, heard a noise on deck at night and succeeded in reaching the deck although one of the hatches had been fastened down. Accused, who was on deck, pointed a pistol at the captain and ordered him to go below, and at that

the captain struck accused, knocking him overboard; and then two other men and accused jumped into a boat and rowed away. After they were gone the captain found that certain articles had been taken from the boat. The court affirmed a conviction of robbery, and stated in the opinion that, although the thief may have procured possession of the property of another without force or violence, the removal of the property from the presence of that other with force and violence constitutes robbery. That it is not necessary that the owner or person in whose presence the property is removed shall know of its removal at the time. The fact that it is removed from such presence by force and violence constitutes the crime.

Brennon v. State, 25 Ind. 403, is a case of taking without the knowledge of the person where the force was held not sufficient to constitute robbery. The facts show that H. was lying on the ground at night in an unconscious state, the result of intoxication, and the thief stood astride his body and took from his pockets the property, putting it in his own, until he was discovered by a policeman, when he fled. Except for the fact that the pockets were turned inside out there was no proof of violence, and the court held that the facts were insufficient to constitute robbery, and reversed the judgment of conviction. The opinion states that it would be contrary to all authority to hold that any force is sufficient, but that there must be enough to constitute violence. *Rex v. Gnosil*, 1 Car. & P. 304 (see II. a, 2, *supra*) is quoted from, but is qualified by *Rex v. Lapier*, 2 East, P. C. 557, and *King v. Moore*, 1 Leach, C. L. 335 (II. a, 3, *supra*). And the court refers to *State v. McCune*, 5 R. I. 60, 70 Am. Dec. 176, and *Rex v. Mason*, Russ. & K. C. C. 419 (II. a, 3, *supra*), and states that they go to the very verge of the law; that, "to go further than this would be to recognize no distinction whatever between robbery and larceny from the person." To this decision, reversing conviction, there is a dissenting opinion, in which the judge states: "It would not take as much force to rob a man 'insensible, drunk with liquor, and in a deep sleep,' as it would a sober man in the possession of all his faculties; yet, in my opinion, violence enough to rob the former would be no less the crime of robbery than it would be to rob the latter by all the force and violence necessary to accomplish the wicked purpose." (See II. a, 2, *supra*.)

Hall v. People, 171 Ill. 540, 49 N. E. 495, is another case of a taking from an intoxicated man. From the facts it appears that the thief unbuttoned his vest and took his pocketbook from his inside vest pocket when he was so intoxicated that he did not know what the thief was doing, and made no resistance, and that he was not intimidated or put in fear. The court reversed a conviction of robbery, and stated in the opinion that the principle in regard to the force or violence necessary to constitute robbery is that the power of the owner to retain possession of his goods must be overcome by the robber, either by actual violence physically applied, or by putting him in such fear as to overpower his will, giving as an illustration the felonious taking of property from the person of another with such violence as to occasion a substantial corporal injury, or obtaining it by a violent struggle with a possessor; but that where it appeared that the article was taken without any sensible or material violence to the person, as snatching a hat from the head or a cane or umbrella from the hand of the

wearer,—rather by sleight of hand and adroitness than by open violence, and without any struggle on his part,—that it is merely larceny from the person; and further said that "If one should rifle the pockets of a sleeping or an unconscious person, even to the unbuttoning of clothes and turning out of pockets, such offense would not be robbery." Judgment of conviction was reversed. (See II. a, 2, *supra*.)

III. Constructive force.

a. In general.

In *Breckinridge v. Com.* 97 Ky. 267, 30 S. W. 634, it is stated: "Again, by repeated adjudications, has this law of robbery been extended so as not only to include fear of personal violence, but fear of the loss of his property; fear that his child in possession of the persons intending the robbery may be killed; fear that he may be accused of an unnatural crime."

It is robbery if one takes another's child and threatens to destroy him unless the other gives him money. *Rean's Case*, 2 East, P. C. 735.

But, obtaining money from a woman by threatening to accuse her husband of an indecent assault is not robbery. *Rex v. Edwards*, 5 Car. & P. 518.

Where one is induced by fear to take less for property in his possession than it is worth, it is held robbery, in *Rex v. Simons*, 2 East, P. C. 712. *Spencer's Case*, 2 East, P. C. 712, decides the same on parallel facts. (See III. b, *infra*.)

As to the fear necessary, it is charged, in *State v. Nicholson*, 124 N. C. 820, 32 S. E. 813, that it need not amount to great terror, but that, if the prosecuting witness surrendered his goods on account of threats or gestures which made him apprehensive of danger, it is sufficient so far as the element of fear is concerned.

In a brief memorandum of decision in *Paco v. Com.* 16 Ky. L. Rep. 476, 29 S. W. 16, the court said that accused's crime consisted in obtaining a watch of one Cooper by putting him in fear, and that the proof introduced for the state left no room for doubting his guilt, and affirmed conviction of robbery. Further facts are not given.

b. Demand with overwhelming numbers or demonstrations of force.

Making a demand with such demonstrations of force or numbers as to render resistance useless is force sufficient to constitute robbery. *Hughes's Case*, 1 Lewin, C. C. 301.

In *Spencer's Case*, 2 East, P. C. 712, the prisoner, with a great mob marching in military order, came to a man's house, and one of the mob said they would give 30s a load for corn which the man had in his possession belonging to other people, and if he would not take that they would take it anyway, upon which the man sold it for 30s when it was worth 38s. This was held to be robbery.

In *Taplin's Case*, 2 East, P. C. 712, a boy knocked violently at the door of a man's house, and said: "God bless your honor! remember the poor mob." The man told him to go along, when the boy said: "Then I will go and fetch my captain;" and he went and brought a mob with Taplin at the head on horseback, and said to the man: "Now I have brought my captain;" and some of the mob said: "God bless the gentleman! he is always generous." The man asked "How much?" and Taplin replied "Half-

a-crown, sir." A conviction of robbery was had.

Where prisoner went with a mob to a man's house, and one of the mob very civilly, and as the man then believed with good intention, advised him to give them something to get rid of them, and prevent mischief, and the man gave them money, this was held robbery in *Rex v. Winkworth*, 4 Car. & P. 444.

In *Rex v. Astley*, 2 East, P. C. 729, prisoners and a stranger went to G.'s house, and the stranger said: "I am come out of friendship to you, Mr. Grundy, to let you know your house is marked to come down to-morrow morning at 2:00 o'clock. I am the head of the mob; they are 2,000 strong in Birmingham. I must have something to make my men drink. I can bring 200 or 300 in an hour's time or keep them back." G. gave him all he had in his purse, and testified that he was greatly alarmed but not for his person, but that he feared his house would be pulled down. It was contended that there was no evidence of robbery because prosecutor did not deliver his money from any immediate fear of danger to himself or his property, but from an apprehension of future injury to his house by pulling it down. This was held to be robbery, but the reporter stated that no case had gone further.

Rex v. Simons, 2 East, P. C. 781, held it was robbery in the dwelling house where accused came to house of R. with about 70 of his companions and demanded a guinea or they would tear down his mow of corn and level his house. Upon receiving the money they opened a cask of cider and drank part of it and ate R.'s bread and cheese and carried away a piece of meat.

In *Rex v. Brown*, 2 East, P. C. 781, accused, having a drawn sword in his hand, and in company with another man, entered D.'s house, and said: "Put a shilling in my cap, or I have a party that can destroy your house presently," upon which prosecutor gave him a shilling. This was held robbery.

Where R., one of the officers of a bank agency, was requested to go to the bank agency to meet, as he supposed, a superior officer, but found instead a colonel and many more of a certain general's officers, who, by threats, insolence, and demands induced him to hand over what money there was in the bank, whereupon the officers carried it to the general, and R. was afterwards given a receipt by the general's orders, it was held, on a hearing of an application for extradition, that there was probable cause to believe the accused (general) guilty of robbery. *Re Ezeta*, 82 Fed. 992.

c. Threatening to charge with *crimen innominatum*.

Extorting money or property by threatening to charge with an unnatural crime is constructive force sufficient to constitute robbery.

If the money is obtained through fear produced by such a threat, it is held robbery, in *People v. McDaniels*, 1 Park. Crim. Rep. 198, although the threat was not in direct terms, but was in the nature of an insinuation.

This question was thoroughly considered in *Rex v. Donolly*, 2 East, P. C. 715, 1 Leach, C. L. 193, and a number of opinions were written discussing the sufficiency of the fear produced by such a threat. One judge stated that whether the party were obliged to part with his money from fear of personal danger, or loss of character, was the same thing, it being equally against his will in either case. In this case there was no violence used in connection 57 L. R. A.

with the threat, and one judge distinguished it from *Brown's Case*, where violence was used, and from *Jones's Case*, where there was a continual force and violence, a mob and crowd whose anger the victim feared if such an accusation should be publicly made; but the judge stated that without force it might be robbery just to threaten to accuse. And in another opinion it was stated that the laying of hands on the party made no difference; that in *Jones's Case*, which was very deliberately considered, this circumstance was not relied upon. Another judge cited the *Cases of Jones, Brown, and Harrold*, and observed that there was some actual violence proved in each of those cases, as taking by the collar or arm; but decided that it did not make any material distinction. All concurred in a decision that a threat to accuse of *crimen innominatum* was robbery.

After *Rex v. Donolly*, 2 East, P. C. 715, the reporter states that John Staples was convicted of a similar crime, and executed.

But in *Rex v. Cannon, Russ. & R. C. C. 146*, several of the judges thought that some degree of force or violence in connection with the threat was essential, and that the mere apprehension of danger to a man's character would not be sufficient to constitute the offense, although to this some of the judges dissented; however, a conviction was sustained because the evidence showed that a coach was called by defendant, and prosecutor was compelled to enter and was driven towards the police station; and this was held a sufficient constraint upon the person.

The doctrine in *Hickman's Case*, 2 East, P. C. 728, was doubted in *Rex v. Cannon*, but was afterwards recognized and followed in *Rex v. Egerton, Russ. & R. C. C. 375*, where it was held that fear of loss of character was sufficient, though the party had no fear of being taken into custody, or of punishment.

In *Hickman's Case*, 2 East, P. C. 728, it is stated "that, whether the terror arose from real or expected violence to the person, or from a sense of injury to the character, the law made no kind of difference, for to most men the idea of losing their fame and reputation was equally, if not more, terrific than the dread of personal injury;" and "that a threat to accuse a man of having committed the greatest of all crimes was a sufficient force to constitute the crime of robbery by putting in fear."

There was some constraint in *Rex v. Jones*, 2 East, P. C. 714, above referred to. While prisoner was threatening prosecutor he held him by the arm, but the judges do not refer to such constraint as necessary to constitute the crime, stating only that taking money from a man in such a situation rendered him not a free man, and that such a putting in fear is robbery.

Harrold's Case, 2 East, P. C. 715, is not reported in full, the reporter simply stating that he was convicted for a robbery similar to *Jones's Case*.

There was a conviction of an assault with intent to rob, in *Reg. v. Stringer*, 2 Moody, C. C. 281, where a man took another by the collar, accused him of an unnatural crime, and forced him to go part way to the police station, but obtained nothing from him.

In *Reg. v. Norton*, 8 Car. & P. 671, it was decided that where the money was obtained by means of any of the threats specified by statute the indictment must be upon the statute, and not for robbery, but, if the person was put in fear, and parted with his money in consequence of threats not specified by statute, the indictment might charge robbery. The facts

showed menaces of bodily injury, violent gestures, statements by the robber that he was armed, and a threat to accuse of a crime in the nature of *crimen inominatum*, but not sufficiently specific to bring it under the statute. The victim stated that he parted with his money from fear both of personal injury and an attack upon his character. And the court held a conviction of robbery was proper, stating that there was violence enough shown to put the party in fear without any threat, and that, if the money was parted with conjointly with the violence offered and a vague threat of an undefined charge, the crime is made out.

Rex v. Gardner, 1 Car. & P. 479, holds that to threaten to accuse of such crime is equally robbery whether a person is guilty or not.

To the same effect are *Reg. v. Richards*, 11 Cox, C. C. 43; *Reg. v. Cracknell*, 10 Cox, C. C. 408.

In *Rex v. Jackson*, 1 Leach, C. L. 193, note, it is held that the money must be taken immediately upon the threat made, and not after the parties have separated, and time has intervened for the prosecutor to deliberate and procure assistance, and especially after he has consulted a friend, who was present at the time the money was paid, though prosecutor parts with his money from fear of losing his character.

But parting with money upon such a threat will not amount to robbery if it is parted with, not from fear of loss of character, but for the purpose of bringing the extorter to justice. *Rex v. Fuller*, Russ. & R. C. C. 408; *Reane's Case*, 2 East, P. C. 734.

Where money is parted with upon such a threat, not so much from a fear of loss of character as loss of a position, it is robbery. *Rex v. Elmstead*, 2 Russell, Crimes & Misdemeanors, 86.

Thompson v. State, 61 Neb. 210, 85 N. W. 62, is an appeal from conviction of murder. The court held that the jury should have been instructed that a man may defend his domicile to the extent of taking life, against invaders who come with the intent of obtaining money by taxing him with the commission of an infamous offense against nature, and threatening to oppose him to public contempt; that under these circumstances the breaking and entry would be felonious because done with intent to rob, saying: "It appears from the authorities, ancient and modern, that the extortion of money by threatening to smirch a fair reputation is so atrocious a wrong that it is generally regarded as robbery,—especially if the vice or crime imputed is an unnatural one."

In *Houston v. Com.* 87 Va. 257, 12 S. E. 385, it is said that to constitute robbery "the demonstrations or fear must be of a physical nature, with the single exception that, if one parts with his goods through fear of a threatened charge of sodomy, the taking is robbery."

In regard to the exception thus made, it is said in *Britt v. State*, 7 Humph. 45: "The reason on which the single admitted exception is made to rest turns upon the overwhelming and withering character of the charge and its damning infamy so well calculated to unman and subdue the will . . . of the falsely accused. It is evident that the courts of England felt that even this exception looked extremely anomalous, and they strove, while permitting it to stand, to place it on ground unapproachable by any other case of fear of prosecution, as, if determined hereafter, it should have no associate in the offense of robbery. Our statutes create no change in this respect." (See III. d, *infra*.)

In *Long v. State*, 12 Ga. 293, it is said: 5? L. R. A.

"Again, threats of a prosecution amount to that violence, by construction, which constitutes the offense of robbery only in one instance, and that is when the threat is to prosecute for an unnatural crime; and it will be robbery whether the party is guilty or not. So abominable is the crime, and so destructive is even the accusation of it of all social right and privilege, that the law considers that the accusation is a coercion which men cannot resist. This seems to be the only case in which a threat to prosecute will supply the place of actual force." (See III. d, *infra*.)

In a note to *Davis v. State* (Tex. Crim. App.) 66 Am. St. Rep. 794, it is said that in England, and perhaps this country in the absence of statute, a threatened charge of sodomy is the only threat of prosecution for a crime from which can be inferred the fear necessary to constitute the crime of robbery.

And in *Simmons v. State*, 41 Fla. 316, 25 So. 881, it is said: "The terror which would lead the person robbed to apprehend an injury to his character was never deemed sufficient to support an indictment for robbery, except in the particular instance of its being excited by means of insinuations against or threats to destroy the character by accusations of sodomitical practices." (III. d, *infra*.)

d. Other threats of prosecution.

No threat of prosecution for debt, or for any crime except *crimen inominatum*, is sufficient to constitute robbery.

Where three men, one of them pretending to be a marshal and authorized to take a woman's furniture, threatened to arrest and take her in custody if she resisted, and so prevailed upon her to deliver up to them property and furniture, the court sustained the contention that the facts alleged did not show a sufficient putting in fear within the meaning of the statute. The court states: "The rule is well settled that property obtained by trick or artifice, or by threats of illegal arrest, or criminal prosecution, or insinuations against character, except they relate to sodomitical practices, is not taken by 'putting in fear' within the common-law definition of robbery; and we think the same rule applies to the offense defined by our statute." Judgment of conviction of robbery was reversed. *Simmons v. State*, 41 Fla. 316, 25 So. 881.

In *Britt v. State*, 7 Humph. 45, a man gave up money to another solely on the ground of the other's threats to prosecute him for having passed a \$5 note alleged to be counterfeit. The prosecutor testified that he was not alarmed or afraid of violence at any time while with prisoner, nor did he apprehend bodily danger or injury to his person. The court decided that these facts do not constitute robbery; and held, also, that it was error to charge that if the prosecutor gave up his property through fear, by reason of the defendant making falsely a threat to prosecute him for a crime, the punishment of which would be confinement in the penitentiary, defendant would be guilty of robbery, but if the prosecutor actually passed to the defendant a counterfeit note, it would not be robbery, but a mere compounding a felony, and the jury ought to acquit defendant. The opinion states: "It has been settled, upon much consideration, by the judges of England in more than one case, that threatening to prosecute an innocent man for any crime whatever except only the *crimen inominatum*, and by the fear arising from such threat, to compel the surrender of money or

property, does not amount to robbery. (See III. c. *supra*.)

In *Williams v. State*, 12 Tex. App. 240, a man falsely pretending to be town marshal obtained money from an ignorant colored man by threatening to arrest and put him in jail for selling a horse without a license. The colored man swore that he gave up the money because he was "mighty scared," but the court states that in its opinion the evidence would not support an allegation of taking by putting in fear of life or bodily injury; and also that the evidence would have to support a charge of assault in order to sustain the indictment, and, in view of the absence of such evidence, reversed the judgment of conviction.

Where a woman was compelled to pay money by treats of carrying her before a magistrate and to prison for not paying for goods pretended to have been bid for by her, but she did not pay the money through fear of any personal violence, the court held that it was duress, not robbery, and stated that the prosecutrix had a choice of difficulties, and chose to pay her money rather than undergo the trouble of being carried before a magistrate, and that the law did not allow the fear of being sent to prison to be a sufficient ground of terror to constitute a robbery; and that the threat of legal imprisonment ought not so to alarm any mind as to induce the person to part with his property. *Rex v. Wood*, 2 East, P. C. 732, 2 Leach, C. L. 732, also cited as *Rex v. Knewland*.

In a trial of an indictment for robbery, which included the charge of larceny, the question was whether the prosecuting witness had voluntarily paid the money obtained from him, to prevent a threatened exposure by the defendant of crime, or whether it was extorted from him by putting him in fear of his life or great bodily injury. A charge that if the jury should find that the prosecuting witness parted with his money to shield himself from a prosecution for a crime, or to avoid a public charge of that character, this would not constitute larceny, was held proper. *Haley v. State*, 49 Ark. 147, 4 S. W. 746. This case is of value here for the reason that if the above facts would not constitute larceny they would not constitute the greater crime of robbery.

But if the threat to accuse, arrest, or prosecute is supplemented by force, actual or constructive, it is sufficient to constitute robbery.

In *McCormick v. State*, 26 Tex. App. 678, 9 S. W. 277, the prisoner came up to two men in a city street at night with his hat pulled down and collar turned up, and, stating that he was an officer of the law, demanded that they hold up their hands or he would arrest them for drunkenness. One of the men testified that he was very much alarmed, and through fear threw up his hands, and the thief took his money. The court stated that there was no evidence tending to show that defendant simply told the man that he was an officer, and by that means obtained his money; but that the evidence showed that he was also put in fear. Judgment of conviction of robbery was affirmed.

And in *Williams v. State* (Tex. Crim. App.) 55 S. W. 500, where a man impersonated an officer, and, accusing two men of having counterfeited money, demanded that they deliver up their money, and used a six-shooter to enforce such demand, the court affirmed a conviction of robbery, stating that, as the party used fire arms to enforce compliance with his demands, and secured the money by these means, it constituted robbery; citing *McCormick v. State*, 26 Tex. App. 678, 9 S. W. 277.

In *Bussey v. State*, 71 Ga. 100, 51 Am. Rep. 57 L. R. A.

256, defendant pretended that he was town marshal, and had on a star designating the office. He seized prosecutor, to whom another was showing a trick at cards, and, upon the exclamation of that other, "There's the marshal," pushed prosecutor against the wall, threatened to take him to jail unless he paid him money, and thus extorted from him \$8, which he said "he paid to keep from going to jail, and he did not want to be bothered." The court states: "Whilst the mere arrest of him, with the threat to take him to jail . . . would not suffice, alone, to make a case of robbery, yet, accompanied with this ill-usage and violence of seizure, pushing and holding, it does, according to *Long v. State*, 12 Ga. 293, make such a case;" and, "whilst the case on the facts may be close, yet there is evidence of force as well as intimidation about the jail." Judgment of conviction of robbery was affirmed.

The court held that robbery by intimidation under § 4389 of the Georgia Code was committed in *Sweat v. State*, 90 Ga. 315, 17 S. E. 273, where two men, without a warrant, arrested another whom they pretended to believe was a fugitive from justice. They handcuffed him, and took possession of his personal property, including a bag of money, and took him some miles across the country to the home of one of the captors. They professed to be keeping the property for the prisoner. By operating on his fears, threatening to carry him to prison, and hinting at mob violence, they induced him to consent that they might have \$50 of the money if they would allow him to depart. The prosecutor testified that he was afraid his captors were going to kill him, so he complied with their proposition and was allowed to go.

A well-known and oft-quoted case on this point is *Long v. State*, 12 Ga. 293. A man was induced by threats of shooting, constraint upon his person, and threats to send him to the penitentiary for a theft he had committed in the past, to give a bill of sale of a negro girl, and almost all of the property which he owned. The court states: "So that threats to take one before a magistrate, or to prosecute for any other offense, or accusations of other crimes, although these may have the effect of extorting money or property from a person, do not make the transaction a robbery. If, however, such threats or accusations are accompanied with force, actual or constructive, and the property or money is given up in consequence of this force, the transaction is robbery. Nor is the guilt of the party accused any defense to an act of robbery. If property is extorted by violence upon a charge of larceny or any other crime, the offense is neither justified nor mitigated by his guilt, nor aggravated by his innocence." The court affirmed judgment of conviction. (See III. c. *supra*.)

Where a woman was obliged to pay for goods for which she had not bid in an auction room, before she was allowed to leave, a conviction of larceny was had, and the court said, by way of *obiter dictum*, that the facts would have proved a robbery also. *Reg. v. McGrath*, 11 Cox, C. C. 347, L. R. 1 C. C. 205, 37 L. J. M. C. N. S. 7, 21 L. T. N. S. 543, 18 Week. Rep. 119.

In *Williams v. State*, 51 Neb. 711, 71 N. W. 729, a man, pretending to be a police officer, accused another of violating a gambling ordinance, holding him by the shoulder and shaking him a little at the time, and demanded that he hand over all his money or the other would take him to the police station. The victim, greatly frightened, gave him all his money. The court held that the evidence supported a charge of robbery by putting in fear.

Gascolgne's Case, 2 East, P. C. 709, holds that a runner at the police office, taking money out of the hand and pocket of a prisoner whom he had before handcuffed and was conducting to prison,—under pretense of letting her go home,—and paying for coach hire and liquor which he had himself ordered, is guilty of robbery, the jury finding that all this was done with a felonious design to get her money, although the party in custody had before offered him the money if he would let her go home, and repeated the offer after he had taken it in that manner.

In *Merriman v. Hundred of Chippenham*, 2 East, P. C. 709, Merriman was carrying his cheeses along the highway in a cart, when he was stopped by a man who insisted on seizing them for want of a permit (which was found by the jury to be a mere pretense for the purpose of defrauding the owner, no permit being necessary), and, after some dispute, they agreed to go before a magistrate to determine the matter. While they were gone the thief's confederates carried away the goods. The jury returned a verdict of robbery. The reporter in a note says that this opinion must have been grounded on the consideration that the first seizure of the cart and goods by the aggressor, being by violence and while the owner was present, constituted the offense of robbery.

The court compares robbery and extortion, in *People v. Barondess*, 61 Hun, 576, 16 N. Y. Supp. 438, as follows: "Robbery is the unlawful taking against the will by means of force or violence, or fear of injury immediate or future, to one's person or property, . . . while extortion is the obtaining with consent by similar means."

IV. Force used to obtain property under color of right or claim of ownership.

When the property is taken by force, actual or constructive, under color of right or claim of ownership, it is not robbery. *Barnes v. State*, 9 Tex. App. 128; *People v. Vice*, 21 Cal. 344; *State v. Hollyway*, 41 Iowa, 200, 20 Am. Rep. 586.

Where the loser in an unlawful card game compels the winner by means of force or fear to restore the money won from him, it is not robbery. *Thompson v. Com.* 13 Ky. L. Rep. 918, 18 S. W. 1022.

To the same effect is *Sikes v. Com.* 17 Ky. L. Rep. 1353, 34 S. W. 902, where, under a similar state of facts, a judgment of conviction was reversed.

And *People v. Hughes*, 11 Utah, 100, 39 Pac. 492, is also a case where money lost by gambling was recovered by the loser by a putting in fear, and the court reversed a judgment of conviction of robbery.

Also, *Gant v. State* (Ga.) 41 S. E. 698, decides the same question in the same way, but the court says, if the winner were compelled to surrender, not only his winnings, but also some of his individual money, it would then be robbery. Judgment of conviction of robbery was affirmed.

Where a creditor by violence forced his debtor to pay the debt, it was held not to be robbery, in *Reg. v. Hemmings*, 4 Fost. & F. 50.

A man had given a note, with sureties, to another in payment of land, but objected to the deed given him. He asked to see the note, and, upon getting it in his hands, refused to return it, and, breaking loose from the man, who had seized him, he caught up an ax and reaching his horse got away, saying that the surety had sent him word to get the note as he

could or might. The court held that these facts made out a case of forcible trespass, but not larceny or robbery, as the act was done under color of right and with some seeming excuse for it. *State v. Deal*, 64 N. C. 270.

In *Rex v. Hall*, 3 Car. & P. 409, the jury found that a man had acted under a bona fide impression that wires and game which a game keeper had found and appropriated were his property, and therefore his demanding and obtaining them by menaces was not robbery.

In *Gables v. State* (Tex. Crim. App.) 68 S. W. 288, there was evidence that a saloon keeper obtained 50 cents, which he claimed was due him from another man, by use of a pistol; other evidence was to the effect that he used the pistol to defend himself from apprehended violence. The court held that the crime was not made out in either case, and reversed judgment of conviction of robbery.

In *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221, where the prisoner obtained money from a man by threats and force while somewhat intoxicated, and the evidence tended to show that he claimed the money as his own, the court charged the jury that if they thought that the prisoner had lost some money, and honestly believed the other man had taken it, and that he was only getting back his own, he should be acquitted. There was a verdict of guilty, which was affirmed on appeal.

The court pointed out, in *Brown v. State*, 28 Ark. 126, that there was a dispute as to the ownership of the property taken, and that defendant claimed it and went in open day to assert his claim in the presence of several others, and that such circumstances make the case fall short of what is necessary to make out robbery.

But in *Crawford v. State*, 90 Ga. 701, 17 S. E. 628, the court says it is for the jury to say whether a claim of right was made and acted on in good faith, or whether it was merely a pretext resorted to as cover for a fraudulent intent.

A man in the presence of a friend gave another money with which to buy a horse at a fair, but afterwards tried to get the money back but could not. On the following day the friend asked the man for the money, and he refused to give it up. Subsequently, this friend seeing the man's son receive some money, demanded that he give it to him on account of the money the father had retained, and upon his refusal to do so the friend knocked him down, and attempted to obtain it. It was held that there was such a semblance of right as not to constitute an assault with intent to rob. *Reg. v. Boden*, 1 Car. & K. 395.

V. Force employed as a means of escape or to prevent a recaption of property taken without force.

If the force or fear is employed merely as a means of escape, or to prevent a recaption of property taken without force, it does not constitute robbery. *State v. Clark*, 12 Mo. App. 593, Appx.

Where a man merely picked up a pistol deftly and suddenly, and walked off with it, covering his retreat by presenting the pistol at the owner with a view to prevent him from pursuing or attempting to recover it, the court held that robbery was not committed, in *Jackson v. State*, 114 Ga. 820, 40 S. E. 1001.

Smith's Case, 1 Lewin, C. C. 301, holds that in robbery the force must precede the theft, otherwise it is a stealing from the person.

And in *Harman's Case*, 2 East, P. C. 736, a thief took a purse from a man's pocket with-

out his knowledge until he saw it in the thief's hand and demanded it, whereupon the thief menaced him and rode away. The thief was held guilty of larceny only, having obtained the property by stealth, and the words of menace being used after the taking.

Rouff v. State, 61 Ark. 594, 34 S. W. 262, was a case where a man snatched a bill from the hand of another and handed it to a confederate, who started for the door. The owner drew a pistol, and the thief did also, and got away. The court reversed a conviction of robbery, and stated: "There are numerous cases holding that where the property is obtained by artifice, trick, or by merely snatching from the hand, and where the only display of force is used to prevent the retaking of the property by the owner, the crime is not robbery." (See II. a, 2, *supra*.)

Likewise, in *Shinn v. State*, 64 Ind. 13, 31 Am. Rep. 110, a man snatched money from another and ran away, while a confederate held the owner so that he could not pursue. The court reversed a conviction of robbery, and stated that there must be some previous struggle for the possession of the property, and that violence or putting in fear will not make a precedent taking effected clandestinely, or without violence or putting in fear, amount to robbery. (See II. a, 2, *supra*.)

A parallel case is *Johnson v. State*, 35 Tex. Crim. Rep. 140, 32 S. W. 537. A man suddenly snatched money from another who grabbed him, but a confederate of the thief drew a pistol, and the owner let the thief go. The court reversed a conviction of robbery, and stated that where no fear is excited prior to the act of robbery there must be force or violence used on the person robbed, and that a mere snatching is not sufficient force. (See II. a, 2, *supra*.)

In *Rex v. Gnosil*, 1 Car. & P. 304, a man snatched another's watch, after which a struggle ensued and the prisoner was secured. The court held that the accused was guilty of larceny only, and stated that, to constitute robbery, force must be used, either before or at the time of the taking. (See II. a, 2, *supra*.)

This last case is followed in *State v. John*, 50 N. C. (5 Jones, L.) 163, 69 Am. Dec. 777, which is very similar, only the thief escaped after the struggle; but there is a dissenting opinion in which the judge said that the distinction between a struggle to escape and one to carry off property when defendant was guilty of both was too refined for practical use. (See II. a, 2, *supra*.)

A case where this rule came up, but was held not to apply under the facts, and conviction of robbery was had, is *Thompson's Case*, 3 N. Y. City Hall Rec. 10, where it was contended that the owner was not put in fear until after his money was taken, when the thief menaced him, but the court held that it was for the jury to say whether acts of the prisoner just previous to the taking were not sufficient to put the owner in fear; or, if the jury believed that the threats were made by the thief before he had obtained complete possession of the money, he would be guilty; or, if the jury should believe that the whole conduct of the thief was sufficient to have induced a well-grounded apprehension of personal danger in the owner, then they should convict. A verdict of guilty was rendered.

Another such case is *State v. Miller*, 53 Kan. 324, 36 Pac. 751, where a man reached over a counter and grabbed the money in the money drawer, and at the same time the owner caught his hand, whereupon the thief cut the owner on 57 L. R. A.

the hand with a knife, causing him to let go, and so escaped. The contention was that the violence used by defendant was merely for the purpose of breaking away from the owner, and that defendant had the money in his possession before the struggle took place. The court stated that the correctness of those cases which hold that robbery is not committed where the thief gains peaceable possession of the property, and uses no violence except to resist arrest or effect escape, is not questioned; but in this case it cannot be contended that defendant had obtained complete possession of the money before using violence, and that the violence to the person and the taking may certainly be contemporaneous.

And also *Sherman v. State*, 4 Ohio C. C. 531, where prisoner, having asked to take conductor's fare box and been refused, grabbed it from under conductor's left arm, jerking it out, and striking conductor across face and nose, and escaping, it is stated that the blow struck and the taking of the property were parts of the same act; that the violence was inflicted as a means of getting possession of the property, and that this case differs widely from those where the violence used was after the property was taken.

That an assault with intent to rob must not be subsequent to an attempt to take the property is held in *Hansom v. State*, 43 Ohio St. 376, 1 N. E. 186. The opinion states that "after the taking of the property had been abandoned by the defendant, a struggle to avoid an arrest ensued. However violent this struggle, it did not characterize the attempt to take the diamond stud."

In *State v. Willis*, 16 Mo. App. 553, Appx., it is stated that the fact that the owner is frightened by the theft is immaterial if the theft was not in consequence of the fright. This was a sudden snatching from the hand of the owner without violence or putting in fear.

But *Thomas v. State*, 91 Ala. 34, 9 So. 81, applies this doctrine to a state of facts where some cases draw a distinction. A man stopped a boy carrying a gun, and entered into conversation with him in regard to purchasing it. The boy handed it to the man on his request for examination, and informed him that it was loaded, whereupon the man backed off a few feet and pointing the gun at the boy told him to run or he would shoot him. The boy, frightened, backed off, and defendant ran away with the gun. The court reversed conviction of robbery, and stated in the opinion that if force is relied on in proof of the charge it must be the force by which another is deprived of, and the offender gains, the possession; and that, if putting in fear is relied on, it must be the fear under duress of which the possession is parted with; that the taking must be the result of the force or fear, and force or fear which is a consequence, and not the means, of the taking will not suffice; that violence or putting in fear, to constitute the essential factor in the crime of robbery, must precede or be concomitant with the taking of the property from the possession of the owner; and that no violence or excitation of fear resorted to merely for the purpose of keeping a possession already acquired, or of escaping after the possession has been acquired, will support the element of force, which is an ingredient of this offense.

The court in the last-mentioned case overrules *James v. State*, 53 Ala. 380, where the facts are somewhat analogous. Two men were traveling together along the same road, and the articles taken, contained in a bag, were handed by the owner to his companion to be

carried for him. They proceeded some distance in this way when the thief took a step backward, and struck the owner behind on his neck, knocking him down and insensible, and when he recovered consciousness the thief was gone with the bag. These facts were decided to constitute robbery, and the reasoning of the court was that up to the time of the blow there was no appropriation of these articles by defendant or denial of the property of owner in them until he was struck and knocked down by the thief; that until then they were in the owner's presence and constructively in his possession; and that the violence was not done after the goods were taken away, but that they were taken away after and by means of the violence.

A case with very similar facts to *Thomas v. State*, 91 Ala. 34, 9 So. 81, but in direct opposition to it, is *McNeal v. State*, 29 Ohio L. J. 185, where a man went into a hardware store, asked to see a revolver, and, when shown one, loaded it, and pointing it at the clerk, backed out of the store with it. In a very brief decision the court holds that this was robbery notwithstanding the revolver was peaceably given the defendant and there were no violent acts until after he had obtained it, and thus seems to follow the doctrine of *James v. State*, 53 Ala. 380, and is contrary to the general doctrine.

Likewise, in *People v. Glynn*, 54 Hun, 332, 7 N. Y. Supp. 555, Affirmed in 123 N. Y. 631, 25 N. E. 953, referred to more at length under II. 6, *supra*, the opinion states that, although the thief may have procured possession of the property of another without force or violence, the removal of the property from the presence of that other with force and violence constitutes robbery.

Another case similar to *People v. Glynn*, but which goes farther, and seems to be a variation of the general rule, is *State v. Trexler*, 4 N. C. (2 Car. Law Repos.) 90, 6 Am. Dec. 558, where a man dropped a bank note, which another picked up, and there was then a struggle for its possession, which resulted in the thief's retaining it and running out of the room. The indictment and conviction were for forcible trespass, and it was contended that the crime was either larceny or robbery which would merge the trespass, but the court held that, the bank note not being a subject of larceny, no felony could be committed to extinguish the trespass. But the court reasoned that, supposing the note a proper subject of larceny, the seizing, the scuffle, and the carrying away were one continuing transaction; that, if a thief privately took money from a man and put it in his pocket, and when he attempted to take it out again the owner seized his hand, upon which a scuffle took place, and the owner was overpowered, it would be robbery; and that in this case, if, during the scuffle, the owner had caught hold of the bill, and then been overcome or intimidated, it would be robbery, and that if an actual touching of the note were essential to the regaining possession (which the court by no means thought necessary), that the jury had ample means to presume it from the circumstances, and should have been so instructed. And the court makes the extreme proposition that while snatching anything unawares is not considered a taking by force, yet, if there is a struggle to keep it, the taking is a robbery; but says that this distinction steers clear of cases like the one where a purse was stealthily taken, and upon the owner's discovering it in the hands of the thief and demanding it the thief threatened to pull his house from over

his head if he said anything about it, and rode off, which was held not to be robbery.

At the conclusion of the opinion in *People v. McGinty*, 24 Hun, 62, referred to more fully under II. a, 2, *supra*, where, after a man had knocked a purse out of another's hand, he seized him and put him out doors, one of the judges who concurred in a decision reversing conviction of robbery states that the decision should not be deemed conclusive as to whether the seizure of complainant and forcibly putting him out might not in a new trial furnish the element of force or fear necessary in robbery.

In a brief memorandum of *State v. Cunningham*, 13 Mo. App. 576, Appx., it is said that property taken from a person and carried away is robbery, although violence be used after the deportation to prevent an arrest. Apparently this case is a violation of the rule, but it is not further reported.

VI. Decisions under special statutes.

Under Texas Penal Code, art. 723 [857], providing that "if any person, by threatening to do some illegal act injurious to the character, person, or property of another, shall fraudulently induce the person so threatened to deliver to him any property with intent to appropriate the same to his own use," he shall be guilty of robbery, it was held in *Davis v. State*, 37 Tex. Crim. Rep. 47, 38 S. W. 792, that the act threatened must be illegal; and that a threat to accuse a person of an offense and prosecute him therefor when such person is guilty of such offense was not a threat to do an illegal act, and was not robbery under the above statute. A judgment of conviction was reversed.

Where a man cocked a pistol and pointed it at another and thus obtained his money it was held a taking by assault or violence, or by putting in fear of life or bodily injury, under art. 722 [856], and not a taking under art. 723 [857] (the provisions of which are set out in the preceding paragraph). *Coffelt v. State*, 27 Tex. App. 608, 11 S. W. 639.

United States v. Hare, 2 Wheeler, C. C. 283, Fed. Cas. No. 15,304, is an exhaustive case which holds that stopping a carrier in the highway and demanding the surrender of the mail, at the same time showing weapons calculated to take his life, such as pistols or dirks, and thus putting him in fear of his life and obtaining possession of the mail against his will, is sufficient under act April 30, 1810, § 19, authorizing conviction for robbery of the mails if the offender shall wound the person having custody thereof, or put his life in jeopardy by the use of dangerous weapons.

This case is cited and followed in *United States v. Wilson*, Baldw. 78, Fed. Cas. No. 16,730, where defendants were indicted under act March 3, 1825, § 22, for robbing the mail of the United States by the use of dangerous weapons and putting the life of the carrier in jeopardy. It was held that "jeopardy," as used in this section, means a well-grounded apprehension of danger to life in case of refusal or resistance; and that it is not necessary that the danger should exist at the moment of giving up the mail, if it ceased in consequence of the driver's submission from a reasonable fear of his life if he resisted or refused; also that pistols are dangerous weapons within the meaning of the statute, and are presumed to be charged until the contrary is proved. Conviction was affirmed.

United States v. Wood, 3 Wash. C. C. 440, Fed. Cas. No. 16,756, holds that a sword or pistol, by means and through terror of which a

carrier is robbed of the mails, is a dangerous weapon within the meaning of the 19th section of the postoffice law (4 Laws U. S. N. E. 297), requiring the putting of the life of the carrier in jeopardy by the means of dangerous weapons to constitute the offense, although it was not drawn or pointed at the breast of the driver at the time.

And in *Com. v. Martin*, 17 Mass. 359, it was held that if the robber shall, being armed with a dangerous weapon, make an assault with intent to kill or maim if it shall be necessary to effect his purpose, the offense is complete under Stat. 1818, chap. 124, § 1, which enacts that if any person shall commit an assault upon another, and shall take from his person any property which may be the subject of larceny, being at the time armed with a dangerous weapon, with intent to kill or maim the person so assaulted, or, being armed as aforesaid, shall actually strike or wound the person so assaulted and robbed, every person so offending suffer punishment of death.

An indictment, under Rev. Stat. chap. 125, § 13, which alleges that the prisoner assaulted the prosecutor and struck and wounded him while armed with a dangerous weapon, was held in *Com. v. Gallagher*, 6 Met. 565, not to be proved as to the wounding by evidence of a slight scratch on prosecutor's face which ruptured the cuticle only, without separating the whole skin, nor as to the striking by evidence that prisoner put his arms around prosecutor and threw him to the ground and held him there. The statute referred to enacts that if any person shall assault and rob another of any property which may be the subject of larceny, being armed with a dangerous weapon and with intent if resisted to kill or maim the person robbed, or if being so armed he shall wound or strike the person robbed, he shall suffer punishment of death.

And in *Com. v. Mowry*, 11 Allen, 20, it was held not necessary to aver or prove that the wounding or striking was done with a dangerous weapon, under Gen. Stat. chap. 160, § 22, which enacts that whoever assaults another and feloniously takes from his person property which may be the subject of larceny, being at the time armed with a dangerous weapon with intent, if resisted, to kill or maim the person robbed; or, being so armed, wounds or strikes the person robbed,—shall be punished by imprisonment in the state prison for life.

Hill's Anno. Laws (Or.) § 1741, provides that it shall be robbery if any person, being armed with a dangerous weapon, shall assault another with intent, if resisted, to kill or wound, and shall take any property from them. And in *State v. Carlson*, 39 Or. 19, 62 Pac. 1018, it is held sufficient, under this statute, where one pointed a loaded Winchester rifle, within shooting distance, at another, and by that means obtained property from him.

But in *Reg. v. Norton*, 8 Car. & P. 671, where the prisoner said to prosecutor, "If you do not assist me I will say you took indecent liberties with me some time ago,"—it was held that the charge was not sufficiently specific to support conviction under special statute, 7 Wm. IV., and 1 Vict. chap. 87, § 4, relating to robbery, which enacts that whoever shall accuse, or threaten to accuse, any person of committing, or attempting to commit, an abominable crime, with a view to extort money from him, and shall so extort money, shall be guilty of felony. (See this case further, under III. c. *supra*.)

See also *Sweat v. State*, 90 Ga. 315, 17 S. E. 273, under III. d. *supra*.
57 L. R. A.

VII. Miscellaneous cases.

If the force or fear is the operative cause of the delivery of the property, although it was not delivered at the time such force or fear was used, it is robbery, as in *Ashworth v. State*, 31 Tex. Crim. Rep. 419, 20 S. W. 982, where a store keeper through fear was compelled by defendant to promise to do up certain goods in packages for delivery to him, and defendant left the store and sent his confederate after the goods, a conviction was affirmed.

If one avails himself of a state of terror into which he has put another by force, actual or constructive, to obtain property from his possession, it is robbery, although that was not the original intention with which the force was exerted, as in *Rex v. Blackham*, 2 East, P. C. 711, where a woman offered a man money to desist from an attempt to commit rape, which he took but continued to treat her with violence until the approach of another person.

And where a negro had assaulted a white woman with the same intention, and she induced him to release her by promising to give him money, which she afterwards did, it was held robbery, in *State v. Nathan*, 5 Rich. L. 219.

Likewise, in *Hope v. People*, 83 N. Y. 425, 38 Am. Rep. 460, where robbers by violence and putting in fear compelled a janitor to disclose the combination of a bank safe, and at the same time took a bunch of keys from a table in his presence, they were afterwards convicted of a robbery of the keys, for the court stated that they had availed themselves of the state of terror into which they had put the janitor in extorting from him the secret of the combination, to enable them to take the keys also.

In *State v. Johnson*, 111 Mo. 578, 20 S. W. 302, where a man held the victim in one room while a woman took property from a trunk in an adjoining room, the court held that if the man was guilty at all it was by reason of a conspiracy between him and the woman, and that an instruction which authorized a verdict of guilty without proof of a conspiracy or concerted action was error.

Where a man stepped from behind a tree and demanded another's money upon a threat to shoot, and leveled what the other thought was a pistol at him, but what was in reality only a knife, the court held that putting in fear was sufficiently proved, but reversed conviction on another point. *State v. McLain*, 159 Mo. 340, 60 S. W. 736.

Pendy v. State, 34 Tex. Crim. Rep. 643, 31 S. W. 647, affirmed a conviction of robbery where the prosecutor testified that he did not know whether he was in fear of death or serious bodily injury or not, when a pistol was presented at his head and his money taken, but that defendant would not have gotten the money but for the pistol. And it was contended that, in order to constitute robbery, the assaulted party must be placed in fear of death or serious bodily injury, but the court held that it may also be consummated by assault or violence as well as by putting in fear of death or bodily injury.

Where persons participated in a search of premises and seizures made under a warrant which was technically insufficient, a charge of robbery cannot be sustained, although they acted in excess of the authority which the warrant gave. *Re Lewis*, 83 Fed. 159.

The taking must be accompanied with a felonious intent in order to constitute robbery; and so, where a pistol was snatched by a man to prevent its being used against him, and without at the time intending to steal it, the sub-

sequent carrying away of it would not be robbery; but such intent is a question for the jury. *Jordan v. Com.* 25 Gratt. 943.

VIII. Résumé.

The force sufficient to constitute robbery may be actual, consisting of violence inflicted directly on the person robbed, or constructive, being anything which produces fear, sufficient to prevent resistance or overcome and render impossible the free exercise of the will.

Constructive force includes fear of injury to a person, his property or character, or fear of bodily injury to the members of his family or someone in his presence. The injury may be threatened to be inflicted at some future time; and if the property is not delivered at the time of the threat, but afterwards, under a continuing sense of fear, it is robbery. It also includes a demand made with such demonstrations of force and numbers as to render resistance useless. A threat of prosecution or arrest for any crime except *crimen inominatum* is not sufficient, unless such threat is supplemented by force; but a threat to accuse of *crimen inominatum* is robbery, whether the person accused is guilty of such crime or not. If the money or property was parted with, not through fear of loss of character, or position, but for the purpose of prosecuting the extorter, it is not robbery. In a few of the old English cases of this nature it was held that there must also be some constraint upon the person in connection with this threat; but later cases hold to the contrary.

Obtaining money from a woman by threatening to accuse her husband of an indecent assault does not constitute the offense. The courts look with marked disfavor upon any attempt to extend this doctrine that a threat to accuse of *crimen inominatum* constitutes robbery to threats of accusation of other crimes, but with one accord uphold the exception thus made.

Where actual force is used, as in cases of snatching, if there is any resistance, however slight, and that resistance is overcome, it is robbery, but the great weight of authority is to the effect that if the property is taken without resistance, or so suddenly as not to allow time to make resistance, it is not robbery. Two cases which seem to be exceptions to this rule are *State v. Carr*, 43 Iowa, 418, and *Davis v. Com.* 21 Ky. L. Rep. 1295, 54 S. W. 959, and they are the only cases which would bear out the decision in *Jones v. Com.* *State v. Carr* is not cited, either by counsel, or in the opinion, and, with the exception of *Davis v. Com.*, the cases which are cited are ones where there was more than a simple snatching,—either resistance on the part of the owner, or a taking with actual force but without knowledge of person robbed,—and therefore *JONES v. Com.* goes farther than the cases cited to sustain it except *Davis v. Com.*, and those two cases, with *State v. Carr*, seem to be exceptions to the prevailing doctrine.

If the property is attached to the person in such a manner as to afford resistance, as an earring in the ear or watch cord around the neck, the sudden snatching of it is held robbery with a few exceptions. And it is held a taking by actual force if property is taken from the owner unawares while he is being pushed, pulled, or jostled for the purpose of diverting his attention.

Property taken by force, either actual or constructive, where there is color of right or claim of ownership is not robbery; but it is for the 57 L. R. A.

jury to say whether such claim is not a cover for a fraudulent intent.

If the force or fear is employed merely as a means of escape or to prevent a recaption of property taken without force, and is not the operative cause of the delivery of the goods, it is not robbery, although *People v. Glynn*, 54 Hun, 332, 7 N. Y. Supp. 555, Affirmed in 123 N. Y. 631, 25 N. E. 953, holds that, even if the thief procured possession of the goods without force, nevertheless the removal of them from the presence of the owner with force constitutes robbery; and *State v. Trexler*, 4 N. C. (2 Car. Law Repos.) 90, 6 Am. Dec. 558, is another case bearing the same way. *James v. State*, 53 Ala. 380, held that where the property was being carried for the owner by the thief, who, while it was thus in his possession, struck the owner a blow which rendered him unconscious, and made off with the property, it was robbery, but *Thomas v. State*, 91 Ala. 34, 9 So. 81, on analogous facts, squarely overrules this decision. *McNeal v. State*, 29 Ohio L. J. 185, with very similar facts to *Thomas v. State*, follows *James v. State*. But these last three are all cases where a distinction might fairly be made.

Although the line is very finely drawn, nevertheless, the authorities with a very few exceptions agree that the force necessary to constitute robbery is force with a felonious intent however exerted, which overcomes resistance, however slight, and that where there is no resistance there is no robbery. And as to constructive force, it is anything which produces fear sufficient to suspend the power of resistance and prevent the free exercise of the will.

M. M. M.

L. P. FOREMAN, Admr., etc., of H. W. Lewis, Deceased, Appt.,
v.

TAYLOR COAL COMPANY.

(.....Ky.....)

1. The question whether or not a petition to recover damages for injuries to the person and for wrongful death, to which a demurrer was sustained, states a cause of action, may be reviewed on appeal, although the causes of action were improperly joined, where no motion to require plaintiff to elect on which he would proceed was made.
2. The master owes no duty to protect his servant from the criminal violence of a mob of strikers; hence no liability is imposed upon him for death resulting from such violence by a statute making him liable for death resulting from injuries inflicted by his negligence or wrongful act.
3. A cause of action against a master for injuries inflicted on a servant by a mob of strikers does not survive the servant's death, under a statute providing that no action for personal injury shall die with the person except actions for assault, etc.
4. Breach of contract by a master to furnish protection to his servant from violence of a mob of strikers will not give a right of action under statutes making the master liable for the death of the

NOTE.—As to carrier's liability for assault upon passenger by strikers, mob, or third persons, see note to *Fewings v. Mendenhall* (Minn.) 55 L. R. A. 713.

servant through his negligence or wrongful act, and providing that actions for injury to the person, except by assault, shall not abate on the death of the person injured.

(March 5, 1902).

A PPEAL by plaintiff from a judgment of the Circuit Court for Ohio County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. H. Yost and Glenn & Ringo for appellant.

Mr. F. M. Sackett, with **Messrs. Sweeney, Ellis, & Sweeney**, for appellee.

The administrator has no right to sue.

Injuries from which death ensues, no matter from what source or by what cause they may have been inflicted, are not, and never were, the subject of a civil action for damages at the common law.

It requires a statute to furnish such right in any case, and such statute, being in derogation of the common law, must be strictly construed.

Eden v. Lexington & F. R. Co. 14 B. Mon. 204; *O'Donoghue v. Akin*, 2 Duv. 478; *Davis v. Justice*, 31 Ohio St. 359, 27 Am. Rep. 514; *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 L. ed. 580.

The Kentucky statutes give no right of action.

The petition states that a contract was made and broken, and to recover damages for its breach this action is prosecuted.

Every case in which an action to recover damages for loss of life is allowed will be found in §§ 4, 5, and 6, Ky. Stat.

The object of the statute under which this action was brought is to give a cause of action only where injuries are occasioned by negligence.

Chiles v. Drake, 2 Met. (Ky.) 146, 74 Am. Dec. 406.

There can be no such thing as a case of negligent injury to one person by another; nor can the acts of one causing injury to another be deemed wrongful in the absence of a legal duty on the part of the person inflicting the injury to take care, and a corresponding right on the part of the person injured to be protected.

O'Callaghan v. Cronan, 121 Mass. 114.

Before it can be said that a case falls within the scope of the statute there must be a particular relationship between the party causing the injury and the party injured.

No duty is considered in law except a legal duty, and all legal duties exist from implication of law.

Wharton, Neg. § 24; 16 Am. & Eng. Enc. Law, p. 410, and note.

The right, on one hand, and the corresponding duty, on the other, in every case where an action for tort can be maintained for negligent injury, exists independent of a contract, even though the injury may have grown out of the breach of a contract.

Cooley, Torts, §§ 2, 3; Bishop, Non-Con-57 L. R. A.

tract Law, §§ 74-76; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911.

Actionable negligence is the inadvertent failure of a legally responsible person to use ordinary care, under the circumstances, in observing or performing a non-contractual duty implied by law, which failure is the proximate cause of the injury to a person to whom the duty is due.

The contract recited in the petition is void because against public policy.

To have carried out the agreement would have compelled appellee to employ an armed force, the scope of whose duty would have been, if the necessity required it, to kill all those who might interfere with appellant's intestate while in the employ of appellee.

When a plaintiff seeks to enforce an executory contract, or to recover damage for its breach, if it appears that the consideration of the contract involves the violation of a penal law the courts will declare the contract void, and refuse to aid in its enforcement, whether its illegality is pleaded or not.

Beach, Modern Law of Contracts, § 1445; *Keith v. Fountain*, 3 Tex. Civ. App. 391, 22 S. W. 191; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Ormerod v. Dearman*, 100 Pa. 561, 45 Am. Rep. 391; *Bowman v. Phillips*, 41 Kan. 364, 3 L. R. A. 631, 21 Pac. 230.

If the cause of action arises *ex turpi causa*, or from a transgression of a positive law of the land, then the courts say such cause of action cannot be successfully maintained.

2 Kent, Com. p. 467; 2 Starkie, Ev. 86; *Mitchell v. Vance*, 5 T. B. Mon. 528, 17 Am. Dec. 96; *Hardesty v. Taft*, 23 Md. 512, 87 Am. Dec. 584; *Hutchen v. Gibson*, 1 Bush, 271.

The earlier English cases did not recognize, but condemned, strikes. But the modern doctrine in this country and in England is to the effect that workmen possess the right to quit work, either singly or in a body, provided only they do not interfere with the rights of others.

State v. Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649.

The agreement stated in the petition is *ultra vires*.

27 Am. & Eng. Enc. Law, p. 354, and note 1; Beach, Modern Law of Contracts, § 980. The contract sued on is void because it is an undertaking to answer for the misdoing of another.

The contract is void for want of power to make it.

Beach, Modern Law of Contracts, § 1443; 3 Am. & Eng. Enc. Law, p. 869.

The contract is void for want of consideration.

Brandt, Suretyship & Guaranty, §§ 6, 7; Beach, Contr. § 505.

Paynter, J., delivered the opinion of the court:

The appellee is a corporation engaged in the business of mining and selling coal.

The intestate, H. W. Lewis, was a coal miner. While in the employ of the appellee he received injuries from the effects of which he died. This action was brought to recover damages resulting from the injuries received. Omitting formal parts, the petition reads as follows: "(3) That in May, 1898, it had in its employment a large number of miners and mine laborers, all of whom were members of a secret organization called the 'Miners' Union,' and were on that account known and designated as 'union men,' in contradistinction to miners and mine laborers who were not members thereof, and who were designated 'nonunion men.' About this time these union miners became dissatisfied with the management of the defendant's mines, or with the amount of wages they were being by it paid for their services, and left its employment on a strike; refusing not only to work themselves, but to permit others to work at, in, or about these mines, until their differences with the defendant corporation could be adjusted. So openly and to such an extent did they show their determination that no one should be employed to fill their places in or about the mines, that they publicly and boldly threatened to take the life of any man or men who should come there and attempt to do any character of work for the defendant. These threats, and the consequent danger to any nonunion men who should attempt to work there for the defendant, were well known to it, its superintendent and agents. Shortly after this strike was inaugurated, the defendant attempted to, and did, hire the services of a large number of nonunion men, and brought them to its said mines, in order with them to carry on its business; but these men were, with threats of violence and force, frightened from their labor and driven from the place. These facts were, as a matter of course, well known to and by the defendant and its agents, as at this time the locality of the mines was under the domination of the strikers, and men who attempted to work or labor for the defendant were intimidated and awed into a submission to their commands and behests. This soon left the mines in a bad and dangerous condition, as the rising of the waters therein, and their great need of being pumped out and drained, was rendering them valueless and unfit for use; and the defendant's officers and agents fully realized that the property would soon be ruined and become a dead loss to its owners unless hands could be procured who would do the work so badly and seriously needed there. (4) That an agent and officer of the defendant company fully authorized to act and make contracts for it then approached the plaintiff's intestate, the said H. W. Lewis, then a resident of the county of Jefferson, in this state, and without warning him of the trouble of the mines, of the strikes of the miners, of their threats against anyone who would come there to work, of the consequent danger to him, which the defendant well knew, employed him to go to the mines and work for it,

promising and agreeing to give him employment for the space of one year. Accepting this employment at the compensation then and there agreed upon, and wholly ignorant of any danger or dangers incident to the work, or on account of the strikers and their threats, his said intestate went to the mines and began work. After a few days, during which time he had been superintending a number of men who were draining the mine, he was warned by a committee of the strikers that they would not allow him to work for the defendant. These facts and the language and the threats of the said committee his intestate at once communicated to the defendant's superintendent and chief officer, then at the mines, and asked him what he must do. It was well known to the defendant, its officer and agents, that, if this work was stopped then, the mines would become flooded, dangerous, and unfit for use, and be thus made utterly worthless; and thus knowing, and realizing the absolute necessity for the continuation of this work, the defendant corporation, by and through its said superintendent and chief officer, then and there promised, agreed, and undertook, in consideration of said Lewis continuing the work under the circumstances as herein above alleged, that the said company would hire a sufficient guard or force of men to protect the said Lewis and all the men working under him from any danger or trouble from the strikers; and thereupon said Lewis, relying solely and wholly upon the defendant's promise to protect him, proceeded again to work, and finished his day's labor. The defendant, however, wilfully, negligently, and wantonly failed and refused to perform its said undertaking, in this: that it did not hire a guard or any number of men to protect the said Lewis, nor did it, through any of its officers or agents, make any attempt to secure the services of a guard, or in any way to protect him from the dangers which it well knew environed him, and from which, in consideration of his work to save its property from ruin, it had solemnly agreed and undertook to hold him harmless. (5) He now alleges that after the said Lewis had finished his labor for the day, and had gone to his home, a number of the strikers, consisting of about — men, went to the house where he was staying, dragged him therefrom by force, and wilfully, unlawfully, and without right or reason, beat him on the head with stones, clubs, and loaded sticks, by reason of which beating he was permanently disabled and injured, and was confined to his bed for — months, suffering all the time great bodily pain and mental anguish, and afterwards died by reason of the wounds then and there so by him received, and all of which these strikers were enabled and encouraged to do on account of the defendant's failure to furnish the guard and protect the said Lewis, which, well knowing the urgent and crying need therefor, it wilfully, wantonly, and negligently failed and refused to do. (6) That his said intestate was so assaulted, beat, injured,

and murdered by these rioters at the defendant's mines, on its property, and although it had due notice of the riot immediately on its breaking out, and although it had promised and agreed to protect the said Lewis, it failed to protect or to make any attempt to protect him, to his damage in the sum of \$15,000, all of which occurred on the 31st day of May, 1898, and within twelve months next preceding the filing of this petition."

At common law, although the death of a person was caused by negligence or wrongful act, no cause of action survived. Under § 6, Ky. Stat. where death results from negligence or wrongful act, the cause of action survives to the personal representative. The section reads as follows: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is wilful or the negligence is gross, punitive damages may be recovered and the action to recover such damages shall be prosecuted by the personal representative of the deceased." Section 241 of the Constitution provides that there may be a recovery where death resulted from negligence or wrongful act. At common law the right of action for the injury to the person abated on the death of the party injured. Under Ky. Stat. § 10, the cause of action for personal injury, causing physical and mental suffering, does not abate on the death of the injured person, except actions for assault, slander, and criminal conversation, and so much of the action for criminal prosecution as is intended to recover for personal injury. These questions are reviewed by this court in *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 L. R. A. 788, 34 S. W. 236. So, under the principles of the common law, if appellee had, through its agent, inflicted the injury which resulted in physical pain and mental suffering and death, neither cause of action would have survived. This court has held that the cause of action for damages resulting in death cannot be joined with the cause of action for physical pain and mental suffering; that a recovery for one bars an action for the other. *Hackett v. Louisville R. Co.* 95 Ky. 236, 24 S. W. 871; *Owensboro & N. R. Co. v. Barclay*, 102 Ky. 16, 43 S. W. 177; *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 L. R. A. 788, 34 S. W. 236; *Hansford v. Payne*, 11 Bush, 385; *Conner v. Paul*, 12 Bush, 145. No motion was made to compel the plaintiff to elect which cause of action he would prosecute. A demurrer was filed to the petition and sustained. As there was no motion to elect, the question as to whether the petition states a cause of action is here for review.

The law imposes on carriers the highest degree of care in the transportation of their

passengers. The law not only makes them liable for neglect in the operation of their road, if a railroad, but makes them liable for the neglect of any duty imposed on them resulting in the injury of a passenger. If those in charge of a train knowingly permit a person to remain upon it who from his conduct renders it probable that the passengers may be injured by him, and one is so injured, then the carrier is liable, because the law imposes the duty of exercising the highest degree of care in his transportation; and it would be gross negligence to endanger the life or limb of passengers by carrying a person of the character described. So the duties of the carrier are such that it might be made responsible for the criminal conduct of someone who is entirely disconnected with its service. The law imposes the duty upon the master to furnish his servant with reasonably safe tools or machinery to use or operate, and reasonably safe premises upon which to work. A violation of this duty, when the servant is ignorant of the master's neglect, or, being aware of it, a reasonably prudent man would continue to work under like conditions, the master is responsible for the injury which he receives in consequence of such neglect. The master, whether he be a common carrier or engaged in another enterprise, does not undertake to protect the servant from the criminal acts of others. This is not a duty which the law imposes, or which arises from the relation of master and servant. The law does not make one liable civilly or criminally for the criminal act of another unless the position of the parties are such relatively that the act must be considered as having been, in contemplation of law, advised or procured to be done by another. Actionable negligence arises from a duty imposed by law to use ordinary care under the conditions in which a person upon whom a duty rests is placed. For a failure to perform that, a cause of action exists. The negligence may have resulted independent of a contract, or a contract may exist which does not contain a promise that the one is to use ordinary care to avoid injury to one who is to perform a service in the execution of the contract. In the latter case actionable negligence results from a condition, rather than a violation of the provisions of a contract.

With these general observations, we come to the consideration of §§ 6 and 10 of the Kentucky Statutes. The word "negligence" is used in § 6 in its usual and ordinary sense. It was intended to make one liable for his own negligent act, or for that of another for whose act he is responsible. The words "wrongful act" are comprehensive enough to include negligent acts, but they were intended primarily to cover cases where the act was wanton or was intentionally committed, or where one may have counseled or procured another to do it, when, in contemplation of law, the act of counseling or advising makes the wrongful

act his own. It is not charged that under the law of master and servant (nor could it have been correctly done) the appellee was bound to furnish a guard to protect the decedent from the hands of a mob. Therefore there was no breach of duty imposed by law which would make it guilty of negligence. It is not charged that the appellee inflicted the injury upon decedent, or counseled, advised, or procured others to do it. Therefore it is not charged, nor could it have been, that the appellee was guilty of the wrongful act which resulted in the injury and death. By the way, it may be added that in *McClure v. Alexander*, 15 Ky. L. Rep. 732, 24 S. W. 619, it was held that the section of the statute where the right of action is given the widow and minor children of a person killed by the careless, wanton, or malicious use of firearms, etc., is not repealed by § 241 of the Constitution. Having reached the foregoing conclusion, it follows that an action for the death of the intestate will not lie under § 241 of the Constitution, or § 6 of the Kentucky Statutes. If appellee had been liable at common law for the assault and battery committed upon the person of the intestate, the cause of action would not have survived to the personal representative, because the act complained of was an assault, and an action therefor does not survive to the personal representative; for § 10 of the Kentucky Statutes reads as follows: "No right of action for personal injurious injury to real or personal estate shall cease or die with the person injuring or injured, except actions for assault, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but for any injury other than those excepted, an action may be brought or revived by the personal representative, or against the personal representative, heir, or devisee, in the same manner as causes of action founded on contract." This court has held, in *Anderson v. Arnold*, 79 Ky. 370, that an action for an assault and battery does not survive. Of course, the court did not mean to hold that, when death has resulted from an assault, any cause of action which was given under the statute for the death would not survive; neither do we want to be understood as holding a cause of action given for the death of a person, either by § 241 of the Constitution, or any section of the statutes, is affected by § 10, although the death was the result of an assault. We simply hold that the cause of action for the assault and battery does not survive. The action is really one in contract. The contract averred cannot bring the case within the provisions of § 241 of the Constitution and § 6 of the statute; nor can it have the effect of keeping alive a cause of action, if it existed, which § 10 of the statute declares does not survive. There is another reason, and may be more, why the contract cannot be enforced, but we deem it unnecessary to consider it.

The judgment is affirmed.

57 L. R. A.

D. H. BALDWIN *et al.*, *Appts.*,

v.

C. D. TUCKER.

(.....Ky.....)

One purchasing a piano from an agent is bound to take notice that, unless it is expressly given, the agent has no authority to take a note for the purchase price payable to himself, and that no title can be acquired to the instrument in exchange for such note unless the transaction is ratified by the principal, or a custom to take such notes is shown.

(*Guffy, Burnam, and Hobson, JJ., dissent.*)

(December 6, 1901.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Mercer County in favor of defendant in an action brought to recover possession of a piano. *Reversed.* The facts are stated in the opinions.

Messrs. Gaither & Vanarsdall, for appellants:

Sparks had no authority to receive cash, or to take a note to himself for the amount of the sale. His authority was fixed by his contract and written instructions, and he could not transcend it so as to bind appellants.

Martin v. United States, 2 T. B. Mon. 90, 15 Am. Dec. 129; *Vanada v. Hopkins*, 1 J. J. Marsh. 287; *Dehart v. Wilson*, 6 T. B. Mon. 581; *Spalding v. Tucker*, 21 Ky. L. Rep. 224, 51 S. W. 2; 1 Am. & Eng. Enc. Law, 2d ed. p. 987; *Mechanics' Bank v. New York & N. H. R. Co.* 13 N. Y. 632; *Tidrick v. Rice*, 13 Iowa, 214; *Snow v. Warner*, 10 Met. 136, 43 Am. Dec. 417; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Dozier v. Freeman*, 47 Miss. 660; *Brown v. Johnson*, 12 Smedes & M. 398, 51 Am. Dec. 118; *North River Bank v. Aymar*, 3 Hill, 262.

An agent to sell personal property must act within the scope of his authority, and where the manner of the sale is set forth in the agent's authority, the instructions therein with reference to the sale must be followed.

1 Am. & Eng. Enc. Law, 2d ed. p. 1012.

An agent cannot bind his principal by accepting from the debtor, in discharge of the debt, a note, bond, draft, or check, nor by accepting payment in merchandise or other property; and the agent cannot substitute himself as creditor by taking a note payable to himself in settlement of a claim.

1 Am. & Eng. Enc. Law, 2d ed. pp. 1027, 1028; *McCormick v. Keith*, 8 Neb. 142; *Aultman v. Lee*, 43 Iowa, 404; *Martin v. United States*, 2 T. B. Mon. 89, 15 Am.

NOTE.—As to the extent of a traveling salesman's authority to collect payment, etc., see note to *Jackson v. National Bank* (Tenn.) 18 L. R. A. 663.

As to agent's power to use the property of his principal for the payment of his own debt, see *Gerard v. McCormick* (N. Y.) 14 L. R. A. 234, and note.

Dec. 129; *Corning v. Strong*, 1 Ind. 329; *McCormick v. Walter A. Wood Mowing & Reaping Mach. Co.* 72 Ind. 518; *McCulloch v. McKee*, 16 Pa. 289.

Messrs. Simrall & Deolan also for appellants.

Messrs. Ben Lee Hardin and W. C. Bell for appellee.

Paynter, Ch. J., delivered the opinion of the court:

On October 7, 1898, D. H. Baldwin & Co., dealers in pianos and musical instruments, by a writing, authorized J. W. Sparks to take orders for their musical instruments in Harrodsburg, Kentucky, and such other territory as might be agreed upon. The instruments and proceeds of sale were to be the property of appellants. The orders taken and sales made by him were not to be binding on appellants until approved by them. Blank notes were furnished to him, payable to appellants' order, and they were to be subjected to appellants' approval when executed. On November 22, 1898, appellants shipped to J. W. Sparks, Lawrenceburg, Kentucky, four pianos, for the purpose of taking orders therefor, according to the terms of the contract of agency. One of the four pianos shipped to him was sold to Charles Sparks, and one of them is the one in contest. On December 22, 1898, he sold the appellee, Tucker, a piano for \$120, for which he took a note payable to himself individually, twelve months after date, at the First National Bank, Harrodsburg. Upon receipt of the note and delivery of the piano, he discounted the note at the bank, and never accounted to appellants for any part of the proceeds. Four or five days after this transaction, appellee wrote to appellants at Louisville, Kentucky, that he had bought the piano, Sparks not having made any report of sale to them. The company at once declined to ratify the sale, and claimed the piano. The appellee refused to give it up, and this action was instituted to recover the possession of it, upon the claim that it belonged to them, as they had never parted with title thereto. The appellee resisted recovery, upon the idea that Sparks was acting for appellants, and that they were bound by his acts. Upon the proof as to the contract of agency and the value of the piano, etc., the court, at the conclusion of appellants' testimony, instructed the jury to find for appellee.

It is a difficult question sometimes to determine whether an agency is general or special. It is sometimes held that where an agency is special as between principal and agent it is general between the principal and third persons. Where the agency is created by writing, it seems to be proper for the court to determine whether it is general or special. If it be by parol it is for the jury to determine its character and extent. Mr. Mechem, in his work on Agency, § 6, says: "A universal agent is one authorized to transact all of the business of his principal of every kind. A general agent

is an agent who is empowered to transact all of the business of his principal of a particular kind or in a particular place. A special agent is one authorized to act only in a specific transaction. A principal can have but one universal agent. He may have a general agent in each line of his business, and in each of several places. He may employ as many special agents as occasion may require. A universal agency is of very rare occurrence, the great majority of the cases being those which involve some form of general or special agency." Sparks seems to have been made the agent, with limited powers to transact all the business in the matter of selling musical instruments in the city of Harrodsburg and such other territory as might be agreed upon between the parties. Without deciding, we will assume, that he was a general agent for appellants to sell pianos in Harrodsburg. According to the terms of the contract, he had no authority except to solicit orders for pianos. Where an agent is intrusted with goods to sell for his principal, he has no right to sell or deliver them in payment of his own debt. The creditor who receives goods under such an arrangement, notwithstanding he may be acting in good faith and in ignorance that the goods did not belong to the agent, acquires no title thereto against the principal. Where the principal authorizes the agent to collect a demand, or receive payment of one, he cannot be bound by the action of the agent except he actually collect the money. The agent is not authorized to take the note of the debtor, payable to himself or to his principal. Mechem, Agency, § 354, says: "An agent intrusted with goods to sell for his principal has no right to sell or deliver them in payment of his own debt, or to pledge them as security for his own debt, and persons dealing with such an agent are bound to take notice of this limitation of his authority. A creditor therefore, who receives the goods under such an agreement, as well as his vendee, though acting in good faith, and in ignorance that the goods did not belong to the agent, acquires no title thereto, as against the principal." The same author, in § 375, says: "An agent authorized merely to collect a demand, or to receive payment of a debt, cannot bind his principal by any arrangement short of an actual collection and receipt of the money. He cannot, therefore, take in payment the note of the debtor, payable either to himself or to his principal; or the note or bond of himself, or of a third person; or a draft or order on a stranger, or horses, wheat, merchandise, or other property of any kind; nor can he set off a claim due from himself; or take property for his own use in payment." In *Charles Brown Grocery Co. v. Becket*, 22 Ky. L. Rep. 393, 57 S. W. 458, the court said: "The general rule is that the acts of an agent bind his principal within the scope of his apparent authority, but that the principal is never bound where the person dealing with the agent knows, or has rea-

son to know, that the agent is exceeding his authority, or is perpetrating a fraud on his principal." In *Hoffman v. John Hancock Mut. L. Ins. Co.* 92 U. S. 161, 23 L. ed. 539, it appeared that an agent of the company agreed to take in payment for the premium a horse for himself and a note to himself. The insurance company refused to recognize the transaction, and in passing upon the question the court said: "The exercise of such a power by the agent was liable to two objections,—it was *ultra vires*, and it was a fraud as respects the company. Hoffman must have known that neither Goodwin nor Thayer had any authority to enter into such an arrangement, and he was a party to the fraud. No valid contract as to the company could arise from such a transaction." In *Bertholf v. Quinlan Bros.* 68 Ill. 297, an agent had in his possession whisky for sale. He traded it for a piano. The court held that he had no authority to make such a contract, and that the principal was not bound thereby, and was entitled to recover possession of the whisky, or its value. In *Holton v. Smith*, 7 N. H. 451, an agent, with general authority to sell his principal's goods did so, and received in payment a debt due from himself to the purchaser. The court held that the principal was entitled to recover the goods. It said "Miller had an undoubted authority to sell the goods; but it was to sell them, not as his own, but as the goods of the plaintiff; and, acting as agent of the plaintiff, he had no right to exchange them for other goods, or for his own note. By the disposition he made of them he treated them as his own, and this disposition was not properly a sale, within the meaning of his authority to sell, but a delivery over, at a certain price, in payment of a demand against himself. Although in the nature of a sale, it is, in fact, a payment of his debt with goods instead of money. If it might also be considered as a purchase by himself at the same time, that will not avail, as an agent has no right to purchase of himself what he is intrusted to sell. Had Miller sold, and received the money, he might, to be sure, have squandered it, but that can make no difference. . . . If a principal may be subjected to loss in such modes, it is because he has thus far trusted to the fidelity of the agent, and this furnishes no reason why the law should permit the agent to defraud him in other cases." In *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89, a sewing machine agent had authority somewhat similar to the powers of Sparks in this case. He sold a machine under a contract that he would take part pay for it in board for himself. The court held that the contract was not binding on the company, saying: "He has no right to charge the security of his principal for his debt, or to make himself the debtor of the principal for the like amount in lieu of the person who owes the debt, without the consent of the principal to that effect. If an agent has authority to re-

ceive for his principal a debt due from a third party to him, and the agent owes a like amount, or a greater, he has no right to substitute himself as the debtor of the principal, giving him credit for the amount, or to set off the debt due by him to such third person." In *McCulloch v. McKee*, 16 Pa. 289, an agent was authorized to collect a debt. He took a note from the debtor payable to himself in settlement. The court held that it could not be done. In *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795, an agent was authorized to sell a horse, but he exchanged it for another. The court held that he had no power to do so. In *Stewart v. Woodward*, 50 Vt. 78, 28 Am. Rep. 488, a general agent for a merchant tailor agreed with a doctor to sell the principal's goods in payment of a medical bill which the agent owed him. The agent's authority was general. The court held that he could not be presumed to have the power to make such a contract for his own benefit at the expense of his principal. In *Aultman v. Lee*, 43 Iowa, 404, an agent for the sale of threshing machines agreed with the purchaser that he would take wheat from him in part payment of the notes given for the machine. The court held that he could not bind the principal by such contract. When the principal places goods in the hands of his agent to sell, the parties dealing with him are bound to take notice that there is a limitation upon his authority which prevents him from taking property in exchange for that which he has to sell, or from receiving in payment thereof the purchaser's note payable to the agent. If an agent has a debt to collect for his principal the debtor must take notice that there is a limitation upon the authority of the agent to receive anything in payment of it except money. If the agent cannot take a note payable to himself for a debt which he has in his hands to collect, or cannot take the note of another in payment of the demand, upon what principle can he sell the property which may be intrusted to him for that purpose and take a note payable to himself for the purchase money? In this case the appellee knew the piano belonged to appellants. He assumed that Sparks was acting as their agent in the sale of the piano. He was bound to know that there was such a limitation upon the power of the agent that he could not take the purchaser's note payable to himself for the purchase money of the piano. In *Hoffman v. John Hancock Mut. L. Ins. Co.* 92 U. S. 161, 23 L. ed. 539, the Supreme Court expressly held that the agent had no right to take a note payable to himself for the premium due his principal. Any man with ordinary understanding ought to know that a firm handling a vast number of pianos, like appellants, would not send its agents over the country to sell pianos and take notes payable to themselves for the purchase money. It is not a question, however, of what he ought to know, but in a transaction

like the one under consideration the purchaser is bound to know that there was a limitation upon the agent's authority which would prevent him from taking a note payable to himself for the purchase money. The proof shows that the selling price of the piano was \$300, and yet Sparks sold it to the appellee for \$120, besides taking the note payable to himself. The court erred in giving a peremptory instruction to the jury. On the facts shown in this record it should have told the jury, in the absence of any evidence to show that Sparks was authorized to sell the piano and take the note payable to himself for the purchase price, to find for appellants. There was nothing in this case to show that, in the business of selling pianos by agents, it was usual for them to take notes payable to themselves for the purchase money. Had such been shown, then it would appear to be an act within the scope of the agent's apparent authority. It is said in *Hoffman v. John Hancock Mut. L. Ins. Co.* 92 U. S. 164, 23 L. ed. 539: "Within the sphere of the authority conferred, the act of the agent is as binding upon the principal as if it were done by the principal himself. But it is an elementary principle, applicable alike to all kinds of agency, that whatever an agent does can be done only in the way usual in the line of business in which he is acting. There is an implication to this effect arising from the nature of his employment, and it is as effectual as if it had been expressed in the most formal terms. It is present whenever his authority is called into activity, and prescribes the manner, as well as the limit, of its exercise."

The judgment is reversed for proceedings consistent with this opinion.

Hobson, J., dissenting:

It has often been held by this court that the acts of an agent within the apparent scope of his authority bind his principal; and that, where there is any evidence of fact, it must be left to the jury, and is not to be determined by the court, as a matter of law, on a motion for nonsuit. Appellants sent out their agent to sell pianos for them; they gave him possession of their instruments, assigned him certain territory in which he was to represent them, and authorized him to sell on credit. As to the public he was their representative in that territory. The selling of a piano was within the apparent scope of his authority, and they are bound by his sale, unless the circumstances were such as to apprise the purchaser that the agent was exceeding his authority, or such as to put a reasonable man on inquiry. It is said that the purchaser

was put on inquiry by the fact that the piano was sold at \$120, and a note taken payable to the agent. No weight is given in the opinion to the amount of the price. Pianos vary much in value, and there is not enough in this case to show that the purchaser was put on notice, by the amount asked for the piano, that something was wrong. At least, what weight should be attached to this circumstance is clearly a question for the jury. As to the taking of the note to himself, the agent having the power to sell on credit and take a note for the price, it was within the apparent scope of this authority to determine the form of the note. The purchaser had a right to assume that the agent took the note according to the course of business between him and his principal. A large part of the business of the country in the selling of sewing machines, pianos, and the like is done by agents who go from house to house and sell their wares on credit. It is not uncommon for the principal to require them to take the notes in their own names and then indorse them, so as to make them personally responsible for the notes. No authority can be found for the proposition, so far as I am aware, that the taking of a note by an agent in his own name is, as a matter of law, conclusive to the purchaser that the agent is exceeding his authority. None of the authorities cited by the court sustain this conclusion, and it is, at least, remarkable that, if such is the law, no case so holding can be found, when such a large part of the business of the country has for years been done in this way. As between two innocent persons, one of whom must suffer, the loss should fall on the principal who has armed the agent with apparent authority, and thus enabled him to obtain the advantage of the person with whom he trades, rather than on the purchaser, where the agent acts within the apparent scope of his authority, and there is nothing in the transaction to put the purchaser on notice that he is exceeding his authority. Where authority is conferred by parol the rule is that the apparent scope of it is a question for the jury. It seems to me the same rule should be applied where the agent is sent to take charge of his principal's interest in a territory distant from his principal, and the secret arrangements between the principal and the agent are unknown to the public dealing with him.

I am therefore of opinion that the case should be left to the jury, under proper instructions, and that a peremptory instruction should not be given, and in this dissent **Burnam and Guffy, JJ., concur.**

WISCONSIN SUPREME COURT.

Josephine TOMSECEK *et al.*, *Respts.*,
v.
TRAVELERS' INSURANCE COMPANY,
Appt.

(.....Wis.....)

A life insurance agent has no implied authority to accept as payment of a premium on a policy an agreement to give him credit upon his individual account, which he shall trade out with the insured in the ordinary course of business, and a policy providing that it shall not take effect until the first premium is paid will not become effective under such agreement, no credit being actually given to the agent, or by him to the company, in the usual course of business.

(January 28, 1902.)

A PPEAL by defendant from a judgment of the Circuit Court for Crawford County in favor of plaintiffs in an action to recover the amount alleged to be due on a life insurance policy. *Reversed.*

Statement by **Marshall, J.:**

Appeal from a judgment in favor of plaintiffs on an insurance policy, rendered in the circuit court for Crawford county. The defense, in the main, was noncompliance with the following condition of the insurance contract: "All premiums are payable at the home office in Hartford, Connecticut, but will be accepted if paid to an agent in exchange for a receipt signed by its president or secretary and countersigned by the agent designated thereon. This policy shall not take effect unless the first premium is paid while the insured is in good health." The evidence was to the following effect: Maurice M. Enright and Vincent J. Tomsecek were copartners in the business of running a meat market at the time the policy was issued, for a considerable time theretofore, and thereafter till the latter died. By the consent of Enright, Tomsecek and one Webb, agent for the defendant company, agreed that Tomsecek should take out a policy of life insurance in such company, paying the first premium by giving such agent credit on account at the meat market, as payment for meat furnished and to be furnished, to the extent thereof. An application was accordingly made to the company in due form, no mention being made of the agreement aforesaid. The application was accepted and a policy containing the condition before mentioned was forwarded to the agent for delivery, who sent it to Tomsecek by mail, not knowing that the latter was ill. Tomsecek was then in a hospital, too ill to do business. The policy was received at the place of business of

Enright & Tomsecek, but was never brought to the latter's knowledge. It remained under seal as taken from the post-office till after he died. That occurred soon after the policy was received. No credit for the first payment on the policy was ever given to the agent as agreed upon, nor was such premium ever paid in any way. There was evidence to the effect that there was an understanding between the agent and Tomsecek that the latter should have an opportunity of examining the policy before deciding whether to accept it or not. The court excluded all evidence as to whether the agent had authority to accept anything in payment of the first premium upon the policy except money, upon the theory that the controversy in that regard was to be solved solely by the writings. It was in effect admitted by plaintiff's counsel on the trial that no payment was made on the policy in money or otherwise, unless the agreement in regard to payment being made by credit to the agent at the meat market operated as payment. The circuit judge stated in the course of the trial, without dissent by plaintiff's counsel, that he so understood the evidence and their position.

The jury found specially as follows: It was agreed between Tomsecek and Webb, defendant's agent, that the former should take out a policy in said company and that the first premium thereon should be paid by applying what was then due and what might become due from said agent to the firm of Enright & Tomsecek thereafter for meat, etc., furnished by them to him. The policy was mailed to Tomsecek in fulfillment of said agreement. It was not agreed between the agent and Tomsecek that the policy should not be in force until Tomsecek had an opportunity, after it was written up, to examine and accept it.

Thereafter the jury, by direction of the court, rendered a general verdict in favor of plaintiffs for the face of the policy less \$22 to cover the first premium and interest upon the balance, making \$1,153. Defendant's counsel moved for judgment on the special verdict. The motion was denied and due exception taken to the ruling. Such counsel then moved the court for an order setting the special verdict and the general verdict also aside, and for judgment on the undisputed evidence or for a new trial, which motion was denied and the ruling duly excepted to. Judgment was then, on motion, rendered upon the verdict in favor of plaintiffs.

Mr. W. E. Howe, with Mr. A. H. Long, for appellant:

The policy contemplates its delivery to the insured subject to the payment of the premium.

McDonald v. Provident Sav. Life Assur. Soc. 108 Wis. 213, 84 N. W. 154; *Prahl v. Mutual Protection L. Ins. Co.* 63 N. Y. 608;

NOTE.—As to agent's power to use property of his principal for payment of his own debt, see *Gerard v. McCormick* (N. Y.) 14 L. R. A. 234, and *note*.

Rossiter v. Aetna L. Ins. Co. 31 Wis. 121, 64 N. W. 876.

The promise to pay was not payment.

McDonald v. Provident Sav. Life Assur. Soc. 108 Wis. 213, 84 N. W. 154.

No agent had authority to waive payment.

Actual payment or a waiver of it must be shown before the policy can become binding upon the defendant.

Ibid.; *Giddings v. Northwestern Mut. L. Ins. Co.* 102 U. S. 108, 26 L. ed. 92; *Ormond v. Fidelity Life Asso.* 96 N. C. 158, 1 S. E. 796; *Heiman v. Phoenix Mut. L. Ins. Co.* 17 Minn. 154, Gil. 127, 10 Am. Rep. 154; *St. Louis Mut. L. Ins. Co. v. Kennedy*, 6 Bush, 450; *Paine v. Pacific Mut. L. Ins. Co.* 2 C. C. A. 459, 10 U. S. App. 256, 51 Fed. 689; *Misselhorn v. Mutual Reserve Fund Life Asso.* 30 Fed. 545; *McClave v. Mutual Reserve Fund Life Asso.* 55 N. J. L. 187, 28 Atl. 78; *Rossiter v. Aetna L. Ins. Co.* 91 Wis. 121, 64 N. W. 876.

Where the policy contains no receipt for premium, as in the case at bar, its possession raises no presumption of its payment, and the beneficiary, to establish a prima facie right to recover, must show that the premium had been paid.

Manhattan L. Ins. Co. v. Myers, 22 Ky. L. Rep. 875, 59 S. W. 30; 2 Beach, Ins. § 1335.

The actual payment of the premium during the good health of the applicant was a condition precedent to the liability of the company.

Reese v. Fidelity Mut. Life Asso. 111 Ga. 482, 36 S. E. 637.

The application provides "that no agent of the company shall have any power to waive or modify any of the conditions of said insurance contract." This is a valid agreement.

Hartford F. Ins. Co. v. Small, 14 C. C. A. 33, 30 U. S. App. 127, 66 Fed. 490; *Hankins v. Rockford Ins. Co.* 70 Wis. 1, 35 N. W. 34; *Enos v. Sun Ins. Co.* 67 Cal. 621, 8 Pac. 379; *Clevenger v. Mutual L. Ins. Co.* 2 Dak. 114, 3 N. W. 313; *Porter v. United States L. Ins. Co.* 160 Mass. 183, 35 N. E. 678; *Cook v. Standard Life & Acc't. Ins. Co.* 84 Mich. 12, 47 N. W. 568.

Messrs. J. P. Evans and O. B. Thomas for respondents.

Marshall, J., delivered the opinion of the court:

Many suggestions are made in the briefs of counsel for respondents why the judgment is right and should be affirmed, which, in our view of the case, need not be considered. The learned trial court rightly decided that if the agreement between Tomsecek and appellant's agent, that the first premium on the policy might be paid otherwise than in money, and the delivery of the policy pursuant to such agreement, constituted a waiver by the company of payment of such premium and of the condition that the policy should not take effect unless such payments should be made while Tomsecek was in good health, then the policy took ef-

fect before Tomsecek died and plaintiffs were entitled to recover; otherwise appellant is entitled to judgment. Was the decision of that question in respondent's favor right? That is the proposition upon which this appeal turns.

Many authorities are cited to our attention to the effect that possession of a policy by the assured at the time of his death prima facie establishes all conditions necessary to its having taken effect as a binding insurance contract in his lifetime, notwithstanding it contains a stipulation that it shall not take effect unless the first premium is paid while the assured is in good health; that if such payment was not in fact made, a waiver thereof will be presumed in the absence of evidence to the contrary. Some of such authorities hold to rather an extreme doctrine when applied to a policy which does not contain a receipt for payment of the first premium and indicates that an independent instrument, evidencing such payment, is to be delivered to the assured upon such payment being made, as in this case. To that extent they are not in harmony with *McDonald v. Provident Sav. Life Assur. Soc.* 108 Wis. 213, 84 N. W. 154, and do not meet with our approval. The trial court applied the doctrine of such authorities to this case, and in that, as it seems, committed error. The court went further, not only holding that the agent waived, and had implied authority to waive, payment of the first premium while the applicant for insurance was in good health, but waived and had authority to waive payment of such premium in money and to make an agreement, binding on appellant, that payment might be made by applying the amount of the premium on the agent's indebtedness for meat and as a credit entitling him to further delivery of meat. The principle is familiar that the authority of an agent as to waiving conditions of an insurance policy before it takes effect is pretty broad, but it does not go beyond his actual authority and that reasonably implied from the nature of the business carried on. The rule in that regard is the same in respect to an agent for an insurance company as any other. There is no claim that the agent had actual authority to make the agreement found by the jury, so his authority in that regard must be tested wholly by what may be reasonably implied. It may be admitted that Webb was a general agent, and still the difficulty is not lessened, because it cannot be implied that he had any authority in excess of the power of the corporation, and it must be presumed that such power did not include the issue of policies of life insurance for anything but money.

Several cases are cited to our attention to sustain the decision that an agent may waive the conditions of an insurance policy calling for payment of the first premium in money, but none of them fit the facts of this case. The nearest approach to a situation similar to the one under consideration is that involved in *Hancock Mut. L. Ins.*

Co. v. Schlink, 175 Ill. 284, 51 N. E. 795. There the agent agreed to waive payment in money of a part of the first premium, such part not exceeding the amount allowed to him as his commission. The policy was sustained upon the ground that payment of the full amount going to the company was made in money, the court inferentially holding that the agent had no authority to waive payment thereof. The decision followed *Lycoming F. Ins. Co. v. Ward*, 90 Ill. 545, where the agent agreed to take part payment of the first premium out of the assured's saloon. In respect to the defense of nonpayment of the first premium in money, the court said: "As the amount paid in cash was more than enough to pay the premium on this policy, we see no ground for holding that the premium was not all paid in cash." The agent "was entitled to commissions for procuring the insurance, and if he saw proper to take out his commissions in the saloon, we know of no reason or authority to debar him from so doing."

So many loose expressions are found in text-books and legal opinions as well, as to the power of a general agent of an insurance company to waive the conditions of a policy calling for payment of premiums in money, that it is not to be wondered at that attorneys and courts as well sometimes go astray. A careful analysis of the authorities will show that with few exceptions, which are not of sufficient significance to be followed, the idea that the agent of an insurance company has implied authority to waive payment of premiums on an insurance policy in money and agree to take something in lieu thereof which is neither money nor an agreement to pay money, nor an equivalent to money to the insurance company when taken, has no support. In *May, Ins. § 360d*, it is said: "An agent authorized to deliver policies and receive payment may waive the payment of the premium in cash notwithstanding a stipulation in the policy to the contrary," citing *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118. In that case the agent agreed to receive credit on his own debt to the assured for the amount of the first premium, and to pay the insurance company the amount thereof, which agreement was fully carried out, the company actually receiving payment in money. The decision was grounded on the fact that the company received cash for the first premium, substantially according to the contract. The court said: "We are not required to decide what the rights of the parties would have been in case . . . the agent had failed to give the company credit and remit in the usual course." However, the court quoted, without explanation or qualification, and in a way to lead one astray if he fails to examine the supporting authorities, from § 360 of *May, Ins.*, this language: "If the agent be authorized to receive the premium, an agreement between the assured and the agent that the latter will be responsible to the company for the amount, and hold the

assured as his personal debtor therefor, is a waiver of the stipulation in the policy that it shall not be binding until the premium is received by the company or its accredited agent," citing *Sheldon v. Connecticut Mut. L. Ins. Co.* 25 Conn. 207, 65 Am. Dec. 565; *Columbus Home Ins. Co. v. Curtis*, 32 Mich. 402; *Willouts v. Northwestern Mut. L. Ins. Co.* 81 Ind. 300, 309. The text in *May* is supported by *Sheldon v. Connecticut Mut. L. Ins. Co.* 25 Conn. 207, 65 Am. Dec. 565, and *Southern L. Ins. Co. v. Booker*, 9 Heisk. 606, 24 Am. Rep. 344. In the last case mentioned the agreement was to the effect that the agent should give the assured time to make the first payment. There was no waiver of payment in money. In *Sheldon v. Connecticut Mut. L. Ins. Co.* the facts were that the agent agreed to give the applicant time to make payment of the first premium, to take his note, payable to the company on short time for one half thereof, and his promise to pay such agent the other half, and to personally make the cash payment to the company. It was the custom between the company and the agent to charge the amount of the first premium to the latter upon forwarding to him the policy for delivery, and for the agent to make settlements with the company from time to time, and to remit money on account. There was no waiver of the payment in money, only a waiver of the time of payment. In *Columbus Home Ins. Co. v. Curtis*, the agent advanced the money for the assured for the first premium, actually paying it to the company, and it was held that there was a sufficient compliance with the provision of the policy requiring payment of the first premium as a condition of the policy going into effect. In *Willouts v. Northwestern Mut. L. Ins. Co.* the facts were that the policy was issued to one of the medical examiners of the company and it was agreed between him and the agent that the dues to the applicant for services as medical examiner might be applied on the premiums. It was held that such agreement was binding on the company as to services actually rendered before the premium became due, because, to that extent, it did not really constitute a waiver of payment in money, as the amount due to the examiner from the company was equivalent to it to a cash payment to that extent.

Enough has been said to indicate the character of the authorities relied upon to show that a general agent of an insurance company has implied authority to waive the provision of an insurance policy calling for payment of the first premium in money. None of them go to the extent of holding that the agent may waive such payment and take something in lieu thereof which does not amount to payment to the corporation in cash, such as an agreement on the part of the agent to take pay for a premium in meat, no credit being given or payment actually made to the agent, or credit being given by him to the corporation in the usual course of business. The precise question we have here was decided in *Hoffman*

v. John Hancock Mut. L. Ins. Co. 92 U. S. 161, 23 L. ed. 539. There the first premium was paid to a local or special agent, by consent of the general agent of the company, in a horse, the cancellation of an indebtedness of the special agent to the applicant for insurance, a note to such agent and a note to the corporation. The transaction was held void, Swayne, J., who delivered the opinion of the court, saying: "It is an elementary principle, applicable alike to all kinds of agency, that whatever an agent does can be done only in the way usual in the line of business in which he is acting;" and the implication to that effect "is present whenever his authority is called into activity, and prescribes the manner as well as the limit of its exercise." It was further said, in effect, that as life insurance is a cash business, the agent of an insurance company, whether he be a general or a special agent, has no implied authority to take or agree to take personal property, such as a horse, in payment of a premium upon an insurance policy; that such an agreement, even if made by the company itself, would be *ultra vires*, and if made by an agent without the knowledge of the company it would not only be *ultra vires* but a fraud both upon the part of the agent and the applicant for insurance, for the latter must be presumed to know that an insurance premium cannot be legitimately paid in horses.

It would seem that nothing further need be said to show that the policy in question never became binding upon appellant. The jury found that the agent agreed to accept his own indebtedness for meat as part payment for the first premium and to take meat for the balance thereof. It is undisputed that such agreement was never carried out by the insured so as to obligate the agent to pay the company. Neither the company nor the agent received pay for the first premium. There is no analogy between this case and one where the agent merely agrees to give the applicant for insurance time to make the first payment, or agrees that he will advance the amount of the first payment himself, and actually does advance it, or agrees to charge himself with the first premium in his account with the company, according to a custom of doing business between himself and his principal, thereby becoming liable to the company. We must hold here that the agent had no implied authority to use the appellant's policy of insurance to pay his meat bills or to build up a credit for future purchases of meat. There are no circumstances disclosed in the evidence to avoid the effect of that conclusion.

The motion made by appellant's counsel for judgment on the special verdict should have been granted and the duty devolves upon this court to reverse the judgment and remand the cause with directions to strike out the general verdict and render judgment in favor of defendant on the special verdict, dismissing the complaint with costs.

So ordered.

57 L. R. A.

Albert GLOCKE, Sr., *Respt.*,

v.

Albert GLOCKE, Jr., Impleaded, etc., *Appt.*

(.....Wis.....)

- *1. It is not essential to a condition subsequent in a conveyance of property, that it be created by express words, or that there be any express power in the writings to make re-entry for condition broken, or to do anything equivalent thereto.
2. If an aged parent conveys his property to his son to secure support for himself during the remainder of his life, whether the agreement calls for support generally or by paying to the grantor money or property in specific amounts at specified times, the presumption is that the primary purpose of the grantor is to secure personal performance by the grantee of the obligations incurred by him.
3. In the circumstances above stated, there being no adequate remedy for such a breach of the agreement by the grantee as will prevent the grantor from realizing the purpose of the grant other than a restoration, so far as practicable, of the parties to their former position, a court of equity will read out of the papers evidencing the agreement a condition subsequent upon which the property was conveyed, enforceable by the grantor the same as any other such condition in the conveyance of property.
4. In case of a conveyance of property as and for the purpose above indicated, and of the grantee, by his conduct, rendering impossible of realization the purpose of the grantor, if the latter elects to rescind the transaction for breach of condition subsequent, a court of equity will take jurisdiction to give a protective remedy to him by establishing his status as owner of the property. It takes jurisdiction in such a case, not to forfeit a title, but to quiet a title already forfeited for nonperformance of the condition subsequent. To the end that the conditional grantor's remedy may be complete, it will cancel all writings and records that might otherwise be used, presently or in the future, to his prejudice, acting, not upon the theory that they are avoided by the act of the court, but that they are void independent thereof, and that equity jurisdiction is required to settle the status of the property in accordance with the facts, on the principle of *quia timet*, and to clear away those things which, though void in fact, might, by reason of their apparent force, be used by the holders thereof in some way, presently or in the future, wrongfully.

(February 18, 1902.)

A PPEAL by defendant Albert Glocke, Jr., from a judgment of the Circuit Court for Waupaca County in plaintiff's favor in an action brought to enforce rescission of a contract granting real estate in consideration of support. *Affirmed.*

*Headnotes by MARSHALL, J.

NOTE.—For rights under a deed in consideration of the support of a person for life, see also, in this series, *Dreischach v. Serfass* (Pa.) 3 L. R. A. 836; *Cook v. Bartholomew* (Conn.) 13 L. R. A. 452; and *Tuttle v. Burgett* (Ohio) 30 L. R. A. 214.

Statement by Marshall, J.:

Action to enforce rescission of a contract for nonperformance of a condition subsequent. The issues raised by the pleadings sufficiently appear by the findings of fact and conclusions of law. For the purpose of this appeal such findings and conclusions may be stated as follows: May 23, 1899, and for many years prior thereto, plaintiff owned and possessed as his homestead the lands described in the complaint. Defendant Albert Glocke, Jr., is plaintiff's son and is twenty-five years of age. Defendant Emma Glocke is the son's wife. May 23d, aforesaid, plaintiff, by a deed with full covenants, conveyed the lands mentioned to his said son, receiving as the only consideration therefor an agreement, executed by the latter and his wife, secured by a mortgage for \$5,000 on said lands, by which agreement it was stipulated that plaintiff should have the use of a designated part of the dwelling house on said lands during his life, the use of 1 acre of land for a garden, the right to go upon any part of the premises at his pleasure, and the right to permit such persons as he might desire to come upon the land to visit him; that defendants would manure and plow plaintiff's garden spot when requested to do so; that they would give plaintiff good and proper care and nursing in case of his sickness, and at such times obey his request to procure a doctor and pay the doctor for medical services; that they would furnish plaintiff, at any time he might desire, any horse that might be on the farm, with rig and harness, ready for his use to go anywhere he might choose; that the occupancy of the premises by the defendants should commence March 1, 1900; that March 1, 1901, and annually thereafter during plaintiff's life, defendants would pay him \$75 in money; that they would, during his life, deliver to him each year at threshing time 40 bushels of good wheat, at digging time 40 bushels of good potatoes, at shearing time 10 pounds of the best wool, in November 100 pounds of good beef and two hogs weighing not less than 200 pounds each, 2 quarts of fresh milk every day, 1 dozen eggs daily from March 1 to November 1, 3 pounds good fresh butter every week, 1 fat chicken every week, at Thanksgiving time 2 fat geese, and all the good dry wood he might desire for fuel, ready for the stove; that in case plaintiff should die leaving a widow, she should have the use during her life of a designated part of the dwelling house as aforesaid, all the good dry fuel she should need, prepared for the stove, and one half as much money, wheat, potatoes, beef, pork, wool, butter, eggs, milk, chickens, and geese as that agreed to be furnished plaintiff, and at the time designated for furnishing the same to him; that on the full performance of all the conditions aforesaid to be performed by the defendants, both as to the plaintiff and as to his widow should he die leaving one, after his death and the death of his widow, if there should be one, the said mortgage should become void and of no effect, and be canceled of record.

.. L. R. A.

As soon as defendants took possession of the farm under the aforesaid agreement, they became intolerably abusive toward plaintiff. They failed, nearly from the first, to carry out any part of the aforesaid agreement. They did not perform any of such agreements except to furnish butter and eggs and milk for about ten days, though they were repeatedly requested to comply in every respect with their contract. Subsequent to the making of the contract plaintiff married and took his wife to live with him on the farm. Defendants immediately thereafter became intolerably abusive toward her. April 5, 1900, without the consent of plaintiff or his knowledge, defendants left the premises to live on a farm purchased by them, some 20 miles away, taking all their belongings with them, after which time they made no attempt whatever to fulfil any of the obligations of said agreement. By reason of such removal they rendered themselves wholly incapable of complying with their contract. After such removal defendants freely asserted to plaintiff that they would not abide by their said agreement, and they gave out publicly that they would sell or lease the place, or commit waste thereon. The premises are worth about \$8,000. Plaintiff never gave up possession thereof other than as contemplated in the contract, but is now in possession the same as before the contract was executed.

The conclusion of law was that the transactions between the parties, consisting of the making of the deed, mortgage, and contract, should be deemed rescinded and all rights which the parties obtained through such transaction extinguished, and the title to the property involved adjudged to be in plaintiff the same as if such transaction had never occurred.

Defendants alleged in their answer, by way of counterclaim, that when the contract was made, which was attempted to be reduced to writing by the making of the deed, written agreement and mortgage, it was a material part thereof that a large amount of the personal property and farming utensils in use and for use on the farm should go with the farm to the defendants as part of the consideration for the agreements on their part contained in the written contract referred to; that by mutual mistake the papers were so drawn as not to carry out that part of the arrangement between the parties, and that plaintiff has refused to let the defendants have any part of said personal property. There was a prayer for a reformation of the agreement and deed so as to embody the part alleged to have been omitted therefrom.

Judgment was rendered for plaintiff in accordance with the conclusions of law as before stated.

Mr. Gabe Bouck, with Mr. C. F. Crane, for appellant:

The agreement is not for the support and maintenance of the plaintiffs, but for the payment of life annuities in money and specific articles.

In such cases the only remedy is by foreclosure.

Peterson v. Oleson, 47 Wis. 122, 2 N. W. 94.

When the agreement is for maintenance and support, in a proper case there can be a rescission.

Beckman v. Beckman, 86 Wis. 655, 57 N. W. 1117; *Hartstein v. Hartstein*, 74 Wis. 1, 41 N. W. 721; *Bogie v. Bogie*, 41 Wis. 209; *Bresnahan v. Bresnahan*, 46 Wis. 386, 1 N. W. 39; *Delong v. Delong*, 56 Wis. 514, 14 N. W. 591; *Knutson v. Bostrak*, 99 Wis. 469, 75 N. W. 156.

Messrs. E. L. Browne and E. E. Browne, for respondent:

In the case at bar it would be unjust to compel the plaintiff to resort to foreclosure proceedings, wait one year before he could sell the premises to enforce his judgment of foreclosure, at the end of which time he could only hope to receive \$5,000, in which event the plaintiff would lose his old home where he had lived for forty-five years, lose all the benefits he expected to derive from his contract with his son, and lose \$3,000 in money.

Bogie v. Bogie, 41 Wis. 209; *Bresnahan v. Bresnahan*, 46 Wis. 385, 1 N. W. 39; *Blake v. Blake*, 56 Wis. 392, 14 N. W. 173; *Delong v. Delong*, 56 Wis. 514, 14 N. W. 591; *Reoch v. Reoch*, 98 Wis. 201, 73 N. W. 989; *Knutson v. Bostrak*, 99 Wis. 469, 75 N. W. 156; *Willard*, Eq. Jur. 302.

Marshall, J., delivered the opinion of the court:

The disposition of this case by the trial court was not complete in that there was a failure to make findings covering the allegations of the counterclaim constituting a cause of action for a reformation of the deed. However, appellant does not appear to have been prejudiced thereby, because the evidence did not establish such allegations with sufficient certainty to warrant findings in his favor. It is elementary that a written contract or instrument cannot be reformed so as to include matters alleged to have been omitted therefrom through mutual mistake, or mistake of one party and fraud of the other, without entirely clear and satisfactory proof of all the facts involved,—proof which will admit of no reasonable controversy. *Meiswinkel v. St. Paul F. & M. Ins. Co.* 75 Wis. 147, 6 L. R. A. 200, 43 N. W. 669. In such a case the party upon whom the burden of proof rests must do more than to produce a mere preponderance of the evidence tending to establish the facts in his favor to a reasonable certainty, as in an ordinary civil case. The court cannot overturn the solemn agreements of parties, as indicated by their writings, by merely choosing between conflicting reasonable inferences, where there is a fair controversy yet remaining. The inferences must be substantially either all in favor of the reformation requested, or must so overbalance the inferences to the contrary that a reasonable person would not be liable to act thereon otherwise than in favor

of the major inferences. Many courts hold the degree of certainty with which a contract must be established to warrant changing a written agreement, intended to embody that which the minds of the parties met upon but which fails to do so, is the same as that required to warrant conviction in a criminal case, i. e., beyond a reasonable doubt. This court has not gone quite that far, but has followed the rule which generally prevails, that the facts must be established, as before indicated, beyond reasonable controversy. Perhaps it may well be said that the difference between the two rules is quite shadowy and inconsequential, yet it is considered that there is a difference. In *Kropp v. Kropp*, 97 Wis. 137, 72 N. W. 381, the language used was: "The rule which governs in this class of cases, that the facts requisite to a recovery must appear by clear and satisfactory evidence, or, as is usually said, the proof of the facts must be entirely plain and convincing." In a later case, *Fillingham v. Nichols*, 108 Wis. 49, 84 N. W. 15, speaking on the same subject, the court said the proof should be such as to establish the facts "beyond reasonable controversy." That language is probably more comprehensive than any other of the various expressions commonly used. The Supreme Court of the United States uses similar language in respect to the subject: "In each case the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties." *Howland v. Blake*, 97 U. S. 624, 24 L. ed. 1027.

A brief review of the evidence will be sufficient to demonstrate that it comes far short of satisfying the standard above indicated. Appellant Albert Glocke said that when the paper was made the understanding was that the farm implements would stay on the place. Defendant Emma Glocke said the same and that respondent consented to give appellant the farm and personal property. Neither of the defendants testified that there was anything said about personal property being mentioned in the conveyance or contract. Both testified that they knew within a few days after the papers were drawn that respondent claimed the personal property and that no mention thereof was made therein. They did not make any complaint in respect thereto or intimate in any way that any mistake had been made in the writings. With full knowledge of the facts, and without objection, nearly a year after the papers were made, they entered upon the performance of their obligations, and there is nothing to show that they ceased performance because of any breach upon respondent's part, either of the written contract or the contract they claimed should have been reduced to writing. Respondent testified that he did not agree to convey the personal property or have any such thing in

mind; that the only time such property was mentioned was when the papers were being signed, when he said to appellants: "If you keep me good, everything will be left. Not a pin will be taken off. If you do not keep me good I will do what I have a mind to," and that he never said anything other than that to anyone. The scrivener who drew the conveyance and mortgage testified that respondent used some such language; that no directions were given to him to embody in the conveyance any reference to the personal property; that the parties talked partly in German and partly in English. Two relatives of appellant testified that respondent said to them the day the papers were made that he had given everything to his son. So it will be seen that the evidence, that the parties agreed that the conveyance of property to appellant should include respondent's personal property on the farm, is not entirely clear and satisfactory. All parties were present when the papers were drawn. Appellant must have heard and participated in giving directions to the scrivener; yet there is an entire absence of testimony as to anything having been said to him about mentioning personal property in the papers. The evidence corroborating appellant's version of the matter is no stronger than that corroborating respondent's version. The case stands substantially on the evidence of the opposing parties. It is far too weak to warrant changing their written contract.

The claim is made that the findings of fact are not supported by the evidence. As we understand defendants' counsel, they do not contend but that substantial breaches of defendants' obligations were established if the contract between the parties required them to reside upon the farm or where they could render respondent personal attention, but say the contract will not bear that construction. In our judgment it will not reasonably admit of any other construction. Respondent's purpose clearly was to make provision for his support during the balance of his life, including care and nursing in sickness and all the attention which a person in his declining years might probably require. It is not reasonable that he would have thought of intrusting his future in those respects to anyone but a member of his family, or that he would have made such a disposition of his property as he did with the idea that his immediate associate or associates during the last years of his life might be a stranger or strangers,—persons who would have no interest whatever to care for him but the expectation of pecuniary compensation to be paid by another; that he should have mere hired attention. Respondent had in mind the benefits of filial regard,—something which, under ordinary circumstances, uninfluenced by disturbing conditions, is invaluable; something which can neither be estimated in nor bought with money, nor made the equivalent of anything else in a mere commercial transaction. The natural yearning of a person to have in his declining years the full benefit of that regard

is well illustrated by the frequency with which persons, circumstanced as respondent was when the transaction in question occurred, part with all or substantially all their property, trusting to the beneficiary to administer the same with the fidelity which becomes a son, in face of the fact shown by experience, that failure, absolute failure, will probably result, and be accompanied with loss of the enjoyment that legitimately belongs to the parental relation; and not only by loss thereof, but a substitution therefor of the most annoying of all hostile relations that can exist between acquaintances not going to the extent of imperiling safety of person or property in a physical sense. Such contracts have come to be looked upon as almost if not quite presumptively improvident in their inception, and in that view courts of equity have gone to great lengths to remedy the mischief by reading out of them a condition, where a covenant only is expressed, upon which may be founded, on principle, a right of rescission where justice requires it for the protection of the weak, the exercise of which will undo the mischief *ab initio* and restore the parties, substantially, to their original situation.

In this case it seems that the hope and expectation of filial regard was the moving cause on the part of respondent in transferring his property to his son. The contract contained the characteristic features found in most agreements of its class, with which courts have commonly had to deal. It obligates appellant and his wife to give respondent good and proper care and nursing in sickness and to hold themselves ready at all times to execute respondent's request to procure for him a physician; and it required the doing of things for him from day to day that could not be done other than by the personal presence of the son and his wife, or one of them, and which would not in the nature of things have been intrusted to anyone with power to delegate it to another. We cannot doubt but that one of the primary considerations for the conveyance made by respondent was the agreements, as he understood them, which would secure to him the personal presence of his son during his last years. That is as plainly written into the papers by reasonable construction of them as if it were literally expressed. The contract reposed in appellant a trust of the most important character,—that of caring for the daily wants of an aged parent in health and sickness to the end of his life; a trust which only the trustee, under proper conditions, could properly exercise,—one that never ought to be delegated, never can be properly delegated to another not in the same relation. *Divan v. Loomis*, 68 Wis. 150, 31 N. W. 760. Looking at the evidence in the light of common experience, and the construction generally put upon instruments similar to the one before us, we must hold that it required defendants to live on the land conveyed and to personally execute the agreements on their part to be performed; and that when they abandoned

the farm and set up a home 20 miles away, they incapacitated themselves from performing their obligations,—breached the same in such a way as to take from respondent a substantial part of the consideration for the conveyance of his property, a part which, taken away, rendered what remained entirely inadequate to satisfy the purpose of the conveyance, and without which it would never have been made. That renders it unnecessary for us to examine in detail the evidence to see whether it sustains each particular violation of the contract of which defendants were convicted by the finding of the trial court.

The next proposition submitted by appellant's counsel is that a transaction of the kind in question is not subject to rescission unless it was made generally for maintenance and support; that it is not subject to rescission where the agreement between the parties calls for specific payments of money or the delivery of property from time to time, the value of which can be readily ascertained, and a mortgage was given to secure performance thereof as in this case, though the agreement may also provide for care and nursing, since damages for a breach in that regard can be measured in money. In view of the law that performance of such a contract as the one in question is not delegable, it would seem that counsel's proposition has been covered by what has been said if it were not for *Peterson v. Oleson*, 47 Wis. 122, 2 N. W. 94, upon which he relies. The contract there passed upon was similar in all respects to the one before us, and it was distinctly held that the remedy by foreclosure of the mortgage, not by an action in equity for a reclamation of the property, applied. The real basis for the jurisdiction of the court in this class of cases, it seems, was not thoroughly established and comprehended. In the first case where the court had the subject under consideration, *Bogie v. Bogie*, 41 Wis. 209, the facts were that the plaintiff, an aged person, gave the defendant, his son, a deed of his property in the usual form, taking back an agreement as consideration therefor, binding the grantee to pay certain sums of money to other members of the grantor's family, and to support his father during the remainder of his life. The son failed to perform any part of his agreement. This court decided that it could not be held that performance of the contract by the defendant was a condition subsequent and that the conveyance could not be rescinded for non-performance of such a condition, but that it was within the power of the court to deal with the situation and remedy the wrong by annulling the whole transaction between the parties, forfeiting the title to the property to the father on the ground of fraud, or to prevent the fraud that would otherwise be consummated. No attempt was made to justify the decision on principle, other than by an observation that the equity power of the court to compel specific performance of a contract, where failure to perform would be a fraud upon the adverse party, includes,

necessarily, power to annul a contract or conveyance where that is required to prevent injustice. That rule, perhaps, was not broad enough to govern *Peterson v. Oleson*, upon the theory that damages for the breach complained of were susceptible of measurement in money, and the parties had limited the remedy for the breach by giving the mortgage to secure performance of the contract. It is significant that *Peterson v. Oleson* has not been followed in any subsequent decision. We are unable to find that it has ever been cited as authority. It seems to be out of harmony with *Bogie v. Bogie*, except upon the theory suggested, and out of harmony with numerous cases that have been since decided, and that it has been impliedly overruled. It is perhaps unfortunate that the real situation in that regard has not heretofore been made significant by some direct reference thereto, since counsel for appellant seem to have relied upon *Peterson v. Oleson*, largely, in bringing this appeal, and it is not improbable that such case may have ruled many cases in trials at the circuit, which have not been brought to the attention of this court.

The only case after *Bogie v. Bogie*, in which the subject under consideration received attention here, except *Peterson v. Oleson*, and in which the former was followed, not recognizing any other ground for relief than the one therein stated, is *Bresnahan v. Bresnahan*, 46 Wis. 385, 1 N. W. 39. When the court reached *Blake v. Blake*, 56 Wis. 392, 14 N. W. 173, it was suggested that the stipulations made by the grantee in the conveyance, or in the contract forming the consideration therefor, might, by construction, be deemed to constitute a condition subsequent, though in form mere covenants. In *Delong v. Delong*, 56 Wis. 514, 14 N. W. 591, decided at the next term of the court, that suggestion was referred to in connection with references to the first two cases mentioned, the court saying that in each of such cases the obligation of the son rested in covenant, not in condition. True, it rested in covenant in form, but in condition by the rule of construction which the court intimated in *Blake v. Blake* might be applied to such a transaction, and which the court later repeatedly held was the true ground for equitable interference. In *Gilchrist v. Fowen*, 95 Wis. 428, 70 N. W. 585, the consideration for the conveyance was payment of a sum of money to a person named therein and support of the grantor during his life. The grantee accepted the deed and thereby impliedly agreed to render to the grantor the consideration named therein. In that, the transaction differed from each of those where there was a written agreement. The court held that what was a covenant in form should be held to be really a condition subsequent, the breach of which, with re-entry by the grantor, would operate to re-vest the title to the property conveyed in the grantor. In *Knutson v. Bostrak*, 99 Wis. 469, 75 N. W. 156, the facts, in all essential particulars, were the same as in the case at hand. Plaintiff con-

veyed property, consisting of a farm and farm implements which were for use and in use in connection with such farm, all of the value of \$8,000 or thereabouts, to the defendant, his son. The grantor was an old man and made such conveyance to provide for his support and that of his wife the balance of their lives. As evidence of the purpose of the conveyance the son, at the time of the conveyance and as the consideration therefor, gave to his father a written agreement promising to support him and his wife during the remainder of their lives or the life of either of them, to provide them a home on the farm during such period in the dwelling house there situated, and in a part thereof particularly designated, and to do many other things similar to those which appellant promised to do for respondent here. Performance of the agreement was secured by the son by a mortgage on the property conveyed. The court held that a foreclosure of the mortgage was not the only remedy for breach of the agreement, no reference being made to *Peterson v. Olson*; that the agreement contemplated personal attention of the son to the wants of his parents as indicated in the agreement, services which he could not delegate, and that performance of the agreement should be held by construction to be a condition subsequent.

The early cases to which we have referred were cited, the court saying, in effect, that it is in accordance with such cases for a court of equity to set aside such a conveyance for breach of condition subsequent. That was not strictly accurate, as we have seen, so far as relates to the precise ground upon which the court rested its decisions in such cases at the start, it being there distinctly held that the obligation assumed by the grantee did not rest in condition and that relief could not be granted on that ground. However, it declared distinctly, what was the necessary conclusion from the history of the subject, that out of such a transaction as the one in question the court may, by rules of judicial construction peculiar to courts of equity, properly read a condition, thereby holding obligations which in form rest in covenant to rest in condition; or, in other words, that a conveyance made under such circumstances is not absolute,—is not to be deemed to have been so intended by the parties,—but was made and intended to have been made upon condition subsequent; and that the title to the property conveyed may be divested from the grantee and revested in the grantor the same as in any other case of a conveyance upon such a condition. That rule is reasonable. If any of the situations where equity, by construction, so called, may arbitrarily, if necessary, turn a transaction into something entirely different from what the parties thereto expressed in their writings in order to do justice, can be supported on principle, the one under consideration can. If courts of equity did not possess power to do that, they would be shorn of much of their efficiency to protect the weak, to prevent the realization of contemplated frauds, of un-

conscionable bargains, and, generally, of administering justice between man and man. Probably no situation can be named where the exercise of that important power is more needed than just such as the one before us,—one where a confiding parent, in his old age, trusting largely to the affectionate regard of his son, conveys to the latter all his property to secure support and personal care for the balance of his days, and the consideration, by the wrongful conduct of the son, so far fails that there is no efficient remedy that can be applied to right the wrong other than to restore the parent to the ownership and possession of his property. In such a case the court does not lend its jurisdiction to effect a forfeiture. The rule in that regard is not violated. The forfeiture, or rescission, as it is sometimes called, is effected by the acts of the grantor, by his re-entry, or its equivalent, for condition broken. Equity lends its aid to quiet the title, assaït in *Knutson v. Bostrak*, 99 Wis. 469, 75 N. W. 156. It lends its aid to "set aside the conveyances." Equity deals with the situation the same as with any other where a reversion of title has taken place by re-entry, or its equivalent, for condition broken. It establishes the title to the property in accordance with the facts and clears away all apparently interfering writings and records, giving such other relief as may be necessary to fully accomplish that end. *Maginnis v. Knickerbocker Ice Co.* 112 Wis. 385, 88 N. W. 300.

An examination of the authority by which *Bogie v. Bogie* was supported in the opinion, and others cited to the attention of the court on the argument, bears out what has been said, notwithstanding the remark there found that the decision could not be justified upon the doctrine of forfeiture for breach of condition subsequent. *Reid v. Burns*, 13 Ohio St. 49, is the only case particularly referred to. Remarks are there made indicating that the judicial idea was that the controversy turned on fraud,—the right to a rescission for fraud. Surely the idea of rescission for fraud in the making of the contract would not apply to such a case. The subject does not seem to have been carefully considered. If the doctrine of rescission by election of one party to a contract for breach of condition subsequent by the other party was definitely in mind, no clear statement thereof appears in the language of the court. *Tracey v. Sacket*, 1 Ohio St. 54, 59 Am. Dec. 610, was referred to, but that went on the ground of undue influence in the making of the contract, and the evidence was ample to sustain that theory. *Story, Eq. Jur. 692 et seq.*, and *Willard, Eq. Jur. 302 et seq.*, are referred to. Both authorities, where cited, treat of the power of a court of equity to clear away those things existing after a rescission by the party for nonperformance of obligations without which the contract would not have been made, and for the breach of which there is no adequate remedy other than a rescission, which have no force in fact but may be used by persons having apparent

rights thereunder to the prejudice of the rescinding party. After going over all phases of equitable interference in such matters, Willard says (Potter's ed. p. 304): "It is obvious from the preceding views that the jurisdiction exercised in cases of this sort is founded upon the administration of a protective or preventive justice. The party is relieved upon the principle, as it is technically called, of *quia timet*; that is, for fear that such agreements, whatever may be the character of the instrument, may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost, or that they may now throw a cloud over his title or interest." 2 Story, Eq. Jur. 13th ed. § 701, in summing up the matter, uses similar language. The idea expressed is that equity is not invoked to obtain a forfeiture or to rescind the contract itself; that the plaintiff's rights to that extent may be vindicated by his own election and act; that what he needs to obtain a judicial establishment of his status in regard to the thing in controversy according to the facts, so he may be freed from danger from outstanding agreements or conveyances which, though void, are apparently good upon their face, and might in some way, presently or in the future, be used to his prejudice. The court so treated the matter in *Devereaux v. Cooper*, 11 Vt. 103, a case cited to the attention of this court in *Bogie v. Bogie*. *Leach v. Leach*, 4 Ind. 628, 58 Am. Dec. 642, is another case brought to the attention of the court in *Bogie v. Bogie*. There the court acted on the authority of *Jenkins v. Jenkins*, 3 T. B. Mon. 327, *Scott v. Scott*, 3 B. Mon. 2, *Devereaux v. Cooper*, 11 Vt. 103, and *Hefner v. Yount*, 8 Blackf. 455, all of which cases except the last were cited by counsel in *Bogie v. Bogie*. The Indiana court decided, as regards the real situation of parties circumstanced as appellant and respondent were after the making of the papers evidencing their agreement, that the grantee holds the land upon condition subsequent that he will in all things substantially comply with his covenant, and in such cases the failure to perform the obligation is a breach of condition subsequent, and a forfeiture of the estate forms a proper subject for the interference of a court of chancery. In *Hefner v. Yount*, 8 Blackf. 455, the facts were similar to those in *Bogie v. Bogie*, and the court decided that the grantee held the property conveyed to him subject to forfeiture for nonperformance of a condition subsequent. In *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698, the facts were quite similar to those in the case before us, including the element of a mortgage to secure performance on the part of the grantee and promisee. The court, looking at all the circumstances under which the papers were made, said: "Giving full effect to the rule that conditions subsequent, as they 'go in destruction and defeasance of estates, are odious in law and shall be taken strictly,' we are, nevertheless, constrained to the conclusion that the deed and mortgage taken together, create an estate in the

grantee upon the condition subsequent, that the latter shall perform the terms stipulated in the mortgage. True, neither the deed nor the mortgage states in express terms that the estate is granted upon condition, but the word 'condition' is not necessary to the creation of an estate upon condition, if it plainly appears from the words used that the intent of the parties was to create an estate of that description." The controlling circumstance in that case, and in most of the cases of the class to which it belongs, by which courts are enabled to reach the conclusion that the intention of the parties was that the estate granted should be held upon condition, was that the grantor was an old man, that he made the conveyance, not only to secure the performance of the obligations referred to in the writings, but performance thereof by the particular person therein obligated,—performance with that affectionate regard for the welfare of the grantor which an aged father has a right to expect of his son and which he has no right to expect from a stranger or any person not standing near to him in the family relation. In such a case, if the purpose of the agreement substantially fails of realization, nothing short of a restoration of the original status as to the property involved is an adequate remedy. So nothing short of that could be reasonably said to have been in the minds of the parties at the inception of their contract as the consequence that might follow from a breach of it. In that situation "a condition subsequent arises by clear implication." 2 Washb. Real Prop. 7.

Nothing further need be said to demonstrate that the doctrine of *Peterson v. Oleason*, upon which counsel for appellant chiefly relies, and the doctrine of *Bogie v. Bogie*, so far as it is to the effect that relief in such a case cannot go upon the ground of forfeiture for nonperformance of a condition subsequent, is not the law; and that by repeated decisions of this and other courts the law has been firmly established that where a son obtains title and possession of his father's property, giving as a consideration therefor his promise to support the grantor for life, such promise, whether the manner in which it is to be kept be definitely specified in the writings or not, is not delegable; that the property conveyed is held upon condition subsequent; that for a breach thereof the title thereto will, at the election of the grantor, no sufficient equitable considerations to the contrary standing in the way, revert without judicial aid, the same as in any other case of breach of condition subsequent; and that the grantor may have the aid of a court of equity for such appropriate relief as may be necessary to judicially establish his status as regards the property and quiet his title thereto, removing any adverse claim or outstanding paper in regard thereto that may exist, which might be used, presently or in the future, prejudicially to him. That amply justifies the judgment appealed from.

Judgment affirmed.

Mary GERRARD, *Respt.*,
v.
LA CROSSE CITY RAILWAY COMPANY,
Appt.

(.....Wis.....)

1. The court's telling the jury the legal effect of their answers to questions submitted to them for a special verdict is ground for reversal.
2. A street railroad company cannot remove snow from its tracks to the adjacent roadway in such a manner as to leave a deep ditch and render the street unsafe and dangerous for public travel, without liability for injuries to travelers caused thereby, although such liability is not imposed by the ordinance conferring its franchise.
3. Whether or not a traveler in a cutter drawn by one horse is negligent in attempting to cross to the opposite side of the street-car track, which is in a depression about a foot deep, when his progress on the side on which he has been traveling is obstructed, and whether or not he does so in an ordinarily prudent manner, are questions for the jury.

(February 18, 1902.)

A PPEAL by defendant from a judgment of the Circuit Court for La Crosse County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by Winslow, J.:

This is an action to recover for personal injuries. The facts were substantially as follows: The defendant is a street railway company operating its tracks in the city of La Crosse. One section of the ordinance giving the company the right to operate its railroad provided that the railway company should not allow snow or ice to accumulate on its tracks in a quantity sufficient to obstruct or hinder the passage of carriages or sleighs, and should not deposit the same on any portion of any street, so as to obstruct or render the same unsafe, or interfere with ordinary travel thereon. Market street, in the city of La Crosse, runs east and west, and is 66 feet in width, and the defendant operates a single track upon the said street; the track being located in the center of the street. The width of the roadway between the curbs is 38 feet; the width of the railway track is 5 feet; thus leaving a distance on each side of the track of 16½ feet. Upon the night of December 11 and 12, 1899, there was a severe snowstorm, 14 to 16 inches deep. On the morning of the 12th the tenants on the north side of Market street at the place of the accident hereafter named, shoveled the snow from their sidewalks and curb onto the roadway, and spread it out between the curb and the

track. The defendant used an electric sweeper to clear its tracks, but in order to operate the same it is necessary to clean the rails, in order to secure contact of the wheel with the rail. For this purpose early in the morning of the 12th two men were sent over the track on Market street to shovel the snow from each rail, which they did; making a groove in the snow the width of a shovel over each rail, and throwing the snow on either side. In the afternoon of the same day the electric sweeper was put on, and swept all of the snow from the track, and a strip 16 inches wide on the north side thereof, and threw it all on the south side of the track; leaving the track in a sort of a trench, with sloping sides of snow. Between this time and the 19th of December the street was used in the usual way by teams, and the surface was worn and packed down hard; the temperature during that time being such that there was little, if any, melting. On December 19th, on the north side of the track at the place of the accident, there began a rise or slope to the north 11 to 14 inches in height in a distance of somewhere from 1½ to 3 feet, from which place to the curb the surface was nearly level. About noon of the 19th, the plaintiff, who was a woman fifty years of age, and accustomed to handling horses, was riding in a cutter drawn by a gentle horse, went on the north side of Market street, and stopped and hitched her horse for a few moments, and went into a store. Coming out of the store, she got into the cutter and started on west, and, after proceeding a short distance, found a delivery wagon standing so that she could go no farther west upon the north side of the track. She then turned and drove across the railroad track in order to get by the delivery wagon, and while so doing the sleigh tipped over as it went down the slope on the north side of the track, and she was thrown out and injured. The jury returned the following special verdict: "(1) Did the defendant company, at or about the time alleged in plaintiff's complaint, allow snow or ice to accumulate upon and between the rails of its track at the point where it is alleged the injury in question occurred, in a quantity sufficient to obstruct or hinder the passage of vehicles or sleighs? No (by the court). (2) Did the defendant railway company, in the removal of the snow or ice from its railway track, on or about the 12th or 13th day of December, 1899, at the point on Market street where the alleged injury to plaintiff occurred, deposit such snow or ice, or any sufficient quantity thereof, upon the north side of the north rail of said track, so as to unreasonably obstruct or render travel by vehicles unsafe at the point in question? No. (3) If you answer question No. 2 'Yes,' then was the removal or deposit of such snow or ice by the railway company the proximate cause of the plaintiff's injury? Not answered. (4) Did the defendant railway company, by the removal of the snow or ice from its track on or about the 12th or 13th of December, 1899, leave a deep

NOTE.—As to liability of street railway company for defect in street, whether caused by snow or otherwise, see notes to *Groves v. Louisville R. Co.* (Ky.) 52 L. R. A. 448.

ditch or gully where such snow or ice had been so removed, with high and steep sides, in or near the center of said street, so as to render travel upon such street at the point where the alleged injury to plaintiff occurred unsafe or dangerous for public travel? Yes. (5) If you answer question No. 4 'Yes,' then was the leaving of such ditch or gully, with high and steep sides, by the defendant railway company, the proximate cause of the plaintiff's injury? Yes. (6) Was the plaintiff, at the time and place when the alleged injury occurred, in the exercise of ordinary care and prudence in attempting to cross the railway track at the point in question? Yes. (7) If you answer question No. 6 'No,' then was such failure to exercise ordinary care and prudence the proximate cause of the plaintiff's injury? Not answered. (8) If it shall finally be determined that the plaintiff is entitled to recover, at what sum do you assess her damages? \$7,000." Judgment was rendered upon this verdict in favor of the plaintiff, and the defendant appeals.

Messrs. Woodward & Lees, for appellant:

The accident is chargeable to the contributory negligence of plaintiff.

The only possible danger being in plain sight, and her attention not being diverted from it at the time, she was negligent in attempting to drive across at a sharp angle, when it was obviously and perfectly safe to drive straight across, or at an angle more obtuse.

Collins v. Janesville, 111 Wis. 348, 87 N. W. 241, 1087; *Crites v. New Richmond*, 98 Wis. 55, 73 N. W. 322; *Kenyon v. Mondovi*, 98 Wis. 53, 73 N. W. 314; *Cumisky v. Kenosha*, 87 Wis. 286, 58 N. W. 395; *De Pere v. Hibbard*, 104 Wis. 666, 80 N. W. 933.

In the use of its franchise defendant was a public agent, and had such privileges as were reasonably necessary to effect the object of its grant. It was reasonably necessary to the transaction of its business that it should remove this snow from its tracks.

Tesch v. Milwaukee Electric R. & Light Co. 108 Wis. 593, 53 L. R. A. 618, 84 N. W. 823.

Messrs. McConnell & Schweizer, for respondent:

Everything defendant did was done for its own convenience and profit. The street would have been passable and perfectly safe had defendant let it alone. It had authority to use the street for its special purpose, and to remove the snow for the profitable accomplishment of that purpose, but in so doing it was bound to exercise ordinary care to leave the street in reasonably safe condition.

1 Shearm. & Redf. Neg. § 350; Wood, Nuisances, § 757; *Alton & U. A. Horse R. & Carrying Co. v. Deitz*, 50 Ill. 210, 99 Am. Dec. 509.

The bank or slope left by defendant was a dangerous defect. A descent of 12 to 14 inches, with a slope of 16 to 18 inches, is 57 L. R. A.

clearly dangerous. Snow banks of this height and of less height have been so held.

Laughlin v. Street R. Co. 62 Mich. 220, 28 N. W. 873; *Smith v. Nashua Street R. Co.* 69 N. H. 504, 44 Atl. 133; *Mahoney v. Metropolitan R. Co.* 104 Mass. 73.

It can make no difference in reason or in law whether the bank is created by heaping up snow on one side of a given line, or by removing it on the other.

Elliott, Roads & Streets, 2d ed. pp. 822, 823; *Smith v. Nashua Street R. Co.* 69 N. H. 504, 44 Atl. 133; *Laughlin v. Street R. Co.* 62 Mich. 220, 28 N. W. 873; *Dixon v. Brooklyn City & N. R. Co.* 100 N. Y. 170, 3 N. E. 65.

Even where plaintiff fully understands the danger the question of contributory negligence is for the jury.

Kelley v. Fond du Lac, 31 Wis. 179; *Kenworthy v. Ironton*, 41 Wis. 647; *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 208; *Cairncross v. Pewaukee*, 86 Wis. 181, 56 N. W. 648; *Salzer v. Milwaukee*, 97 Wis. 471, 73 N. W. 20; 1 Shearm. & Redf. Neg. § 376; *Laughlin v. Street R. Co.* 62 Mich. 220, 28 N. W. 873; *Mahoney v. Metropolitan R. Co.* 104 Mass. 73.

Winslow, J., delivered the opinion of the court:

The case was submitted to the jury upon a special verdict, and the court gave the jury, against proper exceptions, instructions which plainly told them the legal effect of their answer upon the question of contributory negligence. For this reason there must be a reversal of the judgment, irrespective of any other question. *Musback v. Wisconsin Chair Co.* 108 Wis. 57, 84 N. W. 36. Although there must be a new trial for the reason given, we deem it proper to consider the two main questions presented by the record, as they will doubtless arise again upon the second trial: These questions are (1) whether there was any testimony tending to show negligence on the part of the defendant; and (2) whether the plaintiff appears to have been guilty of contributory negligence, as a matter of law.

1. The city ordinance granting to the defendant company its street franchises provides, as stated in the statement of facts, that the company shall not allow snow or ice to accumulate upon its tracks in such quantities as to obstruct travel, nor deposit snow upon the street in such manner as to obstruct travel or render the same unsafe. The defendant claims that the complaint in this action charges negligence only in the violation of the ordinance, and that the jury, in answer to questions 1, 2, and 4 of the special verdict, having found that there was no accumulation or deposit of snow in violation of the ordinance, but only a removal of snow, against which the ordinance does not in terms provide, there is really no negligence proved in the case. While the complaint sets forth the ordinance requirements in detail, and charges their violation, we think it also charges something more. By the last clause of the third subdivision

of the complaint it is charged, in substance, that the defendant negligently caused the snow and ice on its track to be excavated and removed in such manner as to leave a deep ditch, rendering the street unsafe and dangerous for public travel. We can construe this as meaning nothing more nor less than a breach of the common-law duty not to render the street unsafe for travel, which is manifestly wholly independent of the provisions of the ordinance. It is argued, however, that there is no such common-law duty, but that the defendant's obligations to the public are measured by the requirements of the ordinance. With this contention we cannot agree. Even in the absence of any requirements in the ordinance upon the subject, it must be held that when the defendant company received its franchise to operate a street railway upon the streets for its private gain, as well as the public convenience, it at the same time assumed a duty to the public not to unnecessarily render ordinary travel on the street dangerous. It must exercise its rights with due deference to the rights of the general public. It has no license to build and operate its tracks with total disregard of the rights and safety of the man with the horse and wagon, or the woman with the horse and cutter. On this subject the Messrs. Elliott, in their work on *Roads & Streets*, 2d ed., § 764, say very aptly: "A street railway company which accepts a grant or a license impliedly agrees that it will use due care not to unnecessarily impede travel or to make the use of the street hazardous. The burden which it assumes in conjunction with the benefit which it obtains is a continuing one, and it must bear it, although to do what due care and diligence requires may sometimes entail considerable expense. . . . Where the track is cleared for its own convenience, it must do what is reasonably necessary to make the part of the street not occupied by its tracks reasonably safe, for it cannot for its own accommodation obstruct it so as to endanger travelers." We accept these propositions as correctly stating the law. It is said that to require the company to remove any part of the snow from the street outside of its tracks is an undue burden, involving, perhaps, great labor and expense; but, as pointed out above, the company, by accepting its franchise, assumed a duty to the public, and any disposition which it is obliged to make of falling snow in order to run its cars must be such a disposition as preserves the rights of the public to have a reasonably safe street for ordinary travel. If the public right can be preserved by simply brushing the snow to one side, well and good; but if the snow is so deep that the right can only be preserved by removing the snow from its tracks and from such additional space outside thereof as is necessary to prevent the formation of a dangerous declivity, then the company must make such removal. Any disposition which it makes of the snow must be made with due deference to the rights of travel upon the highway. *Wallace v. Detroit City R. Co.* 58 Mich. 231, 24 N. W. 870; *Smith v. Nashua Street R. Co.* 69 N. H. 504, 44 Atl. 133. The evidence in this case was entirely sufficient to call for the submission of the question to the jury whether the company, in the removal of the snow from its track, left a declivity on the north side of its track which rendered the street unsafe for public travel.

2. The question of contributory negligence was also one for the jury. It is said in the appellant's brief that it is not contended that plaintiff was guilty of contributory negligence from the mere fact that she attempted to cross the track where she did, but that the danger being in plain sight, and her attention not being diverted, she was negligent in attempting to drive across at a sharp angle, where it would have been perfectly safe to drive straight across. So the claim is that she was negligent only in not driving across at the proper angle. On this subject the plaintiff testified that she turned to go over the track, and drove slow over the track, and tipped over; that she drove just as straight as she could,—pretty near straight across the track. And, at request of defendant's counsel, she drew a line upon paper, or upon some diagram present at the trial, showing the way she went across the track; but this paper has not been preserved in the bill of exceptions, and hence we have not the benefit of it. The testimony tends to show that the plaintiff exercised some degree, at least, of additional care, in attempting to cross the track. It has been held in numerous cases in this and other courts that a traveler driving upon a highway is not necessarily guilty of contributory negligence because he attempts to pass over or around a defective place of which he has knowledge. The defect may be so serious or dangerous that a court would be justified in saying that any attempt to proceed would be negligence, but in all other cases the question is whether a reasonably prudent man, exercising ordinary care, would attempt to proceed under the circumstances, and, if so, whether the plaintiff used that additional care which such a man would exercise in view of his knowledge of the danger. *Kelley v. Pond du Lac*, 31 Wis. 179; *Kennworthy v. Ironton*, 41 Wis. 647; *Mahoney v. Metropolitan R. Co.* 104 Mass. 73; *Thomas v. Western U. Teleg. Co.* 100 Mass. 156. It must appear, in order to justify a finding of due care in such a case, that the traveler exercised such care as persons of common and reasonable prudence would ordinarily exercise under such circumstances; that is, a degree of care proportionate to the increased danger. If the danger is such as to require unusual precautions, the traveler must use such precaution. Elliott, *Roads & Streets*, 2d ed. § 635. Tested by this rule, we must say that the apparent danger was not so great as to justify the court in saying that the plaintiff was guilty of contributory negligence, as matter of law, in attempting to cross the track, but that the question whether the plaintiff exercised ordinary

care in making the attempt in the manner in which she did make it was a question for the jury, under proper instructions. There is a very plain line of distinction between a case like the present and the case of foot passengers who are injured by reason of seen and known defects in or upon a sidewalk. In the latter class of cases, of which *Hausmann v. Madison*, 85 Wis. 187, 21 L. R. A. 283, 55 N. W. 167, and *Devine v. Fond du Lac* (Wis.) 88 N. W. 913, may be considered typical, it has been held that a traveler upon a sidewalk, who sees a defect before him, such as a piece of ice or a slippery or uneven stone, and walks upon it without necessity, and taking no precautions for his safety, is guilty of contributory negligence. The foot passenger has absolute control over his movements, may stop and turn aside at will and without danger, and hence may properly be held to a strict rule of accountability under such circumstances. But the traveler with a horse and wagon or sleigh is in an entirely different situation. His movements may not, indeed cannot, be absolutely free. His equipage cannot be turned in a moment away from danger. His view is not only

not so clear, but his attention may be necessarily occupied with the handling of his horse, and many circumstances may be present which will be entitled to be considered in judging of the degree of care which he exercises, which cannot be present in the case of the foot passenger upon a sidewalk. We have drawn attention to the line of cases last mentioned simply for the purpose of pointing out the distinction between them and the present case, without intimating, however, that there may not be cases of foot passengers who will be justified in attempting to pass over a known defect in a sidewalk, if it is shown that they took some precautions fairly commensurate with the increased risk. *Richards v. Oshkosh*, 81 Wis. 226, 51 N. W. 256; *Salzer v. Milwaukee*, 97 Wis. 471, 73 N. W. 20.

We think the questions submitted by the court to the jury fairly cover the issues in the case, and we have found no prejudicial errors in the record, save the error first referred to in this opinion, and for this there must be a reversal.

Judgment reversed, and action remanded for a new trial.

WYOMING SUPREME COURT.

Thomas BLYTH *et al.*, *Plffs. in Err.*,
v.
William A. PINKERTON *et al.*

(.....Wyo.....)

A written guaranty of the salary and expenses of a detective in working up a murder case will not continue after conviction of a suspect and settlement of the bill for services to that time, although the guaranty is not canceled or recalled; and the guarantor cannot be held liable for services rendered in connection with a retrial of the accused.

(January 30, 1902.)

ERROR to the District Court for Laramie County to review a judgment in favor of plaintiffs in an action brought to recover on a contract guaranteeing the expenses of detectives furnished by defendants for the investigation of a murder. *Reversed.*

The facts are stated in the opinion.

Mr. J. W. Lacey for plaintiffs in error.

Mr. M. J. Barry, for defendants in error:

By the mention in the guaranty of "services to be rendered for Harvey Booth," it could never have been the intention of parties to this suit that Harvey Booth or his body should be bound in payment for serv-

ices, or that services should be performed for him.

Suit was brought to recover for certain investigations in the matter of the murder of Harvey Booth, and the guaranty introduced to fix liability, but at that time no objection was made to the application of the guaranty to charge Blyth and Stone with the bill for the investigation.

Brandt, Suretyship & Guaranty, § 156.

A contract of guaranty should be construed the same as any other contract, and the same rules should be applied to ascertain the true intention of the parties.

Brandt, Suretyship & Guaranty, § 92; *Hotchkiss v. Barnes*, 34 Conn. 27, 91 Am. Dec. 713.

The contract itself must be read in the light of the circumstances under which it was entered into.

First Nat. Bank v. Gerke, 68 Md. 449, 13 Atl. 358; *Crist v. Burlingame*, 62 Barb. 351.

Previous and contemporary transactions and facts may be taken into consideration to ascertain the subject-matter and the sense in which parties have used particular terms.

Beach, Contr. § 719; *Brawley v. United States*, 96 U. S. 168, 24 L. ed. 622; *Vincennes v. Citizens' Gaslight Co.* 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573; *Illges v. Dexter*, 77 Ga. 36; *Mathews v. Phelps*, 61 Mich. 327, 28 N. W. 108; *Merriam v. United States*, 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536.

Where, by the terms of a written guaran-

NOTE.—As to continuing guaranty generally, see notes to *National Exch. Bank v. Gay* (Conn.) 4 L. R. A. 343, and *Coleman v. Fuller* (N. C.) 8 L. R. A. 380; also *Gay v. Ward* (Conn.) 32 L. R. A. 818.

57 L. R. A.

ty, it appears that the parties look to a future course of dealing for an indefinite time, or a succession of credits to be given, it is deemed a continuing guaranty.

14 Am. & Eng. Enc. Law, 2d ed. p. 1132; *Crist v. Burlingame*, 68 Barb. 351; *Tuohy v. McMurren*, 57 Minn. 242, 59 N. W. 301.

To revoke the guaranty explicit language should be used.

Lanusse v. Barker, 3 Wheat. 101, 4 L. ed. 343.

A contract of guaranty is to be construed so as to promote the use and convenience of commercial intercourse.

Davis v. Wells, F. & Co. 104 U. S. 159, 26 L. ed. 686.

Its construction is to be according to what is fairly to be presumed to have been the understanding of the parties, without any technical nicety.

Lee v. Dick, 10 Pet. 482, 9 L. ed. 503; *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273, 45 Am. Rep. 204; *Lawrence v. McCalmont*, 2 How. 436, 11 L. ed. 329.

Thomas Blyth is liable as an original promisor.

Weiler v. Henaris, 15 Or. 28, 13 Pac. 614.

Knight, J., delivered the opinion of the court:

This action was brought in the district court by defendants in error, as plaintiffs, against plaintiffs in error and one John H. Ward, as defendants, by a petition of a single count, alleging "that the defendants herein jointly and severally promise to pay to the plaintiffs the sum of \$8 per day and expenses for each operative sent out by plaintiffs to perform certain investigations in the matter of the murder of one Harvey Booth in Evanston, state of Wyoming, on or about January 27, 1895; that at the special instance and request of the defendants, and at the special instance and request of each of them, and in consideration of their said joint and several promise to pay, the plaintiffs rendered services which at the said rate of payment amounted to the sum of \$658.25; . . . that the defendants, and each of them, did guarantee the payment of the said services rendered by the plaintiffs, amounting to \$658.25." The defendants named in said petition were John H. Ward, Thomas Blyth, and Charles E. Stone. Issue was joined by a general denial, and a trial resulted in dismissing said case as to defendant John H. Ward, and findings and judgment against the plaintiffs in error, Thomas Blyth and Charles E. Stone, for the amount claimed, with interest. From said judgment said Thomas Blyth and Charles E. Stone come to this court, alleging the following errors, as set out in their motion for a new trial: "(1) The finding of the court is not sustained by sufficient evidence. (2) The finding of the court is contrary to the evidence. (3) The finding of the court is contrary to law. (4) The court erred in excluding from the evidence in said cause the letter

of one W. R. Stoll, dated June 9, 1896. (5) The court erred in excluding from the evidence the following portion of that certain letter written by W. R. Stoll to the defendant Thomas Blyth, and dated June 9, 1896, which is in words and figures following, to wit: 'That I was obliged to wire for Mr. Ward, and obliged to accept the assistance of the Pinkertons in tracing certain matters down. Mr. Ward will explain these matters to you in detail. I had to guarantee their expenses, upon the belief that they would be guaranteed by you or some others when the facts became known.' (6) The court erred in refusing to permit the defendants to prove by the witness Thomas Blyth, one of the defendants in said cause, that the said witness supposed that the plaintiffs were performing their services for which this claim is made in this cause for W. R. Stoll, and not for the defendants. (7) The court erred in refusing to permit the witness Thomas Blyth to testify in said cause that he had no idea that the plaintiffs were rendering any services here on behalf of the defendants, or either of them. (8) The court erred in refusing to permit the defendants to prove by the witness Thomas Blyth, one of the defendants in said cause, that he, the said Thomas Blyth, did not in any way understand that the presence or services of the plaintiffs, or any of them, in rendering the services here in question, were performed under any employment through or under the defendants, or for which they were in any way responsible. (9) The court erred in refusing to permit the witness Thomas Blyth, one of the defendants in said cause, to testify as to his reason for not objecting to the presence and employment of the plaintiffs in performing the services sued for in this cause."

A statement of facts from the record in this case proves most unsatisfactory, and is, in substance, as follows: That on or about January 27, 1895, one Harvey Booth was murdered in Evanston, Uinta county, Wyoming; and as a result of negotiations between John H. Ward, originally one of the defendants herein, who was at the time sheriff of said Uinta county, defendant in error, the Pinkerton Detective Agency, was on February 10, 1895, regularly employed by Thomas Blyth, one of the plaintiffs in error, in the matter of the investigation of said murder. The date of such employment is fixed by the evidence to the effect that before services are rendered by defendant in error a guaranty is always required, and the one introduced in evidence herein bears that date, and reads as follows:

Guaranty. In consideration of the services hereafter to be rendered by the Pinkerton National Detective Agency for case of Harvey Booth, of Evanston, Wyo., I, Thomas Blyth, of Evanston, Wyo., hereby guarantee the payment of said agency's bill for services in the case at the rate of \$8.00 per day and the expenses of each operative

from the time they leave the office of the agency until their return.

Thos. Blyth. [Seal.]

Chas. Stone. [Seal.]

Jas. McParland, Denver, Colo.

Feb. 10th, 1895.

As has been said, the record is unsatisfactory; the reason being that it fails to show when the first trial, at Evanston, was had; who was tried, except by inference; what kind of a verdict, if any, was found; and how it became competent to change the venue to Cheyenne. Counsel for defendants in error supplies some omissions in the record which are important, in his brief, as follows:

"The statement of the case made by counsel for defendant Blyth, while correct in the main, argument omitted, is rather brief, and not given in order of time. For these reasons a new statement is made, giving more detail:

"Statement. One Harvey Booth, of Evanston, Wyoming, was murdered about January 27, 1895. The Pinkerton National Detective Agency was hired to investigate the murder, with view of bringing murderer to justice. A representative of the Pinkertons, in order to secure payment of services to be rendered by agency, secured the following paper, signed by Thomas Blyth and Charles E. Stone. The paper was a printed blank used by the Pinkertons, the words underlined being written by hand. [Then follows the guaranty as set out hereinbefore, and continuing:] Services were rendered, several operatives being employed. As a result, one Crocker was arrested, tried in Evanston, convicted. New trial and change of venue granted. Tried second time in Cheyenne, and acquitted. The murder case closed in Cheyenne about July 1, 1896. All bills rendered by Pinkertons in first trial were paid either by or through Blyth, who was brother-in-law of murdered man, and also his administrator. Blyth was present on second trial, knew the Pinkertons were rendering services, and knew that they held his guaranty, but never recalled it. There is evidence that Blyth offered \$250 as payment of account now in judgment, and, after offer was rejected, renewed promise of payment; also that he gave out an idea of his being responsible for payment."

Stopping at this point, where the trial court, as from the record appears, had no right to stop, for want of information that at any time any one transaction had been completed, we find that, as is claimed, the employment of defendants in error, occasioned in part by the guaranty in evidence, had resulted in the arrest of Crocker for the murder of Booth, and that their services had been dispensed with (which is claimed temporarily) by the demand that their operative be recalled, and the payment by Blyth of all claim and demands to that date (April, 1895). There is no conflict in the evidence as to what occurred at that time. Mr. McParland, superintendent, as aforesaid, of defendants' agency in Denver, tes-

tified: "A good deal of work was done in the way of making investigations as to the murder of Harvey Booth. Bills for work done in January, February, April, 1895, were paid by Thomas Blyth." The testimony of Thomas Blyth as to what occurred in April, 1895, not denied, is as follows:

Q. The day prior to the settlement and payment in April, 1895, what had been done, if anything, with reference to discharging Pinkertons in the matter?

A. I wrote to Mr. McParland to recall the detectives and send the bill.

Q. What was done under that?

A. The detective was immediately recalled, and bill rendered.

Q. And was paid?

A. Yes, sir.

Q. Who else was cognizant of the recall?

A. Mr. Beard and Mr. Ward.

Subsequently, and while defendant in error had no connection with the case, Crocker was tried, convicted of the murder of Booth, made application for a new trial, which was granted, and thereafter the venue of the case was changed to Cheyenne. The only evidence that connects defendant John H. Ward, who was one of the defendants in the court below, with the transaction, up to this point, was that he sent the original telegram to the agency of the Pinkertons at Chicago at the time the murder was discovered, which was referred to the Denver agency, and had knowledge of the employment of the Pinkertons, and advised, worked, and counseled with them in their operations. After the first trial, and after the case had been sent to Cheyenne, it became necessary to make new contracts in some particulars, as appears from the record; and W. R. Stoll, Esq., an attorney of Cheyenne, was employed by Mr. Blyth to conduct or assist in the prosecution. Mr. Stoll had been recommended by Mr. McParland to Mr. Blyth when the latter had applied to him to name the best attorney in Wyoming to be employed. In June, 1896, more than a year after the services were rendered by the defendant in error under the guaranty aforesaid, and the same had been terminated by accord and satisfaction, as is claimed by plaintiffs in error, Mr. Stoll discovered an emergency requiring the assistance of a detective, and by wire secured the services of defendants in error; and from then on, and during the second trial, the services sued for, which are admitted to be of the value claimed, were rendered. Mr. Stoll, after securing the services of the defendants in error as aforesaid, on June 9, 1896, wrote Mr. Blyth, in part, as follows: "That I was obliged to wire for Mr. Ward, and obliged to accept the assistance of the Pinkertons in tracing certain matters down. Mr. Ward will explain these matters to you in detail. I had to guarantee their expenses, upon the belief that they would be guaranteed by you or some others when the facts became known." The sustaining of the objection to the offer of

the part of the letter aforesaid forms the fifth ground in the motion for a new trial presented by plaintiff in error Charles E. Stone. The evidence discloses the fact that while the services sued for were being performed a second guaranty was prepared and presented to Mr. Blyth for his signature, and that he refused to sign the same. This is explained by Mr. McParland, general superintendent as aforesaid, by the statement that the original guaranty in evidence was for a time misplaced or mislaid, and that fact caused the request for a new guaranty to be made.

During the second trial the office of Mr. Stoll was the place where the meetings of those interested in the prosecution were held; and the statement was made in the brief of defendants in error, and in the argument of counsel before this court, based thereon, that "there is evidence that Blyth offered \$250 as payment of account now in judgment, and, after offer was rejected, renewed promise of payment; also that he gave out an idea of his being responsible for payment." Referring to certain evidence, we will give that evidence.

William B. Sayers, an operative of defendant in error, upon that point testified as follows:

Q. Now, you may state what conversation you had with Mr. Blyth in regard to pay for the agency.

A. It was on the occasion of a meeting I had with Mr. Blyth, Mr. Hamm, Mr. Ward, and Mr. Stoll in Mr. Stoll's office in this town, in which, acting under instruction from Mr. McParland, I wanted to get advance expense money, and said that I had been instructed by Mr. McParland to get money on expenses account in this matter. During that conversation, Mr. Hamm, who was acting attorney, and also Mr. Blyth, asked if \$250 would be the amount of expense, and had a paper drawn up to that effect if I would accept. I was not authorized to accept \$250, or any sum. I told them I was not authorized. I told them I traveled a good deal on the railroad,—to Deer Lodge; to Salt Lake; two or three trips to Denver, here. I said I knew my railroad expenses were pretty heavy. I said that I didn't know the amount, and refused it. Then I was given to understand—I remember the conversation quite distinctly at the time in the office, Mr. Stoll being present—that the matter would be satisfactorily adjusted.

Q. Who said that the matter would be satisfactorily adjusted?

A. Mr. Hamm or Mr. Blyth. I don't know which one.

Q. Were they both present at the time?

A. They were both present. I don't know who spoke. So far as that statement, I cannot swear.

Q. If Mr. Blyth did not make the promise, he made no objection to it when it was made?

A. All four were present when this was done. Mr. Stoll, I think, had gone out of

the room, and was in his office. I know we were all in the building.

Q. Did they at that time ask you to continue the work?

A. I don't know that they asked me to continue the work. I was working at that time in the discharge of my duties of my work at that particular time that day.

Q. Was there any difficulty about your pay? Were you going to quit, or keep on working, if you did not get your money?

A. I did not say I was going to quit. I spoke to Mr. Stoll about it, and I spoke to Mr. Ward at that time about it. I was given to understand it was all right. We were all four present at one time during the day.

Q. By the Court: Who were the four?

A. Mr. Stoll, Mr. Ward, Mr. Hamm, attorney in the case.

Q. Just be clear on one point. You may state whether or not in the conversation you heard in Mr. Stoll's office between any of the defendants in this case, or any other persons, promises were made that pay would be forthcoming. (Objection to form of question.)

By the Court: Ask what was said with reference to pay at the time and place.

A. I can't give you the exact words. It has been some years ago, and I don't recollect the exact words. The substance of it was that the settlement of the bill of services would be all right in this case. The substance of the conversation was that the bill would be paid.

On cross-examination this witness was asked the following questions:

Q. You do not know who it was said your services would be paid? You do not know whether it was Hamm or Ward or Blyth?

A. No; I do not know.

Q. Mr. Hamm was not an attorney for Mr. Blyth?

A. Mr. Hamm—I don't know anything about that. He was connected with the case.

Q. He was county attorney of Uinta county, and authorized, in a way, to contract bills for that county?

A. I did not know anything about that. At that time I would not have taken any authorization from Mr. Hamm without knowing what he did it on.

Q. Whatever was said, you do not know whether it was Mr. Hamm or somebody else?

A. Mr. Hamm offered this paper \$250 settlement, which I refused; asked if that is right, I said, "No." They wanted to know how much it would be,—wanted me to make statement. I said, "No."

Later on the same witness testifies as follows:

Q. It was not settled who would pay it? Is that what you mean to say?

A. It was my understanding that the services would be paid for, in the presence

of Mr. Blyth, Mr. Hamm, and Mr. Ward, all of whom heard it at that time as well as I heard it.

Q. As I understand you, you don't know who?

A. One of those gentlemen.

Mr. Blyth testified about the matter above referred to as follows:

Q. You have heard Mr. Sayers's statement as to the conversation in Mr. Stoll's office when you and Mr. Ward and Mr. Hamm were claimed to have been present? You may state what, if anything, of that conversation occurred.

A. I never had any such conversation in Mr. Stoll's office.

Mr. Ward testified upon the same subject as follows:

Q. You have heard the testimony here of Mr. Sayers as to the conversation in his presence in relation to payment of Pinkertons for their services. Did you hear the testimony?

A. Yes, sir.

Q. You may state whether at any time there was an agreement by Mr. Blyth or yourself, or anybody in your presence, that that bill should be paid?

A. Not in my presence, sir.

Mr. Hamm, the other person referred to by witness Sayers as having been present at the time of the conversation referred to, was not a witness in the case.

Charles Stone, one of the plaintiffs in error against whom judgment was rendered in the court below, and who has been described in all the pleadings and proceedings, except in the guaranty which he signed, as Charles E. Stone, without any apparent cause, testified in part as follows:

Q. You may state what knowledge you ever had during the time of its performance of any service by the Pinkertons in this matter after the settlement was made in April, 1895?

A. None whatever.

Q. What authority did you give to anyone to employ Pinkertons on your behalf, or anybody else, to do detective work after April, 1895?

A. None whatever.

The above evidence is not modified, qualified, or questioned in the entire record.

It is not necessary to continue the unraveling of facts which seemed to be required, for the reason that all parties appeared to rely upon the general notoriety gained by the terrible murder out of which this controversy grew, and the attempts made by the state of Wyoming and private individuals to find, present, and punish the guilty.

Counsel for defendants in error includes in his brief the opinion claimed to have been announced by the trial judge in rendering his judgment, which is not included 57 L. R. A.

in the record of the case before us. While it would not be fair to quote this opinion without giving all the evidence, some of which that is omitted might have had great weight in its being arrived at, still, in view of the fact that Charles Stone, one of the judgment debtor defendants in the court below, was never shown to have obligated himself, by word, sign, or deed, beyond signing his name to the guaranty executed February 10, 1895, not sued on, but offered in evidence, we will quote from the opinion sufficient to show that it was for lack of evidence that caused the court below to commit some of the errors complained of. We quote in part: "That it was a continuing contract, in the light contended for by the plaintiff, seems clear to the court; and it appears further equally true that there was no cancellation of the contract by the defendants, and that the contract expired at the close of the second trial, and that the account sued on is a just debt, under the contract." We are constrained to ask, Why did the contract expire at the close of the second trial? It was at the close of the first trial that it was thought the murderer of Harvey Booth had been discovered and brought to justice. At the close of the second trial this was found to be a mistake, and all the efforts and expenditures had been for naught.

The diligence of the attorneys in presenting authorities applicable to the proper consideration of this case must be commended, and as there is little, if any, dispute as to the law that should govern, we have discussed the facts at length. The plaintiffs in error insist that the guaranty in evidence is not a continuing guaranty, and that there is nothing in the instrument itself fixing the limits of time for which it shall run, nor fixing the aggregate amount for which it shall be good, and that such instrument cannot be construed as a continuing guaranty; that a guarantor, like a surety, is bound only by the strict letter or precise terms of the contract of his principal whose performance he has guaranteed, and in this respect he is a favorite of the law; and that this must be remembered in determining the liability; and that he has the right to stand upon the strict terms of his obligation, when such terms are ascertained. And counsel cites in support of these contentions *Miller v. Stewart*, 9 Wheat. 680, 6 L. ed. 189, and, to the same effect, *Stayer & Walker v. Locke*, 22 Or. 519, 17 L. R. A. 652, 30 Pac. 497; *Cushing v. Cable*, 48 Minn. 3, 50 N. W. 891; *Barns v. Barrow*, 61 N. Y. 39, 19 Am. Rep. 247; *Markland Min. & Mfg. Co. v. Kimmel*, 87 Ind. 560; *Lafayette v. James*, 92 Ind. 240, 47 Am. Rep. 140; *Gunn v. Geary*, 44 Mich. 615, 7 N. W. 235; *Henrie v. Buck*, 39 Kan. 381, 18 Pac. 228; *Gill v. Sullivan*, 62 Iowa, 529, 17 N. W. 758; *Lang v. Pike*, 27 Ohio St. 498; *Ryan v. Williams*, 29 Kan. 487; *Burlington Ins. Co. v. Johnson*, 120 Ill. 622, 12 N. E. 205; *People v. Toomey*, 122 Ill. 308, 13 N. E. 521.

As to the contention made by plaintiffs in error that, by the terms of a guaranty

such as is here in evidence, the guarantor cannot be held beyond the immediate transaction, counsel cite *Birdsall v. Haddock*, 32 Ohio St. 177, 30 Am. Rep. 572; the case, briefly stated, being as follows: The guaranty was: "Send my son the lumber he asks for, and it will be all right." The son at once bought \$226 worth of lumber on credit, and afterwards paid for it. But the matter did not stop there. The first purchase was May 11, 1868. Afterward he bought additional lumber, down to January, 1869. The court confined the guaranty to the first purchase, of May 11, 1868, and, in closing a very interesting opinion, said: "The better opinion would seem to be that such an instrument should be confined to the immediate transaction, unless the language of the promise is sufficiently broad to show that it was meant to reach beyond the present, and render the guarantor answerable for future credits. The tendency of decision in this country has accordingly been against construing guaranties as continuing, unless the intention of the parties is so clearly manifested as not to admit of a reasonable doubt. 2 Am. Lead. Cas. 141, note, citing *Congdon v. Read*, 7 R. I. 576." And several other cases are cited. In the case of *Gard v. Stevens*, 12 Mich. 292, 86 Am. Dec. 52, the guaranty was: "If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you have your pay in a reasonable length of time." The court, in discussing this question, says: "As the plaintiff sold leather to Gates at several different times, and for different amounts, the first question is whether the guaranty is limited as to time. We think it limited to a single purchase or transaction. We must hold this, or that it is unlimited both as to time and amount. Every person is supposed to have some regard to his own interest, and it is not reasonable to presume any man of ordinary prudence would become surety for another, without limitation as to time or amount, unless he has done so in express terms or by clear implication. If the guaranty was limited in express terms either as to time or amount, but not as to both, it might be said it was the intention of the guarantor to leave it open as to the other, or that a further limitation could not be implied. But where it contains no express limitation as to either, and there is nothing in the instrument itself from which it can be inferred that it was the intention of the guarantor to leave it open as to both, we think it must be understood as referring to a single transaction." In the case of *Rogers v. Warren*, 8 Johns. 119, the guaranty was: "Our sons wish to take goods of you on credit. We are willing to lend our names as security for any amount they may wish." Goods were bought at several different times on credit. The court says: "The true construction of the letter of credit is that it is to be confined to the first parcel of goods. It would be unjust and unreasonable to extend it to an indefinite credit for an indefinite time." To the same effect 57 L. R. A.

were the following authorities cited by plaintiffs in error: *Anderson v. Blakely*, 2 Watts & S. 237; *Aldricks v. Higgins*, 16 Serg. & R. 212; *John S. Brittain Dry Goods Co. v. Yearout*, 59 Kan. 684, 54 Pac. 1062; *Cremer v. Higginson*, 1 Mason, 323, Fed. Cas. No. 3,383, and many others.

Defendants in error contend that the guaranty in evidence is a continuing one, "and, in order to determine that question, we have to construe its terms in the light of other surrounding circumstances at the time of its execution." And several authorities have been cited in support of that contention, which is not denied. The supreme court of New York used the following language many years ago, and from the authorities examined we have found none more concise, applicable to the case before us: "The party entering into an absolute engagement for the responsibility of his friend should see to the performance of it. The relation in which the parties afterwards stand to each other presupposes privity and knowledge of the credit obtained. It is in most of these cases a nice and difficult question to determine whether the guaranty is a continuing one or not. The intent of the party, to be derived from the words, is the only sure guide, and therefore very little aid is to be derived from the adjudged cases, as they turn upon the peculiar phraseology of the guaranty. Upon general principles, a strict interpretation should be applied in favor of a surety." The same court later, in *Baker v. Rand*, 13 Barb. 152, says: "If the plain terms of the contract may be fulfilled by being confined to one transaction, courts are not anxious to extend it to others." As to surrounding circumstances, a case fairly well describing that language is *Morgan v. Boyer*, 39 Ohio St. 324, 48 Am. Rep. 454. We quote from the opinion: "The defendant H. A. Bowlus, a merchant of Melmore, in Seneca county, had at different times purchased small quantities of goods upon credit of the plaintiffs, partners under the name of Morgan, Root, & Co., who were merchants of Cleveland; and, in order to obtain from them further credit, he procured from the defendant H. A. Boyer, of Tiffin, a written guaranty in the following words:

"Tiffin, April 11th, 1876.

"Messrs. Morgan, Root, & Co.

"Gents:—

"The bearer, Mr. H. A. Bowlus, is visiting your city, buying a few goods in your line; and anything you may be able to sell him will be paid promptly as agreed on, which I herewith guarantee.

"Yours respectfully,

"H. A. Boyer."

"Bowlus delivered this guaranty to the plaintiffs about April 12, 1876, and then purchased of them on the faith of the guaranty goods to the amount of \$797, for which he afterwards paid in full. The plaintiffs continued to sell goods to Bowlus from time to time until about September 20, 1879,

when the balance due from him was \$301.12, for which the plaintiffs brought suit against Bowlus and Boyer. The case was submitted to the court of common pleas, which rendered a judgment in favor of the defendant Boyer, and this judgment was, on error, affirmed by the district court. The plaintiffs ask leave to file a petition in error to reverse the judgment of the district court. The principal question argued by counsel, and the only one requiring our decision, is whether the guaranty given by the defendant Boyer is a limited or a continuing guaranty. The language of guaranties is often so indefinite that their construction in this respect is difficult, and the decisions relating to such construction are very numerous and conflicting. This conflict has in many cases arisen from the difference in the surrounding circumstances, and the particular language of each guaranty, but in many cases it is due to the application by the several courts of the different rules to the construction of those contracts. The rules which we apply in this case are those which are in accordance with previous decisions of this court, and those which we deem to be most in accordance with well-established principles of law. The rule that the language of a promise is to be construed most strongly against the promisor cannot properly be applied to the construction of a guaranty. A guarantor, like a surety, is bound only by the precise words of his contract. Other words cannot be added by construction or implication, but the meaning of the words actually used is to be ascertained in the same manner as the meaning of similar words used in other contracts. They are to be understood in their plain and ordinary sense, when read in the light of the surrounding circumstances and of the object intended to be accomplished. The rule that a guarantor is held only by the express words of his promise does not entitle him to demand an unfair and strained interpretation of those words, in order that he may be released from the obligation which he has assumed. In applying these rules there has been much difference of opinion as to whether the language of a guaranty should be construed as creating a limited or a continuing guaranty, when it is fairly capable of either construction, but we are satisfied that the decided weight of authority is in favor of the rule stated by Judge Story,—that in a doubtful case the presumption should be against the construction that the guaranty is continuing. . . . Applying to the construction of this guaranty the rules which we have stated, with the aid of the surrounding circumstances, and the purpose for which it was given, we are led to the conclusion that

57 L. R. A.

the plaintiffs were not justified in treating it as a continuing guaranty."

Reference is made in the record of the case in the court below several times to the fact that the plaintiffs in error, Blyth and Stone, never canceled or recalled the written guaranty signed by them. They both admitted it on the witness stand; and the court, if correctly quoted by counsel, attached some importance to that fact. Counsel for defendant in error refers to the same both in his brief and argument in this court, and cites us to *Lanusse v. Barker*, 3 Wheat. 101, 4 L. ed. 343; and we quote from the syllabus, which correctly states the opinion upon that point: "When an authority has been once given to a merchant abroad, and has been acted on in good faith, implied revocations are not favored. It is incumbent on the principal to show a revocation in terms too clear to be charged with equivocation,"—and also, in the same case, the language quoted by counsel: "Nowhere in the evidence is it shown that the guaranty has been revoked or recalled. To revoke the guaranty, explicit language should be used." Counsel is excused, without the asking, for failing to call our attention to the language of the court upon this subject in *Twohy v. McMurran*, 57 Minn. 242, 59 N. W. 301, cited by him upon another branch of the case,—one already considered. We quote: "The fact that the guaranty itself was not taken up by defendant at the time he claims to have paid in accordance with its terms cannot be regarded as a practical construction of its language, or an admission that it was continuing." We have not found any authority to the contrary.

We are of the opinion that the guaranty offered in evidence was not a continuing one, and that if, under the petition, upon a new trial of this case, it should be claimed that plaintiff in error Thomas Blyth became liable for the services in controversy by reason of his having authorized the contracting for the same, or by reason of having in some way become bound for the payment therefor by any words, acts, or benefits, which, we are free to say, does not appear from the record before us, then he should be allowed to defend against such claim; and it was error to reject the testimony offered as shown by causes numbered 4, 5, 6, 7, 8, and 9 in the motion for a new trial, as hereinbefore set out in full.

The judgment of the District Court will be reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Potter, Ch. J., and Cern, J., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

Robert D. DOUGLASS, *Plff. in Err.*,

v.

James DAISLEY.

(114 Fed. 628.)

1. No privilege attaches, as matter of law, to a communication transmitted by a commercial agency that a certain person had made an assignment for benefit of creditors, when the information received by or known to it was that he had made an assignment to secure the indorser of a note.
2. A mercantile agency is not liable for sending out by mistake information concerning a merchant variant from that received by it, if it exercises reasonable care and prudence in the matter.
3. Whether or not a mercantile agency which receives information of an assignment on a general assignment blank, to which is added a clause stating that it was to secure an indorser, and transmits it as being a general assignment for creditors, exercises reasonable care and prudence, so as to relieve it from liability for libel, is a question for the jury.
4. Instances of loss of particular customers need not be alleged or proved to warrant an assessment of damages for diminution of business and loss of credit by reason of a false publication by a mercantile agency.

(April 16, 1902.)

ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

The facts are stated in the opinion.

Argued before *Colt*, Circuit Judge, and *Aldrich* and *Brown*, District Judges.

Messrs. W. W. McFarland, Eugene P. Carver, and Edward E. Blodgett, for plaintiff in error:

The report in question was privileged, and the court should have instructed the jury to return a verdict for the defendant.

Erber v. Dun, 12 Fed. 526; *Ormsby v. Douglass*, 37 N. Y. 477; *King v. Patterson*, 49 N. J. L. 417, 60 Am. Rep. 631, 9 Atl. 705; *State ex rel. Lanning v. Lonsdale*, 48 Wis. 362, 4 N. W. 390; *Locke v. Bradstreet Co.* 22 Fed. 771.

Privilege can mean nothing less than exemption from liability for honest error in oral or written statements that are within the orbit of privileged communication.

Truth does not require the protection. The rule is for innocent untruth, and it has no other object.

Truth, falsehood, or diligence is not the test; it is good faith.

NOTE.—For other cases in this series as to libel in publication by mercantile agency, see *Bradstreet Co. v. Gill* (Tex.) 2 L. R. A. 405, and *note*; *Pollasky v. Minchener* (Mich.) 9 L. R. A. 102; *Mitchell v. Bradstreet Co.* (Mo.) 20 L. R. A. 138; and *Dun v. Weintraub* (Ga.) 50 L. R. A. 670.

57 L. R. A.

Haft v. First Nat. Bank, 19 App. Div. 423, 46 N. Y. Supp. 481.

Mere inadvertence or forgetfulness or careless blundering is no evidence of malice; nor is negligence or want of sound judgment.

Odgers, Libel & Slander, 3d Eng. ed. p. 311; *Trussell v. Scarlett*, 18 Fed. 214; *Lawless v. Anglo-Egyptian Cotton & Oil Co.* 10 Best & S. 226; *Tripp v. Thomas*, 3 Barn. & C. 427; *Ingram v. Lawson*, 6 Bing. N. C. 212; *Hemmens v. Nelson*, 138 N. Y. 517, 20 L. R. A. 440, 34 N. E. 342.

The publication having been made upon a privileged occasion, the plaintiff was under the burden of proof to defeat the defense of privilege by proof of malice upon the part of the defendant.

White v. Nicholls, 3 How. 266, 11 L. ed. 591; *Scullin v. Harper*, 24 C. C. A. 169, 46 U. S. App. 673, 78 Fed. 464; *Hamilton v. Eno*, 81 N. Y. 116.

The damage must be the immediate consequence of the defamatory words, and must be attributable wholly to the words.

Newell, Slander & Libel, p. 852, § 22; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261.

The case is entirely free from the disturbing element of malice in any of its forms. Such being the case, there was no legal basis for anything more than nominal damage.

Newell, Slander & Libel, pp. 398, 838-843; *True v. Plumley*, 36 Me. 481; *Evening News Assn. v. Tryon*, 42 Mich. 549, 36 Am. Rep. 450, 4 N. W. 267; *Greenl. Ev.* 16th ed. § 253, and *notes*.

Where loss of custom is relied on, it is not sufficient to make a general allegation of loss of custom, but, either in the declaration or in a bill of particulars, the specific persons withdrawing their custom should be alleged.

1 Rolle, Abr. 58; *Barnes v. Prudlin*, Sid. 396; *Hunt v. Jones*, Cro. Jac. 499; *Hartley v. Herring*, 8 T. R. 130; *Chiatovich v. Hanchett*, 88 Fed. 873; *Moore v. Francis*, 121 N. Y. 199, 8 L. R. A. 214, 23 N. E. 1127; *Landon v. Watkins*, 61 Minn. 137, 63 N. W. 615; *Newbold v. J. M. Bradstreet & Sons*, 57 Md. 38, 40 Am. Rep. 426.

Mr. G. Philip Wardner also for plaintiff in error.

Messrs. Charles F. Choate, Jr., and Josiah H. Benton, Jr., for defendant in error.

Aldrich, District Judge, delivered the opinion of the court:

The defendant is a mercantile agency, known as the R. G. Dun & Co. agency; and on the 28th day of March, 1898, sent out a notice to its subscribers that the plaintiff had assigned for the benefit of his creditors; and the plaintiff brings his action in tort for libel. The defendant does not justify by showing that the communication

sent was true, but claims that, by reason of the character of the business of the agency and of the occasion, the communication was privileged, in the sense that the occasion and the relations of the parties exempt the defendant from liability.

In jurisdictions where such communications are treated as privileged, the privilege is a qualified one, and when information is furnished under circumstances which give it a privileged character, though false, recovery cannot be had unless malice or bad faith is shown. In other jurisdictions, like Georgia, Texas, Missouri, Wisconsin, and in some of the cases in the Federal circuits, like *Locke v. Bradstreet Co.* 22 Fed. 771, the privilege is made to depend somewhat upon the question of due care in the matter of selection of agents, and in respect to the means and manner of communication; and Mr. Francis Wharton, in his valuable note to *Trussell v. Scarlett*, 18 Fed. 214, would seem to give some indorsement to the latter view. In New York and many other jurisdictions, if the requisite occasion and relations exist, such communications, speaking in general terms, are treated as privileged, and the doctrine of immunity from liability is recognized, except in cases where malice or bad faith is shown; and the doctrine is not made to depend much, if at all, upon the question of due care.

It is not necessary in this case that we should examine into the origin, the reason, or the wisdom of the rule of privilege and nonliability as it has been applied in the cases to which we have been referred.

Under the defendant's main contention here in respect to the question of privilege, they largely rely on *Ormsby v. Douglass*, 37 N. Y. 477, which is supplemented by numerous authorities sustaining the view of that case. *Ormsby v. Douglass* has been frequently referred to in decisions in jurisdictions where the rule of that case obtains, and the weight of authority, both English and American, would seem to be in accord with the principle of that case, and we may well enough, we think, without going into a history of these decisions, accept the rule of such cases as the law.

The rule of immunity from liability, in cases where it applies, results largely from the necessities of business and the strong presumption of absence of malice; and the rule of the New York cases unquestionably is that, in the absence of actual proof of malice or bad faith, the privilege justifies the agency in transmitting the information it receives. But, conceding the full force of the New York cases and those holding the same view, the defendant is not within the doctrine there established. The general information which it received upon the blank which it had furnished its agent at South Framingham, Massachusetts, was that James Daisley, the plaintiff, had made an assignment to B. T. Thompson, of Framingham, and, under a heading upon the blank which required the agent to furnish any particulars possible, was an exact and particular statement of what the assignment was; namely, to secure the assignee for in-

dorsing a note. Such was the information received at the office of the agency at Boston; but, instead of sending out the information received, they sent a communication saying, "James Daisley, of South Framingham, Massachusetts, has assigned to B. T. Thompson for the benefit of his creditors." This was a plain and substantial departure from the information received. Therefore, it was not sending information received or information accurate in substance. They were informed that the plaintiff had assigned to secure the indorser of a note, and the information was not that he had made a general assignment for the benefit of creditors. The first, in the ordinary acceptance, would not necessarily be injurious to the party's credit or business, while the other, in the ordinary acceptance, means a general failure, and would necessarily be injurious.

The case of *Ormsby v. Douglass*, 37 N. Y. 477, distinguishes itself at once from the situation here, for the rule is there distinctly stated that "so long as the defendant acted in good faith in reporting facts which came to his knowledge," etc. The later New York case of *Haft v. First Nat. Bank*, 19 App. Div. 423, 46 N. Y. Supp. 481, on which the defendant largely relies, bases its decision upon the same ground; that is to say, that the bank, in the due course of its business, forwarded the precise information which it received from its messenger. The English case of *Lawless v. Anglo-Egyptian Cotton & Oil Co.* (1869) L. R. 4 Q. B. 262, 267, is in the same line, and the decision is based, as in the other cases, upon the ground that "what the directors did was this. In their report to a meeting of the shareholders they appended the statement which had been made to them by the auditors." The case of *Robinson v. Dun*, 24 Ont. App. Rep. 287, 289, treats a privileged communication as one made on a privileged occasion, and fairly warranted by it. It in no sense goes beyond the doctrine of the New York cases in respect to the idea that the communication is privileged, as a rule of law, when limited to the information received, but its reasoning would seem to tend somewhat in the direction of making the question whether the information was fairly warranted an element, or, in other words, in the direction of the other line of authorities, which make the privilege depend somewhat upon the question of due care.

We recognize the exigencies of business and the demands of public policy in respect to information as to the standing of business men in their trade and calling, and we carry to the defendant, for the purposes of this phase of the case, the full force of the authorities upon which it relies. But we are not inclined to extend the privilege, as a rule of law, beyond that of protection, so long as the agency acts in good faith in reporting, with substantial accuracy, information which comes to its knowledge; in other words, beyond the rule of the cases most favorable to the defendant, that the agency, in the absence of bad faith, is privi-

leged in communicating information received, although it may prove to be false.

Where a false report originates in the office, and is not based upon information, the circumstances and the occasion do not necessarily involve a privilege. Carrying the qualified privilege to communications of the character in question, by rule of law, would be carrying the doctrine of immunity beyond the rule in respect to absolute privilege. Mr. Bigelow, in his work on Torts, 7th ed. § 332, in treating of the higher privilege of the publication of court proceedings, and speaking of the report of such proceedings, says: "If, however, the same should be so incomplete or so stated as to give a wrong impression, or, though full, if it is followed by comments containing defamatory matter, the privilege would fail."

The case of *King v. Patterson*, 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705, presents a careful review of the American and English cases, with reasoning which would seem to be sound, as to why the rule of privilege should not be extended beyond its present limit. In that case, the general rule is recognized; but, on the question of extending it further, and to include communications to those who are not subscribers, it is observed that "neither the welfare nor convenience of society will be promoted by bringing the publication of matters, false in fact, injuriously affecting the credit and standing of merchants and traders, broadcast throughout the land, within the protection of privileged communications." In that case it is further suggested that, while the subject in relation to which the communication is made may be privileged, the communication may be unprivileged, and the matter of duty to send the information is made an important element of the question; and, though the doctrine of privilege was there recognized while communicating to its patrons information received, it was observed that the agency, in its conduct and management, must be subjected to the ordinary rules of law, and the proprietors and managers held to the liability which the law attaches to like acts of others.

We think the privilege in a business situation like this, which results as matter of law, rests upon the right to send information received, and upon the duty to send with substantial accuracy such information as is received. The communication in question does not rest wholly or with substantial accuracy upon information received. How can it be said, as a matter of law, either that the agency was privileged to send something plainly and substantially different from what had been received, or that any duty rested upon it to send information substantially different from that which it had received? Neither the right nor the duty to send different information exists in this case; consequently there was no privilege which can be ruled as matter of law, and the defendant is liable unless, under proper instructions, facts necessary to clothe the transaction with the immunity of privilege shall be found by a jury. As said in *King v. Patterson*, *supra* (p. 427, 57 L. R. A.

49 N. J. L., 60 Am. Rep. 622, and p. 710, 9 Atl.): "A defendant intends to send a communication derogatory to the plaintiff's character or circumstances to A, where it would do no harm. By inadvertence he sends it to B, which produces the injury complained of. It is obvious that it would be a plain transgression of legal principles to excuse the act he did because he intended to do an act from which no injury to the plaintiff would have resulted."

We have seen that the communication in question was not based upon information received; neither was it based upon anything known at the home office. A communication cannot be accepted as privileged as a matter of law which is neither warranted by information received nor by facts known at the home office. It was neither the right nor the public or private duty of the agency to send a communication which was not based upon fact or information. The communication, therefore, not being based upon information from an agent whose business it was to gather information, or upon foundation of fact, it is not a privileged one in the sense of clothing the defendant with immunity from liability through an arbitrary rule of law. In short, we find no case, which pretends, through a rule of law, to bring a communication like this within the domain of privilege; nor do we see any reason for carrying absolute privilege to such a communication.

The English case of *Tompson v. Dashwood*, L. R. 11 Q. B. Div. 43, was a case where a communication was intended to be made on a privileged occasion, but was sent to the wrong person; and, while the case is not like the one here, for there it was a mistake in sending to the wrong person rather than a mistake in sending wrong matter, the privilege was held to exist. This case is, perhaps, the most favorable to the defendant's position of any that has come to our attention. But this authority is criticised by Mr. Pollock in his treatise on Torts, as one not by any means universally accepted by the profession, and as contrary to the earlier decisions. Pollock, Torts, 216, 234; Webb's Pollock, Torts, 309. We are not disposed to adopt the doctrine of this case, and hold, as a matter of law, without regard to the question of due care, that the communication was privileged.

We think the circuit court was right in holding that the communication in question was so substantial a departure from the information received that it could not be accepted as privileged, as a matter of law, and that the defendant was not within the rule which gives immunity, as a matter of law, upon the ground of privilege. So, upon this phase of the case, we hold against the defendant, for the reason that the circumstances are not such as to bring it within the doctrine of the cases upon which the defendant relies.

This disposes of the first assignment of error, which, in substance, is that the defendant was entitled to a verdict, as a matter of law, upon the ground of privilege.

Having considered the question whether

immunity resulted by rule of law under the circumstances of this case, we come, at the next step, to the question whether, on the other hand, liability resulted by rule of law, and this is the precise question raised by assignments 2, 3, and 4; and we think there was error here, for the reason that the situation was one which, under the circumstances, involved a question of fact which should have been submitted to the jury. The occasion, which was that of receiving and communicating information relating to the subject-matter in question, was privileged; and, the occasion being privileged, the Boston agency, in the ordinary course of its business or receiving information and imparting it to its subscribers in the business world, was in the exercise of a privilege in the nature of a private right, or, as expressed by some of the authorities, a public right. Therefore, starting with this right, if unwarrantable and injurious consequences result, it cannot be said, except in a very clear case, that liability results as a matter of law from a variance between the information received and the communication sent.

No case like the one here presented has been called to our attention, and we do not find that the precise question has been passed upon either by the Supreme Court of the United States or by the courts of Massachusetts, nor do we find that the precise question has been dealt with elsewhere. We must therefore deal with it somewhat as a new question.

The occasion being privileged, we do not think the general rule of law that liability results from accidental or inadvertent slander, and that the accident or inadvertence only operates to remove malice and limit the damages, applies to this case, and it is for the reason that the occasion was privileged, and the defendant was in the exercise of a right. It being a business right, however, or a private right, to gather and impart information to such members of the business world as were its subscribers, it must exercise the right reasonably, to the end that unnecessary harm shall not come to business men about whom the information is furnished. It is not a right which can be exercised heedlessly or carelessly. It is difficult to find a principle of law which would justify the careless and wanton exercise of a right of this character, and afford immunity on the ground of privilege. It is equally difficult, starting with a privileged occasion, to find a principle which would justify an absolute ruling of law upon the question of liability upon the ground of variance between the information received and that sent, and this is for the reason that the variance may be susceptible of explanation. Reasonable care and prudence with respect to forwarding information may, therefore, continue the privilege and clothe the acts of the agency with immunity, and, on the contrary, negligence may destroy the privilege and leave the parties responsible for acts which are culpable. Though the occasion is privileged, the privilege does not carry immunity

to heedless and careless management in forwarding information. While the question whether an occasion is privileged is one of law, the ultimate question of privilege may become a mixed question of law and fact, through a variance between the information and the communication, and under such circumstances the question would be whether the privilege was carried to the communication through a reasonable and careful exercise of the right, or whether the privilege was lost by indifferent and careless management, or through inattention and want of due regard to the interests of others. If it was a pure mistake, involving no negligence or culpability, the privilege would not fail. On the other hand, if, by the exercise of such care as men ordinarily exercise in like business affairs, the true character of the information would have been discovered and correct information sent out, rather than that which was not warranted, then the privilege would fail. The communication sent being substantially different from the information received, the question whether it was libelous and injurious was quite likely one for the court; but the question whether it was a privileged communication, though different from the information, depended upon the question of fact whether the variance resulted from an excusable mistake, or from indifference or heedlessness.

Even the privilege of regular process does not protect against unreasonable and careless use. Any right or privilege may be so carelessly used as to lose the protection which it would otherwise afford. No privilege which affects the public at large grants immunity from negligent and careless acts. So, in the case under consideration, the question for the jury, under the circumstances, was not whether the communication was a libel,—not whether the variance was a substantial departure,—because such were questions of law, but whether the defendant's conduct was such as to give immunity, on the one hand, or so wanting in care, or so indifferent, as to make the privilege fail.

The contract between the agency and the subscribers contemplates verbal, written, and printed information, and provides that the agency shall not be responsible for neglect, unfaithfulness, or misconduct of agents; but this stipulation, of course, does not bind a member of the public who is not a party to it, and, as against such parties, to be within the privilege, the home office, in transmitting information, must be in the exercise of reasonable care. We do not look upon this holding as a departure from the principle which applies to reports of public proceedings, where the privilege is lost by an unreasonable exercise of the right, or by an unreasonable or unnecessary mode of communication, like sending a privileged communication by telegraph or postal card, where the communication becomes unprivileged. Indeed the recognized and controlling general principle is that a report, in order to be privileged as a matter of law, whether it be a report of a judicial proceeding or of a commercial agency, shall

be a fair report; and in cases where the report is not fairly warranted by the information, exemption from liability upon the ground of privilege, or, what would be a more exact expression, upon the ground of excusable libel, may and should depend upon reasonableness of skill and care in reporting, and the question of skill and care becomes a question of fact for the jury. See Paterson, *Liberty of the Press, Speech, and Public Worship*, 184, 185, 192, 193, 203, 204.

In the regular course of the business of the agency the report came in from the Framingham agent on a general assignment form; and the mistake, quite likely, although the question is one of fact, resulted from the assumption that the assignment was a general one. Still, while the general statement in the body of the form in a sense indicated a general assignment, under the head which calls for particulars the report was clear as to the nature of the assignment. So, under such a situation, we think the communication sent out was neither so clearly an excusable mistake that it can be ruled a privileged communication as a matter of law, nor so clearly a wanton and heedless variance between the information received and the communication sent as to justify a ruling that the privilege failed absolutely, and that the defendant was liable. While the variation was a substantial one, in the absence of malice the situation does not present a case where it can be said that it was "as completely an invention of an untruth by the defendant as though he had received no information whatever," and that "the information received afforded no justification, no palliation, no excuse," and "as though he had sent out this untrue statement without a shadow of any information on his records about James Daisley;" nor was it a situation which justified the assumption and instruction that "it was made out of whole cloth, and was a mere blunder." And, while the variance between the information and the communication was so substantial and so injurious as to render the communication actionable *per se*, in the absence of privilege, still there was a reasonable question for the jury as to whether it was a pure mistake, and one which could not have been avoided by careful business management, or, on the other hand, whether the privilege of furnishing information in the ordinary course of business was carelessly exercised. It was for the jury to say whether reasonable care required the home office to read the whole paper and gather all the information that it contained, and whether it was reasonable to act upon the general appearance of the assignment form, and send the information which it did. If it was carelessness, the privilege was lost. If it was a mistake which could not have been avoided by the exercise of reasonable care, privilege and immunity were not lost. In other words, if the home office was reasonably careful and prudent in respect to this transaction in the ordinary course of its business, the privilege continued, and would cover the mistake; 57 L. R. A.

but if the departure from the information was the result of want of care and heedlessness, the privilege failed.

The erroneous communication did not originate with the agent furnishing the information, but resulted from an attempt in the home office to transmit information received; and there is no pretense that they acted upon information other than that received from the Framingham agent; therefore the erroneous communication resulted from the conduct of an agent for whose acts the defendant is responsible. Still, if the mistake was one which could not have been avoided by the exercise of reasonable care, the privilege of the occasion would afford immunity; while, on the other hand, if the mistake was the result of heedlessness and want of reasonable care, the privilege would fail, and immunity would not result from the privilege of the occasion. Neither the privilege of the occasion nor the privilege of sending in good faith information received, though false, furnishes immunity from careless management in the home office, or the careless exercise of the right; nor does the privilege arbitrarily fail by reason of a pure mistake of the home office involving no negligence or culpability. One may lose the protection of this privilege, like any other, through negligence, or he may safeguard himself by its protection through the exercise of such a degree of care at the home office as would be exercised by men of ordinary circumspection, care, and prudence in similar situations. If the privilege is lost through carelessness, then the defendant is answerable for the consequences of circulating injurious reports, and the rights would be determined regardless of the question of privilege, under the ordinary rules which obtain in libel cases.

In *Trussell v. Scarlett*, 18 Fed. 214, 216, the privilege was made to depend upon reasonable caution, and in *Locke v. Bradstreet Co.* 22 Fed. 771, 774, in submitting the question to the jury, the question of privilege was made to depend upon the exercise of ordinary care and caution.

The error being in the home office, there is no question raised for us as to the responsibility of the defendant in respect to the care of the agent who furnished the information. When there is a departure at the home office from information received, as is often the case in business in condensing, summarizing, and forwarding the reports, management and superintendence are necessarily involved, and, as all this affects the standing and the interests of one who is a stranger to the contract between the agency and the subscriber about whom the report is made, why should not the immunity of privilege depend upon the exercise of reasonable care?

It is fully recognized and established by the authorities that sending out from the home office the report received, knowing it to be false, or sending a true report in bad faith, or sending a true report unnecessarily or maliciously, makes the privilege fail. Inquiries in respect to all these elements involve fact, and it is perfectly clear and logi-

cal that the same principle makes privilege depend upon the fact of careful and prudent conduct and management in the home office when there is a departure from the information sent and a misstatement like the one in question here. It is not the question whether the communication was actionable under the general law of libel, but the question whether privilege exists as a protection to the defendant. That depends upon the rule of reasonableness in respect to the conduct and care of one who invokes the immunity of its protection. If the jury should find the necessary fact of careful and reasonable exercise of the right, then the privilege would exist, and the defendant would be within its protection and immunity, and, if not, it would be subject to the ordinary rules of law.

Making the question of privilege and immunity depend upon the question of fact as to the reasonable exercise of the right is not, in principle, altogether unlike, but is somewhat analogous to, the probable cause doctrine, which involves a question of fact for the jury in cases under circumstances where it is an admissible ground of defense (Folkard's *Starkie, Slander & Libel*, 6th ed. 34, 349-352), and in cases where it is received in mitigation of damages.

The very nature of the business of mercantile agencies makes it impracticable to apply the old rule as to presumption of malice from publication or from gross mismanagement. The reports are gathered from all parts of the country, and in the ordinary course of business there is no such thing as malice in the transaction. No one claims it in this case. Much of the confusion in the books results from attempts to apply ancient rules of presumption, and we have no hesitation in saying that we think the safer and the better rule, in a situation like this, where neither actual malice nor bad faith is suggested, is the ordinary rule that, in the exercise of the privilege or the right, one should be held to the ordinary rule of due care. Mr. Bigelow has aptly said: "It is, indeed, common to say that malice is presumed or implied upon proof of the publication; but that means nothing, and is only misleading, for the presumption or implication cannot be overturned by evidence of want of malice. Malice, touching the making a *prima facie* case, is only a name arbitrarily applied; it is simply a fiction." Bigelow, *Torts*, 7th ed. § 319.

In a case where malice is not an active question, why should not the existence or nonexistence of privilege be made to depend upon the existence or nonexistence of due care, and upon a reasonable exercise of the right, rather than upon illogical presumptions one way or the other as to malice, and, in a case where malice becomes an actual element, let the question of malice be tried like any other question of fact.

In this case all questions of malice and bad faith, and all questions as to vindictive damages, were properly eliminated by the position of the parties and by the court, and we are now brought to the questions raised by assignments 14, 15, and 16, which 57 L. R. A.

relate to the allegation of damages, to the sufficiency of proofs, and to the instructions upon the question of damages; and we find no error here. We do not understand that, in this class of cases, the general allegation of injury to business and credit is treated as an allegation of special damages, in the sense of requiring specific allegations of loss of particular customers in order to recover for general diminution. The proof was general as to the immediate diminution of business and loss of credit. There was no evidence of loss of particular customers or contracts, and the instructions distinctly eliminated all such considerations, and confined the jury to such injury by way of diminution of business and loss of credit as they should find from the general facts and the whole situation was caused by the publication.

No question is raised as to the sufficiency of the proofs, provided such damages are recoverable under the allegation set forth, nor as to the sufficiency of the instructions as to the measure of damages. The general rule of compensation for injury was given to the jury with a limitation in general terms that, in order to recover for diminution, the injury suffered must have resulted directly from the wrongful publication. No point was taken that the instructions were not sufficiently full or explicit upon the line that the injury must have been the natural consequence of the injurious publication, or such as naturally and proximately resulted; so there are no questions of that kind for us to consider.

The general rule in libel and slander cases is aptly stated in *Hamilton v. Walters*, 4 U. C. Q. B. (O. S.) 24, 27, that the plaintiff "may state his case in either of two ways. He may aver a general diminution of business, in consequence of the slander, relying upon his ability to make that appear to a jury, or he may aver a particular instance of damage, knowing that he can give evidence of loss in a specific case." The plaintiff in the case at bar, in his general allegation and proofs, proceeded in the first way. That a plaintiff may do this is, of course, not the result of a rule which is general in its application to all actions of tort, but of one which is, perhaps, peculiar to those of libel and slander. The reason for the rule may be that evil report is insidious, that it travels and does damage in the dark, meandering in ways whereof it is difficult for man to find out, or because, as said in *Bergmann v. Jones*, 94 N. Y. 51, cases may arise where, from the nature of the business in which the party is engaged, it would be almost impossible to prove the loss of trade by witnesses who had dealt with the party bringing the suit.

Such rule, in this class of cases, is probably limited to cases where the words are actionable *per se*, where the words, in their natural and ordinary meaning, import a crime, or such as are clearly injurious to one's business, profession, or trade. We do not find any express decision in Massachusetts upon this question, but it would seem to be the English rule, the rule in New

York, and the rule quite generally adopted in this country. See cases in 18 Am. & Eng. Enc. Law, 2d ed. p. 1084 (4), note 1; cases in 5 Enc. Pl. & Pr. 768d; *Union Associated Press v. Heath*, 49 App. Div. 247, 253, 254, 63 N. Y. Supp. 96; *Bergmann v. Jones*, 94 N. Y. 51, 60, 61; *Hale, Damages*, 226, and cases in note 23; *Folkard's Star-kie, Slander & Libel*, 3d ed. 347, 348.

Under the general allegation in this case, the plaintiff introduced evidence tending to show general loss of business and general loss of credit immediately following the publication complained of. In such a situation, under proper instructions (and no exceptions were taken to the instructions to the jury on the question of damages in this case), we think the jury were warranted, in

view of all the evidence and under the circumstances disclosed, in estimating the damages to determine what part, if any, of the loss was attributable to the publication, and that it was not necessary for the plaintiff to connect the loss with the publication by direct or positive evidence of particular instances.

The result is that the judgment should be set aside, upon the ground that the question of defendant's liability should not have been ruled as a matter of law under the circumstances.

The judgment of the Circuit Court is reversed, the verdict is set aside, the case is remanded to that court for further proceedings, and the plaintiff in error recovers costs in this court.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE of Connecticut
v.

TRAVELERS' INSURANCE COMPANY,
App't.

(73 Conn. 255.)

1. **The taxing power of the legislature is not restricted by any implied rule of fundamental law that taxes must be equal and uniform, in the absence of any such provision in the Federal or state Constitution.**
2. **The privileges and immunities of citizens of other states, guaranteed by U. S. Const. art. 4, § 2, and U. S. Const. 14th Amend., are not violated by Conn. Gen. Stat. §§ 3836, 3916, taxing the resident stockholders of certain corporations in the town in which they reside, deducting from the market value of the stock the value of the capital invested in real estate on which the company pays taxes, but imposing a state tax on nonresident shareholders of 1½ per cent on the market value of their shares, without any provision for deduction of capital invested in real estate, since this law is not a hostile discrimination against citizens of other states in the enjoyment of property rights common to all, but provides for the state taxation of nonresident stockholders because it is impracticable to subject them to the municipal taxation that is imposed on the resident stockholders.**
3. **The duty of determining what is a wise and fair mode of distributing the burden of taxation is a purely legislative power, which the judicial department of the government cannot exercise.**

(October 17, 1900.)

A PPEAL by defendant from a judgment of the Superior Court for Hartford

NOTE.—As to infringement of equal rights and privileges by taxation, see also *note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.)* 14 L. R. A. 583.

For a case holding that a state tax allowing a deduction of debts to residents without allowing such deduction to nonresidents is a denial of the equal protection of the laws, see *Sprague v. Fletcher (Vt.)* 37 L. R. A. 840.

57 L. R. A.

County in plaintiff's favor in an action brought to enforce a tax. *Affirmed.*

Statement by **Hamersley, J.:**

The complaint alleged that on October 1, 1898, 1,878 shares of the defendant's stock belonged to stockholders residing without this state; that the market value on said day of each share was \$250; that the defendant has never paid any part of the tax due the plaintiff under provisions of § 2, chap. 153, Pub. Acts 1897, although said tax was due October 20, 1898. The answer alleged that the defendant's capital stock consisted of 10,000 shares; that on October 1, 1898, 1,799 of these shares were owned by residents of other states who were citizens of the states in which they resided; that on said date the defendant had investments in real estate upon which it was assessed and paid taxes, viz. two pieces of real estate situate in this state, of the market value of \$137,965.81, and 948 pieces of real estate situate in other states, of the market value of \$1,640,696.24, such market value being the amount respectively at which said investments in real estate were on October 1, 1898, carried on the books of the defendant; that the resident owners of the defendant's stock were, on said date assessed upon the stock owned by them, respectively, at a valuation equal to a market value of \$250 a share, less a large deduction therefrom by reason of the company's said investments in real estate; that the amount per share sought to be collected from the defendant in this action as a tax upon the stock owned by said nonresident shareholders is far in excess of the amount per share paid and required to be paid as a tax by the several resident shareholders on the stock owned by them. The demurrer to the answer claimed that the facts alleged therein could not affect the legality of the tax sought to be collected from the defendant in this action, nor the right of the plaintiff to recover as claimed in the complaint, and specified such claims as follows: "It is

immaterial (1) that the defendant had as stated, investments in real estate upon which it was assessed and paid taxes; (2) at what amount the defendant's investments in real estate were on October 1, 1898, carried on its books; (3) that resident owners of the defendant's stock were, on October 1, 1898, assessed on their stock at a valuation equal to its market value, less a deduction therefrom by reason of the defendant's investments in real estate; (4) what amount per share happened to be paid, or to be required to be paid, as taxes by the different resident shareholders of the defendant on stock owned by them on October 1, 1898, in the various counties, towns, cities, boroughs, and school districts in which they respectively resided; (5) that assessors of towns within which resident shareholders reside have happened to assess their stock at a less value than \$250 per share, because the valuation of the defendant's stock, as well as the stock of other corporations affected by the same laws, when owned by resident shareholders, is by the laws of this state made by the assessors of the towns within which such shareholders reside; (6) what taxes were required to be paid by said resident shareholders on the stock owned by them on October 1, 1898, to counties, towns, cities, boroughs, or school districts in which they severally resided, because the taxes required to be paid by resident shareholders of the defendant corporation, as well as of other corporations affected by the same laws, depend upon the action of the counties, towns, cities, boroughs, and school districts in which such shareholders respectively reside. Other grounds of demurrer were that: It does not appear but that on October 1, 1898, the defendant company had assets vastly in excess of its capital and surplus, and it does not appear that any part of its capital was then invested in real estate. The laws of this state do not provide for any deduction from the market value of the stock of the defendant company owned by resident shareholders in assessing said stock for taxation, by reason of the investments of said company in real estate. The trial court having sustained this demurrer, the defendant refused to plead over, and thereupon judgment was rendered for the plaintiff. The appeal assigns error in holding the statute law* under which the tax was imposed to be constitutional, and in not holding that law to be in violation of § 2 of art. 4 and

of the 14th Amendment of the United States Constitution.

Messrs. Robinson & Robinson and William R. Matson, for appellant:

The statute under which the tax is sought to be collected in this action is in violation of the 14th Amendment to the United States Constitution and of the civil rights act, U. S. Rev. Stat. § 1977.

State v. Travelers' Ins. Co. 70 Conn. 590, 40 Atl. 465.

The statute law under which the tax is imposed upon the shares of nonresident stock is in violation of the 2d section of art. 4 of the United States Constitution, in that it withholds from the valuation of the shares belonging to nonresidents the deduction allowed by the statutes in the valuation of shares of the same stock belonging to residents, thereby depriving citizens of other states of privileges and immunities enjoyed by citizens of Connecticut.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Campbell v. Morris*, 3 Harr. & M'H. 554; *Story*, Const. 4th ed. § 1937; *Cooley*, Const. Lim. 6th ed. p. 489; *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449; *Oliver v. Washington Mills*, 11 Allen, 268; *Railroad & Teleph. Cos. v. Tennessee Bd. of Equalizers*, 85 Fed. 306; *Sprague v. Fletcher*, 69 Vt. 69, 37 L. R. A. 840, 37 Atl. 239; *Bliss's Petition*, 63 N. H. 135; *Wiley v. Parmer*, 14 Ala. 627; *Farmington v. Downing*, 67 N. H. 441, 30 Atl. 345; *State ex rel. Hoadley v. Insurance Comrs.* 37 Fla. 564, 33 L. R. A. 288, 20 So. 772; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Maynard v. Granite State Provident Asso.* 34 C. C. A. 438, 92 Fed. 435.

There are rights in every free government beyond the control of the state.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 663, 22 L. ed. 461; *State v. Conlon*, 65 Conn. 478, 31 L. R. A. 55, 33 Atl. 519.

Mr. Edward D. Robbins, with **Mr. Charles Phelps**, Attorney General, for appellee:

Laws making exemptions from taxation, being in derogation of the common rule, must be strictly construed. Doubt is fatal to the exemption.

New Orleans v. Robira, 42 La. Ann. 1098,

*Sec. 3836, as amended by chaps. 68 and 248 of the Public Acts of 1889. "Shares of the capital stock of any bank, national banking association, trust, insurance, investment, turnpike, bridge, or plank-road company, owned by any resident in this state, shall be set in his list, at its market value in the town in which he may reside; but so much of the capital of any such company as may be invested in real estate, on which it is assessed and pays a tax, shall be deducted from the market value of its stock, in its returns to the assessors."

Sec. 3916, as amended by chap. 153, § 2, of the Public Acts of 1897. "The cashier or secretary of each corporation whose stock is liable to taxation, and not otherwise taxed by the provisions of this title, shall, on the first day of October, annually, or within ten days thereafter, deliver to the comptroller a sworn list of all its stockholders residing without this state on said day, and the number and market value of the shares of stock therein then belonging to each; and shall on or before the twentieth day of October, annually, pay to the state one and one half per centum of such value; and if any such cashier or secretary shall neglect to comply with the provisions of this section he shall forfeit to the state one hundred dollars, in addition to said one and one half per centum so required to be paid."

ble to taxation, and not otherwise taxed by the provisions of this title, shall, on the first day of October, annually, or within ten days thereafter, deliver to the comptroller a sworn list of all its stockholders residing without this state on said day, and the number and market value of the shares of stock therein then belonging to each; and shall on or before the twentieth day of October, annually, pay to the state one and one half per centum of such value; and if any such cashier or secretary shall neglect to comply with the provisions of this section he shall forfeit to the state one hundred dollars, in addition to said one and one half per centum so required to be paid."

11 L. R. A. 141, 8 So. 402; *Copp v. Norwich*, 24 Conn. 28; *New Haven v. Sheffield Scientific School*, 59 Conn. 163, 22 Atl. 156; *Hartford v. Hartford Theological Seminary*, 66 Conn. 475, 34 Atl. 483; *Sutherland*, Stat. Constr. § 364.

Our system of taxation is not unconstitutional because of lack of equality.

State Railroad Tax Cases, 92 U. S. 575, sub nom. *Taylor v. Secor*, 23 L. ed. 663; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

The method of taxation now complained of, which has existed unchallenged in this state for a generation, is not "a clear and hostile discrimination against particular persons and classes," and it cannot be said to be a discrimination "of an unusual character unknown to the practice of our governments."

Merchants' & Mfrs. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

So long as the state does not deny to any persons who come within its jurisdiction equal treatment in the matter of taxation with its own citizens similarly situated, its laws are not obnoxious to the civil rights act, nor to the provisions of the Constitution of the United States.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *State v. Travelers' Ins. Co.* 70 Conn. 590, 40 Atl. 465.

The appellant does not show that the statute sought to be enforced in this action provides any different rule of assessment for stock of its nonresident stockholders than for stock of its resident stockholders.

Batterson's Appeal, 72 Conn. 374, 44 Atl. 546.

Hamersley, J., delivered the opinion of the court:

The defendant claims that the statute law under which the tax sought to be collected in this action was imposed violates the Constitution. For the purpose of ascertaining our fundamental law, the state and national Constitutions must be regarded as substantially one ordinance, enacted by that body in whom the supreme sovereignty within our limits is vested. The reasons urged in support of the defendant's claim, if sound, are really a challenge to the validity of methods of taxation that have existed in this community for 250 years. Our taxation has always been based on the power and duty of the general assembly, being responsible for the performance of such duty, not to the courts, but to its constituency, to determine, on grounds of public policy, the methods by which a fair and politic distribution of the stress of taxation may be accomplished. Every line of objection raised by the defendant must invoke for its final support the claim 57 L. R. A.

urged in its brief, that the aphorism, "Taxation shall be uniform and equal," is contained in the Constitution, and operates as a limitation on the power of taxation, which this court is bound to enforce. The case, therefore, practically turns on the existence and authority of such a maxim.

The alleged maxim, in order to control our action, must be found either in some express provision or clear implication of the Constitution. No court can directly set aside an act of the legislature, and the power to indirectly invalidate legislation is one which, in the nature of things, can exist in the judicial department only under a constitution in the American sense, and is limited by the authority from which it is derived. It is not a power of veto or revision, but purely the judicial power of interpretation. This judicial power is bottomed on the absolute supremacy of the law. In the United States the supreme law is the expressed will of that ultimate sovereignty which has been assumed by the people. All legislation as well as the action of all departments of government, must conform to "the supreme original will" of the people as expressed in the Constitutions which "form the fundamental and paramount law." *Marbury v. Madison*, 1 Cranch, 137, 176, 2 L. ed. 60, 73; *Davison v. Champion*, 7 Conn. 244, 246; *Opinion of the Judges*, 30 Conn. 593.

Since the Supreme Court of the United States, in the case of *Marbury v. Madison*, first announced that the judicial department is authorized to declare a legislative act void, if the rights of parties are affected by a clear conflict between the supreme and subordinate law, that power has been used without question. This is an exercise of the judicial power of interpretation, but an application of that power which was wholly novel. In the interpretation of a settled principle of jurisprudence, its meaning, as applicable to existing facts, may sometimes be made clear by illustrations drawn from universal moral rules that in a way account for all law, and, in the interpretation of a statute, historic facts, and political and social conditions, may sometimes make clear a doubtful meaning. So similar considerations may at times be proper and necessary in finding the very essence of constitutional limitations. *Norwalk Street R. Co.'s Appeal*, 69 Conn. 576, 583, 39 L. R. A. 794, 37 Atl. 1080, 38 Atl. 708; *State v. Conlon*, 65 Conn. 478, 489, 31 L. R. A. 55, 33 Atl. 519; *Re Clark*, 65 Conn. 17, 37, 28 L. R. A. 242, 31 Atl. 522 et seq. Yet the indiscriminate use, in the discussion of these questions, of arguments drawn from such sources, has undoubtedly induced some practical confusion between the judicial application of a broad principle stated and the judicial enactment of a principle not stated. The distinction, however, is radical. One is interpretation; the other is usurpation.

We deem it therefore immaterial whether or not the apothegm, "Taxation should be equal and uniform," is sound, and ought to be incorporated in our Constitution; for,

whatever our view as to this might be, we should be compelled to hold that unequal taxation by the legislature might be valid, if the sovereign who enacted our fundamental law has seen fit to grant the power of taxation, and refused to impose such a limitation on its exercise.

Passing, then, to the real question, Is there in our fundamental law any express provision or clear implication, from provisions therein contained, that "taxation shall be uniform and equal?" There can be no claim that such a mandate is directly expressed either in the state or national Constitution. Express provisions of that nature may be found in the local constitutions of many states, and have proved a source of practical difficulties for legislatures and courts. They are not found in our own, which assumes what experience has taught,—that the power of taxation cannot safely be cabined within a theory of uniformity and equality. Taxes, to be both uniform and equal, affecting each inhabitant in proportion to his ability to contribute, can only be devised by a government unhampered by the limitations of humanity. With the complications of civilized society, the stress of taxation is not and cannot be confined to the individual who pays the tax; its ramifications are widespread and hidden. This and other considerations forbid the assertion of any specific theory as essential to just taxation. It is true that it is the interest of every government that the burden of taxation should be distributed fairly and equally, and that it is the duty of the department in which the taxing power may be vested to honestly use its best judgment to secure such result. If this is what is meant by uniformity and equality being of the essence of taxation, the saying is correct, although unfortunately expressed. But the assertion that a violation of the legislative duty of fair and equal taxation, under a constitution like our own, inherently involves a violation of that constitution, by an overstepping of the limits of legislative power, is not true. If a broad expression of the above principle is desirable, it may more properly be stated thus: Justice and equity in the stress of the whole burden is inherent in taxation, and the power of accomplishing that result is vested, with the power of taxation, in the legislature, subject only to restrictions specified in the grant of that power, and to the general limitations placed by the Constitution on the exercise of all legislative power. But it is unwise to limit the principle by the terms of any authoritative formula.

Is this maxim necessarily implied from any provisions of our fundamental law? Unless the vague notion of a higher law is claimed as a constitutional provision, we are pointed to no provision, nor to any combination of provisions, from which it is claimed that such a maxim is a necessary implication. To controvert a claim which rests on no definite propositions is ordinarily like fighting the air. But fortunately

in this case the task of proving a negative is not difficult. The provisions of our Constitution exclude the possibility of a limitation of legislative power by any implied mandate that taxation shall be equal and uniform. It is impossible to study the development of our law during two and a half centuries without reaching the certain conclusion that the right of the people to tax themselves through the representatives in the general assembly has always been held in reverence, and is distinctly secured by the Constitution; that the duty to exercise the power of taxation wisely, and only for the public good, is a legislative duty, for the performance of which the general assembly is responsible to its constituency; that the power of considering the conditions of population or property, the theories and maxims of political economy or moral philosophy, which may affect taxation, and of determining what, on the whole, is a wise and fair mode of distributing the burden, is a purely legislative power, and that the judicial department is, by express provision of the Constitution, forbidden to exercise that power. Such provisions are incompatible with the existence in our state Constitution of any maxim of uniformity and equality in taxation to be defined by the court, and employed in controlling the general assembly in the performance of its legislative duties and the exercise of its legislative powers.

In our national Constitution we find provisions even more pointedly clashing with such a maxim. The power of taxation is granted to Congress in the broadest terms. There are two express limitations as to the manner of exercising that power, and these limitations, without referring to others, necessarily exclude the application to all taxes of any rule of "uniformity and equality." One applies to "direct taxes," and the other to "duties, imposts, and excises." If any mode of taxation can be conceived which does not come within the meaning of this designation of two kinds of taxation, the exercise of that mode is unlimited. "Direct taxes shall be apportioned among the several states which may be included within this Union" in proportion to the census directed to be taken. By this positive mandate any rule of equality in laying direct taxes is rendered impossible. The citizens of different states, if thus taxed at all, must be taxed unequally. "All duties, imposts, and excises shall be uniform throughout the United States." This mandate is plainly geographical, demanding uniformity of rate in all places, but not uniformity of operation, and practically forbids the effort to secure uniformity of operation in laying indirect taxes. And so, by force of specific commands, the theory that equity and uniformity are essential to taxation is ignored. It is unnecessary to dwell upon the reasons for these provisions. They are familiar to all. But the significant fact is the clear declaration of the sovereign will that, in exercising the power of taxation, considerations of public policy

must dominate. In certain vital matters affecting the relations of different states to each other and to the general government, these considerations of policy are fixed by the sovereign will, but in all other respects they are committed, with the power of taxation, to the Congress; and whether fixed by the Constitution, or left to Congress, these considerations are the masters, not the servants, of theories of uniformity and equality.

The Federal courts have had occasion to discuss this matter of "equality in taxation" in two classes of cases,—one arising in states whose local constitutions contain some express phrase of that kind, and one arising from the construction of the national banking law. In both classes the court is called upon to deal with the purely judicial question of the interpretation of language used, and in the former has been obliged to struggle with the problem of discovering distinctions that may save the taxing power from serious paralysis. In some instances these discussions have taken a wide range, but in all the considerations entertained are firmly tied to the question before the court; that is, the meaning of language used, in one case in a state constitution, and in the other in an act of Congress. But quite recently the specific claim that the United States Constitution contains some rule or principle of equality and uniformity of operation in taxation was made before the United States Supreme Court and decided. *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. In the carefully considered opinion in this case, delivered by Mr. Justice White, the court, after long deliberation and with a single dissenting vote, holds that the provisions of the Constitution are inconsistent with the existence of a theory of equality in taxation, which the judicial department is empowered to define and impose upon the legislative. The case arose under the war revenue act of June, 1898, imposing a tax on legacies. The act provided that when by the same will legacies of different values were bequeathed to different persons, strangers in blood to the testator, the tax on one legacy might be 5 per cent of its value, on another $7\frac{1}{2}$ per cent, on another 10 per cent, on another $12\frac{1}{2}$ per cent, and on another 15 per cent. This tax was uniform only in a geographical sense, and its patent and "profound inequality" can be defended as just only on considerations of public policy. The precise claim was that this whole scheme of taxation was grossly unequal, and therefore was not within the taxing power of Congress as granted and limited by the Constitution. The power of state legislatures, whose state Constitutions contain some express provisions requiring uniformity and equality in taxation, to impose such unequal taxation, had previously been sustained on the theory of a distinction, in the right of property as recognized and protected by the state, between the right to make a transfer of property to take effect before death and one to take effect after death. It is thus stated in *Magoun v. Ill-*

inois Trust & Sav. Bank, 170 U. S. 283, 288, 42 L. ed. 1037, 1041, 18 Sup. Ct. Rep. 596: "The right to take property by devise or descent is the creature of the law, and not a natural right,—a privilege; and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state Constitutions requiring uniformity and equality of taxation." Therefore the power of legislatures to tax legacies is less trammelled, and "disenthrall'd from limitations which would otherwise apply if the privilege of regulation did not exist." How far such a distinction, as applicable to the power of taxing, may result from the impracticable nature of such requirements in the state Constitutions, is not material. The distinction has no application to the power of Congress. In *Knowlton v. Moore* the court holds that the tax in question is one on the transmission and receipt of property by death, which is as common and legitimate a subject of taxation as any other transmission of property, or as property itself, and says: "Of course, in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the states, and not in Congress." And so the precise question whether the United States Constitution forbids inequality in any form of taxation was presented in a mode the most concrete possible, and decided in the negative. Still the question whether any particular form of taxation is more just and equal than some other is a question that must be decided, but not by the judicial department. As to this the court says: "In the absence of constitutional limitation, the question whether it is or is not is legislative, and not judicial."

Is it so, then, that the legislature may make any exaction it pleases under the form of a tax? Clearly not. The legislative power in all its manifestations is limited, including that of taxing, which, however, from its inherent nature, approaches more nearly to arbitrary power. If a tax is laid on the exercise of the duty of voting, or if any exaction is put in the form of taxation as a mere sham, and is, in effect and purpose, a denial to one of the enjoyment of rights indicated in the Constitution, and the enjoyment of which it secures equally to all, or is a seizure of the property of one for the benefit of another, or is an uncompensated confiscation of property, the law authorizing such exaction is in violation of mandates contained in our Constitution, and probably in all American constitutions, and is therefore void. It is neither taxation nor legislation. Such guaranties are not limitations on the power of taxation, but on all power. It is immaterial in these cases whether the exaction, if it could be

considered merely as a tax, is wise or foolish, oppressive or just, equal or unequal. The law is not a law solely because it is forbidden by some command of the supreme law. The meaning and scope of these commands present questions on which the judgments of the judicial department are final. The wisdom or necessity of distributing the burdens of taxation according to rules of equality presents questions on which the acts of the legislative department are conclusive. We see no escape from the conclusion that our fundamental law, either state or national, contains no provisions, either expressed or implied, that "taxation must be equal and uniform," and the question seems to be set at rest by the decision in *Knowlton v. Moore*.

The claim, however, is urged that the 14th Amendment and § 2 of art. 4 of the United States Constitution contain certain provisions inferentially inconsistent with the particular taxation now under discussion. In order to deal with that claim, it is necessary to keep in mind the precise nature of this taxation. The main burden of taxation for municipal purposes falls upon inhabitants of towns proportionally to their ability to contribute to public burdens. Their ability to contribute is determined by lists, prepared under authority of each town, setting to each inhabitant certain sums, according to rules more or less arbitrary, fixed by the legislature. The gross amount of these sums measures the ability of each inhabitant to pay, and taxes are imposed by all municipal corporations authorized to lay taxes upon the individuals according to their ability to pay, thus measured. The rule of measurement was formerly largely arbitrary; but, as now fixed by the legislature, is substantially the present fair market value of property owned, both real and personal. This rule of taxing inhabitants of towns as individuals, according to their ability to contribute, measured by legislative rules, was adopted in 1650, and still prevails as to municipal taxation, and to a limited extent as to state taxation. *Yale University v. New Haven*, 71 Conn. 316, 330, 43 L. R. A. 490, 42 Atl. 87. When, in later years, local business came to be carried on by corporations rather than individuals or partnerships, a similar rule was applied in taxing such corporations. When banks were first chartered, in 1792, a different rule became necessary as to them, which has since been applied to other corporations of similar character, whenever chartered. As the burden of municipal taxation fell on towns, and as the inhabitants of a large number of smaller towns were proportionately less able to bear their burden than those of larger towns, the legislature sought to give to these smaller towns, in the preparation of their tax list, the benefit of all property that could be considered as increasing the ability of their inhabitants to pay; and this desire to relieve small towns from a practically unfair share of burden has influenced our whole system of taxing corporations. While banks were

located generally in the larger towns, their property was equitably owned by individuals resident in many other towns, and so, instead of taxing the banks directly, the shares of their stock were treated as distinct personal property, and were listed to the individual owners in the towns of their residence. Still later, when corporations, such as railroads, savings banks, and mutual insurance companies, came into existence, it was found impracticable to accomplish fair results by taxing them under existing rules, and as to them still another rule was adopted, i. e. that of special taxes, by which the legislature taxed the corporation directly for the support of the state government, fixing the sum to be paid—First, by an arbitrary rate fixed by the legislature; and second, by an arbitrary ascertainment of a sum which might be considered as approximating the value of the property owned. And these two factors, i. e. the rate and the sum to which the rate applies, are arbitrarily determined by the legislature, but, with the intent, in adjusting each to the other, that the result shall be a fair and just tax. It was early found that these two modes, i. e. that of taxing shares as the distinct property of the individual owner, and that of special taxes, must be combined in the taxation of banks and similar corporations. Shares of stock owned by nonresidents of any town could not be listed as the personal property of an inhabitant of any town, and for a time the corporations, in respect to shares so owned, escaped all taxation. Eventually a special tax was laid upon the corporation in respect to these shares of nonresidents. Like other special taxes, the amount of the tax depends on two factors, i. e. the rate, and the sum on which the rate is laid, arbitrarily fixed by the legislature, having regard to the other in fixing each. As such non-resident shareholders would otherwise substantially escape that contribution to the taxation of the corporation which is forced from the resident shareholder, the law also compels them, proportionately to the number of their shares, to reimburse the corporation for the special tax so paid in respect to their shares. It follows that, in taxing one class of corporations, the law divides the members of the corporation into two classes, one consisting of shareholders whose property rights can be listed for municipal taxation in the towns of their residence, and the other of those whose property rights cannot be so listed; that it recognizes a similar distinction in the corporate property and interests which belong to the members who constitute the corporation; that the corporate property and interest represented by the former class of members is subjected to municipal taxation, and exempted from special taxes, and that represented by the latter class is exempted from municipal taxes, and subjected to special taxation; that the portion represented by municipal shareholders is taxed under rules governing rate, and sums to which the rate applies, including valuations,

determined by the necessities of municipal taxation, and that the portion represented by the state shareholders is taxed under different rules, determined by the necessities of special taxation; that all taxes thus laid are to be paid by the shareholders proportionately to the number of shares respectively owned by the members in each class, in one case through the form of a tax as on distinct personal property, and in the other through the form of reimbursing the corporation for an expense which properly belongs to the shareholders on account of whom it was incurred.

The precise thing, therefore, claimed as void is treating the members of one corporation, together with the proportional part of the corporate property pertaining to them as members, as forming two classes, and subjecting one class to municipal taxes only, and the other class to state or special taxes only, and fixing the amount to be contributed for these diverse objects by members of one class under rules which necessarily differ in form from those applicable to the other. We have seen that such taxation is not void, because it may be regarded as neither uniform nor equal, nor because it may seem to the judges of this court to be unfair and unjust. *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. ed. 482.

The only remaining claim is that for some other reason it is in violation of the constitutional provisions mentioned. The 14th Amendment seeks to add the security of national protection to the two guaranties common to the state Constitutions, by which life, liberty, and property are free from invasion, except under authority of law consistent with the Constitution, and by which any person or class of persons within state jurisdiction is secured against hostile discrimination, in providing equal protection under the law in the enjoyment of rights belonging to all. It was not intended to otherwise affect the existing control of states over the civil rights of its citizens. *United States v. Cruikshank*, 92 U. S. 542, 554, 23 L. ed. 588, 592; *Missouri v. Lewis*, 101 U. S. 22, 31, *sub nom. Bowman v. Lewis*, 25 L. ed. 989, 992; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533.

The occasion, purpose, scope, and effect of the 14th Amendment were authoritatively stated by the United States Supreme Court, speaking through Justice Miller, shortly after the adoption of the last three amendments. *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394. The underlying thought of the opinion in that case has never been intentionally departed from, and in a very recent case has been deliberately affirmed by the same court, in an opinion delivered by Mr. Justice Peckham, reviewing adjudications of the intervening twenty-seven years. *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448. The reasoning of these two leading cases excludes the idea of the 14th Amendment placing any new limitations on the power

of the people of the states to determine their civil rights by their fundamental law, unless in the hardly thinkable case of a rescission of the guaranties relative to the supremacy of the law of the land and equality in the enjoyment of constitutional civil rights. If, then, the legislation complained of is invalid, as invading any civil right secured by our Constitution, and thus deprives the defendant's shareholders of property contrary to the law of the land, or is otherwise obnoxious to these guaranties, it may violate the provisions of the 14th Amendment; otherwise, it does not.

It would seem idle to claim the invasion of any such right, unless the right to "equal and uniform taxation" is one. Our fundamental law establishes no such right. And so the appeal to the 14th Amendment fails by reason of the primary error of supposing that our Constitution contains such a maxim. The Constitutions of other states contain a maxim of that kind, and in these states a legislative act imposing an unequal tax on anyone is not law; and therefore the collection of such tax might be the seizure of property without due process,—i. e. contrary to the "law of the land,"—or the imposition of such a tax on one person or a select number of persons might invade the right to equal protection of this constitutional exemption from such taxation, and so be a violation of the 14th Amendment. That such taxation comes within the purview of this amendment solely by force of an express prohibition of the state fundamental law (unless, indeed, the legislative act is not really one of taxation, but, in effect and purpose, an act of confiscation, or in other ways a direct assault upon some limitation of the Constitution affecting all legislative power) is illustrated by the cases cited. Whatever extension may properly be given to the provision which forbids the denial by any state to any person or selected number of persons within its jurisdiction of equal protection in the enjoyment of those civil rights secured by its fundamental law to all citizens, it cannot cover the establishment by this amendment of a constitutional rule of "equality in taxation." The broad *dictum* of the United States Supreme Court, speaking by Justice Miller, that, while state constitutions may contain provisions against unequal taxation, "the Federal Constitution imposes no restraints on the states in that regard" (*Davidson v. New Orleans*, 96 U. S. 97, 105, 24 L. ed. 616), has been fully confirmed by the logic of recent decisions. Another line of cases, culminating in *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, brings into sharp relief the impossibility of inferring from the provisions of the 14th Amendment any maxim of "equality in taxation." It was claimed that the 14th Amendment imposed upon each state the limitations of power imposed upon the United States by the first eight amendments. This claim had been denied in several decisions, and in *Maxwell v. Dow* it was held that the state of Utah, through its

local Constitution, could deny to everyone within its jurisdiction the common-law right of trial by jury, and such denial was not obnoxious to the 14th Amendment, which acted on fundamental rights as they existed in each state. The right of trial by jury, until recent years, has been generally regarded as the most essential of those secured by the muniments of English liberty. With other rights protected by the first eight amendments it forms the body of "privileges and immunities," which our American constitutions have, in general, placed beyond the reach of legislative power. "Equality in taxation" finds its source as a fundamental maxim in the brilliant speculations of the Encyclopedists, formulated into a declaration of the "rights of man," and adopted by the revolutionary assembly of France in 1789. The proposition that the 14th Amendment gives the national protection to the equal enjoyment of civil rights as established in each state, and should not be extended by inference, is demonstrably sound; and, this being so, through what considerations of public policy, or by what process of reasoning, can an inference be drawn which leaves the right of trial by jury subject to the control of the state sovereignty, and places the theory of "equality in taxation" beyond its power; which holds that sovereignty competent to define and alter the hard-won civil rights of freemen as embodied in the petition of rights, the bill of rights, our local and national declaration of rights, but powerless to reject the theories of doctrinaires embodied in the "rights of man?"

The defendant's claim of a special violation of § 2 of art. 4 of the United States Constitution is greatly narrowed by the elimination of his initial error of treating the maxim, "Taxation must be equal and uniform," as a mandate of our fundamental law. If the defendant were right as to the existence of such a mandate, then exemption from unequal taxation might be considered a civil right or "privilege" secured by our Constitution to every citizen of this state, and a law which deprived citizens of other states of that privilege might be treated as obnoxious to this particular clause. But, the claim being untenable, the clause has no application, unless the legislation in question deprives citizens of our sister states of some other privilege, and one to which our citizens, by virtue of their citizenship, are entitled. The mere fact of discrimination is immaterial. The exercise of the legislative function necessarily involves discrimination. While discrimination in itself may be harmless, it does sometimes serve to mark the character of legislation. Thus, a law purporting to be a police regulation may, by reason of its discriminations, be shown to be a regulation of commerce. So, a law purporting to be mere taxation may, by the nature of its discrimination, be shown to be in fact a deprivation of citizens of other states of some civil right secured to our own. "The citizens of each state shall be entitled to all privileges and im-

munities of citizens in the several states." The meaning and effect of this language in substantial particulars is settled. It is confined to the single purpose of preventing an exercise of the independent power left to each state in favor of its own citizens in respect to their common personal rights as citizens and against a participation in the same rights by citizens of other states. "Privileges and immunities" are those civil rights belonging to all citizens of the state. *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448; *Lemmon v. People*, 20 N. Y. 562. They are not special privileges, such as any state may grant to portions of its citizens, but those "which are common to its citizens under its Constitution and laws by virtue of their citizenship." *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737. The discrimination must be personal (*Shipper v. Pennsylvania R. Co.* 47 Pa. 338), and against citizens of another state as natural subjects of that state; and so corporations cannot be citizens within the meaning of the clause (*Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972). To render a state law obnoxious to this clause, it is essential (1) that the privilege claimed by the citizen of another state should be a civil right common to the citizens of the enacting state; (2) that the privilege claimed should be denied to a natural citizen of another state in this capacity as such citizen. The legislation complained of does not come within either of these requirements. The "privilege" claimed is under our tax legislation, and must be one of the following: The right of all citizens of this state, being members of a state corporation, to be taxed in respect to their interests in the corporation (1) for the same objects of taxation; or, if taxed for differing objects, (2) by the same modes of taxation; or, if taxed for differing objects and by different modes, (3) by the same rules of valuation; and (4) to a gross amount of taxation, which shall be the same for each member in proportion to his interest. Neither our legislation nor our Constitution entitles our citizens to such rights. The distinctions made by our law are within the legislative power of taxation, and their wisdom or folly cannot present a judicial question. It may be noted, in reference to the fourth privilege claimed, that equality in the gross amount of taxation falling upon two classes of shareholders taxed under our law for the differing objects of municipal taxation and state taxation is impossible, and the different modes of taxation are adopted with a view of roughly obtaining some equality which cannot be so nearly approximated in any other way; and it may be further noted that the taxation is not claimed to be oppressive; indeed, it was urged in argument that the stress of taxa-

tion falling on this defendant and its stockholders is far less than that falling on other corporations transacting a similar business. All these claims resolve themselves into the one claim of a fundamental right to the application of a theory of uniformity and equality in taxation.

If the defendant is treated as representing its "nonresident" shareholders, there is no discrimination against them in their capacity as "citizens of other states." The discriminations are between members of our state corporations by reason of their participation in its grant of corporate franchise. In accepting the rights of property inherent in that grant, they voluntarily put themselves, for purposes of taxation, under our jurisdiction. The state discriminates in the manner of compelling members of a corporation to share the gross amount which the corporation should contribute under all forms of taxation by reason of the property created and accumulated and of the privileges enjoyed through the state's grant of incorporation. The obligation of the members to submit to such discrimination is an incident to their acceptance and enjoyment of the grant. Shares of stock in the hands of the shareholders may be treated for certain purposes, including some forms of taxation, as a property distinct from that of the corporation; but nevertheless the real interest of the shareholder is a corporate interest, and one element of the taxation the state may impose on the corporation. *Delaware Railroad Tax*, 18 Wall. 206, *sub nom. Minot v. Philadelphia W. & B. R. Co.* 21 L. ed. 888. It may assess the shares, and compel the corporation to pay the tax. *First Nat. Bank v. Kentucky*, 9 Wall. 353, 363, 19 L. ed. 701, 704; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 500, 22 L. ed. 189, 194. Chief Justice Waite, speaking for the court, stated the principle thus: "That in corporations four elements of taxable value are sometimes found: First, franchises; second, the capital stock in the hands of the corporation; third, corporate property; and, fourth, shares of the capital stock in the hands of the individual stockholders." *Tennessee v. Whitworth*, 117 U. S. 129, 136, 29 L. ed. 830, 832, 6 Sup. Ct. Rep. 647; *Farrington v. Tennessee*, 95 U. S. 687, 24 L. ed. 560. The state may tax one or all these elements, and discriminate in the taxation, unless restricted by some special constitutional provision. It is held that, where the Constitution forbids unequal taxation, the state may nevertheless discriminate in the taxation of those rights of property growing out of an exercise of its power to regulate the law of succession and wills. *A fortiori*, the state may prescribe the terms on which rights of property growing out of its grant of special corporate privileges may be enjoyed. In the law complained of, in so far as it taxes a corporation on account of the interest of its nonresident shareholders, the whole force of "nonresident," as used, is to designate such persons as, by reason of their nonresidence in some particular town, can-

not be listed for municipal taxation. It is the same in purpose and effect as if the law had directed the stock of all shareholders resident in towns having a grand list of less than \$5,000,000 to be subjected to municipal taxation in the town where the owner resides, and directed the corporation, on behalf of all nonresidents of such towns, to pay a tax to the state of 1 per cent on that portion of its franchise and property exempted from municipal taxation and represented by the interests of said nonresident shareholders, the amount of that portion to be ascertained in any manner the legislature might deem just. Such a law would not discriminate against citizens of other states in their capacity as such citizens; and just as clearly, under any fair reading of our legislation, the existing statute does not so discriminate.

The distinction between this case and others where this clause of the Constitution has been applied to taxation is broadly marked. In all others there was an invasion of that right of everyone secured in the state Constitution to freedom of harmless action in respect to person and property, equal before the law, to that enjoyed by all other citizens under the same conditions and in the same circumstances. The discrimination was not a mere incident of legitimate taxation, but one aimed directly at citizens of other states, calculated and intended to deny or limit as to them a clearly defined civil right. We believe the right to equality of privilege in all members of a corporation under the grant of corporate franchise is not secured in any constitution; certainly not in our own. In *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449, the right to freedom of occupation was invaded by a discriminating tax against nonresident traders. In *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165, the same right was invaded by a law preventing creditors, citizens of other states, in sharing equally with those of Tennessee in the distribution of an insolvent estate of a Tennessee citizen. "Certain creditors, solely because of their being citizens of Tennessee, are accorded advantages in the distribution of the assets in question which are denied to other creditors solely because of their being citizens of another state than Tennessee." 176 U. S. 67, 44 L. ed. 374, 20 Sup. Ct. Rep. 307, decided January 8, 1900. The same distinction appears in the state cases cited. In *Sprague v. Fletcher*, 69 Vt. 69, 37 L. R. A. 840, 37 Atl. 239, the equality of right, as above defined, in the enjoyment of tangible property, was claimed to be invaded. Without stopping to investigate the application, the principle sought to be applied is similar to that in the Federal cases. In *Farrington v. Downing*, 67 N. H. 441, 30 Atl. 345, there is the further distinction that the New Hampshire Constitution contains a clause forbidding inequality in taxation, and the case involved the interpretation of the enabling act of Congress. The invalidity of the New Hampshire law in this particular

was not fully considered, as the case had to be disposed of on other grounds. *Oliver v. Washington Mills*, 11 Allen, 268, turns on the fact that the thing taxed was tangible property situate in Massachusetts. The conclusion of the court that a dividend after declaration, and before payment, is a "commodity" belonging personally to the shareholder, the same as his money in the hands of any agent, is the foundation of the opinion. It was contended that the state law was valid whether it were considered as imposing a tax or an excise duty. The court held it void from either point of view. If a tax, it violated the Massachusetts Constitution forbidding unequal taxation; if an excise, it was laid solely on citizens of other states on account of such citizenship, and so denied to them a privilege or civil right secured to its own citizens. We have been referred to no case where a state law has been held void as violating the provision that "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," unless the "privilege" was a civil right belonging to all citizens of the enacting state, and the law discriminated against citizens of other states in their capacity as such citizens.

But it is urged that ownership in a share of stock is practically of the same nature as ownership of bonds or debts, or even of tangible property; that our tax law practically affects individuals as directly as a tax on their tangible property; that for all practical purposes, in adopting a different mode of ascertaining the tax to be collected for shares of residents and nonresidents, the law imposes a larger tax upon citizens of other states than upon our own citizens; and that under the form of corporate taxation the law in reality and intent discriminates against citizens of other states in respect to that individual equality before the law secured to our own citizens. If, in fact, our law is a mere sham, devised for the sake of screening an actual purpose of excluding citizens of other states from participation in those civil rights secured to our own, then we cannot sustain the law. The light of justice can pass unimpeded through all coverings of form, and lay bare any hiding substance of disobedience to paramount law. When occasion demands, the court cannot shrink from its duty in discovering the real purpose of any legislation; on the other hand, it is worse than folly to apply the microscope to the tangled web of taxation, seeking some broken threads that may suggest a defective origin. It is not, however, true, in the sense suggested, that ownership of a share of stock is practically of the same nature as ownership of tangible property. The latter rests upon a right universally recognized from earliest time, which is common to all, and secured in its enjoyment by constitutional guaranties; while the former is of comparatively modern origin, dependent for its existence upon a legislative grant of special privileges to a few, subject in this and in most cases to alteration and repeal.

57 L. R. A.

It is true of all corporate taxation that it affects individuals directly, whether it is collected from the corporation before the declaration of a dividend or afterwards from its members, and it may be true that under the latter mode individuals are affected more directly, but this does not alter the fact that in prescribing the mode of taxation in question the state is exercising its power of limiting the conditions on which the grant of corporate franchise may be enjoyed. While, under this mode of taxation, a heavier burden may fall on some who are citizens of other states than on some who are citizens of this state, as a heavier burden may fall upon some than upon others of our own citizens, members of the same corporation, yet it does not appear from the record that the effect of the law as a whole is to impose a larger tax upon citizens of other states than upon our own. We see nothing in this legislation to furnish any justification for the claim that while it is in form only a permissible mode of corporate taxation, it is in purpose and effect a hostile discrimination against citizens of other states in the enjoyment of property rights common to all, unless it be in a provision contained in Gen. Stat. § 3836. The provision was first enacted in 1877. For a long period prior to that time the law taxing banks, insurance companies, and other corporations treated the shares owned by residents of towns as a property distinct from that of the corporation, and directed the assessors to list such shares at the market value thereof on October 1st to the owners, like all other personal property; and directed the cashier or secretary of every such corporation to make a return to the assessors of each town informing them of the names of shareholders resident in that town, of the number of shares held by each, and the market value thereof during the preceding month. The law also laid a special tax in respect to shares owned by nonresidents of towns, whose amount was arbitrarily determined, as before explained, by a valuation measured by the market value of the stock on October 1st, and a legislative rate of 1 per cent, now fixed at 1½ per cent. In 1877 the legislature, in re-enacting the law directing assessors to list the shares of resident shareholders at their market value, added the following proviso: "But so much of the capital of any such company as may be invested in real estate, on which it is assessed and pays a tax, shall be deducted from the market value of its stock, in its return to the assessors." This proviso is the provision of § 3836, in question. The plaintiff claims that the provision applies only to the information to be included in the returns of the corporations to the assessors to aid them in listing the property owned in their town, and in fixing the market value thereof on October 1st, and does not otherwise affect the duty of the assessors to list all such stock at its market value. In the preceding case of *Chase's Appeal*, 73 Conn. 288, 47 Atl. 243, the provision is construed as controlling the

action of the assessors. The defendant claims that the provision, thus construed, is equivalent in meaning to an enactment that "owners of shares of stock in corporations paying taxes on land in which their capital is invested shall be entitled to a deduction from the amount of their assessment for taxation of a sum for each share owned equal to the assessed value of the corporation's land divided by the whole number of its shares, but citizens of other states shall not be entitled to such deduction from the assessment for taxation of shares owned by them." It is unnecessary to consider what might be the effect of the provision if it expressed this meaning, for such is not its meaning. We have held that the provision, thus construed, is not a direction to the assessors to make an arbitrary deduction from the amount of the shareholders' list, but is a direction to make a different valuation, so that the statute in respect to corporations owning taxable real estate no longer treats the shareholder as owner of a piece of property distinct from that of the corporation, but treats him as owning an interest in a proportional part of the capital of the corporation,—i. e. of the assets representing the amount of the original capital and profits in excess of existing debts,—and therefore in the valuation of this property for municipal taxation a deduction shall be made of the capital invested in land already taxed in this state and elsewhere, and the sum to be deducted must bear the same relation to the shareholder's interest in the taxable value of the real estate as the market value of his share bears to his interest in the actual value of the assets in excess of existing debts. *Batterson v. Hartford*, 50 Conn. 558, 561; *Dennis's Appeal*, 72 Conn. 369, 44 Atl. 545; *Re Chase* (Conn.) 44 Atl. 1099; and *Batterson's Appeal*, 72 Conn. 375, 44 Atl. 549. This change as to the valuation of the property and franchise of a corporation owning taxable real estate for the purposes of municipal taxation may produce in some instances more inequality, may be uncalled for or unwise (upon such considerations the action of the legislature is conclusive), but it certainly does not transmute the legislation in question from permissible taxation to a denial to citizens of other states of that common right in the use and enjoyment of property secured to our own citizens. The plan of taxation remains the same. After the change in valuation as before, it is simply a mode of securing to towns for purposes of municipal taxation the benefit of that part of the corporate property represented by shares owned by their inhabitants, and subjecting to state taxation that part represented by shares owned by nonresidents, and which cannot be thus subjected to municipal taxation. Here is no hidden purpose to attack the rights of citizens of other states, no evidence that the underlying intention and real substance of the legislation is to hinder citizens of other states in acquiring and holding property. The alleged hindrance is confined to those who

buy stock in corporations paying taxes on real estate. Only a small number of the corporations within the scope of the act own taxable real estate to any appreciable amount. Can it be said that the law regulating the taxation of half a dozen different kinds of corporations is really intended to hinder citizens of other states from owning stock in the small number of these corporations that may, from time to time, invest in taxable real estate, or that the real substance of the law changes from legitimate taxation to hostile and forbidden discrimination with each change of its investments by a corporation? Clearly, the legislature is free from any sinister motive in this legislation. Nor in its practical effect does the law justify the charge. The claim here is that nonresident shareholders pay a larger tax than residents. This, in itself, means nothing. The plan of taxation includes a tax as to the two classes of corporate property for different purposes, whose amount is to be ascertained in a different manner. It necessarily involves inequality in the contributions of members of the corporation for corporate taxation; inequality in the gross amount falling upon the two classes, and inequality in the several contributions of members of the same class. It necessarily rejects a theory of uniformity. This the legislature may do. The claim now under consideration is that in doing this the legislature has produced such a gross inequality between the two classes as, in purpose and effect, constitutes a denial or hindrance to citizens of other states in the enjoyment of property rights common to all, and secured to our own citizens. It is unnecessary to consider whether, or under what circumstances, the limitations imposed by a state in respect to the mutual relations of members of its corporations in the matter of taxation may transform legislation for that purpose into a denial of rights secured to citizens of other states. It is enough for present purposes that a mere inequality in the stress of taxation cannot produce that effect. But the claim that in this case the inequality operates against nonresidents or citizens of other states as a class is unfounded. While the admissions of the demurrer assume the tax in respect to the defendant for this year to bear more heavily on nonresidents than on residents, the general effect of the law is matter of common knowledge. The average rate of taxation for municipal purposes for the 168 towns approximates 15 mills, which is the rate for the special tax imposed in respect to nonresident shares; but the average rate for municipal taxation in the 10 larger towns (representing much more than half the grand list of the state) is about 21 mills. The clear purpose of the legislature in fixing the mode of valuation for the property subject to a single rate for special taxation, and the valuation for the property subject to widely varying rates for municipal taxation, was to approximate a general equality in the burden that should fall on the two classes of property; and it well may

be that the rule objected to in respect to the valuation of the interests of resident shareholders in corporations investing in taxable land still leaves, as a whole, a lighter burden of contribution resting upon nonresident shareholders. There is no more in this last than in the other claims of the defendant, unless our Constitution requires uniformity, and forbids inequality, in taxation. Our fundamental law, state and national, contains no such mandate or maxim. Eliminating from the discussion the notion that some theory of uniformity and equality in taxation constitutes a limitation on legislative power, and confers upon the judicial department authority to supervise the legislature in the performance of its legislative duty of fairly and wisely distributing the burden of taxation, it seems to us apparent that our plan of taxing corporate property and franchise, first adopted more than half a century ago, and in force in its present form for some twenty-five years, is constitutional, and is not obnoxious either to § 2 of article 4 nor to the 14th Amendment of the United States Constitution. If a change is desirable, it may be feasible to preserve to towns the income now derived from taxes on the stock of their resident shareholders, and to collect all forms of corporate taxation from the corporation; thus distributing the burden proportionably among its members. The wisdom of any change must be determined by the legislature.

We have not considered the question whether it is competent for the defendant in this action to make the claims presented on behalf of its nonresident shareholders. In assuming, as the parties have, that such claims are properly presented, we wish to exclude from any implication of settlement some nice questions that may be involved in the assumption.

There is no error in the judgment of the Superior Court.

Andrews, Ch. J., and Torrance and Hall, JJ., concur.

Baldwin, J., concurring in the judgment, but dissenting from part of the opinion of the court:

The opinion of the court rests upon three propositions to which I fully assent. These are that there is nothing in the Constitution of Connecticut, nor in the 14th Amendment to that of the United States, which either expressly or by implication requires that all taxation by this state shall be uniform or equal; that there is no fundamental principle of free government or natural justice that all taxation shall be uniform or equal; and that a citizen of another state, who participates as a shareholder in the defendant corporation in the enjoyment of a special franchise granted by this state, with a reservation of the power of amendment or repeal at pleasure, is not deprived by the tax laws which are in question in this cause of any privilege or immunity coming within the meaning of § 2, 57 L. R. A.

art. 4, of the Constitution of the United States. I dissent from so much of the opinion as asserts that, if it were a fundamental principle of free government and natural justice that all taxation shall be uniform and equal, the judicial power would be incompetent to declare a statute which violated that principle to be no law. The Constitution of Connecticut (art. 2) declares that "the powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." It then proceeds (art. 3) to vest "the legislative power of this state" in the general assembly, and (art. 5) "the judicial power of the state" in this and other courts. This language assumes that a free state has a power of government known as "legislative" and another known as "judicial." The leading men among the framers of our Constitution were familiar with certain limitations of legislative power described in the institutional works upon English law. That "if a statute be against common right or reason . . . the common law shall control it, and adjudge it void," had been laid down in Bacon, Abr. Statute, A, 12-14, repeating the words of Coke in his report of *Bonham's Case*, 8 Coke, 118. So in Wood, Laws of England (p. 10), it had been stated that "acts of Parliament that are against common justice and reason . . . shall be judged void." These principles had been acted upon by American courts. In the *Symsbury Case*, in this state, it had been adjudged in 1784, and again in 1785, that an act of our general assembly to confirm a patent of lands which it had granted, but which trench upon the limits of a prior grant, was, so far as it did thus trench upon them, void, because it took the property of one man and gave it to another. Kirby, 447, 452. We had then no constitution, unless it were the colonial charter, and that contained no particular provision affecting laws of such a character. In 1792 the supreme court of South Carolina had come to a similar determination under like circumstances. *Bowman v. Middleton*, 1 Bay, 252. This doctrine had not been universally accepted. Blackstone, so far as the powers of the British Parliament were concerned, had thrown the weight of his authority against it. In a cause taken up from this court to the Supreme Court of the United States, and familiar to every Connecticut lawyer in 1818, it had been, twenty years before, the subject of a difference of opinion between the justices of that tribunal. Mr. Justice Chase had maintained that "the nature and ends of legislative power will limit the exercise of it," adding the remark that "an act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority." Mr. Justice Iredell had taken the opposite view. *Calder v. Bull*, 3 Dall. 388, 398, 1 L. ed. 648,

653. The question was debated before this court shortly after the adoption of our state Constitution, and thoroughly considered in an opinion by Chief Justice Hosmer, which received the unanimous assent of the court. His conclusion was that, should the general assembly pass a statute authorizing a direct and palpable infraction of vested rights, too unjust to admit of vindication, it would be a violation of the social compact, and within the control of the judiciary. *Goshen v. Stonington*, 4 Conn. 209, 225, 10 Am. Dec. 119. No Connecticut jurist has gone beyond Chief Justice Daggett in upholding the plenary authority of the general assembly prior to the adoption of our Constitution; but he, speaking for this court, defined it as "a legislative power capable of making all laws necessary for the good of the people not forbidden by the Constitution of the United States, nor opposed to the sound maxims of legislation." *Starr v. Pease*, 8 Conn. 548. The power of this court to declare a statute void which clearly abrogated vested rights because it would "stand opposed to the true spirit of the Constitution" was affirmed, though with cautious reserve, in 1843, in an opinion by Chief Justice Church. *Bridgeport v. Housatonic R. Co.* 15 Conn. 491. In 1856 it was discussed by Chief Justice Storrs, and the suggestion made that it could not exist when the power exercised was "properly legislative in its character." *State v. Wheeler*, 25 Conn. 297, 298. That by the expression "properly legislative in character" was meant within the sphere of proper legislation, as that sphere may be finally determined in case of controversy, by a consideration of the fundamental principles of civil government and natural justice, seems to me demonstrated by another case, reported in the same volume, in which a legislative grant of a corporate monopoly was adjudged void in these words: "And although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the bill of rights, the 1st section of which declares that no man or set of men are entitled to exclusive public emoluments or privileges from the community, to render them void." *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19, 38. In 1861 we again deliberately recognized the general doctrine that a statute directly and unjustly impairing vested rights is void, not because of any constitutional provision, but as in violation of "the fundamental principles of the social compact," which, as we then said, through Chief Justice Butler, "underlie all legislation, irrespective of constitutional restraints." *Welch v. Wadsworth*, 30 Conn. 155, 79 Am. Dec. 236. The same great judge soon afterwards stated, with his accustomed clearness and precision, the foundation of the judicial power thus to declare, in extreme cases, a statute not to be a legitimate act of legislative power. The 57 L. R. A.

question then before us was whether the general assembly could allow towns to vote bounties to men volunteering for military service in the field. "It must be conceded," he said, speaking for a unanimous court, "that the people, if convened and organized as a whole, and acting upon the fundamental principle that what the majority prescribe shall be law, could be under no restraint except that imposed by the principles of natural justice; and the general assembly, in the exercise of that conferred legislative power, and irrespective of the bill of rights, are restrained by the same principles, and no other. The first question, therefore, may be further narrowed to the inquiry whether it is contrary to natural justice that A and B and the rest of the inhabitants of the state should be taxed for gratuities to C and D when C and D are called upon to render military service to the general government." *Booth v. Woodbury*, 32 Conn. 127, 128. I believe that the doctrine of *Goshen v. Stonington*, since so often reaffirmed, is sound, and that the term "legislative power," as it is used in our American Constitutions, refers only to what is "legitimate legislation." *Bradley v. New York & N. H. R. Co.* 21 Conn. 305; *Wilkinson v. Leland*, 2 Pet. 657, 7 L. ed. 627. This is the view which was finally adopted and acted on by the Supreme Court of the United States in the leading case of *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 662, 663, 22 L. ed. 455. If such be not the law, then the inadvertent omission in a bill of rights of any of the guaranties against oppression which are usually enumerated would leave the citizen in that respect subject to the uncontrollable pleasure of the legislature. Our liberties are not, in my judgment, held on so precarious a tenure.

The importance of the point which has been discussed has seemed to me to justify this full statement of the reasons which lead me to dissent from what is said in regard to it in the opinion of the court. So far as I can discern, however, it has no importance in the cause, and has simply become the occasion of an *obiter dictum*. We all agree that the statutes in question are not unfair nor unjust. The counsel for the defendant, in their argument, rested their case on the effect of certain provisions of the Constitution of the United States. In the disposition which has been made of the objections thus raised I fully concur. It seems to me, therefore, that it was quite unnecessary to consider whether, if the statute under examination had been flagrantly subversive of fundamental principles underlying our Constitution and characterizing all free governments, its operation could not have been controlled by that department of the government in which the people have reposed all their judicial power.

Affirmed by Supreme Court of United States, May 5, 1902.

Patrick KELLY, Admr., etc., of John B. Kelly, Deceased,
v.
NEW HAVEN STEAMBOAT COMPANY,
Appt.

(74 Conn. 343.)

The duty of using a fender provided by the owner of a vessel to aid in docking it does not rest upon him, and therefore he is not liable for injuries to an employee resulting from the neglect of the mate to use it in bringing the vessel into the dock, although the injured employee works under the immediate orders of the mate.

(January 8, 1902.)

A PPEAL by defendant from a judgment of the Superior Court for New Haven County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death, which were alleged to have been caused by defendant's negligence. *Reversed.*

Statement by **Torrance, Ch. J.:**

The material facts found are these: The defendant corporation, on the day of the injury, owned and ran the steamboat Continental, on which Kelly, the plaintiff's intestate, was a deck hand. On that day said boat arrived at its dock in New Haven when a strong ebb tide was running. When this was the case, it was the custom, in docking the boat, to turn it about by means of a hawser put out on the starboard side of the boat, passed around the stern, carried forward on the port side, and fastened to a post on the dock. This being done, upon reversing the engines, the hawser holding the stern, the bow would swing around. During this operation, to prevent the hawser from slipping from under the stern, the defendant had provided a beam of wood (hereinafter called a "fender"), which, being put out of a chock hole in the stern under which the hawser passed, effectually prevented such slipping. On the day of the injury, while the boat was being turned about in the customary manner, but without using said fender, the hawser slipped, and caused the injuries to Kelly described in the complaint. The sole cause of the slipping was the failure to use the fender. It was the duty of the mate to employ the deck hands, to receive orders from the captain to get ready the lines, and thereafter to see that the appliances were in readiness and in proper condition, that the hawser was put out and taken ashore and fastened to a pile on the wharf, and to give orders and directions to the deck hands in the performance of their duties. The boat was in command of a captain, whose special duty it was to take charge of its navigation, and he did not assume the immediate direc-

tion or supervision of the deck hands. It was the duty of the deck hands to assist in docking the boat under the immediate orders of the mate, and it was the duty of the mate to determine, from the condition of the tide and the depth to which the boat was loaded, whether or not the fender should be used, and, if it was to be used, "to give an order to a deck boy to put out the same." It was not the duty of the deck hands to use the fender without express orders from the mate to do so. The use of the fender at the time in question was necessary for the reasonable safety of the deck hands in the place where they were required to work, "and its proper use would have rendered the appliances used and the method of docking proper and suitable." The fender was a beam of wood about 3 feet long and 4 or 5 inches in diameter. It was kept on the main deck, loosely tied to the flag pole at the stern, and at the time of the accident was in its place ready for use. At the time Kelly was injured he was in the exercise of due care, and at the place where he was ordered to be by the mate; and the court finds that such place was "at that time an unsafe and dangerous place, and the defendant failed to furnish proper and suitable appliances to render the place safe, and the appliances then in operation by the defendant were unsafe and dangerous, by reason of the facts aforesaid." Upon these facts the defendant, among other things, claimed that the injury to Kelly was caused solely by the negligence of a fellow servant, and this claim, with others, the trial court overruled, and rendered judgment as on file.

Mr. Edward H. Rogers for appellant.
Messrs. James H. Webb, Arnon A. Ailing, and Martin & Coyle, for appellee:

It is the master's duty to exercise reasonable care to provide for his servant a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work, and fit and competent persons as his collaborators. It is equally well settled that performance of these duties cannot be effected by the simple giving of an order,—by their execution being intrusted to another. The designation of an agent, however fit and competent that agent may be for the execution of the master's duties, does not fill out the sum of the master's obligation, nor serve to relieve the master from further responsibility.

Wilson v. Willimantic Linen Co. 50 Conn. 433, 47 Am. Rep. 653; *Gerrish v. New Haven Ice Co.* 63 Conn. 9, 27 Atl. 235; *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094.

Those higher officers, agents, or servants cannot, with any degree of propriety, be termed fellow servants with the other em-

NOTE.—For other cases in this series as to vice principalship as determined with reference to the character of the act which caused the injury, see *Lafayette Bridge Co. v. Olsen* (C. C. App. 7th C.) 54 L. R. A. 53, and *note*; *Norton Bros. v. Nadebok* (Ill.) 54 L. R. A. 842; and 57 L. R. A.

Wellston Coal Co. v. Smith (Ohio) 55 L. R. A. 99.

As to vice principalship considered with reference to the superior rank of a negligent servant, see *note* to *Stevens v. Chamberlin* (C. C. App. 1st C.) 51 L. R. A. 513.

ployees who do not possess any such extensive powers, and who have no choice but to obey such superior officers, agents, or servants. Such high officers, agents, or servants must be deemed, in all cases when they act within the scope of their authority, to act for their principal, and in fact to be the principal.

Darrigan v. New York & N. E. R. Co. 52 Conn. 285, 52 Am. Rep. 590; *Wilson v. Willimantic Linen Co.* 50 Conn. 468, 47 Am. Rep. 653.

Torrance, Ch. J., delivered the opinion of the court:

The trial court has found that, legally speaking, the sole cause of the accident to Kelly was the negligent failure to use the fender; and one of the important questions in the case is whether the defendant was responsible to Kelly for that failure. It was so responsible if, in law, the negligence of the mate was the negligence of Kelly's master; while it was not if such negligence was that of Kelly's fellow servant. The common-law rule that a master is not liable to his servant for injuries caused to the latter solely by the negligence of a competent fellow servant is recognized as the settled law of this state. *Burke v. Norwich & W. R. Co.* 34 Conn. 474; *Wilson v. Willimantic Linen Co.* 50 Conn. 433, 47 Am. Rep. 653; *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep. 590; *Zeigler v. Danbury & N. R. Co.* 52 Conn. 543; *Griswold v. New York & N. E. R. Co.* 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261; *Nolan v. New York, N. H. & H. R. Co.* 70 Conn. 159, 43 L. R. A. 305, 39 Atl. 115. The rule seems plain enough in itself, but in applying it no universal fixed and reliable principle or test for determining who are fellow servants within its meaning has been agreed upon. Different courts have adopted and applied different tests, and the natural result is conflicting decisions in the different jurisdictions, and a confused and unsettled state of the law of master and servant. Speaking generally, two rules, applied as tests in questions of this kind, have obtained a wide acceptance. Under one the test is whether the duty violated by the offending servant was one resting upon the master, or solely upon the offending servant; while under the other the test is whether the offending servant, in what he did or omitted to do, was or was not *pro hac vice* the master. Under the first rule the test is mainly the nature and character of the duty violated by the offending servant. If it was a duty resting upon the master, the master, as a general rule, is liable to the injured servant for the negligence of the offending servant; if it was not such a duty, he is not. Under this rule the rank or grade of the offending servant in the master's business or the department of it in which he is employed, as compared with that of the injured servant, is not of primary importance in determining the master's liability. Under the second rule the test is mainly the relation of the offending servant

to the master and to the injured servant. If in what he does he acts for and represents the master, and therefore *pro hac vice* is the master, then his negligence is the master's negligence. Under this rule the rank or grade of the offending servant in his master's business and the department in which he works is regarded as of primary importance in determining the master's liability. The first of these tests—the nature and character of the duty violated—is the one adopted in this state. This is the test applied in *Wilson v. Willimantic Linen Co.* 50 Conn. 433, 47 Am. Rep. 653; in *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094; and in *Sullivan v. New York, N. H. & H. R. Co.* 62 Conn. 209, 25 Atl. 711. It is also the one, if not in form, in fact at least, applied in *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep. 590; *Gerrish v. New Haven Ice Co.* 63 Conn. 9, 27 Atl. 235, and *Sprague v. New York & N. E. R. Co.* 68 Conn. 345, 37 L. R. A. 638, 36 Atl. 791, for in each of these cases the duty violated by the offending servant was held to be a duty resting upon the master. In the case at bar the trial court has found that the master violated its duty to furnish Kelly a reasonably safe place to work and reasonably safe appliances; but this conclusion is based entirely upon the fact that the fender was not used. With that in use, it is found that the place and appliances were reasonably safe. The controlling question in the case is whether it was the duty of the defendant to see that the fender was used. We think it was not. It had furnished a sufficient fender, and a place in which it could be used, and it kept the fender in a proper and convenient place at all times ready for use. In doing this it had performed its full duty in this respect. It was not obliged to be there, every time the boat was docked, to use the fender, or to see to it that it was used. It was the duty of the defendant to furnish the appliances. It was the duty of the servants to use them when necessary. When the owner of a vessel furnishes proper guard rails, gang planks, and hatchway covers for the use of the crew, we know of no case that has gone so far as to hold that he is liable to one of the crew for the negligence of a fellow servant in leaving the guard rail down, the hatchway uncovered, or the gang plank insecurely fastened. Such negligences are incidental to the use by the crew of the appliances furnished by the master, and the only way the master is required to guard against them is to appoint a sufficient number of competent servants. Our conclusion is that the court below erred in holding that the defendant was liable for the negligence of the mate upon the facts in this case. The following are a few of the many cases outside of our own Reports which might be cited in favor of the conclusion reached in this case: *Benson v. Goodwin*, 147 Mass. 237, 17 N. E. 517; *Kalleck v. Deering*, 161 Mass. 469, 37 N. E. 450; *Geoghegan v. Atlas SS. Co.* 146 N. Y. 369, 40 N. E. 507;

McLaughlin v. Camden Iron Works, 60 N. J. L. 557, 38 Atl. 677; *Sofield v. Guggenheim Smelting Co.* 64 N. J. L. 605, 50 L. R. A. 417, 46 Atl. 711.

There is error. The judgment is set aside, and the cause remanded to be proceeded with according to law.

The other Judges concur.

RHODE ISLAND SUPREME COURT.

Mary A. O'ROURKE

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

(.....R. I.....)

1. Evidence of statements to the agent taking an application for insurance, different from those written therein, are not admissible in an action on the policy, where he is the agent of the applicant.
2. Preliminary evidence is not necessary of the truth of warranties in an application for life insurance, in a suit on the policy.
3. Statements of an insurance solicitor to one making an application for insurance, as to the immateriality of facts brought to his attention, do not bind the insurer, where he is the agent of the applicant.
4. An insurance company which has rejected and retained an application cannot take advantage of a warranty in a subsequent application by the same applicant that an application by him for insurance had never been rejected.
5. An insurance company will be bound to know that an applicant for

insurance is the same as the maker of a prior rejected application, where not only the name of the applicant, but the date of birth, age, town, occupation, and parents' names, are the same in both applications.

6. A statement in a rejected application for insurance that applicant has consulted a physician for rheumatism does not charge the company with knowledge that he has that disease, so that its acceptance of a subsequent application in which applicant states that he has never had it will constitute a waiver of the falsity of the statement.
7. An infant is not bound by his warranties in a contract for life insurance.
8. The beneficiary in an insurance policy on the life of a minor is not prevented from recovery thereon because of false warranties in the contract, if he did not procure the insurance with knowledge of them.

(January 6, 1902.)

PETITION by defendant for new trial after verdict in favor of plaintiff in an action brought to recover the amount alleged to be due on a life insurance policy. *Denied.*

The facts are stated in the opinion.

NOTE.—Insurance on the life of a minor.

- I. Policies taken out by minors, 496.
- II. Insurance to secure creditors, 497.
- III. Policies taken out by others on infant's life, 499.
- IV. Insurance in benefit societies, 502.
- V. Surrender or disaffirmance of policy on infant's life, 504.
- VI. Summary, 506.

I. Policies taken out by minors.

A policy of insurance taken out by a minor on his own life is recognized as a valid contract voidable only at the instance of the minor, and if not avoided by him during minority the company will be held liable thereon. (As to surrender of policy, see subd. V., *infra*.)

In the following cases on such a contract the insurance of minors was recognized as binding on the insurance company:

In *O'ROURKE v. JOHN HANCOCK MUT. L. INS. CO.* it was held that a defense of breach of warranty could not be made on the ground that, as the warranties were not binding on the minor, they would not be binding on the beneficiaries without notice.

In this case a mother beneficiary brought an action on a policy taken out on the life of her son, a boy fifteen years old when the policy was issued. The defense was breach of warranty and misrepresentation, the insured having died during minority. It was held that during the minority of the applicant his warranties could not be set up as a defense to a suit upon the policy, and that, as the warranties were not binding upon the minor, they

were not a part of the contract, and the beneficiary was not estopped by them, she not having procured the insurance with knowledge of false statements. It was argued by the company that the answer of infancy was a privilege personal to him, and could not be taken advantage of by anyone else. The court said: "Undoubtedly this is a general rule, but its chief application is for the protection of the infant in cases where an adult seeks to avoid a contract upon that ground, when the contract has not been disaffirmed by the infant. To apply the rule in this case would amount to holding the contract good during the minority of the infant, because, the policy being on his life, no suit could be brought upon it until after his death."

In *PIPPEN v. MUTUAL BEN. L. INS. CO.* it was held that an administrator of an infant who had insured and surrendered the policy to the company could not claim that the surrender was a voidable contract, and set aside the disaffirmance of the infant, holding that the disaffirmance rendered the policy void *ab initio*.

In *Johnson v. Northwestern Mut. L. Ins. Co.* 56 Minn. 372, 26 L. R. A. 189, 59 N. W. 992, Overruling 56 Minn. 365, 26 L. R. A. 187, 57 N. W. 934, where an infant attempted to disaffirm the contract on becoming of age, it was held that a policy of insurance in an insurance company, in the absence of fraud, was a reasonable contract for an infant to make; but, as this policy provided for a surrender, the infant, on arriving at majority, could maintain an action for the surrender value of the policy.

And, where a minor effected insurance on his own life for the use of his father, and died after an illness of four months, aged twenty-

Messrs. Doran & Flanagan, for defendant:

Watson merely had a right to solicit applications and to collect money. This defendant is not affected by verbal communications made to such an agent.

Reed v. Equitable F. & M. Ins. Co. 17 R. I. 785, 18 L. R. A. 496, 24 Atl. 833.

Where there was a copy of the application on the back of the policy, showing that false answers had been given, it was the duty of the insured or beneficiary to notify the company, and it could not hold the policy after such notice without becoming a party to the fraud.

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837.

This contract of defendant was made with plaintiff, an adult.

Mary A. O'Rourke warrants the statements, or, by accepting the policy, she agrees that if they are not true she is not entitled to collect. She cannot get away from the effect of her adoption of the statements by any reference to the infancy of the person whose statements she adopted. Her situation is the same as though she signed the application.

Prudential Ins. Co. v. Fredericks, 41 Ill. App. 419; *Armour v. Transatlantic F. Ins. Co.* 90 N. Y. 450; *Cooper v. Farmers' Mut. F. Ins. Co.* 50 Pa. 299, 88 Am. Dec. 544; *Vose v. Eagle Life & Health Ins. Co.* 6 Cush. 42; *Commonwealth Mut. F. Ins. Co. v. Huntzinger*, 98 Pa. 41; 2 Beach, Modern Law of Contracts, § 1346.

If the application is annulled the policy is annulled.

one years and one month, it was held that the father was entitled to the services of his son until he attained his majority, and after that age this son, in case of indigence of his father, might be compelled to aid in his support. It was also held that the father had an insurable interest in the life of this son, and he, being also the executor of the insured, was entitled to recover. The policies were in terms payable to the executors or administrators of the insured for the use of P. G. and his father. The insured having named his father as executor of his will, the father was held entitled to recover the money in that capacity. *Grattan v. National L. Ins. Co.* 15 Hun, 74.

A minor signed an application for insurance on his life, and his father gave a note for the first premium on the condition that the policy was to be payable to the father and his heirs. The policy was made payable to the father and after his death to the son, and no objection was made until after the maturity of the note. It was held that the failure of the maker of the note to object within a reasonable time after knowledge was a waiver, and that the benefit of the policy for a year was a part consideration, and the father was liable on the note. *Roddey v. Talbot*, 115 N. C. 287, 20 S. E. 375. In this case the court does not discuss the question of the validity of a policy on an infant except as stated, the defense being that the maker of the note never received the policy at all, and the policy as written was not the kind contracted for.

An infant was insured, the policy being payable to his executors or administrators. He executed an instrument authorizing the com-

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837.

As against the plaintiff, and for the purposes of this suit, the warranty in the application made by the infant is valid, because an infant's contracts are only voidable and are good until disaffirmed, and the right to disaffirm is a right personal to the infant himself, or to his personal representatives or privies in the contract or estate involved.

2 Beach, Modern Law of Contracts, § 1346; *Roberts v. Wiggins*, 1 N. H. 73, 8 Am. Dec. 38; *Manfield v. Gordon*, 144 Mass. 168, 10 N. E. 773; *Union Cent. L. Ins. Co. v. Hilliard*, 63 Ohio St. 478, 53 L. R. A. 462, 59 N. E. 230.

Whether the infant's warranty is good or not, if the application contained no warranty the condition remains in the policy. The promise on which plaintiff sues, on its face provides that it shall be void if any of the answers are untrue.

An infant may validly contract as agent, act as trustee, or execute a power.

Talbot v. Bowen, 1 A. K. Marsh. 436, 10 Am. Dec. 747; *Sheldon v. Newton*, 3 Ohio St. 494.

Insurance upon the life of an infant, issued upon an application made by him, is not a nullity, but valid and binding upon both infant and company until disaffirmed by the minor.

Union Cent. L. Ins. Co. v. Hilliard, 63 Ohio St. 478, 53 L. R. A. 462, 59 N. E. 230; *Roddey v. Talbot*, 115 N. C. 287, 20 S. E. 375; *Chicago Mut. L. Indemnity Assn. v. Hunt*, 127 Ill. 257, 2 L. R. A. 549, 20 N. E. 55.

pany to pay the benefit to his aunt in case he died first, and he died before reaching majority. It was held that the right of the aunt to recover was not affected by his infancy, and that the assignment by him was valid, although she had no insurable interest in his life. It was further held that while the infant might have disaffirmed the policy on reaching majority, yet the insurance company could not avail itself of that fact as a defense against the person who was authorized by the insured to receive the money, and to give a complete release and discharge for the same. *Grogan v. United States Industrial Ins. Co.* 90 Hun, 521, 86 N. Y. Supp. 687.

See also next subdivision for other cases in which infants have taken life insurance, where this was done to secure creditors.

II. Insurance to secure creditors.

There are but few cases on this question, and these seem to sustain the validity of a policy issued to a minor and assigned by him as security for debts. The reasoning in the North Carolina case is to the effect that if the administrator of an infant could claim that the assignment was void, and take the proceeds, it would be a premium on the spendthrift, who ran into debt and then obtained the security for the same for his estate without any payment being made. In the Ohio case the policy then held by the insurance company as collateral for a mortgage of another was attacked by a lien holder claiming that it was void. The infant had arrived at age, and had not disaffirmed the contract, and was not a party

It passes our comprehension how this plaintiff can be allowed to affirm and set up the application, as she must by suing upon the policy issued upon it, and then claim the annulment of the condition in the policy on the ground that the application was void, and especially, considering that the application was executed by her son in her presence.

If the application was avoided it would seem to be a necessary consequence that the policy itself was also avoided.

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *Richardson v. Maine Ins. Co.* 46 Me. 394, 74 Am. Dec. 469; *Prudential Ins. Co. v. Fredericks*, 41 Ill. App. 419; *Re Globe Mut. Ben. Assn.* 63 Hun, 263, 17 N. Y. Supp. 852; *McQuitty v. Continental L. Ins. Co.* 15 R. I. 573, 10 Atl. 635.

On petition for rehearing.

The opinion establishes the law now in Rhode Island to be that a company may not rely upon the applicant's answer to the question, whether he had been rejected; that if this question is asked, an applicant who

has been rejected may with impunity falsely deny rejection.

The weight of authority is against the doctrine expressed in this part of the opinion.

Mr. Irving Champlin for plaintiff.

Stiness, Ch. J., delivered the opinion of the court:

This is an action on a policy of life insurance, in which the plaintiff is the beneficiary, upon the life of her son, a boy fifteen years old when the policy was issued. The defense is that the application contained false answers to questions which are made warranties by the terms of the policy. To the question, "Has this company ever refused to issue a policy on this life?" the answer was, "No." The plaintiff admits in her testimony that she knew that the boy had been previously rejected by this company, and says that she and her husband so stated to the agent who took the application and wrote in the answers, but that she did not know what he wrote. A question and answer of the same import is repeated on the back of the application in the state-

to the action. It was held that it could not be attacked collaterally. An English case holds the policy void where a gambling debt was secured.

A mortgagor obtained a loan of \$12,500, from an insurance company, secured by a mortgage. He also gave another mortgage on the same land to secure four notes of \$532 each. These were for advance premium notes on a policy issued on a minor's life and assigned by him to the insurance company as collateral for the mortgage notes. The administrator of the mortgagor held another mortgage on the same land, and claimed that the mortgage of the insurance company was usurious, and that the policy was void by reason of infancy. The court held that it was not usurious, and that it would not be adjudged void, the infant, having reached majority, not having elected to repudiate the same, and not being a party to this action. *Union Cent. L. Ins. Co. v. Hilliard*, 63 Ohio St. 478, 53 L. R. A. 462, 59 N. E. 230. The court said: "In the present case the record does not show that the insured has elected to avoid the contract, although it does show that he has long since reached his majority. Nor is he a party in the case, and his rights in the matter, whatever they may be, cannot be adjudicated here. . . . It does appear to work a hardship as it has turned out. But had the young man died soon after the issuing of the policy, or during the time for which the premiums had been paid, the apparent hardship would have been on the other party. It was held by a fast bargain, and would have been compelled to pay, for no court would have listened to a defense by the company, had such been interposed, based on the ground here urged by defendants in error, viz., the inability of the minor to make a binding contract."

In *Rivers v. Gregg*, 5 Rich. Eq. 274, an infant married at eighteen and died at twenty, and during that time, through extravagance, wasted a large amount of money. In an action to settle the estate, the administrator claimed the proceeds of policies effected on the infant's life by creditors who had sold him a large amount of goods. The insurance was paid to the creditors under an agreement that it was to be held 57 L. R. A.

subject to the order of the court. It was held that the creditors, having negotiated the policies at their own expense and for their own benefit and security, were fairly entitled to have the net proceeds applied as payments upon their claim against the intestate. The court said: "A third party, who is *sui juris*, may become bound for the debt of an infant, though the infant should be discharged. And I apprehend it would make no difference whether the third party were a corporation or a natural person. If the creditor of an infant, for a consideration paid by himself, obtains a guaranty of the infant's debts from a third party, I see no reason why such third party should not be bound, nor why the creditor should not have the benefit of his bargain. This I think is the true nature of the transaction. The infant certainly is not entitled to the funds thence arising. This would be to give him the whole of the creditor's goods, on the plea of infancy, and, as a premium on the plea, the whole proceeds of the policies." These policies were negotiated in the name of the minor and assigned to his creditors by him.

But the holder of a note given by an infant for money won at play was held to have no insurable interest in the minor's life. *Dwyer v. Edie*, 2 Park, Marine Ins. 914. In this case an action was brought on a policy on the life of James Russell from the 1st of June, 1784, to the 1st of June, 1785. Russell was warranted in good health, and by a memorandum at the foot of the policy it was declared that it was intended to cover the sum of \$5,000 due from Russell to the plaintiff, for which he had given his note payable in one year from the 14th of May, 1784. Two objections were made on the part of the defendant: (1) That part of the consideration for the note was money won at play; (2) that Russell at the time he gave the note was an infant. Mr. Justice Buller nonsuited the plaintiff upon the ground that part of the consideration of the note was for a gaming transaction; and therefore there was a want of interest in the plaintiff. But, as to the other objection on account of infancy, it was held that the interest must be contingent, for Russell might or might not avoid his note; and

ment to the medical examiner. Another question, "When did you last consult a doctor, and for what?" was answered, "Two years ago; bronchitis; not predisposed." Another question, asking if the boy had ever had any serious illness from either one of fifteen diseases named, including rheumatism, was answered, "No." A previous application had an answer that the boy had consulted a doctor for rheumatism in January, 1893. The case was tried to a jury, and a verdict was rendered in favor of the plaintiff for the sum of \$243.40, the amount claimed, and the defendant petitions for a new trial, upon the grounds that the verdict was against the evidence, and that there were errors of law in rulings at the trial.

The first, third, fifth, and sixth exceptions were to the admission of testimony by the plaintiff that at the time of this application the defendant's agent was told that the applicant had been previously rejected by this company, and as to the powers of the agent. Taken by themselves, the rulings were erroneous. In *Reed v. Equitable F. & M. Ins. Co.* 17 R. I. 785, 18 L. R. A. 496, 24 Atl. 833, this court adhered to the

rule, recognized in this state since *Wilson v. Conway F. Ins. Co.* (1856) 4 R. I. 141, that an agent in simply procuring insurance is the agent of the applicant, and not of the company, in drawing the application, and that the applicant is responsible for his mistakes and false answers. See also *Bryan v. National Life Ins. Assn.* 21 R. I. 149, 42 Atl. 513. Testimony of what was stated to or by the solicitor was therefore immaterial. The effect of these rulings will be considered later.

The second exception related only to the form of a question claimed to be leading, which is not important.

The fourth exception was to the refusal of the trial judge to direct a verdict for the defendant, because of failure to prove the warranties embraced in the questions and answers stated above. It was held in *Sweeney v. Metropolitan L. Ins. Co.* 19 R. I. 171, 38 L. R. A. 297, 36 Atl. 9, that such answers are warranties, which must be proved by the plaintiff, but which, for convenience of trial, may stand on presumption or prima facie evidence until contradicted, like the signature and consideration of a promissory note. There was, however, tes-

he doubted much whether, till so avoided, the note must not be taken against a third person to be the note of an adult, for the maker of the note only could take the objection.

III. Policies taken out by others on infant's life.

In policies taken on the life of an infant for the benefit of another the question involved usually is: Had the beneficiary sufficient interest in the infant's life? Where this is the chief question the subject of the propriety of insuring the lives of minors is seldom discussed. A New York statute authorizes a person liable for the support of an infant to take out insurance on his life in a limited amount. But this is held not to limit the number of policies. A Canada statute also recognizes the right of parents to take out insurance on the lives of their children. The question of insuring infants' lives was discussed and discouraged in *Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1036, holding a policy void for want of interest in the life of a nephew. In that case the insured had no knowledge of the insurance, and had been exposed to diphtheria. It may be said that, in the absence of a restrictive statute, insurance on infants' lives for the benefit of persons having an insurable interest therein will be sustained. The policy of such insurance is very questionable, as it opens up an avenue to the neglect of the lives of those of tender years, and possibly may lead to murder.

In the following cases it was held that policies were valid:

A father who effected insurance on the life of a minor son who was about proceeding to California, and to whom he had made large advances, was held to have a pecuniary interest in the life of his son, and the insurance was held valid. *Mitchell v. Union L. Ins. Co.* 45 Me. 104, 71 Am. Dec. 529. In this case the court said: "The father is entitled to the earnings of his minor child, and may maintain an action for their recovery. If the child be injured, he is entitled to an action *per quod creditum amittit*. He has a pecuniary interest in the life of a minor child, which the law

will protect and enforce. An insurance, therefore, on the life of such child is not within the rule of law by which wager policies are declared void."

And where a father assented to his minor son's entering the employ of a trading company, and relinquished any claim to his services so far as said company was concerned, and furnished an outfit out of his boy's former earnings, and effected an insurance on his life,—it was held that the father had an insurable interest in his life. *Loomis v. Eagle Life & Health Ins. Co.* 6 Gray, 396. The court said that in this case the assured had a direct and pecuniary interest in the life of his son. "But, upon broader and larger grounds, we are of opinion that, independently of the fact that the son was a minor, and the assured had a pecuniary interest in his earnings, the assured had an insurable interest sufficient to maintain this action."

In *McCoy v. Metropolitan L. Ins. Co.* 133 Mass. 82, a policy was issued to a mother on the lives of three of her children. One of the children was sick at that time, and an action was brought on the policy. A count in the declaration also claimed for money had and received. The defense was misrepresentations in the application as to the health of the child. The plaintiff claimed that these had been inserted by the agent, and that she had given him true statements. But it was held that if so they were part of the contract, and it could not be proved by oral evidence that the company knew the representations were untrue. It was further held that, as the question of recovery of premiums was not made in the trial, it would not be heard on appeal. The case does not show that the insured were minors, but it is evident from the language used that they were.

And in *Anderson v. John Hancock Mut. L. Ins. Co.* 27 N. Y. S. R. 275, 7 N. Y. Supp. 601, a policy had been taken out by a mother for her benefit on the life of her child. A collector was accustomed to call for weekly premiums, but failed to call for several weeks. The mother applied at the office for reinstatement, and signed a paper. At the trial she

timony that the answers were true, except as to rheumatism and the previous rejection, which will be considered under the seventh and eighth exceptions.

The seventh exception relates to an alleged statement by the solicitor that the former rejection was an immaterial matter, which statement, if made, would bind the company. It does not appear from the charge that the judge so ruled, but, inasmuch as the jury were allowed to consider the fact whether the agent made the statement, the exception is applicable. The solicitor in making the application, being, as we have said, the agent of the insured, would not bind the company by his statements. But another question is presented which renders this question of fact of what the agent said quite unimportant. The previous application was in the hands of the company. The rejection of it was by the defendant itself. The purpose of warranties in a policy is not to set a trap for applicants, but to inform the company about important facts upon which the contract is based. When, therefore, a company is in actual possession of knowledge of a fact, and by turning to its own record can assure itself better than by

the imperfect memory of an applicant, it is a perversion of the purpose of a warranty to allow it to avoid a contract. It is evident injustice for one party to allow another to enter into a contract which the former knows, or is bound to know, is invalid. As stated in *Reed v. Equitable F. & M. Ins. Co.* 17 R. I. 785, 18 L. R. A. 496, 24 Atl. 833, it is taking advantage of one's wrong. See also *Greene v. Equitable F. & M. Ins. Co.* 11 R. I. 434.

The defendant argues that it is unreasonable to hold that a company is bound to have present knowledge of all that appears on its previous files. To this suggestion at the trial the judge asked the pertinent question: "Any more so than it was to ascertain that fact just after the boy died? They have taken the money. Now, just as soon as the boy died, and the beneficiary asks to be paid, then their records are looked up; then they saved the record." The company had exactly the same information in its possession at the time the contract was made that it has now. If it is available at one time, it ought to be imputable at the other. But it is said that the company cannot be supposed to know that it is the same per-

claimed that when she signed the paper she was ignorant of its contents, and that there was no inquiry made of her as to whether the child was sick. The paper stated that the child was well at the time of the reinstatement of the policy. The court left it to the jury to decide whether the plaintiff was guilty of fraud or misrepresentation, and they found a verdict for plaintiff. No discussion appears in the case as to the right to insure infants.

In *Hilliard v. Sanford*, 4 Ohio N. P. 363, 6 Ohio Dec. 449, where insurance was issued on the life of a minor, it was held that a grandfather has an insurable interest in the life of his grandchild, because the relationship is such that it will support—as a good consideration for—a gift, or a deed, or a grant.

And in an action to recover the amount of a policy of insurance upon the life of a child ten years of age, the plaintiff's step sister, evidence was given of a promise made by the plaintiff to the mother of the child to take care of her and help maintain her. No objection was made on behalf of defendants that the plaintiff had not in fact incurred any expenditure in respect of the child. It was held that the plaintiff had an insurable interest in the child's life, and was entitled, in the absence of any objection as to the amount in fact expended by her, to recover the amount of the policy. *Barnes v. London, E. & G. L. Ins. Co.* [1892] 1 Q. B. 864.

In *Valley Mut. Life Assn. v. Teewalt*, 79 Va. 421, it was said: "It is now well settled that a father has an insurable interest in the life of his child, whether a minor or of full age, and the child in the life of his father."

In *O'Rourke v. John Hancock Mut. L. Ins. Co.* 10 Misc. 405, 31 N. Y. Supp. 130, in an action on a policy where the defense was that it was in contravention of N. Y. Laws 1892, chap. 690, § 55, providing that a person liable for the support of a child of the age of one year and upwards may take out a yearly renewable term policy of insurance thereon, not exceeding the sums specified in the following table " . . . between the ages of one and two years, \$30,"—it was held that this statute, in so far as it limits the amount of insurance

to be carried, is in derogation of the rights of a parent at common law to effect insurance upon the life of a minor child, and is therefore to be given that strict construction which must obtain in the case of such an enactment. It was further held that such statute did not prohibit making more than one such contract, and that a policy taken upon the life of a child, by virtue of its provisions, cannot exceed the sums specified in the schedule set forth, and that a later statute (Laws 1893, chap. 175), clothed the mother with the powers, rights, and duties with regard to her children equal to those of her husband.

In *Metropolitan L. Ins. Co. v. Bowser*, 20 Ind. App. 557, 50 N. E. 86, where a mother insured the life of her minor daughter and others without their knowledge, and brought an action to recover the premiums, it was held that, in the absence of any evidence showing that such policies were void, she could not recover the premiums paid.

An infant was insured, the policy being payable to the beneficiary as provided in the application, but the application named no beneficiary. On the bill of interpleader the fund was claimed by the executor of the step mother of the insured, the latter being a child eight years of age when the policy was issued, and the fund was also claimed by the husband and administrator of the insured. It was held that the step mother was the contracting party, the application being made by her. The evidence showed that the insured paid the premiums in part after her marriage. It was held that the fact that the step daughter was the person insured raised no implication in her favor as beneficiary when the contract was not made by her and did not run to her benefit by its terms, and that the fund was payable to the executor of the step mother. *John Hancock Mut. L. Ins. Co. v. Lawder*, 22 R. I. 416, 48 Atl. 883.

In *Weber v. Metropolitan L. Ins. Co.* 172 Pa. 111, 33 Atl. 712, the policy was issued to an aunt on the life of her nephew, who was a minor nineteen years of age and living with the plaintiff, who was his aunt and stood as to him *in loco parentis*. In an action on the pol-

son, even though the name may be the same. While this might be so in some cases, we do not see that there would be any uncertainty in this case, because the applications identify the same applicant by date of birth, age, town, occupation, and parents' names. There was ample opportunity for examination, as the application was dated July 22, 1896; the medical examination was August 22, 1896; it is stamped, doubtless by the company, September 2, 1896; and the policy was not issued until September 9, 1896. In *Jerrett v. John Hancock Mut. L. Ins. Co.* 18 R. I. 754, 30 Atl. 793, there had been a previous rejection, but the policy was held to be invalid because neither application stated the fact, called for by a question, that a sister of the assured had died of consumption. This was a fact that the company could not be held to know, and hence the case was essentially different from the case at bar. The answer about rheumatism stands in a somewhat different relation. The first application was dated March 3, 1893, and it stated that the boy had consulted a physician for about four attacks of rheumatism in January. The company had no possible knowledge from this

that he had rheumatism, and may have relied upon the denial of it in the present application as showing that his trouble which he thought to be, turned out not to be, rheumatism. The evidence of the plaintiff was that he had rheumatism. This might have been after the first application, and so outside of any implied notice. Up to this point we find no ground for a new trial, because the statements to the solicitor did not prejudice the defendant, by reason of the knowledge of the facts imputed to it in its previous rejection of the applicant.

The answer about rheumatism is included in the general ground of defense raised by the eighth exception, which is to the refusal of the court to charge as follows: "If the boy did sign an application containing a material untrue statement, the beneficiary is bound, and the policy is void." The defendant had notice from the application itself that it was dealing with a minor and taking his warranties. The question, therefore, is whether an infant is bound by his warranties in a contract of insurance. In considering it we have not the advantage of weighing the reasons given in previous decisions, for we have been unable to find a

where the defense was misrepresentation and breach of warranty, and a verdict was had for plaintiff. On appeal the judgment was affirmed on a division of opinion. The case does not construe the question of infancy.

Under 55 Vict. chap. 39, § 35, subsec. 5, Ont. 1892, providing that in respect of all insurance effected on the life of a person under twenty-one years of age, when such insurance has been effected by a parent on the life of a child, such insurance shall not be deemed to be invalid by reason only of the parent's want of pecuniary interest in the life of the child, it was held that policies issued on applications made by the mother on her child's life (seven years old) with the mother as beneficiary were not void at the instance of the father, who sued to recover back the premiums advanced. He claimed that it was done without his knowledge, but after he had knowledge he acquiesced in the payment of the premiums thereon. *Wakeman v. Metropolitan L. Ins. Co.* 30 Ont. Rep. 705. In this case the court said: "A great part of the argument was occupied in discussing what law, whether of Ontario or of New York, was applicable. No point of this kind is made in the pleadings; on the contrary, the contention of the fourteenth paragraph of the claim is that Canadian law governs the policies, and there is really no proper evidence to lay a basis for determination on this point. If Ontario law governs, then the insurance on the life of the child by the mother is legalized by retroactive legislation, which binds this company. 55 Vict. chap. 39, § 35, subsec. 6 (Ont.). This statute coming into force on April 14, 1892, made valid all such insurances theretofore affected, covering, therefore, these two of 1890 and 1891. If New York law obtains, then I find it decided, long before the making of this insurance, that a parent has an insurable interest in the life of a child. *Grattan v. National L. Ins. Co.* (1878) 15 Hun. 74, 76; *Loomis v. Eagle Life & Health Ins. Co.* (1856) 6 Gray, 396; and *Reif v. Union Mut. L. Ins. Co.* 17 Ins. Chron. p. 3, cited in *May on Insurance*, 4th ed. § 107, p. 190. In this regard the American law is more liberal than the English, 57 L. R. A.

as expounded in *Halford v. Kymer* (1830) 10 Barn. & C. 724."

But in *Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1056, holding that a policy was void where an insurance was taken out by a beneficiary on his nephew, thirteen years old, without his knowledge, after he had been exposed to diphtheria, it was said: "The insurance of children who are helpless and under the control and authority of others is susceptible of such possibilities of evil that it should not be encouraged, and the evidence ought to establish an insurable interest most clearly and satisfactorily before a verdict should meet the approval of a trial court."

And in *Halford v. Kymer*, 10 Barn. & C. 724, where a father insured the life of his son before he attained the age of twenty-one, for the father's benefit, and the son made a will shortly after arriving at majority giving all his property to his father, it was held that the father had no pecuniary interest in the life of his son when he effected the policy, under 14 Geo. III. chap. 48, § 1, providing that no insurance shall be made on the life of any person wherein the person for whose use or benefit, or on whose account, such policy shall be made, shall have no interest, and that every insurance made contrary shall be null and void; and the father could not recover on the policy.

For a discussion of the principles of this case, see *Life Insurance Clearing Co. v. O'Neill* (C. C. App. 3d C.) 54 L. R. A. 225, note, *Insurable interest in life of parent or child or other relative by blood*.

In *Innes v. Equitable Assur. Co.*, a nisi prius case, before Kenyon, J. (Followed in *Halford v. Kymer*, 10 Barn. & C. 724), the plaintiff effected a policy on the life of his daughter. In order to show his interest he produced a purported will showing that he was entitled to £1,000 in the event of his daughter dying under the age of twenty-one. Innes was convicted of forgery of the will, and an attesting witness was convicted of perjury. Lord Tenterden, Ch. J., in the *Halford Case*, said: "It was in effect admitted in that case that it was necessary to prove that the father had a pecu-

case like this reported. Certain principles, however, are well settled in regard to infancy. It is an elementary rule that infants are incapable of making contracts, except for necessities. Such contracts are voidable, but not void. The infant may avoid his contract, but an adult contracting with him cannot. A contract may thus be binding on an adult when it is not binding on an infant. *Dearden v. Adams*, 19 R. I. 217, 36 Atl. 3; *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640.

As an infant is not liable on his contract, he is not liable for warranties or representations upon which the contract is based. Thus, in *West v. Moore*, 14 Vt. 447, 39 Am. Dec. 235, it was held that infancy was a bar to an action founded upon a false and fraudulent warranty upon the sale of a horse. *Prescott v. Norris*, 32 N. H. 101. In *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345, the contract was for fire insurance on the property of an infant. It was held that it was not a contract for necessities, and that the infant was not liable on his premium note. In *Doran v. Smith*, 49 Vt. 353, it was held that infancy was a bar to an action on the case for false

and fraudulent representations by a vendor or pledgee as to his ownership of property sold or pledged. In *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659, the court said that an infant is liable in an action *ex delicto* for an actual and wilful fraud only in cases in which the form of action does not suppose that a contract has existed, but that, when the gravamen of the fraud consists in a transaction which really originated in contract, the plea of infancy is a good defense. See notes to this case in Ewell, Lead. Cas. 206; *Freeman v. Boland*, 14 R. I. 39, 51 Am. Rep. 340. The principle of these cases is that infancy is a bar for misrepresentations based upon a contract. It is to be noted that the cases cited were brought by the adult against the infant. But if the plaintiff cannot sue the infant upon his warranties, upon what principle can he set up the same warranties in defense? In either case he is seeking to enforce the contract as made by the infant. In *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286, where a minor who had agreed to work for the defendant for six months at least, and to give no less than two weeks' notice before leaving, left within six months, and

niary interest in the life of his daughter, otherwise there would have been no occasion to go into the question as to the will, and unless it were a fact material in the case the witness could not have been convicted of perjury."

In *Cronin v. Vermont L. Ins. Co.* 20 R. I. 570, 40 Atl. 497, it was held that the English act of 1774, 14 Geo. III. chap. 48, § 1, has never been taken as a part of our law, but its rule was generally followed in this country as declaratory of the common law. But in defining the term "interest" the tendency of the decisions, both in England and this country, has been inclusive rather than exclusive; and it was held that an aunt had an insurable interest in the life of her niece. The case does not show whether the niece was of age or not. (See subd. II. *supra*.)

As to *Insurable interest in life of parent or child or other relative by blood*, see *Life Insurance Clearing Co. v. O'Neill* (C. C. App. 3d C.) 54 L. R. A. 225, note.

As to *Consent of the person whose life is insured as a condition of insurance thereon*, see *Martin v. McAllister* (Tex.) 56 L. R. A. 585, note.

IV. Insurance in benefit societies.

The right of an infant to become a member of a benefit society with all the privileges incident thereto is questionable. The duties of the members and the business of such institution would seem to require that the members should be free from all disabilities. In a majority of the cases that have arisen it has been held that, under the statutes of the several states that were involved, an infant cannot be a member of a mutual benefit society. The contrary was held in Illinois, and in an English case a contract with a benefit society was held binding on an infant. An English statute seems to allow the insurance of minors by friendly societies.

In *Re Globe Mut. Ben. Asso.* 135 N. Y. 280, 17 L. R. A. 547, 32 N. E. 122, it was held that a mutual benefit association, organized under N. Y. Laws 1883, chap. 175, providing for the incorporation of co-operative life and casualty

companies, had no power to receive as members infants of such tender years that they were incapable of exercising any choice in becoming members, or of appointing a beneficiary, or of exercising the powers with which members are invested by this statute. The court said: "There is nothing in the statute which permits the inference that a child may be made a member of the corporation upon the application of the parent, or that a beneficiary may be designated or changed by any person except the member himself." The court further said "that it appears from a consideration of the statute of 1883 and the nature and object of co-operative insurance companies and the relation which members hold to corporations, that adult persons only were contemplated as entitled to membership."

In *People v. Industrial Ben. Asso.* 92 Hun, 311, 36 N. Y. Supp. 903, Affirmed in 149 N. Y. 606, 44 N. E. 1127, it was said that the act of 1883 was repealed by the insurance law, and, construing the insurance law, it was held: "It seems to be reasonably clear that, taking article 6 by itself, it must be deemed to have been the intention of the legislature to limit the business of any corporation engaged in life insurance upon the co-operative or assessment plan to that business as defined by § 201. It is practically conceded that under article 6, standing alone, the business here in controversy could not be done. Section 201 is, so far as this question is concerned, substantially like § 5 of the act of 1883, and the case cited from the court of appeals would apply."

And Mich. pub. act 1887, chap. 187, § 16, providing that corporations doing business in this state, under the provisions of this act, shall not issue any policy or certificate of membership upon any person not capable in law of making contracts, operates to prevent persons under the age of twenty-one from becoming members of corporations organized under that act for the purpose of doing a life insurance business, except for necessities. *Re Insurance of Minors*, 5 Det. L. N. (Atty. Gen.'s Op.) No. 18. In this opinion it was said "that a contract of insurance (fire) has been held not to be a contract for necessities. *Monaghan v.*

without giving such notice, the question was whether the defendant could deduct the damages occasioned thereby from what he would otherwise be entitled to recover from his labor. The court held that no deduction could be made, saying: "To compel the minor thus to make good the loss occasioned by the nonperformance of his contract is virtually to enforce the contract, and thus to enforce the contract is, in effect, to abrogate the rule of law that a minor is not bound by his contract." This language was quoted in *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640, apparently with approval, although the decision of the court in that case proceeded upon the theory that, as there was no binding contract, the plaintiff could recover reasonable compensation, which might include a deduction for injury done. We think the reasoning of *De-rocher v. Continental Mills* is sound, and that the terms of a minor's contract can no more be set up defensively than offensively.

The defendant argues that the answer of infancy is a privilege personal to him, and that it cannot be taken advantage of by anyone else. Undoubtedly this is a general

rule, but its chief application is for the protection of the infant in cases where an adult seeks to avoid his contract upon that ground, when the contract has not been disaffirmed by the infant. To apply the rule in this case would amount to holding the contract good during the minority of the infant, because, the policy being on his life, no suit could be brought upon it until after his death. He could only disaffirm it by refusing to pay premiums, and thus forfeiting the policy. If it were an endowment policy maturing before his majority, it follows, from what we have said, that he could sue upon it without being bound by his warranties. If after majority he should continue to pay premiums, he might be regarded as having affirmed the contract, as in *Morrill v. Aden*, 19 Vt. 505.

Our conclusion is that during the minority of the applicant his warranties cannot be set up in defense to a suit upon the policy. But, even if this is so, the defendant argues that the beneficiary cannot recover, because, the policy being conditional upon the truth of the statements, she is estopped by false statements on the face of the contract. Undoubtedly this would be the rule

Agricultural F. Ins. Co. 53 Mich. 238, 18 N. W. 797.

In *People v. Industrial Ben. Asso.* 92 Hun, 311, 36 N. Y. Supp. 963, Affirmed in 149 N. Y. 606, 44 N. E. 1127, it was held that a benefit association was not entitled to the benefit of a general provision (N. Y. Laws 1892, chap. 690, § 55) that "no policy or agreement for insurance shall be issued upon the life or health of another or against loss by disablement by accident, except upon the application of the person insured. . . . A person liable for the support of a child of the age of one year and upward may take a yearly renewable term policy of insurance thereon, the amount payable under which may be made to increase with advancing age, and which shall not exceed the sums specified in the following table, the ages wherein specified being the age at time of death, and which, after the age of thirteen, may become an ordinary life policy for an amount not exceeding the sum specified in the table. Between the ages of one and two years, \$30. . . . Between the ages of twenty and twenty-one years, \$900." In respect of insurance heretofore or hereafter, by any person not of the full age of twenty-one years but of the age of fifteen years or upwards, effected upon the life of such minor, for the benefit of such minor or for the benefit of the father, mother, husband, wife, brother, or sister of such minor, the assured shall not, by reason only of such minority, be deemed incompetent to contract for such insurance, or for the surrender of such insurance, or to give a valid discharge for any benefit accruing, or for money payable under the contract. This construction bars a benefit association from embarking in such insurance, but recognizes that the right to issue such policies is given to corporations engaged in a general life insurance business. A careful reading of this statute to validate insurance of infants fifteen years old, although it authorizes them to surrender or discharge such insurance, seems to indicate that the surrender and discharge contemplated are such as adult policy holders may make. In other words, it seems to change the infant's relations in insurance contracts so that they are not voidable at the 57 L. R. A.

election of the infant. But this question does not appear to have ever arisen.

And under Pa. act May 23, 1891, P. L. 107, providing that it shall be lawful for beneficial and protective associations to pay, and to enter into contracts to pay, to each member thereof certain sums of money, it was held that the capacity for membership was to be tested by the ordinary rules of law. It was also held that minors under twenty-one years of age were incapable of contracting, and could not qualify as members of such association. It was further held, in a quo warranto proceeding, that such insurance was not lawful. *Com. ex rel. Atty. Gen. v. People's Mut. Life & Relief Asso.* 6 Pa. Dist. R. 561.

In *Com. v. Keystone Ben. Asso.* 171 Pa. 465, 32 Atl. 1027, referring to this statute and a similar benefit society, it was said: "The constitution and by-laws provide for membership by persons between two and sixty years of age. Infants cannot make the contract of membership for themselves, and it is not clear how the parents can make it for them, and, as the statute only authorizes insurance of members, not of other persons in whom members may have an insurable interest, the legality of this branch of the business would seem to be open to question. On this, however, we do not pass. It was not raised or argued, and we only refer to it now to make this fact clear."

A minor was insured in a railroad benefit society, agreeing that part of his wages should be retained monthly as fees. He constituted his uncle his beneficiary, and at his death the fund was paid into court and claimed by his father. It was stipulated that, if the uncle was not entitled to the same, judgment should go for the father. It was held that the direction in the application that the money should be paid to his uncle was voidable for the reason that an infant or person under age could not give such direction by reason of his minority, as the designation of the beneficiary by a member of the society is a testamentary act, and to make it valid it requires a person to execute it of full and lawful age. It was further held that while the rules would give the fund to the father the court was only required to

in the case of a valid contract, because she could recover only on the terms of the contract. This contract purports to have been made with the minor. The beneficiary has made no statements of her own. If the warranties are not binding upon the minor, then, in legal effect, they are not a part of the contract, and the beneficiary is not estopped by them. This does not mean that a beneficiary may not be estopped by fraudulent conduct of her own; for example, if she had procured the insurance on this application with knowledge of the false statements. But we do not find that fact in this case.

A copy of the medical examination is on the back of the policy, and it is claimed that notice is imputed to her of its contents. Even so, it shows only a denial of any serious illness from rheumatism, and, while it appears from testimony that "he has had

rheumatism," it does not appear that it was serious, so as to charge the plaintiff with knowledge of a false warranty. There was a conflict of testimony as to her knowledge of the statements, and it does not clearly appear from the record that much stress was laid upon the fact. We may assume, however, that the question was before the jury, otherwise the testimony would have no relevancy, and from the verdict for the plaintiff that she did not know the contents of the application. It therefore appears that she is not estopped by the terms of the contract, nor by any conduct of her own which precludes her from recovery.

We think that the defendant is not entitled to a new trial either upon the ground of erroneous rulings or verdict against the evidence.

Rehearing denied.

pass upon the question as to whether the uncle was entitled to the fund. *Burst v. Welsenborn*, 1 Pa. Super. Ct. 276.

In *Newbold Friendly Soc. v. Barlow* [1893] 2 Q. B. 128, it was held that a friendly society was liable for a penalty, under friendly societies act 1875, § 28, providing that no society shall pay any sum on the death of a child under ten years of age except upon production of a certificate of death issued by the register of deaths. In this case the society had paid a sum of money on the death of a child under ten years of age without the production of a certificate of death. The articles of association were to provide subscriptions for the relief and maintenance of members during sickness, and for insuring money to be paid for funeral expenses, and for all other purposes incident; and "it is hereby declared that the society does not intend, nor shall it be empowered, to issue policies of assurance on human life, or grant annuities on human life, within the meaning of the life assurance companies act 1870." In this case the court said: "If such bodies of the appellants are not within the section, the lives of children under ten are deprived of the protection intended to be thrown around them by the section in question."

But in *Chicago Mut. Life Indemnity Asso. v. Hunt*, 127 Ill. 257, 2 L. R. A. 549, 20 N. E. 55, which was an information to dissolve a benefit association, it was held that minors were not, merely because of their minority, disqualified from becoming members of mutual benefit societies, and that their admission was not such a violation of public policy as would subject such a society to dissolution in the absence of any statute. In this case the court said: "The contention is, that the certificate of membership is a personal contract between the member and the association, and that, as an infant is capable of making only a voidable contract, his admission to membership is a violation of those principles of mutuality which lie at the basis of mutual benefit societies. . . . While the certificate of membership is a contract, such contract, in the absence of express stipulations to the contrary, is purely unilateral. . . . If he fails to pay his assessments or dues, or does any act forbidden by the certificate of membership, the certificate becomes void and the membership ceases. . . . We do not assent to the view that, as a further consequence of his disability, he may recover back the dues and assessments he may have already paid. . . . Nor are we able to see any force in the suggestion that minors

should not be admitted to membership because of their incapacity to act as trustees, or to perform the duties of members at corporate meetings, such as consulting or giving advice for the mutual benefit of the members, voting for officers, and the like. . . . There would seem to be no legal obstacle in the way of minors taking part in corporate meetings, consulting, advising, or even voting."

One of the exceptional cases holding that an infant may become a member of a benefit association is *Clements v. London & N. W. R. Co.* [1894] 2 Q. B. 482, 9 Reports, 223, 42 Week. Rep. 338, 58 J. P. 816, where the point decided was that the infant could not repudiate the contract; and the decision is placed upon the ground that the contract was beneficial and to his advantage.

V. Surrender or disaffirmance of policy on infant's life.

The extent of the right of an infant who seeks to surrender a policy, to disaffirm the contract and recover back the money paid by him, on the ground of minority, is a question which does not seem to have been fully determined in all respects. In the case of *PIPPEN v. MUTUAL BEN. L. INS. CO.* the surrender had been accepted by the insurance company, and the question in that case was whether the administrator of the infant could avoid the infant's disaffirmance. The administrator insisted that the disaffirmance was a void contract, and that he could take advantage of that and set aside the surrender. It was held otherwise by the court, saying: "The disaffirmance of the contract by voluntarily surrendering it rendered the contract void *ab initio*, and the intestate then became entitled to be restored to his original status, which is not the subject of this controversy." In this case the court said: "His disaffirmance could have been made, either by refusing to perform his part of the contract, and then pleading his disability in a suit for its enforcement, or by a voluntary annulment or cancellation made by agreement with the company. And it appears that he adopted the latter course, by a voluntary surrender of the policy and receiving its cash value."

In the case of *Johnson v. Northwestern Mut. L. Ins. Co.* 56 Minn. 372, 26 L. R. A. 189, 59 N. W. 992, Overruling 56 Minn. 365, 26 L. R. A. 187, 57 N. W. 934, the infant on becoming of age attempted to disaffirm the contract and recover the money paid. It was held that life insurance by infants in a reasonable amount

NORTH CAROLINA SUPREME COURT.

F. L. PIPPEN, Admr., etc., of J. H. Pippen,
Deceased, Appt.,
v.

MUTUAL BENEFIT LIFE INSURANCE
COMPANY.

(130 N. C. 23.)

1. An infant's surrender of a policy on his life for a cash value, fairly made without undue influence, cannot be avoided by his administrator and the insurance contract enforced, although the infant did not receive the whole amount to which the contract entitled him.
2. A surrender of an insurance policy to the insurer for its cash value is not a sale which can be disaffirmed by the administrator of the insured on the ground of

the latter's infancy, but it is merely a rescission of the contract.

(March 4, 1902.)

APPEAL by plaintiff from a judgment of the Superior Court for Halifax County in favor of defendant in an action brought to recover the amount alleged to be due on a life insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. Day & Bell for appellant.

Messrs. Burwell, Walker, & Cansler and *Thomas N. Hill*, for appellee:

The application and policy constitute the contract of insurance, to be construed as other contracts. It is a promise to pay money upon certain conditions and upon the happening of a certain event.

would be sustained, saying that if insurance was taken so as to impose on the infant such a contract would be set aside. It was also held that the risk in carrying the insurance while the policy was not disaffirmed would prevent a recovery of the premiums on that risk. But it was held that, as under the contract he would be entitled to recover the surrender value of the policy, he was entitled to maintain the action therefor. In this case the court said: "Life insurance in a solvent company, at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate, or his financial ability to carry it, is a provident, fair, and reasonable contract, and one which it is entirely proper for an insurance company to make with him, assuming that it practises no fraud or other unlawful means to secure it; and if such should appear to be the character of this contract the plaintiff could not recover the premiums which he has paid in, so far as they were intended to cover the current annual risk assumed by the company under its policy. But it appears from the face of the policy that these premiums covered something more than this. The policy provides that after payment of three or more annual premiums the insured will be entitled to a paid-up nonparticipating policy for as many twentieths of the original sum insured (\$1,000) as there have been annual premiums so paid. The complaint alleges the payment of four annual premiums. Hence, the plaintiff was entitled, upon the surrender of the original policy, to a paid-up, nonparticipating policy for \$200, and it therefore seems to us that, having elected to rescind, he was entitled to recover back in any event the present cash "surrender" value of such a policy. For this reason, as well as that the burden was on the defendant to prove the fair and honest character of the contract, the demurrer to the complaint was properly overruled."

In *Metropolitan L. Ins. Co. v. Bowser*, 20 Ind. App. 557, 50 N. E. 36, a woman brought an action against an insurance company to recover the premiums paid for insurance taken out for her benefit by plaintiff at the instance of the agent of the company, on the lives of her minor daughter, son-in-law, brother, two nieces, and the mother-in-law of the niece, on the ground that such policies had been taken out without the knowledge of the insured, and that they were void. It was held that the plaintiff could not recover where no rule, by-law, or statute was shown rendering such policies void for want of consent, and there were no facts found

showing that she did not have an insurable interest in the lives insured. In regard to the infant, the court said: "The liability to return the premiums paid depends upon whether there is a contract of insurance under which a risk is run by the insurer in favor of the insured. To constitute such a contract there must be parties capable of contracting. If the case could be said to present for consideration a contract of insurance with an infant, such a contract for his benefit is not void, but only voidable at his election. The insurance company in such a case could not avoid the policy merely upon the ground of the infancy of the insured. *Monaghan v. Agricultural F. Ins. Co.* 53 Mich. 238, 18 N. W. 797. Where a minor takes out a policy of insurance on his own life, he cannot, on reaching majority, in the absence of fraud and unfairness, recover back premiums paid by him upon the ground alone of his infancy, such a contract not being void. *Johnson v. Northwestern Mut. L. Ins. Co.* 56 Minn. 365, 26 L. R. A. 187, 57 N. W. 934, 59 N. W. 992."

And where an infant at the time of entering the employ of a railway company made a contract, as part of the contract of service, that in case of injury he was to be compensated by an insurance company formed among the employees of the railway, and towards which the railway company contributed, it was held that it was a contract for the advantage of the infant, and therefore he could not repudiate that contract and recover directly from the railway company for injuries received. *Smith, L. J.*, said: "In my judgment it is a fair contract for the infant. First of all, no matter how the accident may happen to him, and whether he has a remedy in a court of law or not, he is to have payments made to him according to the scale set out in the rules of the society. He avoids litigation, . . . to pay costs as between solicitor and client out of the damages he may recover. He avoids also the uncertainty of getting a verdict and the difficulty of establishing a cause of action. In my judgment, the agreement, instead of detrimental to the infant, is, on the whole, manifestly to his advantage." *Clements v. London & N. W. R. Co.* [1894] 2 Q. B. 482, 9 Reports, 223, 42 Week. Rep. 338, 58 J. P. 816.

But, so far as the above case sustains the validity of a contract by an employee to accept benefits from a relief organization as his sole remedy for injuries and not to sue the employer, it is not in accord with many of the decisions in this country, such, *e. g.*, as *Pitts-*

Bobbitt v. Liverpool & L. & G. Ins. Co. 66 N. C. 70, 8 Am. Rep. 494; *Cuthbertson v. North Carolina Home Ins. Co.* 96 N. C. 480, 2 S. E. 258; *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789.

It is an executory contract.

Lovell v. St. Louis Mut. L. Ins. Co. 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390.

The policy became personal property when delivered.

Conigland v. Smith, 79 N. C. 303; *Simmons v. Briggs*, 99 N. C. 236, 5 S. E. 235; *Hooker v. Sugg*, 102 N. C. 115, 3 L. R. A. 217, 8 S. E. 919.

A policy may be surrendered when there is no forfeiture.

Mutual L. Ins. Co. v. Phinney, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. Rep. 906; *Mutual L. Ins. Co. v. Sears*, 178 U. S. 345, 44 L. ed. 1096, 20 Sup. Ct. Rep. 912; *Mutual L. Ins. Co. v. Allen*, 178 U. S. 351, 44 L. ed. 1098, 20 Sup. Ct. Rep. 913; *Mutual L. Ins. Co. v. Hill*, 178 U. S. 347, 44 L. ed. 1097, 20 Sup. Ct. Rep. 914.

The intestate had possession of the policy more than a year before its surrender, and had an opportunity fully to understand the character and nature of the contract.

The receipt and the return of the policy created a cessation and complete determination of all relations between the intestate and the company in regard to the policy, and the contract of insurance was thereby disaffirmed and became void.

Skinner v. Maxwell, 66 N. C. 45.

A contract is disaffirmed by any conduct which is inconsistent with the existence of the contract, and shows an intention not to be bound by it.

Clark, Contr. ¶ 129, p. 252; *Crown Point v. Aetna Ins. Co.* 127 N. Y. 608, 14 L. R. A. 147, 28 N. E. 653; *Hoyle v. Stowe*, 19 N. C. (2 Dev. & B. L.) 320.

Disaffirmance renders the contract absolutely void *ab initio*, and the rights of the parties are determined as if there had never been a contract between them.

Clark, Contr. ¶ 134, p. 258.

There is no question of necessities in this case.

Mustard v. Wohlford, 15 Gratt. 329, 76 Am. Dec. 209; *McCormio v. Leggett*, 53 N. C. (8 Jones L.) 425.

Contracts which relate to persons or personal property may be avoided by an infant during his infancy by any act which clearly manifests such a purpose.

burg, C. C. & St. L. R. Co. v. Moore (Ind.) 44 L. R. A. 638.

In *O'Bourke v. John Hancock Mut. L. Ins. Co.* the court said: "Certain principles, however, are well settled in regard to infancy. It is an elementary rule that infants are incapable of making contracts, except for necessities. Such contracts are voidable, but not void. The infant may avoid his contract, but an adult contracting with him cannot. A contract may thus be binding on an adult when it is not binding on an infant." But this point was not actually involved in this case.

So, in *Grogan v. United States Industrial Ins. Co.* 90 Hun, 521, 36 N. Y. Supp. 687, the court, though not having that point in issue, said: "While the instrument, as is contended by the learned counsel, might have been disaffirmed by Peter Grogan in his lifetime, on the ground of infancy, on arriving at his majority, had such an event happened, yet I fail to see how the defendant in this action can avail itself of that fact as a defense against the person who was clearly authorized by the assured by this instrument [the assignment] to receive the money, and give ample and complete release and discharge for the same."

Again, in *Union Cent. L. Ins. Co. v. Hilliard*, 63 Ohio St. 478, 53 L. R. A. 462, 59 N. E. 230, it was said, as a *dictum* only, "that a contract [of insurance] by a minor is voidable only, and that at his election. The other contracting party cannot avail himself of the lack of power on the part of the minor to conclusively bind himself as a reason for refusing performance on his part. Hence, the contract cannot be said to be absolutely void."

As to contract for surrender, see also *New York statute in People v. Industrial Ben. Assn.* 92 Hun, 311, 36 N. Y. Supp. 963, subd. IV., *supra*.

The above cases do not seem to deny the right of an infant to surrender his policy and to that extent disaffirm his contract. Indeed, the usual course of business allows that privilege to all policy holders. But the right of an infant to repudiate what has previously been done and make the contract void *ab initio*, and recover 57 L. R. A.

back money that he has already paid to the insurance company, is the chief question on this subject. The most important case upon it is that of *Johnson v. Northwestern Mut. L. Ins. Co.* 56 Minn. 365, 26 L. R. A. 187, 57 N. W. 934, 59 N. W. 992, which denies his right to recover moneys formerly paid as premiums so far as the insurance company has earned those premiums by the risk that has been carried, and so far as the contract was provident, fair, and reasonable for the infant. Notwithstanding the general language of some *dicta* that might be so interpreted, there is no decision sustaining the doctrine that an infant who has been carrying life insurance can repudiate his contract to the extent of recovering back all the premiums that he has paid.

VI. Summary.

An infant's right to take insurance on his life seems to be generally upheld. Insurance by creditors on the life of an infant to secure their debts is recognized as valid to the extent of their claims that are not invalidated by other considerations, as, for instance, a gambling debt. Where insurance is taken out by others on the infant's life, the question of the invalidity of the policy on the ground of infancy seems to have been a minor consideration in the cases, the question of the interest of the beneficiary in the life insured being the controlling question. An ordinary life policy is allowed to be taken out by certain named relatives on the life of an infant in a limited amount, under a New York statute. This statute is held, however, not to limit the number of policies on such life. It is held in Illinois that an infant may become a member of a benefit association. This was also recognized in England as to a railway association, where the contract absolved the railway from any action for injuries covered by the benefit certificate. In several of the states, however, it is held that a benefit association, organized under the statutes, cannot have infant members.

I. T.

State v. Howard, 88 N. C. 652; *Poe v. Horne*, 44 N. C. (Busbee L.) 398; *Tipton v. Tipton*, 48 N. C. (3 Jones L.) 552; *Rogers*, Dom. Rel. 741; *Yarborough v. Yarborough*, 59 N. C. (6 Jones Eq.) 209; *Dube v. Beaudry*, 150 Mass. 448, 6 L. R. A. 146, 23 N. E. 222; *Beach*, Modern Law of Contracts, § 1362.

Ratification of a contract after it has once been disaffirmed comes too late.

Clark, Contr. p. 260; *McCarty v. Woodstock Iron Co.* 92 Ala. 463, 12 L. R. A. 136, 8 So. 417; *Edgerton v. Wolf*, 6 Gray, 453.

Cook, J., delivered the opinion of the court:

This is an action brought by the administrator of Joseph H. Phippen to recover the sum of \$1,000, alleged to be due upon the death of said Joseph by reason of a certain life insurance policy issued by defendant company to said Joseph. It appears from the facts agreed that Joseph was an infant when he applied for and obtained the policy, and died during his infancy. The application was made on the 4th day of February, 1897, and the policy was issued to him on the 10th day of said month. It was agreed in its policy by the defendant company that in consideration of \$40.54 to it in hand paid, and of the annual premium of \$40.54, to be paid on the 10th day of February in every year until twenty full years' premiums shall have been paid, it would on the 10th of February, 1917, pay to the assured \$1,000, or, should he die before that time, then, upon his death, and proof thereof, to pay said amount to his executors, administrators, and assigns. After the issuance of the policy, and while the same was in force, plaintiff's intestate, pursuant to a provision contained in said policy, in consideration of the sum of \$54.40 (the then cash value of said policy) paid to him by the company, fully surrendered and delivered the said policy to the defendant company, and thereafter, to wit, on the 17th day of February, 1899, died. The good faith and fairness of these transactions with the infant (intestate) is not questioned; and it is expressly stated in the case agreed that "the said surrender was voluntarily made and executed in writing by the said intestate, bona fide, and without compulsion or undue influence on the part of the defendant."

The main contention of the plaintiff is that the surrender of the policy by his infant intestate was a voidable contract, which he, in this action, seeks to avoid, and sues to recover upon the original contract of insurance, which he endeavors to affirm. His honor, upon the facts agreed, rendered judgment in favor of the defendant, and plaintiff appealed. We sustain his honor, and hold that plaintiff is not entitled to recover.

The contract of insurance made with the infant, plaintiff's intestate, was not for necessities, and was therefore voidable at his election, but binding upon the defendant company. It was an executory contract (*Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 284, 28 L. ed. 423, 4 Sup. Ct. Rep. 390), 57 L. R. A.

relating to personality (*Conigland v. Smith*, 79 N. C. 303; *Simmons v. Biggs*, 99 N. C. 236, 5 S. E. 235; *Hooker v. Sugg*, 102 N. C. 115, 3 L. R. A. 217, 8 S. E. 919), and could therefore be avoided by him during his infancy (*State v. Howard*, 88 N. C. 650, on page 652; *Clark*, Contr. p. 244). His disaffirmance could have been made either by refusing to perform his part of the contract, and then pleading his disability in a suit for its enforcement, or by a voluntary annulment or cancellation made by agreement with the company. And it appears that he adopted the latter course, by a voluntary surrender of the policy and receiving its cash value.

But it is argued by the learned counsel for plaintiff that the intestate did not receive the full amount to which he was entitled by reason of the terms expressed in a "note" or condition appearing on the policy. Be that as it may, the disaffirmance of the contract by voluntarily surrendering it rendered the contract void *ab initio*, and the intestate then became entitled to be restored to his original status, which is not the subject of this controversy.

It is further insisted by plaintiff that the surrender or delivering up of the policy in consideration of the sum paid to him by the company was a sale of the policy made by his intestate to the company, and in this action he, having affirmed the contract of insurance, disaffirms the sale, and is therefore entitled to recover upon the policy, although it had been delivered to the company. This contention cannot be sustained because the property or interest so vesting in the intestate was a contingency liable to be defeated, and incapable of delivery, actual or constructive, and therefore not the subject of sale; or, should it be considered an assignment, the instant the interest of intestate passed out of him into the company, *eo instanti* the obligations therein imposed ceased, and the contract was rescinded. In the case of *Edgerton v. Wolf*, 6 Gray, 453, the defendant, an infant, purchased a horse, which was delivered to him, with the right to return the horse if he could not get the money to pay for him, and, after failing to get the money, returned the horse to the vendor plaintiff, but afterwards took the horse from plaintiff's possession and sold him. The court there held that the sale made to the infant was voidable at his election, and his returning the horse voluntarily, intending to give up all his interest in the property, was an avoidance of the contract, and all the rights of the vendor revested in him, and the infant defendant ceased to have any right over the property, and could not retake the same against the will of the vendor plaintiff. So, it appearing that the surrender of the policy was a disaffirmance of the original contract of insurance, rendering the same absolutely void *ab initio* (*Clark*, Contr. p. 258), a "disaffirmance cannot be retracted. Ratification of a contract, after it has once been disaffirmed, comes too late. . . . When the infant has exercised the privilege to rescind his contract, he cannot after-

wards abandon or repudiate the rescission, and take the other alternative. . . . The contract, having been made void, cannot be revived, except by mutual consent," —says the court in *McCarty v. Woodstock*

Iron Co. 92 Ala. 463, 12 L. R. A. 136, 8 So. 417.

There is no error, and the judgment of the court below must be affirmed.

INDIANA SUPREME COURT.

Catherine O'BRIEN et al., Appts.,
v.
CENTRAL IRON & STEEL COMPANY
et al.

(.....Ind.....)

The permanent obstruction of a street within 200 feet of the property of an abutting owner, cutting him off from his usual and only direct access to the business portion of the town, thereby depreciating the value of his property, inflicts special injury on him for which he may recover damages.

(March 18, 1902.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Clay County in favor of defendants in an action brought to recover damages for the obstruction of a street upon which plaintiffs' property abutted, which rendered their access to the business portion of the city somewhat more difficult. *Reversed.*

The facts are stated in the opinion.

Messrs. E. S. Holliday and F. A. Horner for appellants.

Mr. George A. Knight, for appellees:

An injury to real estate by cutting off direct approach thereto in one direction by discontinuing a highway across a railroad at a point not in front of the premises, even if it is a serious and permanent injury, is one which the owner suffers in common with the rest of the community although in greater degree, and gives him no individual remedy, either to recover damages, or to review the order of discontinuance.

Davis v. Hampshire County, 153 Mass. 218, 11 L. R. A. 750, 26 N. E. 848; *Smith v. Boston*, 7 Cush. 254; *Stanwood v. Malden*, 157 Mass. 17, 16 L. R. A. 591, 31 N. E. 702; *Wood, Nuisances*, §§ 645, 646; *Buhl v. Ft. Street Union Depot Co.* 98 Mich. 596, 23 L. R. A. 392, 57 N. W. 829; *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332.

Mere trouble and inconvenience are not sufficient grounds upon which to predicate a claim for damages in a case like this, because the same trouble and inconvenience affect the public at large.

Dantzer v. Indianapolis Union R. Co. 141 Ind. 604, 34 L. R. A. 769, 39 N. E. 223; *Decker v. Evansville Suburban & N. R. Co.* 133 Ind. 403, 33 N. E. 349; *Indiana, B. &*

W. R. Co. v. Eberle, 110 Ind. 547, 59 Am. Rep. 225, 11 N. E. 467; *Ross v. Thompson*, 78 Ind. 90; *Dwenger v. Chicago & G. T. R. Co.* 98 Ind. 153; *People's Gas Co. v. Tyner*, 131 Ind. 277, 16 L. R. A. 443, 31 N. E. 59; *Haslett v. New Albany Belt & Terminal R. Co.* 7 Ind. App. 603, 34 N. E. 845; *Pittsburgh, C. C. & St. L. R. Co. v. Noftsgar*, 148 Ind. 101, 47 N. E. 332; *Sohn v. Cambern*, 106 Ind. 302, 6 N. E. 813; *Terre Haute & L. R. Co. v. Bissell*, 108 Ind. 113, 9 N. E. 144.

In the case at bar no new burden is imposed on the soil owned by appellants. The structure in the street is 200 feet from their property, and damages are claimed because of the trouble and inconvenience in going to and from their property in an easterly direction, and the same trouble and inconvenience are suffered by the community in general, and, this being true, appellants are without legal remedy.

McCowan v. Whitesides, 31 Ind. 235; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Matlock v. Hawkins*, 92 Ind. 225; *Dwenger v. Chicago & G. T. R. Co.* 98 Ind. 153; *Powell v. Bunger*, 91 Ind. 64.

Hadley, J., delivered the opinion of the court:

This case comes to us from the appellate court under § 15 of the act concerning appeals, approved March 12, 1901 (Acts 1901, p. 569). Appellants prosecute the action to recover of appellee damages for the obstruction of a street upon which their property abuts. Judgment against appellants upon demurrer to the complaint. The sufficiency of the complaint is therefore the only question presented.

In substance, it is averred in the complaint that the plaintiffs owned a house and lot abutting on Church street, in the city of Brazil, which they now and have for many years occupied for a residence; that when they purchased and first occupied said lot, which was before the grievances complained of, Church street was a regularly platted, dedicated, improved, and traveled street, and constituted the only way, and was exclusively used by the plaintiffs in going from, and returning to, their home, and that in purchasing said real estate they took into consideration its location on said street, which gave them convenient access to all

NOTE.—As to private right of action for obstruction of street, see note to *Charlotte v. Pembroke Iron Works* (Me.) 8 L. R. A. 828; also, in this series, *Flynn v. Taylor* (N. Y.) 14 L. R. A. 556; *Megargee v. Philadelphia* (Pa.) 19 L. R. A. 221; *Bradley v. Pharr* (La.) 19 L. 57 L. R. A.

R. A. 647; *Buhl v. Ft. Street Union Depot Co.* (Mich.) 23 L. R. A. 392; *Jacksonville, T. & K. W. R. Co. v. Thompson* (Fla.) 26 L. R. A. 410; and *Mahler v. Brumder* (Wis.) 31 L. R. A. 695.

parts of the city, and particularly to that part of the city lying east of their residence, where the business of the city is principally carried on; that in 1899 the defendant constructed, and still maintains, a permanent building on, over, and across said street, thereby completely obstructing the street, and preventing travel thereon; that said obstruction is located about 200 feet east of the plaintiffs' said residence and between said residence and the business portion of the city; that there is no cross street or other outlet between said obstruction and the plaintiffs' said property, and plaintiffs' egress and ingress to and from their property to the east is wholly barred, cut off, and destroyed; that by reason of the obstruction plaintiffs are put to great trouble and inconvenience in getting to and from their property, and their property has been thereby greatly diminished in value; that their property immediately before the obstruction was of the value of \$1,200; that by reason of the obstruction of the street as aforesaid their property became and is worth not exceeding \$600; and that said depreciation was caused wholly by the wrongful act of the defendant in obstructing said street.

Appellees contend that the injury of appellants, exhibited by the complaint, is different only in degree from the injury suffered by the community at large, and hence no action for the recovery of damages will lie. On the other hand, appellants contend that the injury complained of is private and special, and different in kind from the public injury, and that damages are recoverable therefor as for any other private wrong. This particular controversy is the question for decision.

The erection and maintenance of a permanent building across a public street, thereby closing it against travelers, constitutes a public nuisance, subject to indictment and abatement by the state. *Valparaiso v. Booth*, 153 Ind. 536, 47 L. R. A. 487, 55 N. E. 439, and cases cited on page 538, 153 Ind. page 488, 47 L. R. A., and page 439, 55 N. E. But the individual has no right of action to recover damages from the author of such public nuisance, unless he is able to show that he has sustained some particular or peculiar injury differing in kind and not common to the general public. *Martin v. Marks*, 154 Ind. 549, 555, 57 N. E. 249. This doctrine springs from the principle that the law affords no private remedy for anything but a private wrong; that the damages resulting from a common or public nuisance, such as affects all the public in the same way, though perhaps in different degrees, is of a nature to be impossible of apportionment among the injured public, and therefore the only action maintainable is by the state. 3 Bl. Com. p. 219; *Fossion v. Landry*, 123 Ind. 136, 140, 24 N. E. 96; *Dantzer v. Indianapolis Union R. Co.* 141 Ind. 604, 610, 34 L. R. A. 769, 39 N. E. 223; *Manufacturers' Gas & Oil Co. v. Indiana* 57 L. R. A.

Natural Gas & Oil Co. 155 Ind. 566, 58 N. E. 851.

The inquiry therefore is, Does the complaint show that, by reason of the obstruction placed in Church street by the appellees, appellants have suffered an injury peculiar to themselves, and of a kind different from that suffered by the other residents of the community? The complaint alleges that, when appellants purchased their property and took up their residence therein, Church street, upon which it abuts, was a regularly platted, dedicated, improved, and traveled street, and furnished them the only means of going to and from their residence. Under our law, when land is platted into lots, streets, and alleys, and recorded, the act is accepted as a dedication by the owner to the public of a continuing right to travel such streets and alleys, and a conveyance of a lot abutting on such a street carries with it, not only the fee in the soil to the center of the street, but also the right to use such street, as dedicated, in perpetuity, for the purposes of egress and ingress to the premises. And, so far as such street is necessary to a free and convenient way for travel to and from the lot, the right of the lotowner to use it for the purpose is appurtenant to his premises, is essential to its enjoyment, and is as inviolable as his right to the use of the property itself. In this respect the abutter's right is distinct, and altogether different, from the rights of the general public in the street. The abutter has a right, in common with the community, to use the street from end to end for the purpose of passage; but, in addition to this common right, he has an individual property right, appendant to his premises, in that part of the street which is necessary to free and convenient egress and ingress to his property. That this latter right is private and personal, and unshared by the community, and cannot be taken away, or materially interfered with, without the wrongdoer being answerable in damages, has been many times declared by this court. *Haynes v. Thomas*, 7 Ind. 38; *Pettis v. Johnson*, 56 Ind. 139; *Ross v. Thompson*, 78 Ind. 90; *Cummins v. Seymour*, 79 Ind. 491, 501, 41 Am. Rep. 618; *Indiana, B. & W. K. Co. v. Eberle*, 110 Ind. 542, 546, 59 Am. Rep. 225, 11 N. E. 467; *Chicago, St. L. & P. R. Co. v. Eisert*, 127 Ind. 156, 26 N. E. 759; *Decker v. Evansville Suburban & N. R. Co.* 133 Ind. 493, 33 N. E. 349; *Pittsburgh, C. C. & St. L. R. Co. v. Nofstger*, 148 Ind. 101, 47 N. E. 332; *Martin v. Marks*, 154 Ind. 549, 555, 57 N. E. 249. See also *Pennsylvania Co. v. Stanley*, 10 Ind. App. 421, 37 N. E. 288, 38 N. E. 421.

In the *Haynes Case*, 7 Ind. 38, it is said: "These decisions establish the principle that, besides the right of way which the public has of passage over a street in a town or city, there is a private right which passes to the purchaser of a lot upon the street, and as appurtenant to it, which he holds by implied covenant that the street in front of

his lot shall forever be kept open to its full width."

In *Eberle's Case*, 110 Ind. 542, 546, 59 Am. Rep. 225, 11 N. E. 467, Mitchell, J., for the court, says: "Whatever may be the rule of decision elsewhere, nothing is better settled in this state than that the owners of lots abutting on a street may have a peculiar and distinct interest in the easement in the street in front of their lots. This interest includes the right to have the street kept open and free from obstruction which prevents or materially interferes with the ordinary means of ingress to, and egress from, the lots. It is distinguished from the interest of the general public, in that it becomes a right appendant, by legally adhering to the contiguous grounds and the improvements thereon as the owner may have adapted them to the street. To the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as the lot itself. . . . Nor can the street be invaded so as to inflict special and peculiar damage or injury upon the adjacent lot owner's property without rendering the wrongdoer liable for such damages."

This complaint alleges that the defendants have erected a permanent building across Church street about 200 feet east of the plaintiffs' residence, thereby effectually barring all passage in that direction, and have thus cut off the plaintiffs from their usual and only way of direct travel to and from the east and business portion of the city, and have thus imposed upon them great trouble and inconvenience in getting to and from their property, by reason whereof their property has been depreciated in value from \$1,200 to \$600. These facts show that the wrongful act of appellees has not only deprived appellants of their common right to use a regularly dedicated, improved, and traveled street in front of their property, but it has placed that property in

a *cul de sac*, with the base in the direction of the business and most frequented part of the city, thus making it necessary in going to market, or to the eastern part of the town, to travel in the opposite direction to the first cross street.

If appellees may close this street on the east within the same square, without special injury to appellants, why may they not also close it on the west within the same square, and completely fence appellants in and render valueless their property without special injury? Surely the injury would be the same in kind. In such case it seems absurd to say that the injury sustained by appellants in their property rights would be the same, but only greater in degree, as that sustained by the community in general. We have a class of cases which hold that when an obstruction does not exclude the abutter from ingress and egress, but only imposes upon him, in common with other travelers, that inconvenience which results from a more circuitous way, his injury is in common, for which there can be no recovery; as, for instance, if the obstruction in this case had been placed east of an intersecting cross street. Then it could not be said that appellants were excluded from approaching or leaving their premises in any direction originally afforded by the street.

That there may be others affected in a similar manner to appellants does not affect the question. *Martin v. Marks*, 154 Ind. 560, 57 N. E. 249. In such cases an action for damages is maintainable by a person, or any number of persons, who are able to show that they have sustained special and peculiar damage different in kind from that sustained by the public in general. We think the complaint states a cause of action.

Judgment reversed, and the cause remanded, with instructions to overrule the demurrer to the complaint.

PENNSYLVANIA SUPREME COURT.

PENNSYLVANIA COMPANY for Insurance on Lives and Granting Annuities, Exr., etc., of Sarah B. Van Syckel, Deceased,

v.

PHILADELPHIA CONTRIBUTIONSHIP for Insurance of Houses from Loss by Fire, Appt.

(201 Pa. 497.)

The loss to be made good under a policy of fire insurance is not limited to

NOTE.—As to insurer's option to rebuild, see, in this series, *Platt v. Aetna Ins. Co.* (Ill.) 26 L. R. A. 853, and note; and *Henderson v. Crescent Ins. Co.* (La.) 35 L. R. A. 385.

For another case as to effect of municipal police regulations on insurer's liability, see *Monteleone v. Royal Ins. Co.* (La.) 56 L. R. A. 784.

57 L. R. A.

the cost of replacing the structure described in the survey, if, when the fire occurs, the statutes require, as a condition of rebuilding, more substantial and expensive structural work.

(February 24, 1902.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 4, for Philadelphia County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed*.

The facts are stated in the opinion of the Court of Common Pleas, which was delivered by WILLSON, J., and was as follows:

On the 14th of October, 1851, the defendant company issued a policy of insurance against fire to William Wurts, in the

amount of \$5,000, on a brick store and counting house, situated on the north side of Market street, between Fourth and Fifth streets, as per a survey of the same, which was attached to the policy, signed and agreed to by the assured. In the survey the walls were described as 18, 14, and 9 inch walls. By subsequent transfers, approved by the defendant company, the ownership of the said policy of insurance became vested in the plaintiff's testatrix, who was at the time of her death the owner of the property referred to. She also held another policy of insurance upon the same property for \$10,000, issued by the Franklin Fire Insurance Company, and the defendant company indorsed upon the policy now in suit that such insurance was allowed; the loss, if any, in case of fire, to be borne proportionately. Subsequent to the issuing of the policy by the defendant company, various other privileges were given to the assured upon additional deposits being made, but for the purpose of this case it is not necessary to refer to such matters in detail. On the 29th of November, 1899, a portion of the building covered by the insurance was destroyed by fire. It was then found that in consequence of an act of assembly regulating the construction, maintenance, and inspection of buildings in cities of the first class, which was approved the 5th day of May, 1899 (P. L. 193), it was not possible to reconstruct the part of the building which was destroyed in the same manner in which it existed before the fire. Under the provisions of the act the municipal authorities in charge of such matters required that the wall should be constructed of a thickness greater than that which was stated in the survey referred to. This necessitated either the tearing down and the rebuilding of those walls, or strengthening them by means of a steel construction. This latter plan was in point of fact adopted because of a smaller expense being thus made possible. If the building could have been reconstructed, after the fire, without the demolition of the walls in order to comply with the requirements of the law, the cost of construction would have been \$6,650; but the actual cost of rebuilding in the method prescribed was \$11,330.36. In point of fact, the market value of the building after its reconstruction according to those requirements was no greater than it would have been if it had been rebuilt according to its original plan as described in the survey. The foregoing *résumé* of the case is, in substance, that which is agreed to by the parties in their agreement for the case stated. The controversy between the parties arises upon these recited facts. The plaintiff demanded from the defendant one third, or its proportionate share, of the cost of rebuilding the premises according to the requirements of the law, namely, \$3,776.79. The defendant declined to pay that sum, but offered to pay \$2,216.87, which is admitted to be its one third or proportionate share of

57 L. R. A.

what would have been the cost of rebuilding according to the description contained in the survey. Indeed, this sum has been paid by the defendant company to the plaintiff, so that the amount which is involved in this controversy is the difference between the amount paid and the amount claimed, namely, \$1,516.12. If the last-named amount shall be found by the court to be due to the plaintiff, then it is agreed that judgment shall be entered for the plaintiff for that amount, with interest from March 1, 1900, but otherwise that judgment shall be entered in favor of the defendant. The point involved in this controversy is a novel one. The industry of the counsel for plaintiff and for defendant has not succeeded in finding any precedents which throw light directly upon the case, and we have not been able to make any more fruitful search. It is necessary, therefore, to attempt to dispose of the question involved in the case on principles which are equitable and reasonable, in view of the nature of the contract which existed between the parties. Without any elaboration of the thought, it is hardly necessary to say that the contract was intended to give to the party assured indemnity and protection against loss by fire up to a certain specified amount. The liability of the insuring company could not, whatever the loss might be, be carried beyond the amount designated in the policy. But up to that amount, whatever the loss might be, the insuring company would be liable, either fully or proportionately, according to the circumstances of the case. This position must be regarded as unquestionable, in view of the well-recognized doctrine of the law in regard to such contracts. The difficulty in the case arises when the effort is made to determine what was the loss against which the company insured; or, in other words, upon what basis the plaintiff can estimate the damages which are proper to be included in the loss insured against. Are such damages only such as are to be arrived at by a computation of the cost of the reconstruction of the building exactly according to the description contained in the survey attached to the policy, or is the true result to be reached by taking the cost of reconstruction according to the conditions existing and lawfully imposed at the time when the fire occurred? Certainly it would not be claimed that the insurers are only liable for such an estimate of cost as would be based upon the market price of materials at the time when the contract of insurance was made. It would seem, also, if the materials out of which the building was originally constructed were not to be obtained at the time of the fire and reconstruction, that the insurers would be liable for the cost of reconstruction out of such materials as were reasonably proper and adequate at the time of rebuilding. These illustrations indicate that a contract of insurance may need to be interpreted with regard to changed conditions for the pur-

pose of arriving at a proper standard for estimating the extent of the liability of an insuring company at the time of loss. It is our judgment that the case in hand must fall under such a general classification. It has long been well recognized that building regulations and restrictions were matters properly within the scope of legislative and municipal authorities. This must have been known to the contracting parties at the time when the policy involved in this suit was issued. The defendant company did not, by the terms of the policy, become liable only for the loss which might accrue to the owner of the policy in case of fire to the extent of what it would cost to rebuild the premises injured according to the actual dimensions of the walls of the building as described in the survey. It did insure a building which corresponded to the description therein contained, but the insurance was against loss to the owner by reason of the destruction or injury of that building by fire; and if, in consequence of a state of the law existing at the time of the fire, the loss was increased above what it would have been by reason of regulations which required the rebuilding to be done in some other way, according to some different plan, for the protection of the community, it seems to us that there is nothing in good reason or in law why the insuring company would not be held liable for the actual loss thus incurred up to the extent of the amount designated in the policy, provided the proportional amount of the loss falling upon the company reached that sum. Applying such a principle would not involve the insuring company in any loss greater in extent than that which it undertook to assume when the policy was made, and the method of arriving at the extent of the loss which we have adopted appears to us a just, reasonable, and lawful one. The decision in *Brown v. Royal Ins. Co.* 1 El. & El. 853, while not ruling the exact question involved in this case, yet may be regarded as in general harmony with the view already expressed, so far as the differing facts of the

two cases would allow. *Brady v. Northwestern Ins. Co.* 11 Mich. 445, and *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 103, 59 Am. Rep. 613, 18 S. W. 337, were referred to in the agreement, but they turned upon a different point, and they are only mentioned here for the information of those who may hereafter be interested in the question under discussion. Judgment will therefore be entered for the plaintiff for the sum of \$1,658.92.

Mr. W. W. Montgomery, for appellant:

The parties to a contract of insurance may stipulate in regard to the manner of estimating the loss if it should occur, or as to the time which shall be the period of the valuation of the property destroyed.

Phillips, Ins. chap. 1, § 3; Ostrander, Fire Ins. § 183, p. 463; Commonwealth Ins. Co. v. Sennett, 37 Pa. 205, 78 Am. Dec. 418.

If a man insures an old and dilapidated building, which by reason of its position or the use to which it is put may rent as well, and while it stands be as valuable to him, as a new one, he cannot, in case of its destruction by fire, recover from the insurer the cost of a new building.

Ætna Ins. Co. v. Johnson, 11 Bush, 587, 21 Am. Rep. 223; *Waynesboro Mut. F. Ins. Co. v. Creaton*, 98 Pa. 451.

Mr. John G. Johnson, for appellee:

Insurance is a contract of indemnity, and if the parties stipulate for the manner in which that indemnity shall be made, on the contingency of liability, it is their right to do so, and the law will carry out their contracts as made, if there is no fraud in them, as in other cases.

Commonwealth Ins. Co. v. Sennett, 37 Pa. 208, 78 Am. Dec. 418; *Grandin v. Rochester German Ins. Co.* 107 Pa. 35; *Brown v. Royal Ins. Co.* 1 El. & El. 853; *Fire Assn. of Philadelphia v. Rosenthal*, 108 Pa. 474, 1 Atl. 303; *May, Ins.* 1900, § 423 A.

Per Curiam:

We affirm the judgment in this case on Judge Willson's opinion.

NEW YORK COURT OF APPEALS.

UNION NATIONAL BANK of Chicago,
Respt.,
v.

Elizabeth J. CHAPMAN, Impleaded, etc.,
Appt.

(169 N. Y. 538.)

The contract of a surety on a note is complete when his signature is affixed and the instrument delivered to the payee, and is therefore governed by the law of the place where those transactions occur, although the note is payable in another state, and as against the makers has no valid inception until its negotiation in the latter state, if the surety has no knowledge that it is to be negotiated there, or intention that his contract shall be governed by the laws of that state.

(*Bartlett and Vann, JJ., dissent.*)

(January 31, 1902.)

NOTE.—*Conflict of laws as to capacity of married woman to contract.*

- I. *As between lex loci contractus and lex domicilii.*
 - a. *General rule*, 513.
 - b. *Exceptions; when domicil is at forum*, 517.
- II. *As between lex loci contractus and lex fori; remedy*, 520.
- III. *As between lex loci contractus, or lex domicilii, and lex rei sitæ.*
 - a. *Personal property*, 523.
 - b. *Real property*, 524.

Scope.

This note is confined to the question, what law governs the capacity of a married woman to contract, as between the law of the place where the contract was made or that of the place where it was to be performed, on the one side, and the law of the place of the domicil, or of the forum, or of that where the property is situated, on the other. It does not take up the question, what law governs as between the law of the place where the contract was made, on the one side, and the law of the place where it was to be performed, on the other. That question is much broader than the subject of this note, and is reserved for treatment in a separate note in which the entire subject may be covered. As to the capacity of a woman to marry, see note to *Hills v. State* (Neb.) *ante*, 155.

I. As between lex loci contractus and lex domicilii.

a. General rule.

Waiving, then, the question as to whether the law of the place where the contract was made, or that of the place where it was to be performed, governs, when the two are in conflict, it may be confidently asserted that the general principle of international law, supported by the American decisions, is that, as between the law of the place where the contract was made (*lex loci contractus*) and the law of the place where the woman was domiciled (*lex domicilii*), the former governs as to 57 L. R. A.

A PPEAL by defendant, Elizabeth J. Chapman, from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Monroe County in plaintiff's favor in an action brought to enforce her liability as surety on a promissory note. *Reversed.*

The facts are stated in the opinions.

Messrs. O. F. Hurd and David B. Hill, for appellant:

The capacity of Mrs. Chapman to make the note in question, and to become a surety for her husband, was governed by the law of Alabama.

1. She was a resident of Alabama at the time she executed the note.

2. Her consent to become a surety was obtained in Alabama.

3. Every act on her part in becoming a surety took place in that state.

4. She did not consent that her liability

the capacity of a married woman to make a personal contract,—at least when the domicil is not at the forum.

In the following cases, which support that doctrine, the married woman was not domiciled at the forum: *Connecticut Mut. L. Ins. Co. v. Westervelt*, 52 Conn. 592; *Young v. Bullen*, 19 Ky. L. Rep. 1561, 43 S. W. 687; *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251; *Hill v. Chase*, 143 Mass. 129, 9 N. E. 30; *Smith v. Frame*, 3 Ohio C. C. 587; *Pearl v. Hansborough*, 9 Humph. 433.

In *Wheeler v. Constantine*, 39 Mich. 62, 33 Am. Rep. 355, the decision was that a court of Michigan could not presume, in the absence of evidence to that effect, that there was anything in the law of Indiana, the domicil of a married woman, which would render void notes made by her and which were authorized by the law of Michigan; but the court said that it did not wish to be understood as intimating that the laws of Michigan would not govern the notes of a married woman made in that state, though she were domiciled in another state.

In *Nichols & S. Co. v. Marshall*, 108 Iowa, 518, 79 N. W. 282, the rule that the law of the place of the contract, rather than the law of the domicil, governs with respect to the capacity of a married woman to contract, was applied so as to hold unenforceable in Iowa a contract of suretyship, made and to be performed in Indiana, by a married woman domiciled in Iowa, because she was incapable of contracting by the law of Indiana, notwithstanding that she was capable according to the law of Iowa.

In *Pearl v. Hansborough*, 9 Humph. 433, the principle was also applied so as to hold invalid a contract which, though valid by the *lex domicilii*, was invalid by the *lex loci contractus*, because of the married woman's lack of capacity. In this case, however, the domicil was not at the forum as it was in the preceding case.

It is thus apparent that when, by the *lex loci contractus* the contract would be invalid, the principle applies, and the contract is condemned without reference to whether the domicil is at the forum or not. As subsequently shown (*infra*, I. b) the fact, in that

on the note was to be regulated by the law of any other state.

Felix, Droit Inten. Trivi, § 9; Story, Confli. L. 19, § 18; *Lemmon v. People*, 20 N. Y. 562; 2 Parsons, Contr. 8th ed. 569; 3 Am. & Eng. Enc. Law, p. 502; Dicey, Confli. L. p. 547; 2 Kent, Com. 458; Westlake, Private International Law, §§ 401-404.

The Alabama statute deprived her of any capacity to become her husband's surety.

The *lex loci contractus* between herself and her husband was in Alabama, and she was under the protection of the laws of that state.

3 Am. & Eng. Enc. Law, p. 518; *Hill v. Pine River Bank*, 45 N. H. 300.

The validity of the note is governed by the law of Alabama. By the law of that state the note was void as to Mrs. Chapman

at the time she signed it and delivered it to the payee.

Union Nat. Bank v. Chapman, 7 App. Div. 450, 39 N. Y. Supp. 1051; 7 Am. & Eng. Enc. Law, 2d ed. p. 100; *Bell v. Leggett*, 7 N. Y. 179; *Barton v. Port Jackson & U. F. Pl. Road Co.* 17 Barb. 397; *Continental Bank v. Clarke*, 117 Ala. 292, 22 So. 988; *Hawkins v. Ross*, 100 Ala. 459, 14 So. 278; *Heard v. Hicks*, 82 Ala. 484, 1 So. 639; *Lansden v. Bone*, 90 Ala. 447, 8 So. 65; *Schening v. Cofer*, 97 Ala. 726, 12 So. 414; *McNeil v. Davis*, 105 Ala. 657, 17 So. 101.

When a contract is declared void by the laws of the state where made, but is valid in the state where it is to be performed, the contract cannot be enforced in either state.

Hyde v. Goodnow, 3 N. Y. 266; 2 Parsons, Contr. 8th ed. 576; Story, Promissory Notes, § 150.

respect, may be important when it is sought to apply the principle to a contract, valid by the *lex loci contractus*, but invalid by the *lex domicilii*.

In the following cases, which also hold that the *lex loci contractus*, rather than the *lex domicilii*, governs, the domicile was at the forum; and in each of these cases the contract was upheld and enforced, being valid by the *lex loci contractus*, although invalid by the *lex domicilii* and *lex fori*. *Bowles v. Field*, 78 Fed. 742; *First Nat. Bank v. Mitchell*, 34 C. C. 542, 92 Fed. 565, Reversing 84 Fed. 90; *Robison v. Pease* (Ind. App.) 63 N. E. 479; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Phoenix Mut. L. Ins. Co. v. Simons*, 52 Mo. App. 357; *Brigham v. Gilmartin*, 58 N. H. 346.

Whether the cases last cited are correct, or incorrect, in applying the principle when the party sought to be charged was domiciled at the forum (as to which see *infra*, I. b), they certainly lend strong support to the principle as applied to cases where the domicile was not at the forum.

In the following cases the contract was made at the domicile, so that there was no conflict between the *lex loci contractus* and the *lex domicilii*, the only conflict being between the *lex loci contractus et domicilii*, on the one side, and the *lex fori*, on the other; but the decisions are expressly put upon the ground that the *lex loci contractus* governs, and, so, may be regarded as some support for the principle that, as between the *lex loci contractus* and *lex domicilii*, the former governs.—at least when the domicile is not at the forum. *Nixon v. Halley*, 78 Ill. 611; *Bond v. Cummings*, 70 Me. 125; *Partee v. Silliman*, 44 Miss. 272; *F. B. Hauck Clothing Co. v. Sharpe*, 83 Mo. App. 385; *Hill v. Pine River Bank*, 45 N. H. 300; *Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651; *Evans v. Cleary*, 125 Pa. 204, 17 Atl. 440.

In *Robinson v. Queen*, 87 Tenn. 445, 3 L. R. A. 214, 11 S. W. 38, where the note in suit was made and payable in Kentucky by a married woman domiciled there it was held that the *lex loci contractus* (in the sense of the place of performance) would prevail over the law of the domicile if the two were different.

In *Dulin v. McCaw*, 30 W. Va. 721, 20 S. E. 681, where the place of the contract and of the domicile were the same, it was held that the coincidence was an additional reason for applying the *lex loci contractus*.

In *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138, in which the presumption was indulged 57 L. R. A.

that the married woman was domiciled in the state where the contract was made, the contrary not appearing, the court approved of the position taken in *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, *supra*, that a contract which by the law of the place is recognized as lawfully made by a capable person is valid everywhere, although the person would not, under the law of the domicile, be deemed capable of making it.

In *Armstrong v. Best*, 112 N. C. 59, 25 L. R. A. 188, 17 S. E. 14, *infra*, I. b, it was also held that the *lex loci contractus*, rather than the *lex domicilii*, in general, furnishes the test of capacity, though, as subsequently shown (*infra*, I. b), the circumstances of the case were held to bring it within an exception to that general principle. In *Graham v. First Nat. Bank*, 84 N. Y. 393, 38 Am. Rep. 528, the court said, *obiter*, that the disability of coverture is to be determined by the rule of the place of the contract and performance.

The provision of the Alabama Code that the separate estates of married women shall be liable for all contracts for certain articles of comfort and support of the household does not apply to a contract made and to be performed outside of Alabama. *Judge v. Wright*, 73 Ala. 324.

The status obtained by a married woman, while domiciled in Alabama, by a decree of a chancery court in that state relieving her of the disability of coverture as to her statutory, or other, separate estate, so far as to invest her with the right to buy, sell, hold, convey, and mortgage real and personal property, and to sue and be sued as a *feme sole*,—cannot be insisted on in Florida, after the removal of her domicile to that state, as to transactions had in Florida. *Walling v. Christian & C. Grocery Co.* 41 Fla. 479, 47 L. R. A. 608, 27 So. 40.

In the following cases, in accordance with the principle above stated, the law of the place (other than that of the domicile) where the contract had its legal inception was held to govern, notwithstanding that the contract was signed or assented to by the married woman at the domicile and there left her hands, being delivered to the other contracting party through the mails or by some third person. *First Nat. Bank v. Mitchell*, 34 C. C. 542, 92 Fed. 565, Reversing 84 Fed. 90; *Robison v. Pease* (Ind. App.) 63 N. E. 479; *Young v. Bullen*, 19 Ky. L. Rep. 1561, 43 S. W. 687; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Bell v. Packard*, 69 Me. 105, 31 Am. Rep.

If Mrs. Chapman did not possess the power or capacity to obligate herself as security for her husband, the note is not a valid obligation against her.

Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; *Brown v. American Finance Co.* 31 Fed. 516.

Notes declared void by statute, or which are so by necessary implication, are void even in the hands of a bona fide holder.

Edwards, Bills & Notes, 333-337; *Rockwell v. Charles*, 2 Hill, 499; *Vallett v. Parker*, 6 Wend. 615; *Grimes v. Hillenbrand*, 4 Hun, 354; 1 Dan. Neg. Inst. §§ 197, 807; 3 Kent, Com. 80; *Voreis v. Nussbaum*, 131 Ind. 267, 16 L. R. A. 45, 31 N. E. 70; *Johnson v. Sutherland*, 39 Mich. 579; *Waterbury v. Andrews*, 67 Mich. 281, 34 N. W. 575.

As between Mrs. Chapman and her hus-

band and her husband's partners, the note in question had its inception in the state of Alabama, if it can be said that it ever had any inception at all as to her.

Konitzky v. Meyer, 49 N. Y. 571; *Freeman's Appeal*, 68 Conn. 533, 37 L. R. A. 452, 37 Atl. 420; *Thompson v. Taylor* (N. J. L.) 46 Atl. 567; *Hager v. National German-American Bank*, 105 Ga. 116, 31 S. E. E. 141.

Mr. John A. Barhite, for respondent:

The note had no inception until it was delivered to the bank for value in Chicago. It was an Illinois contract, and the liability of Mrs. Chapman is governed by the laws of that state.

Stearns v. St. Louis & S. F. R. Co. 4 N. Y. S. R. 715; *Pickering v. Cording*, 92 Ind. 306, 47 Am. Rep. 145; *Dubois v. Mason*, 127 Mass. 37, 34 Am. Rep. 335; *Voigt v.*

251; *Phoenix Mut. L. Ins. Co. v. Simons*, 52 Mo. App. 357; *Smith v. Frame*, 3 Ohio C. C. 587; *Brigham v. Gilmartin*, 58 N. H. 346.

In *Connecticut Mut. L. Ins. Co. v. Westervelt*, 52 Conn. 592, while there was no decision as between the law of the place where the contract had its legal inception by delivery, and the law of the place of performance, it was held that the law of one or the other of those places governed, and not the law of the domicile, although the completed contract was handed by the wife to her husband at the domicile, it being delivered by the husband to the other contracting party in another state.

In *Freeman's Appeal*, 68 Conn. 533, 37 L. R. A. 452, 37 Atl. 420, however, it was held that the validity of a guaranty of the payment of her husband's debt, performable in Illinois, executed by a married woman in Connecticut and there delivered to her husband and mailed by him to Illinois to the other party, was governed by the law of Connecticut rather than that of Illinois, and was therefore invalid. The decision is upon the ground that, though whatever delivery there was took place in Illinois when the guaranty was there received, yet the effectiveness of that delivery depended upon the validity of the wife's act in constituting her husband agent for the purposes of the delivery, and that her attempt to confer such authority upon him in Connecticut was invalid. The court said that if the wife had been within the state of Illinois when she signed the guaranty, it might be that her personal presence would have so far made her a resident of that state as to subject her to its laws in respect to acts done within its jurisdiction. The decision in this case was disapproved by the circuit court of appeals in *First Nat. Bank v. Mitchell*, 34 C. C. A. 542, 92 Fed. 565, *supra*.

The question as to where, under various circumstances, a contract will be deemed to have been made, is a separate and distinct one, depending upon considerations equally applicable to a large class of cases not coming within the subject of this note, and is therefore not discussed; but it is apparent from the cases cited that when the place where the contract was, in a legal sense, made (that is, where it had its legal inception), has been determined, its law furnishes the test of capacity of the married woman to make it, notwithstanding that she may never have been out of her domicile.

There is, however, some authority, both in England and America, for the doctrine, which is favored by the foreign jurists, that, as be-

tween the *lex loci contractus* and the *lex domicilii*, the latter governs with respect to the capacity of a married woman to make personal contracts.

In *LeBreton v. Nouchet*, 3 Mart. (La.) 60, 5 Am. Dec. 736, the court said that, according to the principles of the law of nations, "personal incapacities communicated by the laws of any particular place, accompany the person wherever he goes. Thus he who is excused the consequences of contracts for want of age in his country, cannot make binding contracts in another." This was said in discussing the question whether the property rights, as affected by the marriage in Mississippi of a minor domiciled in Louisiana, were to be determined by reference to the law of Louisiana or of Mississippi.

In *Garnier v. Poydras*, 13 La. 177, it was held that the capacity of a married woman to contract in Louisiana, without the assent of her husband, was to be determined by the law of France, their domicile, rather than the law of Louisiana, the *lex loci contractus*.

In *Roberts v. Wilkinson*, 5 La. Ann. 369, the court seems to have been of the opinion that notes made and payable in Mississippi, by a married woman domiciled in Louisiana, would be held valid against her in Louisiana, notwithstanding that they would be invalid by the law of Mississippi. This position is referable only to the doctrine that the *lex domicilii* furnishes the test of capacity, and cannot be referred to the public policy doctrine, since, as subsequently shown (*infra*, I. b), that doctrine only operates to invalidate contracts valid by the *lex loci* but invalid by the *lex fortis*, never to validate contracts invalid by the *lex loci* but valid by the *lex fortis*.

The statutes regulating the privileges and disabilities attaching to married women are purely domiciliary in their character, and, unless otherwise expressly declared, do not affect married women domiciled in another state. *Hyman v. Schlenker*, 44 La. Ann. 108, 10 So. 623.

In *Baer Bros. v. Terry*, 105 La. 479, 29 So. 886, the court, referring to the capacity of a married woman, said that the capacity to contract is tested by the law of the domicile. The note in question, in this case, was executed in Missouri by a woman domiciled in that state, but was payable in Louisiana. The court rejected the contention of counsel that, because the note was payable in Louisiana, the capacity of defendant to make it must be tested by the law of Louisiana, holding, as already stated,

Brown, 42 Hun, 394; *First Nat. Bank v. Mitchell*, 34 C. C. A. 542, 92 Fed. 565; *Miliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251; *Johnston v. Gawtry*, 83 Mo. 339; *Lee v. Selleck*, 33 N. Y. 615; *Dickinson v. Edwards*, 77 N. Y. 573, 33 Am. Rep. 671; *Merchants' Bank v. Griswold*, 72 N. Y. 472, 28 Am. Rep. 159; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *Story*, Conf. L. § 280; *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61; *Ludlow v. Bingham*, 4 Dall. 47, 1 L. ed. 736; *Tilden v. Blair*, 21 Wall. 241, 22 L. ed. 632; *Cook v. Litchfield*, 9 N. Y. 279; *Wharton*, Conf. L. § 429.

The laws of New York would make Mrs. Chapman liable upon the note, and the courts have the right to construe the contract with reference to these laws if such contention will protect the rights of one of our citizens.

Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518; *Story*, Promissory Notes, § 156; *Hoyt v. Thompson*, 19 N. Y. 207; *Re Waite*, 99 N. Y. 433, 2 N. E. 440; *Edgerly v. Bush*, 81 N. Y. 199; *Smith v. Godfrey*, 28 N. H. 379, 61 Am. Dec. 617;

Marshall v. Sherman, 148 N. Y. 9, 34 L. R. A. 757, 42 N. E. 419.

Haight, J., delivered the opinion of the court:

This action was brought upon a promissory note made in Tuscumbia, in the state of Alabama, by the defendants, Chapman, Reynolds, & Co., a copartnership engaged in business at that place, in the building of a lock in the Tennessee river for the government of the United States, of which note the following is a copy:

\$5,000.

Tuscumbia, Alabama, May 1st, 1894.

Six months after date, we promise to pay to the order of E. P. Reynolds, Jr., five thousand and no 100ths dollars, value received, with interest at eight per cent per annum from date, payable at Union National Bank, Chicago, Illinois.

Chapman, Reynolds & Co.

W. P. Chapman.

Elizabeth J. Chapman.

Ella Howard.

C. W. Howard.

that the capacity must be tested by the law of Missouri, the domicile. In this case it will be observed that the law of the place where the note was made and the law of the domicile were the same, but the decision is squarely put on the ground that the law of the domicile governs. The court cites, in support of this position, Rorer's Interstate Law, p. 263, but that author takes exactly the contrary position, holding that the capacity to contract as to all personal matters depends upon the law of the state or country where the transaction takes place, whether the subject-matter contracted about or involved be within the state or without. The decision, moreover, is *obiter*, since the action was not on the notes, but was to recover the purchase price of the property for which the notes were given.

In *Guepratte v. Young*, 4 DeG. & S. 217, it was held that while the law of England, where a contract by a married woman was made, determined the form, the law of France, where she was domiciled, determined her capacity, and the contract was upheld in accordance with the law of France, although by the law of England she would be incapable of making such a contract.

In *Union Nat. Bank v. Hartwell*, 84 Ala. 379, 4 So. 156, the court said that the general rule was that the capacity of a married woman to make contracts in respect to her separate personal property, when situated in a country other than that of the domicile of her husband, is that the law of the domicile of the husband governs unless the property, from its peculiar nature, necessarily has an implied locality, or unless the contract is made in the country where the property is situated. (Italics ours.) It will be observed that this case impliedly supports the *lex loci contractus*, as against the *lex domicilii*, when the two are opposed.

A married woman, incapacitated by the law of her domicile from binding herself by a note, cannot be made liable on such a note because, though executed at the place of her residence, it is made payable in another state by the law of which she is authorized to make such a contract. *Hager v. National German-American Bank*, 105 Ga. 116, 31 S. E. 141. 57 L. R. A.

It is to be observed that in the last case there was no conflict between the law of the place where the contract was made and that where the married woman was domiciled.

It will be observed that the reason for applying the law of Alabama in *UNION NAT. BANK v. CHAPMAN* was not that the married woman was domiciled there, but that the note was an Alabama contract, it having been signed and delivered there, although payable in Illinois.

In *Waldron v. Ritchings*, 3 Daly, 288, the opinion was expressed that the New York statute permitting married women to carry on trade or business did not extend to contracts made in New York by married women domiciled in another state, where, presumptively, the common-law rule was in force. In this case, however, it was held that the contract was not made in New York, so that the question did not actually arise.

In *Dalton v. Murphy*, 30 Miss. 59, a deed of trust of personal property, executed by a married woman domiciled in Mississippi, was held invalid, though valid by the law of Alabama, where it was executed. The decision, however, is not upon the ground of her lack of capacity to contract, but upon the ground that the deed was not executed by her in the manner prescribed by the law of Mississippi, where the performance of the contract was contemplated.

The liability of a wife who, with her husband, was domiciled in Connecticut, for property purchased upon the credit of the husband in New York and used for the benefit of both husband and wife in New York, is to be governed by the law of Connecticut (the domicile), rather than by the law of New York. It was provided by a statute of Connecticut that all purchases made by either husband or wife, in his or her own name, shall be presumed, in the absence of notice to the contrary, to be on his or her private account and liability, but both shall be liable for any actual purchases by either that shall have in fact gone for the support of the family, or for the joint benefit of both. It was held that the statute applied to the case, although it did not, by its terms, purport to have an extraterritorial operation. The

The trial court has found as facts that the defendant Elizabeth J. Chapman was the wife of William P. Chapman, who was a member of the firm; that she signed the note at the request of her husband as surety for the firm, and that, while it was the intention of the firm that the note should be negotiated and discounted in the state of Illinois, she did not know of such intention, except from what appeared on the face of the note; that she signed the note for the purpose of raising money for the firm, to enable it to continue its work upon the government contract in Alabama, and after the note was executed it was delivered to Reynolds, the payee therein named, who took it to the plaintiff's bank, in Chicago, Illinois, indorsed it, and delivered it to the bank for the purpose of securing loans already made to the firm, and for the purpose of procuring additional loans. The defense interposed by the defendant Elizabeth J. Chapman was that she had no capacity to make the contract in question, under § 2349 of the Code of 1886 of the state of Alabama, which provides that "the wife shall not, directly or indirectly, become

surety for her husband," and it was therefore invalid and of no binding force against her. On behalf of the plaintiff it is contended that the note had no legal inception until it was discounted by the plaintiff's bank in Illinois, and that it then became a valid contract of that state, and under its laws the wife was not disqualified from becoming surety for her husband. The question thus presented is as to whether this was an Alabama or an Illinois contract.

As we have seen, the note was drawn, signed, and delivered to the payee at Tusculumbia, Alabama, and Mrs. Chapman signed as surety for her husband. She did not authorize it to be discounted in Illinois, or know that the members of the firm intended to have it negotiated there. She only knew that it was payable at the plaintiff's bank, in that state. It is true, the note did not have a valid inception, in such a sense as to create a liability on the part of the makers, until it was discounted and passed over to the bank; but this does not necessarily make it an Illinois contract, so far as the surety is concerned. Mrs. Chapman's contract to become surety was com-

court said the action was not brought on the express contract made by the husband, but upon an implied promise which the statute raised from the beneficial use of the husband and wife of the goods purchased, and that, therefore, the express contract made in New York might be laid out of the case. *Buckingham v. Hurd*, 52 Conn. 404.

In *Ritch v. Hyatt*, 3 McArthur, 536, it is expressly held that a married woman's capacity to contract is to be determined by the *lex domicilii* rather than by the *lex loci contractus*.

In *Goldsmith v. Ladson*, 9 Mackey, 220, it was held that the validity of a purchase of goods on credit by a married woman domiciled at Washington, from a merchant domiciled at New York, and her title to the goods purchased, depended upon the law of the District of Columbia. The court said that it was immaterial whether the transaction was in New York (where a married woman was enabled by statute to carry on business as a sole trader, and for that purpose to make contracts to a limited amount), or at Washington (where a married woman was incapable of purchasing goods on credit), since the New York statute related only to married women acting as sole traders in that state. There is an apparent inconsistency between the decision in this case, which applies the law of the District of Columbia to determine the capacity of the married woman, and the implication that the New York statute would have been applied if it had, in terms, covered a contract made in New York by a married woman domiciled elsewhere. Even if the New York statute had expressly covered such a case, its application by a court of the District must have proceeded on the principle that the capacity of a married woman is to be determined by the law of the place of the contract, rather than the law of the place of her domicile; and if so, it would seem that the law of New York must govern, whether there was a statute expressly applicable or not. There being no statute of New York applicable, it would seem that resort should have been had to the common-law rule in New York on the subject; and, as a matter of fact, the contract seems to have been held invalid upon common-

law principles, though it was apparent that it would have been upheld if the enabling statute of the District had been held to cover such a case.

The provision of Mass. Stat. 1862, chap. 198, § 2, that if a married woman, proposing to do business on her separate account, shall fail to file the certificate provided for by the statute, the husband shall be liable upon "all contracts lawfully made in the prosecution of such business," applies to purchases made in the prosecution of a business carried on in Massachusetts by parties domiciled here, even if they are made by married women outside the state, and contemplate payment at the place where they are made. *Ridley v. Knox*, 138 Mass. 83. The court said it was unnecessary to consider what would be the effect of a New York statute covering the present case and prohibiting the imposition of any liability on the husband, since it was enough to say there was no such statute, without intimating that the result would have been different had such a statute existed.

b. *Exceptions; when domicil is at forum.*

While, as already shown, the weight of authority establishes the *lex loci contractus*, rather than the *lex domicilii*, as the general international test of the capacity of a married woman to make a personal contract, this principle, like all other principles of private international law, is subject to the qualification that the law of another state or country will not be enforced if contrary to the public policy of the forum. It is conceivable, at least, that a court might take the view that it would be contrary to the public policy of the forum to enforce the contract of a married woman valid according to the *lex loci contractus* but invalid according to the *lex fori*, although she was not domiciled at the forum (see *Spearman v. Ward*, 114 Pa. 634, 8 Atl. 430, *infra*). But when the married woman was domiciled at the forum at the time the contract was made, and would have been incapable by the law of the forum, there is much greater reason for holding that the contract, though valid according to the *lex loci contractus*, is contrary to the public policy

plete when the instrument was signed and delivered to the payee. It was then a contract beyond her recall, upon which she in the future might become liable when negotiated by the payee, if otherwise valid; and the place of the negotiation could not, under the circumstances, in any manner change the force or effect of her contract. One of the essential elements in a contract is the meeting of the minds of the contracting parties upon the matter which is the subject of the contract. In this contract Mrs. Chapman agreed with the payee of the note that she would become surety for her husband to the amount thereof, and this agreement was made in the state of Alabama. She did not agree that it should be negotiated in Illinois and made an Illinois contract. Her mind did not meet the intention of the payee upon that subject, and she

cannot, therefore, be held to have agreed that it should become a contract of that state. She knew by the terms of the instrument that it was payable at the plaintiff's bank, but this did not advise her that it was intended to discount it there, or to constitute it a contract of that state. It appears from the evidence that the firm kept its accounts with, and made its deposits in, the plaintiff's bank, and she might well have assumed that it was made payable there for the convenience of the firm.

We have had occasion to examine many cases bearing upon the question under consideration. It may not be profitable to here indulge in an extended discussion of the authorities, for we have found none that are exactly in point. We shall therefore extract from them some general principles which appear to be settled beyond contro-

of the forum, and therefore will not be enforced. If the court, upon the ground of public policy, should refuse to enforce a contract of a married woman not domiciled at the forum, there would, of course, be no chance to impute to it an intention to hold that capacity is to be determined by the *lex domicilii*, rather than the *lex loci contractus*. But when the married woman was domiciled at the forum, a decision refusing to enforce the contract is likely, unless careful discrimination is made, to be interpreted as a decision that the capacity is to be determined by the *lex domicilii*, even when the real ground is that it would be contrary to the public policy of the forum to enforce, *against persons domiciled at the forum*, contracts which, though valid where made, are condemned by the *lex fori*. Strictly and technically speaking, a decision which rests upon this ground does not apply the *lex domicilii* to the question of capacity, but, since the public policy is derived from, and evidenced by, the law of the forum, which, *ex hypothesi*, is also the law of the domicile, it is sufficiently accurate, for the purposes of the disposition of such a case, to say that the capacity is determined by the *lex domicilii*. The use of that term, however, in such a case is objectionable because it is calculated to create an impression that the court is announcing a general principle of international law which is applicable wherever the domicile may happen to be. The reality and importance of the distinction here alluded to, between the theory that the *lex domicilii* determines capacity, and the theory that denies enforcement of a contract against a married woman domiciled at the forum because contrary to its public policy, are shown by the fact that the first theory would operate to validate contracts valid according to the *lex domicilii* but invalid according to the *lex loci contractus*, as well as to invalidate contracts, valid according to the *lex loci contractus*, but invalid according to the *lex domicilii*; while the second theory would only operate to invalidate contracts, valid according to the *lex loci*, but invalid according to the *lex domicilii* (using the latter term as synonymous with *lex fori*), and never to validate contracts invalid by the *lex loci contractus* but valid by the *lex domicilii*. Again, according to the first theory, the *lex domicilii* would determine the question of capacity wherever that question might arise, even if in the state where the contract was made, while the second theory leaves the question to be determined by the *lex loci contractus*, if it arises in any state or country other than that 57 L. R. A.

of the domicile. The distinction above discussed is well brought out in *Armstrong v. Best*, 112 N. C. 59, 25 L. R. A. 188, 17 S. E. 14. In that case it was held that a contract made in Maryland by a married woman domiciled in North Carolina (the forum) was not enforceable in the latter state, by the law of which a married woman is incapable of making such a contract, notwithstanding that she would be capable according to the law of Maryland (*lex loci contractus*). The decision is not upon the ground that the capacity of a married woman is, in general, to be determined by the law of her domicile. Upon the other hand, the court expressly says that the weight of authority establishes that such capacity is, in general, to be tested by the law of the place where the contract is made, and that if the action at bar had been brought in the courts of Maryland, the defendant could not have availed herself of her incapacity under the law of her domicile. The decision is upon the ground that the enforcement of the contract against a married woman domiciled in North Carolina would be contrary to the public policy of the latter state, and that the case therefore falls within the qualification which attaches to all principles of private international law, to the effect that no state or nation will enforce a foreign law which is contrary to its fixed settled policy.

In *Hanover Nat. Bank v. Howell*, 118 N. C. 271, 23 S. E. 1005, it was held, following the decision in *Armstrong v. Best*, 112 N. C. 59, 25 L. R. A. 188, 17 S. E. 14, that a married woman, domiciled in North Carolina, could not be held liable on a note signed as surety for her husband in North Carolina, although it was payable in New York, according to the law of which she was capable of making such a contract. This decision was on the ground that it would be contrary to the public policy of North Carolina to enforce such a contract against one of its own citizens. In this case it is true that the *lex loci contractus* and *lex domicilii* were the same; but if the domicile had not been at the forum, the court would, perhaps, have applied the law of the place of performance upon the ground that, as between the law of the place where a contract is made and that where it is to be performed, the latter should govern, if it does not violate the public policy of the forum.

In *Spearman v. Ward*, 114 Pa. 634, 8 Atl. 430, the court said: "It is true that the *lex loci contractus* governs as to the legality and construction of a contract. But the *lex fori* will not always enforce a contract because it

versy and apply them to the question under consideration: (1) All matters bearing upon the execution, the interpretation, and the validity of contracts, including the capacity of the parties to contract, are determined by the law of the place where the contract is made; (2) all matters connected with its performance, including presentation, notice, demand, etc., are regulated by the law of the place where the contract, by its terms, is to be performed; (3) all matters respecting the remedy to be pursued, including the bringing of suits and the service of process, depend upon the law of the place where the action is brought. In the case of *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245, a bill of exchange was drawn by a party in Chicago upon a firm in St. Louis, and verbally accepted by a member of the St. Louis firm,

then present in Chicago. Under the law of Missouri, acceptances were required to be in writing, but under the law of Illinois a parol acceptance was valid. The bill of exchange, as we have seen, was drawn in Chicago, Illinois, and therefore all matters pertaining to its execution, interpretation, and validity had to be determined by the laws of that state. It was made payable in St. Louis, Missouri, and ordinarily the laws of that state would control with reference to acceptance and performance; but a member of the firm in that state was present in Chicago, and he there accepted the bill of exchange, without waiting for it to be sent on to St. Louis, to his firm in that city. It was therefore held to be an Illinois acceptance. In the case of *Voight v. Brown*, 42 Hun, 394, the husband and wife resided in the state of New York. The wife here

was lawful where made. It will not be enforced by the courts of other states where the contract is against public morals, or the public interests. The *lex loci* always governs as to the disability of minors, married women, etc., to contract; and sometimes it governs as to their ability to contract. But I do not think it should always govern." The court then intimates that it might be a question whether the public policy of Pennsylvania would not forbid the enforcement in that state of a contract made in another state, where it would be valid, notwithstanding that in this case the married woman was not domiciled in Pennsylvania. The decision against the enforcement of her liability, however, was not put upon that ground.

So, in *Hayden v. Stone*, 13 R. I. 106, the court said: "And a contract valid by the laws of one state cannot be enforced in another, unless such a contract made between its own citizens could be enforced there, or, in other words, it depends on the *lex fori*." It was said in the subsequent case of *Brown v. Browning*, 15 R. I. 422, 7 Atl. 403, however, that the court did not, in the former case, mean to make a rule as broad as the language above quoted might imply, and that the reasoning of the court in the former case did not go to the validity of the contract, but to the remedy sought, which is always subject to the *lex fori*. In *Brown v. Browning* a contract made in Connecticut after sunset on Sunday, being valid according to the law of that state, was held to be enforceable in Rhode Island, notwithstanding that it would have been invalid if made in the latter state. The case is distinguished from *Hayden v. Stone* on the ground that the enforcement of the contract violated no law of remedy in force in Rhode Island.

It is a prerogative of the sovereignty of every country to define the conditions of its members, not merely its resident inhabitants, but others temporarily there, as to capacity and incapacity. But capacity and incapacity as to acts done in a foreign country, where the person may be temporarily, will be recognized as valid, or not, in the forum of his domicile, as they may infringe, or not, its interests, laws, and policies. *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. Rep. 319.

In *Thompson v. Taylor* (N. J. L.) 46 Atl. 567, the court held that a contract of suretyship by a married woman domiciled in New Jersey could not be enforced in that state, although valid according to the law of the place where it was made. This decision is not upon the

ground that the *lex domicilii* determines the capacity of a married woman, but upon the ground that it would be contrary to the public policy of New Jersey to enforce such a contract against one of its own citizens.

In *Robinson v. Queen*, 87 Tenn. 445, 3 L. R. A. 214, 11 S. W. 38, *supra*, the court said that if the suit were against a married woman, a citizen of Tennessee, on a contract made out of the state, there would be much force in the insistence of counsel that, inasmuch as it was the fixed policy of Tennessee to throw around married women the shield of disability, a court of that state should not, under any supposed obligation of comity, entertain a suit based upon such a contract.

It will be observed that in one group of cases cited in division I. a, *supra*, to sustain the general principle that the *lex loci contractus*, rather than the *lex domicilii*, determines the capacity of a married woman to make a personal contract, the domicile was at the forum. Some of these cases do not recognize, or at least do not advert to, any distinction arising from the fact that the domicile of the married woman was, or was not, at the forum. In *Bowles v. Field*, 83 Fed. 886, however, the court said that, upon the assumption that the consideration for the note and mortgage in suit rested upon notes executed and made payable in Ohio, by a married woman domiciled in Indiana, as surety for her husband, their enforcement by a Federal court sitting in Indiana would not be precluded by the public policy of the latter state. The court further said that if there were an irreconcilable conflict in the public policy of the two states on the subject, the Federal court ought to be governed by the more liberal policy indicated by the act of Congress touching the rights of married women in the District of Columbia, rather than by the public policy indicated by the statutes of Indiana. In *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, the court conceded that, under some circumstances, the fact that the married woman was domiciled at the forum at the time the contract was made might bring the case within the exception with reference to contracts contrary to the public policy of the forum, to the rule that the *lex loci contractus*, rather than the *lex domicilii*, furnishes the test of capacity. The court said in this connection: "It is possible also that in a state where the common law prevails in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an ut-

authorized her husband to sign her name to an accommodation note. He then went into Connecticut, and there executed a note payable to the order of the firm of which he was a partner, and signed her name thereto. He then took the note to New York, and had it discounted by the plaintiffs, and received the money. Under the laws of Connecticut a married woman could not contract, except for the benefit of herself, her family, or her separate or joint estate. Under the laws of New York, her contract was valid. It was held to be a New York contract. The learned appellate division cite this case as supporting their contention, but to our minds it widely differs from that which we have under consideration. In that case the wife, as we have seen, resided in this state, and remained in this state. The authority of her husband to sign her name to the note

was given here. When he, therefore, as her agent, drew the note and signed her name thereto, he acted upon authority derived in this state, and the paper became of the same force and effect as if the wife had actually signed it here. It was taken to the city of New York, and there negotiated. We thus have it drawn as a New York contract, and negotiated as a New York contract, and, it evidently was so understood by the parties. In the case of *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, a wife guaranteed the payment by her husband of \$500 to one Pratt of Portland, Maine. The guaranty was in writing, and was dated at Portland, January 29, 1870. She, however, actually signed the paper in Massachusetts, but she sent it to Pratt at Portland, and caused it to be delivered to him there. Acting upon it he delivered goods to her husband which

ter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state for the protection of its own citizens that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract." The court held, however, under the circumstances, that there was no reason of public policy which should prevent the maintenance of the action, because, although at the time the guaranty was made the law of Massachusetts did not authorize a married woman to make contracts of that kind, yet even then she had a very extensive power to bind herself by contract, and that power had been extended at the time of the commencement of the action so as to cover guaranty contracts.

So, in *Holmes v. Reynolds*, 55 Vt. 39, while it was held that the validity of a contract of a married woman was to be determined by the law of Massachusetts, where it was made, though apparently she was domiciled in Vermont, the court said that contracts are not *proprio vigore* of any efficiency beyond the territory of the state where made; the effect given them elsewhere is from comity, and not of strict right; and that how far comity ought to extend is left to the courts in the jurisdiction where the remedies are sought. It does not prevail where the contract is in violation of the laws of that jurisdiction, of God, or nature, against good morals, religion, public rights, or public policy. The case, however, was held not to fall within any of the foregoing exceptions. It appeared that after the contract in question the legislature of Vermont passed a statute authorizing such contracts.

In *Case v. Dodge*, 18 R. I. 661, 29 Atl. 785, it was held that a purchase of goods by a married woman in Massachusetts, being valid according to the law of that state, was enforceable in Rhode Island, although, at the time it was made, it would not be valid according to the law of the latter state. It does not appear in this case whether the married woman was domiciled in Rhode Island or Massachusetts. At the time the action was brought such a contract would have been valid even according to the law of Rhode Island. The court takes the general position that if a contract is valid by the law of the place where it was made an action upon it in another forum will be sustained, unless the contract contravenes the law or policy of that forum. It is obvious that the court here distinguishes between a contract which is contrary to the statute of the forum and one

which is contrary to its public policy, for in this case the contract, when made, was contrary to the law of Rhode Island, but it was enforced notwithstanding.

In *Brigham v. Gilmartin*, 58 N. H. 346, where a contract, made in Massachusetts, was held to be enforceable in New Hampshire, the domicile of the married woman, the court said that the Massachusetts liability of the defendant to pay for the property she brought there is not in conflict with the New Hampshire law of married women, nor hostile to New Hampshire interests, nor contrary to good morals.

II. *As between lex loci contractus and lex fori; remedy.*

Even when it is admitted, or conceded, that the capacity of a married woman is to be tested by the law of some place other than that of the forum, and that by the law of that place she had the requisite capacity to make the contract in question, there may still be a difficulty in the way of enforcing the contract at the forum, with the same effect as if the action had been brought at the place whose law determines the married woman's capacity, either because the *lex fori*, which necessarily determines the remedy, furnishes no remedy at all, or a remedy which is too broad or too restricted to protect the rights of the parties as fixed by the law of the place which determines the existence and extent of the capacity of the married woman, it being impossible to borrow the remedy from the latter place.

Thus, in *Ruhe v. Buck*, 124 Mo. 178, 25 L. R. A. 178, 27 S. W. 412, it was held that, notwithstanding that a married woman by the law of Dakota, where the matrimonial domicile was established and the contract was made, might bind herself by contract, yet her personal property in Missouri was not subject to attachment for the debt created by such contract. The decision is not upon the ground that the validity of the contract was to be determined by the law of Missouri, but upon the ground that the creditor was only entitled to the remedies allowed by the law of Missouri, and that at the time the suit was commenced the property of a married woman could not be attached in that state. There was an able dissenting opinion in this case in which the position was taken that while the *lex fori* governs as to the remedy, yet the status of the party with reference to the contract was established by the *lex loci*, and that, relatively to such contract, she had the status of a *feme sola*.

he then purchased. The guaranty was valid under the laws of Maine, but void under the laws of Massachusetts. It was held that the contract was governed by the laws of Maine. In this case it will be observed that the guaranty not only purports to have been executed in Maine, but that the wife caused the instrument to be sent to Maine, and there delivered to the plaintiff. She therefore knew and understood that the contract was to have its inception there, and consequently must have intended it to be controlled by the laws of that state. In line with this is the recent case of *Grand v. Livingston*, 4 App. Div. 589, 38 N. Y. Supp. 490, Affirmed in this court (158 N. Y. 688, 53 N. E. 1125), in which it was expressly held that the contract must be construed and determined under the law of the

state where it was executed, unless it could fairly be said that the parties at the time of its execution clearly manifested an intention that it should be governed by the laws of another state. Applying these principles to the question under consideration, it seems clear that the capacity of Mrs. Chapman to contract must be determined by the law of the state where the contract was executed, unless it can fairly be said that she, at the time of the execution of the instrument, clearly understood and intended that it should be governed by the laws of another state. Such an intention or understanding is not manifest in this case. Instead thereof, it is found that she did not know where the paper was to be discounted.

The judgment should be reversed, and a

The decision in *Hayden v. Stone*, 13 R. I. 106,—where it was held that neither real nor personal property in Rhode Island belonging to a married woman domiciled in Massachusetts could be attached in an action upon a promissory note made by her in Massachusetts and valid in that state but invalid according to the law of Rhode Island,—as explained in the subsequent case of *Brown v. Browning*, 15 R. I. 422, 7 Atl. 403,—seems to rest on substantially the same ground as the decision in the preceding case.

The court in *Gibson v. Sublett*, 82 Ky. 596, seems to take the same position that was taken in the dissenting opinion in *Ruhe v. Buck*, 124 Mo. 178, 25 L. R. A. 178, 27 S. W. 412, *supra*. In that case it was held that a contract made in Louisiana by a married woman domiciled in that state, and which was valid by the law of that state and enforceable against her separate property there, could be enforced against her real property in Kentucky, notwithstanding that the obligation was not one which, by virtue of the Kentucky statute, could be enforced against such property. The decision is upon the ground that when it is ascertained that a contract made by a married woman in another state is valid and binding, the remedy provided for the satisfaction of judgments should be applied as though the judgment were against a *feme sole*, or a married woman invested with the rights, and subject to the responsibilities, of a *feme sole*. The same position was taken in *Young v. Bullen*, 19 Ky. L. Rep. 1561, 43 S. W. 687.

In *Hinkson v. Williams*, 41 N. J. L. 35, it was held that an action could not be maintained in New Jersey against a husband and wife for goods sold to the wife in Pennsylvania upon her credit, by virtue of a statute of Pennsylvania which provides, in effect, that suit may be brought and judgment recovered against both husband and wife upon such liability, but that after judgment execution must first issue against the husband alone, and shall issue against the wife only in case no property of his is found. The decision is upon the ground that there was no mode of procedure by which the wife's right, under the Pennsylvania statute, to have the judgment satisfied out of the husband's property before resorting to hers could be preserved, since, under the law of New Jersey, the effect of a judgment in the action would be merely that of a common-law judgment against two defendants, to be carried into effect by execution against both, and the wife's separate property might thus be made primary.

ly liable for the entire debt,—a result manifestly repugnant to the policy of the Pennsylvania act.

In *Spearman v. Ward*, 114 Pa. 634, 8 Atl. 430, it was held that a note given in Ohio by a married woman domiciled in that state could not be enforced against her personally, or even against her separate property in Pennsylvania, notwithstanding that it would be enforceable against her separate estate in Ohio. The decision is upon the ground that the proceeding on a married woman's contract in Ohio is practically a proceeding *in rem*, not against the *feme covert* personally, but against her property; and that the law which authorized it has no extraterritorial effect. *Whitehurst's Estate*, 7 Pa. Co. Ct. 12, is to the same effect.

In *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681, it was held that while the capacity of a woman to bind herself and her property was to be determined by the law of Pennsylvania, where the contract was made, the form of the judgment, whether against her generally or against her separate property in that state, was to be determined by the law of West Virginia (*lex fori*); and in this case it was held that the judgment ought to be limited to her separate property, according to the law of West Virginia at the time the suit was commenced, although according to the law of Pennsylvania a personal judgment could have been entered against her.

So, in *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. Rep. 319, the court, while conceding the general principle that the validity of a contract is to be determined by the law of the place where it is made, or by the law of the place of performance, held that notwithstanding that a note made by a married woman would be a personal charge against her by the law of the place where it was made and was payable, it would not support an action in Mississippi, her domicile, for a personal judgment, but that the remedy would be limited, as in case of a contract made in that state, to her personal property.

While it is probably true, as held in the two cases last cited, that if the *lex fori* limits the remedy to the separate property of the wife, a personal judgment cannot be recovered although allowed by the law of the place which determines the validity of the contract, the converse of that proposition, namely, that if the *lex fori* permits a personal judgment, such a judgment may be recovered although not allowable by the law of the other place, does not seem to be true.

new trial granted, with costs to abide the event.

Parker, Ch. J., and Gray, O'Brien, and Martin, JJ., concur.

Vann, J., dissenting:

While Mrs. Chapman signed her name in Alabama, she promised to pay in Illinois. If there is doubt as to the state where the contract was made, there is none as to the state where it was to be performed. Although in fact a surety for her husband's firm, there is nothing on the face of the note to show it; for she contracted as a maker, and her promise is absolute in form. Uniting with that firm and others as joint makers, she promised to pay the sum in question to the order of E. P. Reynolds, Jr., at the "Union National Bank, Chicago, Ill." The payee was a member of her husband's firm, and she knew it when she signed the note. She also knew that it was an accommodation note, made to raise money for the use of the firm, and that

until negotiated it was without binding force upon anyone. After signing it she entrusted it to the payee, knowing that, in behalf of the firm, he intended to negotiate it somewhere, and that he was at liberty to negotiate it anywhere. When the payee thus received the note signed by her, she had made no contract, for the paper had no inception as yet. The contract of a surety rests upon the contract of the principal, and until the latter becomes operative the former is not binding. The promise of the surety has nothing to act upon until the promise of the principal is in force as an effective contract. When the firm negotiated the paper in Illinois, as they had a right to do, by selling it to a bona fide purchaser for value, that which theretofore had been merely a note in form first became a note in fact. It then became a contract, and for the first time acquired the quality of commercial paper. Until then the law did not recognize Mrs. Chapman as a surety. She had made no enforceable contract, but merely an inchoate promise, which was

Thus, in *Bradley v. Johnson*, 46 N. J. L. 271, it was held that an action would not lie in that state to recover a personal judgment against a married woman upon a contract made in New York, notwithstanding that such an action would lie if the contract had been made in New Jersey. The decision is upon the ground that, as no statute of New York on the subject was proved, it must be presumed that the equity rule is in force in New York, by which a liability assumed by a married woman will be enforced against her separate estate, but will not render her personally liable.

So, an action cannot be maintained in Colorado to obtain a personal judgment against a married woman domiciled in Missouri upon a contract made by her in that state, where, by the law of Missouri, the contract would only constitute a charge against her separate property. *Hochsradter v. Hays*, 11 Colo. 118, 17 Pac. 289. The decision is upon the ground that by the law of Missouri, which governs the effect of the contract, there was no personal obligation.

But a charge by a married woman in Tennessee, of her separate estate at the place of contract or elsewhere, for the payment of notes given for her own debt, may be enforced in Mississippi, although the contract might not uphold a personal judgment in Tennessee against her. *Read v. Brewer* (Miss.) 16 So. 350.

In *Halley v. Ball*, 66 Ill. 250, it was held that the question whether an action against a married woman should be at law or in equity must be determined by the law of the forum, rather than by the law of the place where the contract was made. In this case, however, the contract was enforceable at law in both states. The court said that a party seeking to enforce a contract valid by the laws of another state must avail himself of the remedy provided by the laws of the forum.

The law of the state in which a contract is executed by a married woman must be resorted to, to determine the nature of the obligation it imposes. But if it only constitutes a charge against her separate property, and does not bind her personally, the question whether it is enforceable in an action at law, or only by suit in equity, is governed by the *lex fori*. *Burchar v. Dunbar*, 82 Ill. 450, 25 Am. Rep. 334. 57 L. R. A.

In this case the contract was made in New York, and, by the law of New York, did not bind her personally, but was a charge upon her separate property. It was held that an action at law would not lie on the contract in Illinois, since by the law of that state the remedy would be exclusively in equity, notwithstanding that by the law of New York an action at law might be brought. It does not appear where the married woman was domiciled.

In *Robinson v. Queen*, 87 Tenn. 445, 3 L. R. A. 214, 11 S. W. 38, it was said that the court of Tennessee would recognize and enforce so much of the law of Kentucky as determined and fixed the liability of a married woman domiciled in that state upon a contract made and payable in that state; yet, with respect to the necessity of joining her husband as a defendant, the law of Tennessee, rather than that of Kentucky, governed.

The result of the foregoing cases on the question of remedy seems to be that whatever law determines the capacity of a married woman to make a personal contract, the *lex fori* must be looked to for the remedy to enforce the contract. If the *lex fori* furnishes no remedy at all, it is obviously impossible to enforce the contract at the forum, even conceding it to be perfectly valid. But the question whether the particular contract in suit, if made at the forum, would have been enforceable, does not furnish the proper criterion of the existence, or nonexistence, of a remedy at the forum. Often, the very necessity of holding that the law of some place other than the forum determines the capacity of a married woman arises from the fact that if it were governed by the law of the forum it would be unenforceable, not because there would be no remedy, but because there would be no right upon which the remedy could act. It follows, therefore, that there may be a remedy at the forum for the enforcement of contracts of married women, which will attach to contracts, made outside of the forum, of a kind that are prohibited by the *lex fori*, if made at the forum.

Thus, it was held in *Wood v. Wheeler*, 111 N. C. 231, 16 S. E. 418, that a personal judgment may be rendered in North Carolina against a married woman upon a note signed by her in South Carolina, where she was domiciled at the time, it being valid according to the law of

without legal life until what was done in Alabama with implied authority to complete it elsewhere ripened into a lawful obligation by what was done in Illinois. All that was done in Alabama did not make a contract, and therefore the contract was not made in that state. It was made in Illinois, because there was no contract, either of principal or surety, until the paper was used in that state. That use of the note was necessarily within the contemplation of Mrs. Chapman when she signed it and gave it to Mr. Reynolds, the payee, with her implied consent that he or his firm might negotiate it anywhere, and hence within a state where the law permits a wife to become surety for her husband. As the law presumes a lawful, and not an unlawful, intent, when possible, the presumption arises, in the absence of evidence upon the subject, that she intended the note should be used in a state where she could become such a surety. Hence she is presumed to have contracted, not with reference to the laws of Alabama, where her action would not be binding, but with reference to the laws of any jurisdiction where

her promise would be lawful, provided the paper should subsequently be used within such a jurisdiction. Otherwise she must have intended to aid in imposing upon someone, which will not be presumed, but must be proved. As the note was made payable in Illinois, was delivered by Mrs. Chapman with leave to negotiate it anywhere, and it was actually negotiated and had its first inception in that state, the mere fact that it was written in another state, where she had a temporary residence only, and where she knew it could not be enforced, and hence could not be honestly used, did not make it a contract of that state, nor prevent it from becoming a contract of the state within which she promised to pay it. I think it was an Illinois contract, and should be governed by the laws of that state.

For these reasons, I dissent from the conclusion reached by the majority of the court, and record my vote in favor of affirming the judgment appealed from.

Bartlett, J., concurs with **Vann, J.**

that state, notwithstanding that it would have been invalid if executed in North Carolina because her husband did not assent thereto, and notwithstanding that it was secured by a mortgage upon land in North Carolina which is void because not executed in the manner required by the law of North Carolina.

And in *Benton v. German-American Nat. Bank*, 45 Neb. 850, 64 N. W. 227, it was held that an action would lie in Nebraska to recover a personal judgment against a married woman domiciled in Missouri, upon an indorsement. In the latter state, of a note executed and delivered and payable in such state, notwithstanding that it would have been invalid if governed by the law of Nebraska, because it was not made with reference to, or upon the faith and credit of, her separate estate or business, as required by the Nebraska statute. In this case it will be observed that the place where the contract was made, where it was payable, and where the indorser was domiciled, was the same, and the conflict was merely between the law of that state and the law of the forum.

There must, however, be, not only a remedy at the forum, but it must be such that it will protect the rights of the married woman, and not extend her liability beyond that fixed by the law which governs the contract. Thus, as already shown (*Hinkson v. Williams*, 41 N. J. L. 35, *supra*), the action at the forum may fail because the remedy at the forum is too broad, and extends the liability beyond that fixed by the law which governs the contract. Sometimes, however, when the remedy at the forum is broader than that at the other place, the difficulty may be avoided by foregoing a part of the remedy at the forum and taking advantage only of that part which is coextensive with the remedy at the other place (*Bradley v. Johnson*, 46 N. J. L. 271; *Hochstadter v. Hays*, 11 Colo. 118, 17 Pac. 289, *supra*). Again, when the remedy at the forum is too narrow and restricted to reach the full liability of the married woman under the law of the place governing the contract, the other party can avail himself of it, such as it is; but he must be content with it, and cannot supplement it by borrowing the remedy from the other place.

57 L. R. A.

III. *As between lex loci contractus, or lex domicilii, and lex rei sita.*

a. *Personal property.*

As a general rule, the general rights, capacities, and disabilities of a married woman, in regard to her personal property, are governed by the law of her domicile, rather than the law of the place where the property is situated. *Lofthus v. Farmers' & M. Nat. Bank*, 133 Pa. 97, 7 L. R. A. 313, 19 Atl. 847. The point involved was as to the validity of a transfer, by a married woman domiciled in Great Britain, of certificates of loan issued by the city of Philadelphia. The court said that the question how far the *lex loci contractus* might affect the rights of property arising therefrom was not necessary to consider, evidently because the transfer was executed in Great Britain. In this case, however, it was held, by way of exception to the general rule, that the mode of transfer was to be governed by the law of Pennsylvania, it being held that the act regulating the mode of transfer applied to foreign, or nonresident, married women owning such securities.

In *Union Nat. Bank v. Hartwell*, 84 Ala. 379, 4 So. 156, the court said that the general rule is that the capacity of a married woman to make contracts in respect to her separate personal property, when it is situated in a country other than that of the domicile of her husband, is that the law of the domicile of the husband governs unless the property, from its peculiar nature, necessarily has an implied locality, or unless the contract is made in the country where the property was situated. In this case it was held that the capacity of a woman to give her husband a power of attorney to pledge stock in an Alabama corporation was to be governed by the law of Louisiana, where the woman was domiciled and the transaction took place, rather than by the law of Alabama, where the stock had its situs, there being no rights of creditors involved.

The court, in *Kerr v. Urie*, 86 Md. 72, 38 L. R. A. 119, 37 Atl. 789, while conceding, for the purposes of the argument, that a subscription made in one state to capital stock of a corporation which exists in and carries on its

business in another is a contract to be performed in the latter state, and is governed by the laws of that state, nevertheless held that a transfer of stock in a national bank in another state made in Maryland to a married woman, who was competent by the law of that state to be a stockholder, is valid, irrespective of the law of the state in which the bank is situated.

The liability of a married woman under an agreement executed in New Jersey, where the parties resided, to repay to her husband for advances made by him in New Jersey for the support of the family, out of her interest in an estate which was being administered in New York, is determined by the law of New Jersey, rather than by the law of New York. *Hendricks v. Isaacs*, 46 Hun, 239. In this case it was held that, as no statute of New Jersey had been proved, the right of the husband to maintain an action on the agreement must depend upon the general principles of equity which have been applied to the solution of controversies arising between husband and wife.

With reference to the right to subject personal property in one state to the discharge of a debt contracted in, and governed by, the laws of another, see *supra*, II.

As between the *lex loci contractus* and *lex domicilii*, the capacity of a married woman to contract with reference to her personal property would seem, upon principles applicable to contracts generally (see I. a, b, *supra*), to be governed by the former,—at least when the domicile is not at the forum. It is to be remembered, however, in this connection, that the *lex domicilii* determines, as between the husband and wife, the existence and extent of her title to personal property, so that, conceding her capacity to contract with reference to personal property owned by her is to be determined by the *lex loci contractus* rather than the *lex domicilii*, we must nevertheless look to the latter to ascertain what personal property is owned by her. Obviously, if the common-law rule, by which the personal property of the wife vests in the husband, prevails at the domicile, a contract by the wife with reference to such property is ineffectual, even if by the law which governs the contract she has as full capacity to contract as a *feme sola*.

b. Real property.

The capacity of a married woman to contract with reference to real property is determined by the law of the place where the property is situated, at least so far as her capacity depends upon a law which operates directly on such property, as distinguished from one which operates on the person.

Thus, it has been held that the capacity of a married woman, with or without the assent of her husband, to convey or mortgage real property, is determined by the law of the place where the property is situated (*lex rei sitæ*). Irrespective of the place where the deed or mortgage was executed, or the married woman was domiciled. *McDaniel v. Grace*, 15 Ark. 463; *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12; *Walling v. Christian & C. Grocery Co.* 41 Fla. 479, 47 L. R. A. 608, 27 So. 46; *Sell v. Miller*, 11 Ohio St. 331; *Otis v. Gregory*, 111 Ind. 504, 13 N. E. 39; *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303; *Cochran v. Benton*, 126 Ind. 58, 25 N. E. 870; *Doyle v. McGuire*, 38 Iowa, 410.

And, not only the form of execution of a power of attorney executed by a married woman domiciled in Louisiana authorizing her

husband to convey real property in Arkansas, but her capacity to give such a power of attorney at all, is to be determined by the law of Arkansas (*lex loci sitæ*), and not by the law of Louisiana, where she was domiciled and where the power of attorney was executed. *McDaniel v. Grace*, 15 Ark. 463.

So, the capacity of a married woman to convey land directly to her husband (*Duffy v. White*, 115 Mich. 284, 73 N. W. 363); or to receive a conveyance directly from him (*Rush v. Landers*, 107 La. 549, 32 So. 95. *Polson v. Stewart*, 167 Mass. 211, 36 L. R. A. 771, 43 N. E. 737).—is to be determined by reference to the law of the place where the land is situated, irrespective of the domicile or the place where the deed was executed.

Sometimes, however, while a contract of a married woman with reference to real property would be invalid if executed in the state where the property is situated, it would be so, not because of a law which operates directly on the property, but because of one which operates on the person, or, to use the language of the civil jurists which has been adopted in Louisiana, it would be because of a personal statute, and not because of a real statute. When that is so, if the contract would be valid by the law of the place where it was made and where the married woman was domiciled, it is at least a serious question whether it should not be upheld, even as affecting real property, at another place. Such a case was presented in *Augusta Ins. & Bkg. Co. v. Morton*, 3 La. Ann. 417. In that case a mortgage executed in Maryland, by a married woman domiciled there, upon immovables in Louisiana, to secure a debt of her husband, was upheld in the latter state, notwithstanding an article of the Louisiana Code which provided that a wife could not bind herself for the debts of her husband. The decision is upon the ground that by the law of Maryland a married woman could bind her separate property to secure a debt of her husband, and that article of the Code above referred to was a personal, and not a real, statute, i. e., that it operated on persons rather than on property, and that her personal capacity was governed by the law of Maryland. In *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303, a contrary result was reached. It was there held that a mortgage on land in Indiana to secure a debt of the husband was invalid, although executed in Ohio, because by the statute of Indiana a married woman was prohibited from mortgaging her land as surety for her husband. This case, however, is distinguishable from the preceding case because the Indiana statute expressly related to property, and was therefore real, and not personal. It was held in *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12, however, that a mortgage executed by a married woman on her separate real estate in Florida, as security for a debt of her husband, was valid and enforceable, notwithstanding that by the law of Alabama, where the mortgagor was domiciled, the mortgage executed, and the debt payable, a wife could not bind herself, or her property, for a debt of the husband. As the statute of Alabama was evidently a personal statute, it would seem that the principle of the decision in the Louisiana case would have made the law of Alabama govern. In *Evans v. Beaver*, 50 Ohio St. 190, 33 N. E. 643, it was held that a mortgage upon land in Ohio, executed by a married woman domiciled in Indiana, to secure notes given by her husband in Indiana and payable in that state, was invalid because by the law of Indiana she was not capable of

becoming surety for her husband, although she was by the law of Ohio. The decision, however, does not rest upon the theory adopted in the Louisiana case, but upon the ground that a mortgage was only security for the performance of the personal obligation, and, that obligation being invalid by the law of Indiana, which governed it, there was nothing to support the mortgage. This result was avoided in *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12, *supra*, by holding that the personal obligation of the husband, which was valid by the *lex loci contractus*, was sufficient to support the wife's mortgage, notwithstanding that she was not personally bound because of her incapacity by the *lex loci contractus*.

Apparently upon the same principle that controlled the decision in *Augusta Ins. & Bkg. Co. v. Morton*, 3 La. Ann. 417, it was held in *Kelly v. Davis*, 28 La. Ann. 773, that the capacity of a married woman to take a deed of real property situated in Louisiana from her husband was to be determined by the law of Mississippi, where the parties resided, though its effect on real property in Louisiana would be determined by the law and policy of Louisiana. In this case the deed, which was executed in Mississippi, was held invalid in accordance with a law of Mississippi, making such a deed void as to existing creditors. The court said that, even if tested by the law of Louisiana, the deed would be invalid; but the decision is clearly on the ground that the law of Mississippi governed apparently because it was personal.

The weight of authority seems to establish that a contract made in one state by a married woman there domiciled, with reference to, or upon the credit of, real property situated in another, may be enforced against such real property in accordance with the *lex rei sitæ*, notwithstanding that it was invalid by the law of the place where it was made.

Thus, a promissory note given in Louisiana by a married woman domiciled in that state, as surety for her husband, although void according to the law of Louisiana, will nevertheless be enforced in Mississippi against her separate real property in that state, where she contracted with reference to such estate and intended to charge it by the note. The decision is upon the ground that, while the capacity of a married woman to make a personal contract will be determined by the law of her domicile, yet her capacity to contract with reference to her real property is determined by the *lex rei sitæ*, and that the note in question was a contract with reference to her real property. It was conceded in this case that the note, as a personal obligation of the wife, would have been adjudged void out of comity to Louisiana, even if it were not so by the law of Mississippi. *Frieron v. Williams*, 57 Miss. 451.

And in *Shacklett v. Polk*, 51 Miss. 378, it was held that a note given in Tennessee by a married woman domiciled in that state, in consideration of services rendered in respect of a plantation owned by her in Mississippi, would be enforced against her property in Mississippi, although by the law of Tennessee (*lex loci* and *lex domicilii*), she was incompetent to contract.

Whenever a married woman, having a separate estate in lands in Missouri, makes a contract which, if made in Missouri, would be enforced in equity against her separate estate there, her capacity to make it, and its validity, when the attempt is made in Missouri to enforce it against her separate estate there, are

governed by the laws of Missouri. *Johnston v. Gawtry*, 11 Mo. App. 322, Affirmed in 83 Mo. 339.

In *Griswold v. Golding*, 8 Ky. L. Rep. 777, 8 S. W. 535, however, it was held that a note executed and payable in Missouri, by a woman domiciled there, and which, by the law of Missouri, was not chargeable against her personally, or against her general estate, was not chargeable against real property in Kentucky belonging to her general estate, although the note, if made and payable in Kentucky, would have been chargeable against such property. In this case, however, it is stated in the opinion that it did not appear that the married woman promised the creditor that the note should be a charge upon, or that it should be paid out of, her Kentucky estate, or, indeed, that she made any representation whatever as to the debt or her estate. The implication would seem to be that if the contract had been made with reference to, or upon the credit of, the Kentucky estate, it would have been held enforceable against such estate.

The converse of the foregoing proposition, however,—namely, that real property will not be liable unless so by the *lex rei sitæ*,—does not seem to follow.

Thus, it was held in *Gibson v. Sublett*, 82 Ky. 596, *supra*, II., that a contract made in Louisiana by a married woman domiciled in that state, which was valid by the law of that state and enforceable against her separate property there, could be enforced against her real property in Kentucky, notwithstanding that the obligation was not one which, by virtue of the Kentucky statute, could be enforced against such property.

So, in *Young v. Bullen*, 19 Ky. L. Rep. 1561, 43 S. W. 687, *supra*, II., it was held that a contract executed by a married woman, in a state where it is legal and binding, may be enforced against her real and personal property in Kentucky, notwithstanding that it would not be so enforceable if executed in Kentucky.

So, the laws of Iowa providing that a married woman may create a liability against her separate real estate are properly applied in an action in Texas to attach the separate property of a married woman residing in Iowa, upon a promissory note executed by her in the latter state. *Merrillees v. State Bank*, 5 Tex. Civ. App. 483, 24 S. W. 564.

The Kentucky decisions, as already shown (*supra*, II.), are upon the ground that, relatively to such a contract, the married woman has acquired the status of a *feme sole* which will be recognized even by a court of the state or country where the land is situated. The question is discussed as though the only obstacle in the way of enforcing the contract against the real property in Kentucky was the general principle that the *lex fori* governs as to the remedy. There is no allusion to the general principle that the *lex rei sitæ* governs with respect to contracts relating to real property. It is true that in neither of these cases did the contract relate to real property; but, if the position of the court is sound, and the general principle referred to is conceded, the rather singular result follows, that while a mortgage upon the Kentucky land, though executed elsewhere as collateral security for the personal obligation, would not have been valid, yet that land may be subjected to the payment of that personal obligation by means of an execution or other process.

The position taken in the majority opinion in *Rube v. Buck*, 124 Mo. 178, 25 L. R. A. 178, 27 S. W. 412, *supra*, II., though that case did

not involve real property, is, as already shown, contrary to the theory upon which *Gibson v. Sublett*, 82 Ky. 596, and *Young v. Bullen*, 19 Ky. L. Rep. 1561, 43 S. W. 687, rest; but that theory is consistent with the position taken in the dissenting opinion in *Ruhe v. Buck*.

The law of Illinois, where the deed was delivered, governs with respect to the interpretation and validity of a married woman's covenant, in a deed of her husband's land in that state, to pay and discharge a certain trust deed or mortgage on the property, notwithstanding that the deed was acknowledged by her in Kentucky. *Western Springs v. Collins*, 40 C. C. A. 33, 98 Fed. 933. It did not appear in this case where the woman was domiciled.

In *Brown v. Dalton*, 20 Ky. L. Rep. 1484, 49 S. W. 443, it was held that an action would not lie in Kentucky against a married woman, domiciled in that state, upon her covenant in a deed to land in Virginia, executed by her husband to herself in Kentucky, whereby she assumed the payment of a note executed and payable in Virginia which had been given by the husband in part payment of the land. The decision is not upon the ground that the deed was made in Kentucky, but apparently upon the ground that it would be contrary to the public policy of Kentucky to enforce such a covenant against a married woman domiciled in that state. The court said: "The wife was entitled, not only to the protection of the husband, but to his counsel and guidance in the management of her affairs, and she had learned that it was her duty to submit to him. If, when the law had imposed this duty upon her, it shall allow him to make contracts with her to pay his debts and enforce these contracts against her because the debt is payable in another state, it will defeat the purposes of the statute framed to protect married women and prevent their property being wasted."

A rather curious result was reached by the Massachusetts supreme court in *Polson v. Stewart*, 167 Mass. 211, 36 L. R. A. 771, 45 N. E. 737. The court there held that a covenant executed by a husband in North Carolina, where the parties were domiciled, to "surrender, convey, and transfer" certain property to the wife and her heirs could be specifically enforced in Massachusetts with reference to real property in Massachusetts. Holmes, J., who wrote the prevailing opinion, admitted that a deed directly from the husband to the wife would have been invalid, although it had been executed, and the parties had been domiciled, in North Carolina, according to the law of which the wife would have been capable of receiving such a deed. He also apparently conceded what is expressly stated in the dissenting opinion of Field, Ch. J., that the covenant would have been invalid and unenforceable if the parties had been domiciled in Massachusetts and the contract had been made there, for he said that the competency of the wife to receive the covenant is established by the law of her domicile and of the place of the contract. Then, starting with the competency of the parties to make the covenant, he holds that it can be specifically enforced in Massachusetts because everything essential to its performance can be done consistently with the law of Massachusetts. Proceeding evidently on the theory that the parties must be regarded as having contemplated the enforcement of the covenant in a manner which would be consistent with the law of Massachusetts (which, as already shown, forbade a conveyance directly from the husband to the wife), he summarizes the undertakings of the husband as follows: First, not

to disturb his wife's enjoyment while she kept her property; secondly, to execute whatever instrument was necessary in order to release his rights if she conveyed; and thirdly, to claim no rights on her death, but to do whatever was necessary to clear the title from such rights. He then says all these were as capable of performance in Massachusetts as they would have been in North Carolina. The suit was brought by the wife's administrator; but the opinion says that all the purposes of the covenant could have been secured at once in the lifetime of the wife by a joint conveyance of the property to a trustee upon trusts properly limited. To revert again to the distinction based on domicile and the place of the contract it would seem, from the reasoning of the opinion, that the reason the covenant could not have been enforced 'if the parties had been domiciled in Massachusetts and the covenant had been made there, would have been that the parties would have no capacity to make the covenant at all, and therefore that, though everything which was necessary to its performance might be voluntarily performed by the husband, he could not be compelled to do any of such acts because in legal effect, the covenant was as if it had never been executed. Field, Ch. J., says in his dissenting opinion: "It seems to me illogical to say that we will not permit a conveyance of Massachusetts land directly between husband and wife wherever they may have their domicile, and yet say that they may make a contract to convey such land from one to the other, which our courts will specifically enforce." If he meant a contract to convey *directly* from one to another, the quotation does not represent the position of the majority, for it is impliedly admitted, in the prevailing opinion, that such a contract could not have been enforced because it would call for an act which would be contrary to the law of Massachusetts. The position of the majority on this point seems practically to amount to this: That the capacity of the parties to contract to do any act with reference to real property that might be done voluntarily, consistently with the *lex rei sitæ*, is to be determined by the law of their domicile and of the place of the contract, and, if capable according to that law, the contract may be enforced, although they would not be capable by the *lex rei sitæ* of binding themselves to do such act.

In *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587, which proceeded upon the assumption that the validity of a contract was to be determined by the law of Ohio, where it was made, and that by the law of such place it was valid, it was held that the law of the state where land, the separate property of a married woman, is situated, must determine the question of its liability to be subjected to the payment of claims against her, without reference to where the contract upon which the claim was based was made. This language is broad enough to make the *lex rei sitæ* govern, even if it operates to prevent the enforcement against real property of a contract made in a state by the law of which it would be enforceable against such property, and is thus opposed to the decisions reached in the cases last cited; but, as a matter of fact, the *lex rei sitæ* was applied in this case so as to hold the contract enforceable against real property in West Virginia, although it was executed and to be performed in Ohio.

In *Baum v. Birchall*, 150 Pa. 164, 24 Atl. 620, Reversing 11 Pa. Co. Ct. 222, it was held that the law of Delaware governed with respect to the capacity of a married woman domiciled in Pennsylvania to execute a bond for

the purchase price of land in Delaware. There were three alternative grounds of decision. The first was that, the bond being payable by its own terms in Delaware, the law of that state governed without reference to where the contract was made; but it was further held that the contract was really made in Delaware, although signed in Pennsylvania, since it was delivered to the obligee in Delaware. The third ground was that, as it was a contract relating to real property, it was governed by the *lex rei sitæ*. G. H. P.

Abraham S. ROSENTHAL *et al.*, *Respts.*,
v.

Levi C. WEIR, President of Adams Express Company, *Appt.*

(170 N. Y. 148.)

A carrier's contract limiting liability for loss to a specified amount has no application to the damages to be recovered for its failure to comply with a notice of stoppage *in transitu* after it had agreed to do so.

(March 4, 1902.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County in favor of plaintiffs in an action brought to recover damages for failure to stop goods *in transitu*. *Affirmed.*

The facts are stated in the opinion.

Messrs. Carl A. de Gersdorff and R. R. Rogers, for appellant:

The limit of responsibility undertaken by the defendant as a carrier of the goods in question is defined by the bill of lading, under which in no event could plaintiffs recover in excess of \$50, the agreed value of the goods.

Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442, 70 N. Y. 410, 26 Am. Rep. 608; *Zimmer v. New York C. & H. R. R. Co.* 137 N. Y. 460, 33 N. E. 642; *Rathbone v. New York C. & H. R. R. Co.* 140 N. Y. 48, 35 N. E. 418; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151.

The acceptance of the bill of lading by the shipper or his agent makes the contract a binding one, and, in the absence of fraud, it is immaterial whether or not the contract was read.

Steers v. Liverpool, N. Y. & P. S. S. Co. 57 N. Y. 1, 15 Am. Rep. 453; *Germania F.*

NOTE.—As to right of common carrier to limit the amount of its liability in case of negligence, see *Ballou v. Earle (R. I.)* 14 L. R. A. 433, and *note*; *Alair v. Northern P. R. Co. (Minn.)* 19 L. R. A. 764; *J. J. Douglass Co. v. Minnesota Transfer R. Co. (Minn.)* 30 L. R. A. 860; *Ohio & M. R. Co. v. Taber (Ky.)* 34 L. R. A. 685; *Pierce v. Southern P. Co. (Cal.)* 40 L. R. A. 350; *Harman & Crockett v. Norfolk & W. R. Co. (Va.)* 44 L. R. A. 289; and *Ullman v. Chicago & N. W. R. Co. (Wis.)* 56 L. R. A. 246.

57 L. R. A.

Ins. Co. v. Memphis & O. R. Co. 72 N. Y. 90, 28 Am. Rep. 113; *Hill v. Syracuse, B. & N. Y. R. Co.* 78 N. Y. 351, 29 Am. Rep. 163.

A loss occasioned by a neglect or violation of the carrier's duty, on proper notice, to stop goods in transit, is incidental to the transportation, and covered by the shipping contract.

Rubens v. Ludgate Hill S. S. Co. 48 N. Y. S. R. 732, 20 N. Y. Supp. 481; *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442.

No presumption of negligence arises from the mere fact that the goods were not stopped in transit after notice.

5 Am. & Eng. Enc. Law, 2d ed. pp. 356, 357.

Mr. Julius J. Frank, for respondents: Defendant was a common carrier and as such bound to respect plaintiffs' notice to stop in transit.

Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174, 23 L. ed. 872; Benjamin, Sales, Corbin's ed. § 1231; 2 Kent, Com. 542; 2 Schouler, Pers. Prop. § 565.

The defendant was under the additional obligation to stop and return the merchandise, arising out of its express agreement so to do.

Bloomingdale v. Memphis & O. R. Co. 6 Lea, 618.

The transaction in question is not governed by the shipping receipt.

Compania de Navegacion v. Brauer, 103 U. S. 104, 42 L. ed. 398, 8 Sup. Ct. Rep. 12; *Kenney v. New York C. & H. R. R. Co.* 125 N. Y. 425, 26 N. E. 626; *Wheeler v. Oceanic Steam Nav. Co.* 125 N. Y. 161, 26 N. E. 248; *Bermel v. New York, N. H. & H. R. Co.* 62 App. Div. 394, 70 N. Y. Supp. 804.

Assuming that the shipping receipt applies to defendant's duty to stop in transit, as an incident to the contract of carriage, its limiting clauses do not exempt the defendant from liability in this action.

Stipulations of this character will not bind the shipper unless he is shown, or under the circumstances of the case must be presumed, to have had knowledge or notice of their terms.

Springer v. Westcott, 166 N. Y. 117, 59 N. E. 693.

The presumption of knowledge or notice cannot arise in this case. The form of the instrument is such as to shut out the presumption that the shippers regarded it as a contract.

Grand v. Livingston, 4 App. Div. 589, 38 N. Y. Supp. 490.

No consideration is shown for the alleged exemption from, or limitation of, liability.

Vanderbilt v. Schreyer, 91 N. Y. 392; *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75.

The defendant was guilty of gross negligence.

2 Redfield, Leading Am. Ry. Cas. 392; *Wheeler v. Oceanic Steam Nav. Co.* 125 N. Y. 155, 26 N. E. 248; *Canfield v. Baltimore & O. R. Co.* 93 N. Y. 532, 45 Am. Rep. 268; *Pearce v. Lungfit*, 101 Pa. 511, 47 Am. Rep. 737; *Rice v. Montgomery*, 4 Biss. 75, Fed. Cas. No. 11,753; *Burnell v. New York C. R.*

Co. 45 N. Y. 184, 6 Am. Rep. 61; *Rathbone v. New York C. & H. R. R. Co.* 140 N. Y. 48, 35 N. E. 418.

Gray, J., delivered the opinion of the court:

The plaintiffs on March 31, 1897, sold to Goldsmith & Co., in Dallas, Texas, certain silk goods, and delivered them to the Adams Express Company for carriage to the buyers. They received a bill of lading from the express company, which, among other things, provided that it should not be liable for loss or damage "from any cause whatever unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company or their servants; nor, in any event, shall the holder thereof demand beyond the sum of \$50, at which the above property forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them, and so specified in this receipt." There was no insurance for special value, and upon the bill of lading were stamped the words, "Value asked and not given." The plaintiffs, learning that Goldsmith & Co. were insolvent, on April 1st sent to the office of the express company and demanded that it stop the goods in transit. The express company's agent agreed to do so, after ascertaining that it could be done, if the plaintiffs would pay for a telegram. They assented, and the telegram was at once made out by the agent and sent to the agent at Dallas, where it was received. For some reason the merchandise was nevertheless delivered to the buyers, and the goods were never returned by them to the plaintiffs, except a small part, of the value of \$37.41. Thereupon the plaintiffs commenced this action to recover damages of the defendant, to the extent of the value of the goods, by reason of its failure and neglect to obey the directions of the plaintiffs and to return the goods. At the conclusion of the trial both parties moved for the direction of a verdict, whereupon the court directed a verdict for the plaintiffs, and the judgment upon that verdict has been affirmed.

As the case comes here, all the facts must be regarded as having been determined in the plaintiffs' favor, inasmuch as there was no request made for the submission of any questions of fact to the jury, and there was sufficient evidence to support the decision of the trial judge in directing the verdict. Therefore the question upon this appeal is one which relates to the measure of the liability of the defendant. On the one hand, it is claimed for the appellant that that liability is necessarily limited by the terms of the bill of lading to a recovery of \$50, while, on the other hand, it is insisted for the respondents that the recovery is not so limited, as the transaction was not governed by the bill of lading. The appellate division has taken the latter view; holding, in effect, that the defendant had undertaken to perform the duty, at the request of the plaintiffs, of stopping the merchandise in transit, and, for its neglect to use reasonable care

in performing that duty, it is liable, to the extent that the plaintiffs suffered by the loss of their property. It was the view of the learned court that this undertaking of the defendant was something apart from, and independent of, the contract of carriage, as expressed in the bill of lading.

I think the judgment is right. The plaintiffs had the right to stop the goods *in transitu*, by giving notice of their claim to the carrier, in whose possession the goods were, actually or constructively. The notice need not be given to the person in actual possession of the goods and may be given to the principal. In the latter case, to be effectual, it must be given at such time and under such circumstances that the principal, by the exercise of reasonable care and diligence, may communicate it to his agent in time to prevent a delivery of the goods to the buyer. The defendant was, as forwarder, a principal, to whom notice was properly given. The rule appears to be settled upon authority. See Benjamin, Sales, p. 180, where the authorities are collated. The appellant does not dispute the rule with respect to the right of stoppage *in transitu*, but contends that the limitation in the bill of lading defining the liability of the carrier by the agreed value of the goods controls, in all events. As the case comes to us, the neglect of duty or the wrongful conduct of the defendant in delivering the goods after the notice must be regarded as established. The action, therefore, is actually founded on the tortious act of the defendant, and not on its contract of carriage. The exercise of the right of stoppage *in transitu* by the plaintiffs put an end to the contract of carriage, and revested the possession of the property in them. They are to be regarded as having retaken the goods. *Litt v. Cowley*, 7 Taunt. 169, 23 English Ruling Cases, p. 411; *Cross v. O'Donnell*, 44 N. Y. 661, 665, 4 Am. Rep. 721; *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. 485, 493, 17 Atl. 671; *Reynolds v. Boston & M. R. Co.* 43 N. H. 580, 592; *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338. The relation of the parties changed. The defendant, from the time it was notified, and directed its agent not to deliver the goods to the buyers, in legal contemplation, held the plaintiffs' property as their bailee. When, through the disobedience or neglect of its agent or servant, the goods were delivered to the buyers, the defendant became liable for their then value to the plaintiffs, not upon contract, but in tort. As it was said in a case quite similar in its facts, though not involving the same legal question, by Lord Chief Justice Cockburn (*Pontifex v. Midland R. Co.* L. R. 3 Q. B. Div. 23), "the contract of the defendants was to carry and deliver. But under the circumstances which arose, the law gave the plaintiff the right to put an end to that contract and to demand back the possession of the goods, and he did so. From that time the retention of the goods and the dealing with them by the defendants became tortious." If the carrier delivers the goods to

the purchaser after notice not to do so, it is liable in trover to the seller. *Litt v. Cowley*, 7 Taunt. 169, 23 English Ruling Cases, p. 411. The bill of lading, however broad its language with respect to the value of the goods, which the holder might demand, must be read with reference to its purpose. It related to the undertaking to carry and forward the goods to the consignees, and to the incidents attendant upon its execution. The price paid for the carriage by the shippers was fixed by the reduced valuation of the goods. Upon the stoppage *in transitu*, the defendant held the goods as the plaintiffs', and the law created a new relation, to which the bill of lading had no reference. The goods were to be returned to the plaintiffs. We must assume that it was possible for the defendant to do so, and its failure or neglect was wrongful, and created a liability altogether different from that which was intended to be governed by the bill of lading.

For these reasons, I think the judgment appealed from should be affirmed, with costs.

O'Brien, Martin, Vann, and Werner, JJ., concur.

Cullen, J., concurring:

I concur in the result on the ground that the trial court might, on the evidence, have found that the plaintiffs were not notified at the time of shipment of the conditions and limitations prescribed in the receipt, nor asked the value of the goods. *Springer v. Westcott*, 166 N. Y. 117, 59 N. E. 693. I dissent, however, from the view that the provision of the receipt limiting the liability of the carrier to the sum of \$50 unless the value of the goods is declared does not apply to a claim of the character of that now before us. This condition is not similar to those often found in contracts for shipment, by which it is sought to relieve the carrier from the consequences of its own negligence and fault,—provisions which the courts so strictly construe against the carrier, and the effects of which they are so astute to avoid, that it may be doubted whether it would not be better, even for the carrier, were they held void as against public policy, which is the law in many jurisdictions. The limitation under consideration is fair and reasonable. Not only is the compensation for carriage based on the value of the goods, but the care and attention given by the carrier and his servants is necessarily influenced and affected by the knowledge that the goods are of great or of little value. Concealment of value, though without any improper motive, on the part of the shipper, is therefore considered an imposition on the carrier, and relieves the latter from liability in excess of the stipulated amount, "unless something more in its conduct is shown than negligence to carry safely and to deliver promptly." *Magnin v. Dinmore*, 62 N. Y. 35, 20 Am. Rep. 442. Contracts of this character should be upheld and construed as fairly as other contracts. *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 161.

57 L. R. A.

The action is for negligence. Defendant's line did not extend to Dallas, but ended at Kansas City, and the delivery complained of was made by the connecting company. Therefore there was in fact no conversion by the defendant, but its fault lay in its failure to promptly notify the connecting carrier. The action was therefore necessarily brought in its present form, and not for conversion. The right of stoppage *in transitu*, as the term indicates, springs out of the contract of transportation. It exists only where the possession is in a person employed to forward or transport the property to its destination, and it ends with delivery at the termination of the transit. *Harris v. Pratt*, 17 N. Y. 249. The right of the shipper to stop the delivery is absolute, "and the carrier is bound to obey, leaving the justification of the stoppage with the seller as concerns the sale parties, since the due exercise of this right is at the seller's, and not the carrier's, peril." Schouler, Pers. Prop. § 565. The right of stoppage *in transitu* is therefore a necessary incident of the contract of carriage, and though it may be that after notice of its exercise the strict liability of the carrier ceases, and it thereafter becomes responsible only as a warehouseman, which is the case where the consignee fails to accept the goods, still the relation of warehouseman is contractual, and in either case the carrier assumes that relation solely by the virtue of its original contract of carriage. In other words, when a carrier contracts to carry, it also contracts to stop the goods, or to hold them as a warehouseman, in certain contingencies; and there is no reason why the limitation of its liability for the value of the goods should not equally apply to all the responsibilities it assumes under the contract, whether of one kind or another. The only point decided in *Pontifex v. Midland R. Co.* L. R. 3 Q. B. Div. 23, was that an action against a carrier for his failure to stop the goods in accordance with directions from the shipper was in tort, not on contract. I do not see how that doctrine is material to the question under discussion. It is sufficient, however, to say that an action against a carrier, even for breach of its contract of carriage, may be brought indifferently on the contract or in tort. *Oatlin v. Adirondack Co.* 11 Abb. N. C. 377.

The judgment should be affirmed, with costs.

Parker, Ch. J., concurs with Cullen, J.

De Frees CRITTEN et al., Respts.,
v.

CHEMICAL NATIONAL BANK, Appt.

(171 N. Y. 219.)

1. To relieve itself from liability to

NOTE.—As to liability of bank to depositors for payment of altered or raised checks, see also cases in note to *Atlanta Nat. Bank v. Burke* (Ga.) 2 L. R. A. 96.

As to duty of depositor in respect to forged

make good the amounts which it has paid on raised checks, a bank must affirmatively establish negligence on the part of the drawer which facilitated the commission of the fraud.

2. The drawer of a check is not bound to prepare it so that no one else can successfully tamper with it, to charge the bank with the loss in case it pays it after its amount has been fraudulently raised.
3. Whether or not the drawer of a check was negligent in signing it in the condition in which it was prepared is a question of fact to be determined largely by an inspection of the check itself.
4. A depositor owes the bank the duty to exercise reasonable care to verify the vouchers returned by the bank on balancing the account by the record of issued checks, if he has kept one.
5. By failing to discover forgeries among the vouchers returned by the bank on balancing the depositor's account, and to notify the bank thereof, the depositor does not adopt the checks as genuine, ratify their payment, or estop himself from asserting that they are forgeries.
6. A depositor who, by negligence in failing to detect forgeries among the vouchers returned by the bank, and give the bank notice thereof, causes loss to the bank, either by enabling the forger to repeat his fraud, or by depriving the bank of an opportunity to obtain restitution, will be responsible for the damage caused by his default.
7. The drawer of a check owes no duty to detect a fraudulent alteration of it, to a bank in which it is deposited for collection, and to which the proceeds are paid by the drawee.
8. The knowledge of the clerk of a bank depositor that he has made fraudulent alterations for his own benefit in checks drawn by his employer is not to be imputed to the latter.
9. A depositor who delegates to his clerk the verification of canceled checks returned as vouchers by the bank is chargeable with notice of fraudulent alterations which a mere comparison of the vouchers with the stubs in the check book would have disclosed, as that the name of the payee had been erased and the word "cash" substituted therefor, although the clerk himself made the alteration.
10. A bank which pays to a clerk of the drawer a plainly altered check without requiring an explanation of the alteration from his employer cannot throw the loss occasioned by subsequent payment of a series of such checks upon the employer, on the ground that he negligently failed to detect the frauds when the vouchers were returned to him.
11. An action on contract to recover a balance from a banker is not converted into an action in tort by a reply setting up defendant's negligence to defeat a defense that the money was paid out accord-

ing to what the bank believed to be plaintiff's directions.

(Vann and Martin, JJ., dissent.)

(May 13, 1902.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment entered in the office of the Clerk of New York County upon a report of a referee in favor of plaintiffs in an action brought to recover deposits made with defendant. *Reversed upon condition.*

The facts are stated in the opinion.

Messrs. George H. Yeaman and George O. Kohbe, for appellant:

The drawer is bound for the whole amount if his own negligence has facilitated or invited the fraud done by raising the check.

5 Am. & Eng. Enc. Law, 2d ed. p. 1075; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; 2 Dan. Neg. Inst. 2d ed. § 1059, p. 608; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *Land Title & T. Co. v. Northwestern Nat. Bank*, 196 Pa. 230, 50 L. R. A. 75, 46 Atl. 420; *Iron City Nat. Bank v. Ft. Pitt Nat. Bank*, 159 Pa. 47, 23 L. R. A. 615, 28 Atl. 195.

The bank is not responsible if the depositor has been negligent in examining his accounts and vouchers.

Myers v. Southwestern Nat. Bank, 193 Pa. 1, 44 Atl. 290; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *Crawford v. West Side Bank*, 100 N. Y. 50, 53 Am. Rep. 152, 2 N. E. 881; *Weinstein v. National Bank*, 69 Tex. 38, 6 S. W. 171; *De Feriet v. Bank of America*, 23 La. Ann. 310, 8 Am. Rep. 597; *Dana v. National Bank*, 132 Mass. 156; *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L. R. A. 426, 14 So. 335; *August v. Fourth Nat. Bank*, 15 N. Y. S. R. 956, 1 N. Y. Supp. 139.

Messrs. A. J. Simpson and Benjamin N. Cardozo, for respondents:

As between the bank and its depositor, the bank's liability is the same whether the forgery relates to the signature of the depositor, or to the signature of the payee, or to the body of the check.

Winslow v. Everett Nat. Bank, 171 Mass. 534, 51 N. E. 16; *Crawford v. West Side Bank*, 100 N. Y. 50, 53 Am. Rep. 152, 2 N. E. 881; *Citizens' Nat. Bank v. Importers' & T. Bank*, 119 N. Y. 200, 23 N. E. 540.

Where the bank has paid its moneys to an innocent holder under mistake as to the genuineness of the drawer's signature no recovery can be had, since the bank should have known its customer's signature, and hence must be presumed to have acted negligently.

Price v. Neale, 3 Burr. 1354; *Continental Nat. Bank v. Tradesmen's Nat. Bank*, 36

checks charged to him by bank, see *First Nat. Bank v. Allen* (Ala.) 27 L. R. A. 426, and *note*. As to recovery by payor of forged check of money paid, see *Iron City Nat. Bank v. Ft. Pitt Nat. Bank* (Pa.) 23 L. R. A. 615; *First Nat. Bank v. Marshalltown State Bank* (Iowa) 44 L. R. A. 181; and *Land Title & T. Co. v. Northwestern Nat. Bank* (Pa.) 50 L. R. A. 75.

Pitt Nat. Bank (Pa.) 23 L. R. A. 615; *First Nat. Bank v. Marshalltown State Bank* (Iowa) 44 L. R. A. 181; and *Land Title & T. Co. v. Northwestern Nat. Bank* (Pa.) 50 L. R. A. 75.

App. Div. 113, 55 N. Y. Supp. 545; *Bank of Commerce v. Union Bank*, 3 N. Y. 234.

There is no such presumption of negligence where the money was paid under mistake as to the genuineness of the body of the instrument (*Bank of Commerce v. Union Bank*, 3 N. Y. 234), or of an indorsement thereon (*Canal Bank v. Bank of Albany*, 1 Hill, 287); and in such cases, unless there is affirmative proof of negligence, a recovery may be allowed.

Continental Nat. Bank v. Tradesmen's Nat. Bank, 36 App. Div. 112, 55 N. Y. Supp. 545.

The bank would not excuse itself by showing that the forgery defied detection.

Clark v. National Shoe & Leather Bank, 32 App. Div. 316, 52 N. Y. Supp. 1064.

The plaintiffs exercised due care in issuing the checks.

Crawford v. West Side Bank, 100 N. Y. 50, 53 Am. Rep. 152, 2 N. E. 881; *Young v. Grote*, 4 Bing. 253; *Dan. Neg. Inst.* § 1659; *Société Générale v. Metropolitan Bank*, 27 L. T. N. S. 849; *Scholfield v. Lonsborough* [1896] A. C. 514 [1894] 2 Q. B. 665; *Union Credit Bank v. Mersey Docks & Harbor Board* [1899] 2 Q. B. 211; *Shepard & M. Lumber Co. v. Eldridge*, 171 Mass. 516, 41 L. R. A. 617, 51 N. E. 9; *Belknap v. National Bank*, 100 Mass. 380, 97 Am. Dec. 105.

The plaintiffs were not negligent in confiding to Mr. Davis the examination of the canceled vouchers.

Frank v. Chemical Nat. Bank, 84 N. Y. 209, 38 Am. Rep. 501; *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Shipman v. Bank of the State*, 126 N. Y. 318, 12 L. R. A. 791, 27 N. E. 371; *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731; *Wachsman v. Columbia Bank*, 8 Misc. 280, 28 N. Y. Supp. 711; *Clark v. National Shoe & Leather Bank*, 164 N. Y. 498, 58 N. E. 659, 32 App. Div. 316, 52 N. Y. Supp. 1064.

The doctrine of imputed knowledge has no application where the agent is acting in hostility to the principal, or has turned aside from his agency to perpetrate a fraud.

Benedict v. Arnoux, 154 N. Y. 715, 49 N. E. 326; *Henry v. Allen*, 151 N. Y. 1, 36 L. R. A. 658, 45 N. E. 355; *Bienenstok v. Amidown*, 155 N. Y. 47, 49 N. E. 321; *American Surety Co. v. Pauly*, 170 U. S. 133, 157, 42 L. ed. 977, 986, 18 Sup. Ct. Rep. 552; 2 Pom. Eq. Jur. § 675; *Kettlewell v. Watson*, L. R. 21 Ch. Div. 685; *Shipman v. Bank of the State*, 126 N. Y. 318, 12 L. R. A. 791, 27 N. E. 371; *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Allen v. South Boston R. Co.* 150 Mass. 200, 5 L. R. A. 716, 22 N. E. 917.

If the depositor has adopted such safeguards for the examination of the accounts that, unless his agents are criminals, an error will be discovered, he has not been negligent.

Union Bank v. Kent, L. R. 39 Ch. Div. 248; *Baendale v. Bennett*, L. R. 3 Q. B. Div. 530.

The plaintiffs owed no duty to the defendant. 57 L. R. A.

ant to exercise reasonable diligence in the examination of the canceled checks.

Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731; *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175.

The defendant was guilty of negligence in honoring the checks; and hence it is liable even if the plaintiffs were negligent in examining the vouchers.

Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 112, 29 L. ed. 817, 6 Sup. Ct. Rep. 657; *Vagliano Bros. v. Bank of England*, L. R. 23 Q. B. Div. 262; *Voorhis v. Olmstead*, 66 N. Y. 116; *Continental Nat. Bank v. National Bank*, 5 N. Y. 575.

For the bank to continue to cash checks for Davis after notice that he had presented a forged check, or after its suspicions had been aroused as to that fact, was as plainly negligent as the plaintiffs' continued employment of Davis would have been after notice of his wrongdoing had reached them.

Know v. Eden Musee American Co. 148 N. Y. 460, 31 L. R. A. 779, 42 N. E. 988.

If the plaintiffs were negligent in their comparison of the vouchers, the negligence was not the proximate cause of the payment of the checks, and hence it cannot constitute a defense to this action.

Frank v. Chemical Nat. Bank, 84 N. Y. 209, 38 Am. Rep. 501; *England v. Bank of England*, L. R. 21 Q. B. Div. 170; *Bank of Ireland v. Evans's Charities*, 5 H. L. Cas. 389; *Suan v. North British Australasian Co.* 2 Hurlst. & C. 175; *Know v. Eden Musee American Co.* 148 N. Y. 461, 31 L. R. A. 779, 42 N. E. 988; *Schmidt v. Garfield Nat. Bank*, 64 Hun. 306, 19 N. Y. Supp. 252; *People v. Bank of North America*, 75 N. Y. 547.

Cullen, J., delivered the opinion of the court:

The plaintiffs kept a large and active account with the defendant, and this action is to recover an alleged balance of a deposit due to them from the bank. The plaintiffs had in their employ a clerk named Davis. It was the duty of Davis to fill up the checks which it might be necessary for the plaintiffs to give in the course of business, to make corresponding entries in the stubs of the check book, and present the checks so prepared to Mr. Critten, one of the plaintiffs, for signature, together with the bills in payment of which they were drawn. After signing a check Critten would place it and the bill in an envelope addressed to the proper party, seal the envelope, and put it in the mailing drawer. During the period from September, 1897, to October, 1899, in twenty-four separate instances Davis abstracted one of the envelopes from the mailing drawer, opened it, obliterated by acids the name of the payee and the amount specified in the check, then made the check payable to cash and raised its amount, in the majority of cases, by the sum of \$100. He would draw the money on the check so altered from the defendant bank, pay the bill for which the check was drawn in cash, and appropriate the excess. On one occasion

Davis did not collect the altered check from the defendant, but deposited it to his own credit in another bank. When a check was presented to Critten for signature the number of dollars for which it was drawn would be cut in the check by a punching instrument. When Davis altered a check he would punch a new figure in front of those already appearing in the check. The checks so altered by Davis were charged to the account of the plaintiffs, which was balanced every two months, and the vouchers returned to them from the bank. To Davis himself the plaintiffs, as a rule, intrusted the verification of the bank balance. This work having in the absence of Davis been committed to another person, the forgeries were discovered and Davis was arrested and punished. It is the amount of these forged checks, over and above the sums for which they were originally drawn, that this action is brought to recover. The defendant pleaded payment, and charged negligence on plaintiffs' part, both in the manner in which the checks were drawn and in the failure to discover the forgeries when the pass book was balanced and the vouchers surrendered. On the trial the alteration of the checks by Davis was established beyond contradiction, and the substantial issue litigated was that of the plaintiffs' negligence. The referee rendered a short decision in favor of the plaintiffs, in which he states as the ground of his decision that the plaintiffs were not negligent either in signing the checks as drawn by Davis or in failing to discover the forgeries at an earlier date than that at which they were made known to them.

The relation existing between a bank and a depositor being that of debtor and creditor, the bank can justify a payment on the depositor's account only upon the actual direction of the depositor. "The questions arising on such paper [checks] between drawee and drawer, however, always relate to what the one has authorized the other to do. They are not questions of negligence or of liability of parties upon commercial paper, but are those of authority solely. . . . The question of negligence cannot arise unless the depositor has in drawing his check left blanks unfilled, or by some affirmative act of negligence has facilitated the commission of a fraud by those into whose hands the check may come." *Crawford v. West Side Bank*, 100 N. Y. 50, 53 Am. Rep. 152, 2 N. E. 881. Therefore, when the fraudulent alteration of the checks was proved, the liability of the bank for their amount was made out, and it was incumbent upon the defendant to establish affirmatively negligence on the plaintiffs' part to relieve it from the consequences of its fault or misfortune in paying forged orders. Now, while the drawer of a check may be liable where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alterations, it is not the law that he is bound so to prepare the check that nobody else can successfully tamper with it. *Société Générale v. Metropolitan Bank*, 27 L. T. N. S. 849; *Belknap v. National*

Bank, 100 Mass. 380, 97 Am. Dec. 105. In the present case the fraudulent alteration of the checks was not merely in the perforation of the additional figure, but in the obliteration of the written name of the payee and the substitution therefor of the word "Cash." Against this latter change of the instrument the plaintiffs could not have been expected to guard, and without that alteration it would have no way profited the criminal to raise the amount. Apart, however, from that consideration, the question was clearly one of fact to be determined largely by an inspection of the checks themselves. They are not produced before us, and we cannot say that the finding of the referee, that the plaintiffs were guilty of no negligence in signing them in the condition in which they were presented for signature, was without sufficient evidence for its support.

We are now brought to the consideration of the finding of the referee that the plaintiffs were not guilty of negligence in failing to discover the forgeries after the return of the checks and the balancing of the account in the pass book. Preliminarily we must determine what duty the depositor owes to his bank by way of examination and verification of his checks and account, for the learned counsel for the respondents asserts that no such duty in reality exists. This contention is principally based on the authority of *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731. In that case a depositor sued his bank for the amount of certain checks to which his signature was forged by his clerk. His pass book was balanced and vouchers returned at intervals as in the present case. At the trial he recovered a verdict for the full amount of the forgeries. On appeal the general term of the superior court ordered a reversal of the judgment unless the plaintiff would reduce his recovery to the amount paid on the forged checks prior to the time when the bank book was first balanced and vouchers returned. To this reduction the plaintiff assented, and, on the defendant's appeal, the judgment as modified was affirmed by this court. In the opinions delivered by two distinguished judges the doctrine is asserted that the depositor owes no duty to the bank to examine his pass book or vouchers with the view to the detection of forgeries, but the decision itself is not authority for more than the proposition that the bank was not relieved from liability for forged checks which it had paid before the account was balanced by the failure of the depositor to subsequently discover the forgeries. As was said by Judge Johnson as to these checks: "Whatever loss the bank has sustained, it has suffered from its own negligence or want of skill in a matter as to which, in the first instance, it and it only was bound to exercise skill and diligence. To this loss no act of Weisser has contributed." The question again came before this court in the case of *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501. That action also was brought to recover the amount of a series of checks

forged by the depositor's clerk. A recovery by the plaintiffs was upheld, though not on the principle that the depositor owed no duty to his bank, but on the ground that he had discharged that duty. In the opinion there delivered Judge Andrews said: "It does not seem to be unreasonable, in view of the course of business and the custom of banks to surrender its vouchers on the periodical writing up of the accounts of depositors, to exact from the latter some attention to the account when it is made up, or to hold that the negligent omission of all examination may, when injury has resulted to the bank which it would not have suffered if such examination had been made and the bank had received timely notice of objections, preclude the depositor from afterwards questioning its correctness. But where forged checks have been paid and charged in the account and returned to the depositor, he is under no duty to the bank so to conduct the examination that it will necessarily lead to the discovery of the fraud. If he examines the vouchers personally and is himself deceived by the skilful character of the forgery, his omission to discover it will not shift upon him the loss which in the first instance is the loss of the bank." In that case the depositor compared the returned checks with the stubs in the check book, but was deceived by the fact that the forger had abstracted the forged checks from the package. In the Supreme Court of the United States and in several of our sister states the rule is settled that the depositor owes his bank the duty of a reasonable verification of the returned checks. In *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, it was held that a depositor is bound personally or by his agent, and with due diligence, to examine the pass book and vouchers, and to report to the bank without unreasonable delay any errors which may have been discovered therein, and that, if he fails to do so and the bank is thereby misled to its prejudice, he cannot afterwards dispute the correctness of the balance shown in the pass book. In *Dana v. National Bank*, 132 Mass. 156, the supreme court of Massachusetts said: "The mistake was in the payment of the money upon an altered check, believed to be genuine; it was not for the advantage of the defendant, and its condition was changed by it. It was in the course of dealings between the parties in relation to which each owed duties to the other. . . . The plaintiffs [depositors] owed to the defendant [bank] the duty of exercising due diligence to give it information that the payment was unauthorized; and this included, not only due diligence in giving notice after knowledge of the forgery, but also due diligence in discovering it." In *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 44 Atl. 280, it was held that the bank was entitled to have the vouchers which it surrendered with the pass book examined and, if rejected, returned within a reasonable time, and that if this was not done because of the depositor's fail-

ure to perform his duty in that regard he should not be permitted to recover. The same rule of law obtains in Louisiana (*De Feriet v. Bank of America*, 23 La. Ann. 310, 8 Am. Rep. 597), in Texas (*Weinstein v. National Bank*, 69 Tex. 38, 6 S. W. 171), and in Alabama (*First Nat. Bank v. Allen*, 100 Ala. 476, 27 L. R. A. 426, 14 So. 335). The course of dealings between banks and their depositors is well known and is considered at length in the three cases first cited from other jurisdictions. The methods of depositors in drawing checks on their accounts have become much more uniform than at the time of the decision in *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731. The practice of taking checks from check books and entering on the stubs left in the book the date, amount, and name of the payee of the check issued has become general, not only with large commercial houses, but with almost all classes of depositors in banks. The skill of the criminal has kept pace with the advance in honest arts, and a forgery may be made so skilfully as to deceive, not only the bank, but the drawer of the check, as to the genuineness of his own signature. But when a depositor has in his possession a record of the checks he has given, with dates, payees, and amounts, a comparison of the returned checks with that record will necessarily expose forgeries or alterations. It is true that it will give no information as to the genuine character of the indorsements, and because the depositor has no greater knowledge on that subject than the bank, it owes the bank no duty in regard thereto. *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Shipman v. Bank of the State*, 126 N. Y. 318, 12 L. R. A. 791, 27 N. E. 371. It is also true that verification of the returned checks would not prevent a loss by the bank in the case of the payment of a single forged check, and probably not in many cases enable the bank to obtain a restitution of its lost money. It would, however, prevent the successful commission of continuous frauds by exposing the first forgeries. That this is a numerous class of frauds is apparent from the number of cases which we have cited, in all of which the forgery was not a single act, but a series of acts extending over a considerable period of time, and the crime was committed by a clerk or employee of the depositor. Considering that the only certain test of the genuineness of the paid check may be the record made by the depositor of the checks he has issued, it is not too much, in justice and fairness to the bank, to require of him, when he has such a record, to exercise reasonable care to verify the vouchers by that record.

While we hold that this duty rests upon the depositor, we are not disposed to accept the doctrine asserted in some of the cases, that, by negligence in its discharge or by failure to discover and notify the bank, the depositor either adopts the checks as genuine and ratifies their payment or estops himself from asserting that they are forgeries. Such a doctrine would be in conflict,

not only with the opinions rendered in *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731, but with the decision there actually made. That authority has stood for nearly fifty years, and we would not feel justified in now overruling it. Nor, if the question were an open one in this state, would we deem the rule of estoppel or that of ratification a just one. If the depositor has by his negligence in failing to detect forgeries in his checks and give notice thereof caused loss to his bank, either by enabling the forger to repeat his fraud or by depriving the bank of an opportunity to obtain restitution, he should be responsible for the damage caused by his default, but beyond this his liability should not extend. In the cases cited from the Supreme Court of the United States, from that of Massachusetts and that of Pennsylvania, it is conceded that, if the bank has been guilty of negligence in paying the forged checks, then the doctrine of ratification and estoppel does not apply. It seems to us that the exception is somewhat inconsistent with the principle on which the doctrine rests. Moreover, we see no reason why the bank should be entitled to anything more than indemnity for the loss the depositor's negligence has caused it. In the present case a check altered by Davis from the sum of \$22 to \$622 was paid by the defendant to the Colonial Bank, in which Davis had deposited it. Against that bank the defendant has ample recourse. If it were to be held that the plaintiffs are estopped from denying the genuineness of that check as against the defendant, the latter could have no claim against the Colonial Bank, nor is it clear that the plaintiffs would have any direct right of action against that bank. The Colonial Bank took the check solely on the responsibility of Davis. To it the plaintiffs owed no duty. If the plaintiffs and the defendant had never settled their accounts the Colonial Bank could have had no complaint against either party for that cause. A rule which might operate to relieve that bank from the liability it assumed when it collected an altered check, merely because the plaintiffs failed in their duty, not to it, but to a third party, should not be upheld. Nor would it operate justly in a case in which the bank had paid a single forgery unless by the depositor's default and delay the bank had lost its opportunity to secure restitution. This question is well discussed by the supreme court of Alabama in the case of *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L. R. A. 426, 14 So. 335, and we concur in the view expressed by that court that the liability of the depositor for neglect of his duty to examine and verify his account with the bank is limited to the damages sustained by the bank in consequence of such neglect.

In the present case Davis falsified the additions or totals at the foot of the pages in the check book. But with a few exceptions he did not alter the amounts expressed in the stubs. In no case did he change in the stubs the name of the payee of the check. It is clear, therefore, that at all

times a comparison of the returned checks with the stubs in the check books would have exposed the alterations made in the checks. Of course, the knowledge of the forgeries that Davis possessed, from the fact that he himself was the forger, was in no respect to be attributed to the plaintiffs. But we see no reason why they were not chargeable with such information as a comparison of the checks with the check book would have imparted to an innocent party previously unaware of the forgeries. The plaintiffs' position may be no worse because they intrusted the examination to Davis instead of to a third person; but they can be no better off on that account; if they would have been chargeable with the negligence or failure of another clerk in the verification of the accounts, they must be equally so for the default of Davis, so far as the examination itself would have disclosed the facts. We think it plain, therefore, that the finding of the referee that the plaintiffs were not negligent in the examination of the pass book and vouchers is without evidence to sustain it, unless the plaintiffs discharged their duty to the defendant when they committed the examination to a proper clerk, and were not responsible for the manner in which the clerk performed the task. From the language of the report of the learned referee it would seem as if this last were the theory on which his decision proceeded. We do not think it can be sustained. If any duty rested on the plaintiffs, we do not see why the ordinary rule of principal and agent or master and servant, that the principal or master is liable for the fault of his servant or agent in the master's business, did not apply. This was so held in the case of *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, and nothing to the contrary is to be found in *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501. There it is said: "The alleged duty, at most, only requires the depositor to use ordinary care; and if this is exercised, whether by himself or his agents, the bank cannot justly complain, although the forgeries are not discovered until it is too late to retrieve its position or make reclamation from the forger." In that case, however, the question of the liability of the principal for the negligence of his clerk did not arise, for the plaintiff made the examination personally. There are exceptions to the general rule of the liability of the master for his employee. But this case does not fall within those exceptions, nor within the principle on which those exceptions are based.

These views would render it necessary to reverse the judgment appealed from except for another fact now to be noted. The referee's report is in the form of a short decision, and on appeal it is to be presumed that all facts warranted by the evidence and necessary to support the judgment have been found. *Amherst College v. Ritch*, 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876; *Bartlett v. Goodrich*, 163 N. Y. 421, 47 N. E. 794; *Marden v. Dorthy*, 160 N. Y. 39, 46

L. R. A. 694, 54 N. E. 726. The sixth in sequence of these forgeries was a check of June 20, 1898, for \$12.49, altered to the sum of \$112.49, with the name of the payee erased and "Cash" written in the place thereof. The teller of the defendant, who paid the check and was a witness on its behalf, testified that the check showed on its face that the word "Cash" had been written in the place for the payee's name over an erasure; that the number of dollars was also written over an erasure; that he did not like the appearance of the check; and that it was in such a mutilated condition when it was presented to him that, before paying it, he required Davis to indorse upon the check a receipt for its amount. That the defendant was grossly negligent in paying the check, and has only itself to thank for that loss, is apparent. But the effect of that negligence did not cease with the payment of the check. The referee might well have found that, had payment of the check been refused, or had Davis been required to obtain the indorsement or guaranty of the plaintiffs as to its correctness, the forgeries of Davis would have been exposed, and their repetition would not have occurred. That Davis was able to successfully continue from this time to his arrest a series of forgeries is as fairly attributable to the folly of the bank in paying to a clerk a check of his employers which had plainly been altered, without making inquiry as to the reason or authority for the alteration, as it was to any carelessness of the plaintiffs in failing to detect the alteration when the checks were returned to them from the bank. Since we have held that the question in the case was not one of ratification or estoppel, but that the liability of the plaintiffs to the bank was solely for the loss caused by their negligence, it is a complete answer to the defendant's claim that its own negligence contributed to the loss.

The learned counsel for the appellant contends that the plaintiffs' cause of action is not based on negligence, and that the plaintiffs cannot sue on contract and recover in tort. This claim is without force. The action unquestionably was brought on contract, but it remains such. The plaintiffs sue for a debt to which the defendant answers: "We have paid the money, true, not according to your direction, but in compliance with what we believed to be your directions, and your negligent conduct in your duty towards us led us into that error;" to which the plaintiffs rejoin: "Your own negligence contributed to the loss." All this may be true, yet the plaintiffs recover, not in tort, but on contract, for the allegation of negligence on the part of the defendant is used only to defeat its claim for relief on account of the plaintiffs' negligence.

It follows that, under the authority of *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731, the defendant is not entitled to credit for the two checks paid by it before the account was balanced and vouchers returned. For the third, fourth, and fifth checks, amounting to \$300, it is entitled to

credit unless it was guilty of negligence in their payment, a fact which is neither found by the referee nor established by the evidence. For the sixth check and the subsequent ones it is not entitled to credit because of its negligence in paying the sixth check.

The judgment should be reversed, and a new trial granted, costs to abide the event, unless the plaintiffs consent to deduct from their recovery the sum of \$300, with interest from November 15, 1899, in which case the judgment, as modified, should be affirmed without costs of this appeal to either party.

Parker, Ch. J., Haight, and Werner, JJ., concur.

Vann, J., dissenting:

Whether the plaintiffs exercised reasonable care in examining the checks returned as vouchers by the defendant was a question of fact, and, as they intrusted the work to a competent agent and took other precautions, there was evidence to support the finding in their favor which, after affirmation by the appellate division, is conclusive here. *Amherst College v. Ritch*, 161 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876.

In my opinion the judgment below should neither be reversed nor modified, unless the court reaches the conclusion that the plaintiffs had constructive notice of what their agent discovered in examining the checks. The rule which imputes to a principal knowledge acquired by his agent rests upon the presumption that the latter has disclosed all the material facts to the former. This presumption does not extend to a fact which, if disclosed, would subject the agent to a prosecution for crime or defeat a scheme in which he was engaged to defraud his employer. *Henry v. Allen*, 151 N. Y. 1, 9, 36 L. R. A. 658, 45 N. E. 355; *Benedict v. Arnoux*, 154 N. Y. 715, 728, 49 N. E. 326; *Bienestok v. Ammidgen*, 155 N. Y. 47, 60, 49 N. E. 321; *Pom...* 875. The dishonesty of the agent changes the situation, for the necessity of concealing his dishonest acts, in order to prevent exposure and punishment, destroys the presumption which would otherwise prevail that he had made the facts known to his principal. A presumption must be reasonable or it cannot exist, and it would not be reasonable to expect one engaged in executing a fraudulent project to make a disclosure which would not only defeat his purpose, but would send him to prison. Knowledge is not imputable when the agent is acting in hostility to his principal, or is engaged in perpetrating or concealing a fraud. In this case the agent committed the furtive acts, and knew all about them long before he examined the vouchers returned by the bank. He discovered no fraud while making that examination, for he knew all before, and could not discover what he already knew. He found out nothing while acting as agent, but only while acting on his own account.

He was still engaged in his scheme to defraud when he made the examination, and concealment was as necessary then as it had ever been. In concealing the fraud he did not act as agent, and he was engaged in concealing the fraud all the time after he began to carry on his system of forgery, and was so engaged when he examined the checks. In *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501, the court said: "It was only because Goodheim was the criminal that the examination did not disclose to them the forgeries. He was not the plaintiffs' agent in issuing the forged paper, nor was he their agent in abstracting the false vouchers and falsifying the books, which was done in aid of his criminal purpose." If Goodheim, whose duty it was to examine the vouchers, discovered nothing imputable to the plaintiffs in that case, how could Davis, in examining the checks, make a discovery binding upon the plaintiffs in this case? Goodheim abstracted the false vouchers, so that the examination made by himself and the depositor would disclose no wrong, except by their absence, and Davis, whose duty it was to use the check punch, so used it as to leave sufficient space next to the dollar sign in which to subsequently cut a figure and thus raise the amount of the check. He also changed the footings at the bottom of the stub page of the check book so as to prepare for the examination. If what Goodheim did was not binding on his principal, how can we say that what Davis did was binding on the plaintiffs? In neither case can the duties of the dishonest agent be so separated as to distinguish the fraud in concealing the forgery from the forgery itself, for each act was part of a single scheme. The forgery, the preparation for concealment, and the constant concealment were successive steps in the same transaction. It cannot be held that what Davis would have discovered if he had not been the forger, but somebody else, is imputable to the plaintiffs, without also imputing to them knowledge of the space left to punch out another figure, as well as of the false footings, for these acts were within the scope of his employment as much as the examination of the vouchers. In every case of successful fraud by an agent, it is the nature of the duties intrusted to him that enables him to perpetrate the fraud, and it is erroneous reasoning to say that if a part of those duties had been intrusted to another clerk, as he would have found out the facts, they must be imputed to the principal, because the latter in good faith assigned such duties to the criminal.

Under the circumstances, it cannot be presumed that Davis disclosed facts which an honest agent might have discovered in looking over the checks, but which the former knew before the checks came to his hands for examination, without subverting the reason upon which the rule of imputed knowledge is founded. Entertaining these views, I am compelled to dissent from those 57 L. R. A.

expressed in the prevailing opinion, so far as they are inconsistent with this memorandum, and to vote in favor of affirmance.

Martin, J., concurs with **Vann, J.**
Bartlett, J., takes no part.

Re Application of Margaret C. DEVOE for Order Directing Payment of Funds Held by Miln P. Palmer, Trustee, etc., of Frances B. Hegeman, Deceased.

(171 N. Y. 281.)

The widow of a beneficiary is not entitled to share under a will directing that in case of death of a beneficiary before the time for distribution arrives his share shall be paid over to his next of kin as, according to the statute of distributions, his personal estate would be divided and distributed.

(*O'Brien and Bartlett, JJ., dissent.*)

(May 20, 1902.)

A PPEAL by petitioner from an order of the Appellate Division of the Supreme Court, Second Department, affirming an order of a Special Term for Kings County refusing to direct payment to her of money claimed under the will of Frances B. Hegeman, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hitchings, Palliser, & Moen, for appellant:

The principal of the fund in question vested in Edmund M. Devoe at the time of the death of the testatrix.

Barker v. Woods, 1 Sandf. Ch. 129; *Embury v. Sheldon*, 68 N. Y. 227; *Nelson v. Russell*, 135 N. Y. 137, 31 N. E. 1008; *Byrnes v. Stilwell*, 103 N. Y. 453, 57 N. E. 760; *Palmer v. Dunham*, 52 Hun, 468, 6 N. Y. Supp. 46; *Cropley v. Cooper*, 86 U. S. 167, 22 L. ed. 109; *Jones v. Knappen*, 63 Vt. 391, 14 L. R. A. 293, 22 Atl. 630; *Wengerd's Estate*, 143 Pa. 615, 13 L. R. A. 360, 22 Atl. 869; *Connelly v. O'Brien*, 166 N. Y. 406, 60 N. E. 20; *Goebel v. Wolf*, 113 N. Y. 405, 21 N. E. 388; *Re Brown*, 154 N. Y. 313, 48 N. E. 537; *Re Young*, 145 N. Y. 535, 40 N. E. 226; *Re Tienken*, 131 N. Y. 391, 30 N. E. 109; *Brightly's Dig.* p. 4546.

The vested remainder of Edmund M. Devoe was not and could not be divested, changed, or altered, except by his death before the testatrix.

Paget v. Melcher, 156 N. Y. 405, 51 N. E. 24.

The fund in question must be turned over to the estate of Edmund M. Devoe to be administered in accordance with the laws applicable thereto.

Mr. Joseph S. Wood, for respondents:

If a remainderman dies before the life tenant, the remainder which he would have received had he survived the life tenant must,

NOTE.—As to who are next of kin, see also note to *French v. French* (109a), 15 L. R. A. 300.

under the substitutionary clause, go to his next of kin.

Palmer v. Dunham, 125 N. Y. 68, 25 N. E. 1081; *Kelso v. Lorillard*, 85 N. Y. 177.

The remainders given in the will under consideration are contingent.

Clark v. Cammann, 160 N. Y. 315, 54 N. E. 709; *Steinway v. Steinway*, 163 N. Y. 200, 57 N. E. 312; *Bisson v. West Shore R. Co.* 143 N. Y. 130, 38 N. E. 104; *Warner v. Durant*, 76 N. Y. 136; *Colton v. Fox*, 67 N. Y. 349; *Delaney v. McCormack*, 88 N. Y. 174; *DeLafield v. Shipman*, 103 N. Y. 464, 9 N. E. 184.

If the will is of doubtful construction, that interpretation must be followed which gives the legacy to the testatrix's blood relatives, rather than to strangers.

Clark v. Cammann, 160 N. Y. 315, 54 N. E. 709.

Inasmuch as Edmund M. Devoe died before his mother, the life tenant, the remainder in question went to his next of kin under the substitutionary clause of the will. He left him surviving a mother and a widow. His mother was his next of kin; his wife was not.

Murdock v. Ward, 67 N. Y. 389; *Luce v. Dunham*, 69 N. Y. 39; *Keteltas v. Keteltas*, 72 N. Y. 315, 28 Am. Rep. 155; *Tillman v. Davis*, 95 N. Y. 21, 47 Am. Rep. 1; *Platt v. Mickle*, 137 N. Y. 106, 32 N. E. 1070; *Betsinger v. Chapman*, 88 N. Y. 487.

If any statute of distributions is to govern in this case, it must be the statute of distributions of the state of New York.

Harrison v. Nison, 9 Pet. 484, 9 L. ed. 201; *Story*, Conf. L. p. 410; *Trotter v. Trotter*, 4 Bligh. N. S. 502; *Dayton*, Surrogates, p. 410; *Anstruther v. Chalmers*, 2 Sim. 1; *Lanewille v. Anderson*, 2 Swabey & T. 24; *Dannelli v. Dannelli*, 4 Bush, 62.

Cullen, J., delivered the opinion of the court:

I concur in the view of Judge O'Brien regarding the difficulties and perplexities which attend the construction of wills. I admit that they proceed largely from the inaccurate use of language in the instruments, but I insist that they are also largely occasioned by the conflicting decisions of the courts. I think a review of the numerous antagonistic decisions cited by Mr. Jarman in his work on Wills makes it apparent that this is a most potent factor in the creation of the difficulties. The trite aphorism that the intention of the testator is to be deemed the polar star in the interpretation of a will has, it seems to me, but little application where the very subject in controversy is, What was that intention? The state has a great interest in this subject, for it is certainly to the public detriment that the construction of wills should create such a large and increasing field for litigation, thus involving not only uncertainty in the tenure and titles of property, but imposing a great cost on the state itself. It is conceded that in its primary meaning the term "next of kin" includes neither a widow nor a husband. I think that it is settled by authority in this state 57 L. R. A.

that a direction that the property shall be distributed among the next of kin the same as in the case of intestacy is not sufficient to extend the meaning of the term "next of kin" to include either of the relatives named, though he or she would share in the property of the deceased if it were a case of actual intestacy. The clause of the will in construction on this appeal is: "In case of the death of any of the beneficiaries or persons entitled to share in the investments herein directed to be made, before the time limited for the payment thereof, my will is that the same be paid over to their next of kin as, according to the statute of distributions, their personal estates would be divided and distributed." The argument is that the property cannot be paid over according to the statute of distributions unless the widow is allowed to share. I am not disposed to underrate the force of this contention, and, if it were an original proposition, it might command my assent. Let us see, however, how far it is consistent with the decided cases. In *Murdock v. Ward*, 67 N. Y. 387, the will provided that, upon the death of the beneficiaries without receiving the principal, then it was "to be equally divided among and paid to the persons entitled thereto as their, or either of their, next of kin, according to the laws of the state of New York, and as if the same were personal property, and they, or either of them, had died intestate." The same argument was there made for extending the meaning of "next of kin" as has been advanced in this case. Yet this court held, reversing the decision of the general term, that the widow did not take. In *Luce v. Dunham*, 69 N. Y. 36, the will, after a gift to testator's wife of the homestead and a legacy, proceeded: "All the rest, residue, and remainder of my estate, real and personal, present and hereafter to be acquired, and wherever situated, I give, devise, and bequeath, and do desire and will that the same shall be divided among my heirs and next of kin in the same manner as it would be by the laws of the state of New York had I died intestate." It was held that the widow did not take, and it is to be remarked that in that case the decision was against the testator's own widow,—not, as here, against the widow of a legatee. Speaking of the argument made here, Judge Rapallo said: "This same position was taken and argued by counsel with much force in the case of *Murdock v. Ward*, 67 N. Y. 387, and it was urged that a distribution could not be made according to the statute without including the widow. Some of the judges, while the case was under consideration in this court, were strongly inclined to maintain the position contended for; but a full examination of the authorities constrained them to abandon it, and it was finally held that, where the bequest was to the next of kin, the addition of the words, 'according to the statute as in case of intestacy,' was not sufficient to enlarge the class of legatees, so as to include the widow." The question again came before this court in *Platt v. Mickle*, 137 N. Y. 106, 32 N. E. 1070. In

that case the will read: "And I thereupon after his [the life tenant's] decease give . . . said rest and residue . . . to such person or persons as shall then be the heirs at law and next of kin of my said grandson George Benjamin, respectively, in such parts, shares, and proportions as, having regard to the form in which the said estate shall then exist, such heirs and next of kin would have been then respectively entitled thereto and therein by law if my said grandson had been seised thereof in fee simple as an inheritance on the part of his mother, or possessed of the same, and he had died intestate, and they had inherited or become entitled thereto from my said grandson." Again it was held that under such a provision the widow was not entitled to share in the estate. Judge Gray there wrote: "The case is governed by *Murdock v. Ward*, 67 N. Y. 387, and the other authorities cited below by Judge Lawrence in his careful opinion. I find no authority for giving to these words an enlarged sense, in the absence of something in the context or of some requirement of a statute which would furnish the court with a reason for doing so." Plainly, the learned judge did not deem the qualification that the distribution should be made as in case of intestacy to constitute "something in the context" to justify interpreting the term "next of kin" in an enlarged sense. Of course, the language used differs in the different cases, but the effect of it is the same in all. In fact, the appellant's argument could have been more forcibly made in any of the cases cited than in the one before us. Nor is there any such uniformity of sentiment on this subject as there is with reference to the disinheritance of children,—an intent to effect which the courts are loath to impute to a testator unless it be unmistakably expressed, and properly loath, because in all probability the testator had no such intent. It might be more decent, where a large estate is given to a man for life, the principal to go to his issue or to his heirs, to make some provision for his wife in case she survives him. An examination of the cases, however, shows that it is not the prevalent practice, and that a testator rarely makes provision for the surviving wife of the life tenant, and in the analogous case of a surviving husband practically never makes provision for him, unless in a few exceptional instances where the husband is in existence at the time, and known to the testator.

Reliance is placed by the appellant on the case of *Betsinger v. Chapman*, 88 N. Y. 487. It was there held that a widow could bring an action to recover her distributive share under §§ 9 and 10 of title 5 of chapter 6 of part 2 of the Revised Statutes, authorizing such suits to be maintained "by any legatee or by any of the next of kin." That decision proceeded, however, on the ground that unless the term "next of kin," in this title of the statute, was given this extended meaning, no provision was to be there found providing for the citation of the widow on an accounting, for making a decree thereon conclusive against her, or for enabling a

creditor of the estate to recover from her the value of the assets thereof she might have received. In that case Judge Andrews refers to the cases of *Murdock v. Ward*, 67 N. Y. 387, and *Luco v. Dunham*, 69 N. Y. 36, but in no respect does he criticise either. The decision cannot, therefore, be considered as impairing the authority of the earlier cases. However that may be, *Platt v. Mickle*, 137 N. Y. 106, 32 N. E. 1070, is the last authority in this court and is controlling. I think that the decisions of this court on the construction of provisions in wills similar to the one now before us have created a rule of property which we are not justified in overthrowing, especially where the proposition that the testator might have had a different intent from that we have ascribed to him is the merest surmise. Probably he never thought on the subject, and what testamentary disposition he would have made had the contingency that has arisen been called to his attention, no one can tell.

The order appealed from should be affirmed, with costs payable out of the estate.

Parker, Ch. J., and Gray, Haight, and Werner, JJ., concur:

O'Brien, J., dissenting:

The original proceeding in this case took the form of an application to the court, by petition, for an order directing the payment to the petitioner of the fund in the hands of a trustee under the will of Frances B. Hegeman, who died in the year 1878. The will was executed two years before, and disposed of a large estate. It contained various trusts to terminate in the distant future, only one of which is involved in this appeal. The corpus of this trust amounts to the sum of \$7,336.95, and the only question is in what manner and to what persons it should be distributed under the terms of the will. This will is now before this court for the third time (*Palmer v. Horn*, 84 N. Y. 516; *Palmer v. Dunham*, 125 N. Y. 68, 25 N. E. 1081), and the history of the litigation confirms the familiar observation of Lord Coke in *Roberts v. Roberts*, 2 Bulst. 130, that "wills and the construction of them do more perplex a man than any other learning, and to make a certain construction of them, this *excedit jurisprudentum artem*." The wisdom of this remark is even more apparent now than it was in his day, owing to the complex nature of human affairs, the poverty of language, or the inaccurate use of it in the instrument. Arbitrary rules frequently have to yield to circumstances and conditions, and a word, a phrase, or a sentence in one will may have a clear and certain meaning, while the same word, phrase, or sentence in another will may have a different scope and meaning, where the circumstances, conditions, and general purpose of the testator are different. The question in this case, in its last analysis, involves only an inquiry as to the sense in which the testatrix used the term "next of kin." That term, we know, com-

prehends, in its primary and strict legal sense, only blood relations, but in a broader and more general sense it is used to designate the persons who are entitled to share in the distribution of personal property in cases of intestacy. There is little room for dispute with respect to the general scope and purpose of the two short provisions of the will in which the term is to be found, and reference need be made to only one of the trusts, since it is the disposition of the corpus of that trust that constitutes the present controversy. The testatrix gave to the trustees \$20,000 in trust, to be divided into as many shares as there were children of her niece, who was named, "living at my death, and that they keep the same invested, and apply the income or interest from one of the said shares to the use of said children, respectively, and on the death of said children, respectively, that they pay over the principal and accumulations of interest to their issue and descendants according to the statute of distributions in case of intestacy." By a subsequent provision of the will the testatrix provided as follows: "In case of the death of any of the beneficiaries or persons entitled to share in the investments herein directed to be made before the time limited for the payment thereof, my will is that the same be paid over to their next of kin as according to the statute of distributions their personal estate would be divided and distributed." The event suggested in this clause actually happened, and that is what gives rise to the present controversy.

One of the children of the testatrix's niece provided for in this trust for her life was Letitia Devoe. She had one child, Edmund M. Devoe, who became a resident of Colorado in 1892, and died there August 4, 1899, at the age of thirty-three, leaving his mother and his widow, the petitioner in this proceeding, him surviving. This young man must therefore have been about ten years old at the date of the will, and twelve when the testatrix died. Letitia, his mother and the life tenant, however, survived him, and died in Colorado in the same year as her son, and about three months thereafter. The courts below have held that although the fund would have gone to Edmund, had he survived his mother, yet, he having died before her, she became and was his sole next of kin, and took the fund as such, and that upon her death it passed to her administrator, and that the widow of Edmund, who is the petitioner, was not entitled to share in the distribution at all. It was held by the courts below, and both sides now insist, that the remainder vested on the death of the testatrix, and we have affirmed the judgment in which that point was distinctly decided. *Palmer v. Dunham*, 52 Hun, 468, 6 N. Y. Supp. 46; Affirmed in 125 N. Y. 68, 25 N. E. 1081. There was, however, the substitutionary gift in the event of Edmund's death before his mother that operated upon his power of disposition, and affected the right of transmission in any other way than as directed in the will. Hence nothing passed under the laws of

Colorado, since at the time of Edmund's death his interest was not absolute, but subject to the provisions of the will, which directed that it should pass to his next of kin, who were entitled to share in his other personal estate under the statute of distributions. The statute referred to as the guide was doubtless the statute of this state, since it cannot be supposed that the testatrix, who was domiciled here, intended that the final distribution of the remainders should be made according to the statute of some other state. Of course, the statute which she had in mind when the will was made was the statute of this state.

The case, then, is this: Letitia, the mother, was entitled to a life estate in the fund, with remainder to Edmund, her only child; but as the latter died before his mother, and therefore before the time for distribution, the remainder went to his next of kin, who were entitled to share in the distribution of his other personal property under the laws of this state. It remains only to identify these persons according to the directions of the will. That direction was that, in the event of Edmund's death before the fund was payable to him (that is to say, before the death of his mother), then it should be paid to his next of kin in the same manner that his personal estate would be distributed under the statute of this state. Therefore the case is the same as if Edmund had been domiciled and had died in this state. When a person dies here intestate, without issue, leaving a widow and a mother, but no father, one half of his personal estate passes to the widow, and the other half to the mother or her personal representatives. It is legally impossible in such a case to distribute the personal estate according to the statute, and at the same time ignore the widow; and since the learned courts below have awarded it all to the mother, or, rather, to her administrator in Colorado, it would seem to be a plain violation of the directions of the will. That result was reached by giving controlling effect to the words "next of kin," and no effect whatever to the words which follow and qualify that term. Of course, in the primary and strict legal sense, the widow is not the next of kin of her husband, nor is the husband the next of kin of his deceased wife; but the testatrix used other words which showed that she intended to use the term in the statutory, and not in the common-law, sense. When the testatrix used this language Edmund was ten years old, and it would be unreasonable to suppose that she did not contemplate the possibility of his marriage in the near or distant future, and his death without issue, leaving a widow to be provided for. It is plain, therefore, that the decisions below cannot be sustained unless we are compelled to give to the words "next of kin" their narrowest meaning, and to ignore the important words that follow.

The learned courts below have doubtless found some color of authority for these views in certain cases which are cited. *Murdock v. Ward*, 67 N. Y. 387; *Luce v. Dunham*, 69 N. Y. 36. In regard to these

cases it may be observed generally that the qualifying language was not so clear and explicit as that found in the present will. Moreover, the court found in the facts surrounding the disposition a clear indication that the testatrix could not reasonably have intended to include the widow within the scope of the language used. But in this case all the circumstances point in a contrary direction. The most conclusive answer, however, is to be found in the later utterances of this court on the question. In *Betsinger v. Chapman*, 88 N. Y. 487, this court held that the words "next of kin entitled to share in the distribution of the estate" included the widow of a deceased person. No substantial difference can be found in the language of the statute in that case and the language of the will in this case. The words are as broad in the one case as in the other. It would be very difficult to state any good reason for giving a meaning to the words of a statute when used by lawmakers presumptively familiar with legal terms that is broad and liberal, and when the same words are used by a layman in his will a meaning which is narrow and technical. If in the nature of things any distinction is to be made, it should be in favor of the words used in the will. Judge Andrews, who spoke for the court, called attention to the earlier cases, and remarked that they construed the words according to their strict legal definition, and added: "But in the construction of wills, statutes, or other written instruments, the intention is the controlling consideration, and words of description will be held to include subjects to which they are not strictly applicable, if it appears from the context, or other circumstances which may be legitimately referred to, that such inclusion was intended, and this was conceded in the cases cited." He also called attention to the fact that primarily the husband, in popular, though inaccurate, speech was said to be next of kin to his wife, and, conversely, the wife the next of kin to the husband, and that in *Schuyler v. Hoyle*, 5 Johns. Ch. 206, Chancellor Kent said that the wife's choses in action vest in the husband, by the statute of distributions, "as her next of kin," and that similar language was used in the case of *Whitaker v. Whitaker*, 8 Johns. 112. It is impossible to read this case without finding in it a clear indication that the court intended to adopt a broader construction of the words "next of kin," when followed by a reference to the statute in such terms as are found in this will, than was given in the earlier cases referred to. The case was in some respects a clear departure from the adherence to strict legal definitions which controlled in these cases. But there is still a more recent case in this court that is very instructive upon this question. The strict legal meaning of the words "next of kin" is not clearer or better settled than the legal import of the words "personal representatives." The latter words almost universally mean executors or administrators, and yet in an action between an administrator and the widow and children of a deceased

57 L. R. A.

person, involving the right to money payable by the terms of a policy of insurance to the "legal representatives" of the deceased, it was held that the money belonged, not to the administrator, but to the widow and children. *Griswold v. Sawyer*, 125 N. Y. 411, 26 N. E. 464. Here, again, the court abandoned the technical legal meaning of terms, and took a broader view of the case, based upon the intention of the deceased when he procured the policy. So that in any reasonable view of this case the widow of the remainderman came within the scope of the provisions of the will, as one of the persons entitled ultimately to share in the fund. It is proper to observe that the broader meaning is the one adopted by the English courts when by the terms of a will personal property ultimately devolves upon "next of kin" or "heirs." These words in such cases are construed to mean "distributees." *Withy v. Mangles*, 10 Clark & F. 215; *Evans v. Salt*, 6 Beav. 266; *Jacobs v. Jacobs*, 16 Beav. 557; *Re Newton's Trusts*, L. R. 4 Eq. 171; *Re Steevens' Trusts*, L. R. 15 Eq. 110; *Wingfield v. Dingfield*, L. R. 9 Ch. Div. 658. And the same meaning is given to these words by the courts of many of our sister states when used in a will or other instrument with respect to the succession to personal property under such instruments. *Sweet v. Dutton*, 109 Mass. 589, 12 Am. Rep. 744; *McGill's Appeal*, 61 Pa. 46; *Eby's Appeal*, 84 Pa. 241; *Welsh v. Crater*, 32 N. J. Eq. 177; *Freeman v. Knight*, 37 N. C. (2 Ired. Eq.) 72; *Croom v. Herring*, 11 N. C. (4 Hawks) 393; *Corbitt v. Corbitt*, 54 N. C. (1 Jones Eq.) 114; *Alexander v. Wallace*, 8 Lea, 569; *Collier v. Collier*, 3 Ohio St. 369.

The order appealed from should be modified by directing that one half of the fund be distributed to the widow, and the other half to the administrator of the mother, with costs to the administrator in this court, and to the widow in all the courts, payable out of the fund.

Bartlett, J., concurs with **O'Brien, J.**

Re Transfer Tax upon the ESTATE of Walden PELL, 1st, Deceased.

(171 N. Y. 48.)

1. A vested remainder cannot be made the subject of a transfer tax, although it does not come into possession of the re-

NOTE.—For a case in this series holding that a statute taxing a right, already vested, to take shares of an estate of a person who died before the act was passed, is not an unconstitutional impairment of vested rights, see *State ex rel. Gelsthorpe v. Furnell* (Mont.) 39 L. R. A. 170.

As to inheritance tax on residuary estate, see *Re Swift* (N. Y.) 18 L. R. A. 709.

As to taxation of future contingent interests under collateral inheritance tax laws, see *Re Romaine* (N. Y.) 12 L. R. A. 401, and note; *Re Stewart* (N. Y.) 14 L. R. A. 836; and *Howe v. Howe* (Mass.) 55 L. R. A. 626.

mainderman until after the passage of the statute, since such tax would diminish the value of a vested estate, impair the obligation of a contract, and take private property for public use without compensation.

2. A statute, the manifest purpose of which is to tax transfers of property, cannot be construed as imposing a direct tax upon the property to save it from being declared unconstitutional.
3. A tax on all remainders or reversions which vested prior to a certain date, but which shall not come into possession until after the passage of the act, even if it can be regarded as a tax on property, and not on transfers, is invalid as not bearing equally upon the entire class to which the property belongs.
4. A tax on remainders when they come into possession, of 5 per cent on some, 1 per cent on others, and on others nothing, even if it can be regarded as a tax on property, and not on transfers, is void for not apportioning the burden equally among the owners of the estates sought to be taxed.

(May 6, 1902.)

APPEAL by the administrator of the estate of Walden Pell, 1st, deceased, from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of the Surrogate for New York County denying his application to declare the estate exempt from taxation under the act relating to taxable transfers. *Reversed.*

The facts are stated in the opinion.

Mr. E. Ellery Anderson, with **Messrs. William Temple Emmet** and **P. Chauncey Anderson**, for appellant:

The provisions of the transfer tax law cannot apply when there is no transfer of property whatever.

Re Hoffman, 143 N. Y. 330, 38 N. E. 311; *Re Bronson*, 150 N. Y. 6, 34 L. R. A. 238, 44 N. E. 707; *Re Harbeck*, 161 N. Y. 218, 55 N. E. 850; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

If the amendment under consideration be considered as imposing a succession or transfer tax upon the estate which vested April 14, 1863, it is retroactive and affects rights which had vested before its passage.

A retroactive statute which impairs the value of a vested estate is unconstitutional.

Germania Sav. Bank v. Suspension Bridge, 159 N. Y. 362, 54 N. E. 33; *Benson v. New York*, 10 Barb. 223; *People ex rel. Fountain v. Westchester County*, 4 Barb. 64; *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291; *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160; *Sayre v. Wisner*, 8 Wend. 661; *New York & O. Midland R. Co. v. Van Horn*, 57 N. Y. 473; *Berley v. Rampacher*, 5 Duer, 183; *Calkins v. Calkins*, 3 Barb. 305; *Danks v. Quackenbush*, 1 Denio, 128, 3 Denio, 594; *Wood v. Oakley*, 11 Paige, 400; *Young v. Henderson*, 76 N. C. 420; *Pennsylvania Co. for Ins. on Lives & G. A. v. McClain*, 105 Fed. 367; *Brevoort v. Grace*, 53 N. Y. 245.

If the amendment under consideration be considered as imposing a direct tax upon the property of the persons designated by 57 L. R. A.

the act, it cannot be sustained, because it is not uniformly imposed upon any class of property or class of persons.

Cooley, Taxn. chap. 5, p. 241; *Lexington v. McQuillan*, 9 Dana, 513, 35 Am. Dec. 159; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 599, 39 L. ed. 825, 15 Sup. Ct. Rep. 673; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685; *San Bernardino County v. Southern P. R. Co.* 118 U. S. 422, 30 L. ed. 127, 6 Sup. Ct. Rep. 1144; *Railroad Tax Case*, 8 Sawy. 238, 13 Fed. 722; *Santa Clara Railroad Tax Case*, 9 Sawy. 165, 18 Fed. 385; *Northern P. R. Co. v. Walker*, 47 Fed. 681; *Fraser v. McConway & T. Co.* 82 Fed. 257.

Messrs. Jabish Holmes, Jr., and Edward H. Fallows, for respondent:

The bequests of money and estates in remainder are clearly taxable under the provisions of § 230 of the taxable transfer law, as amended by chap. 76 of the Laws of 1899.

This amendment was passed March 14, 1899, and, as the life tenant did not die until December 20, 1899, the case is controlled by the provisions of that law.

The state has the general power to fix the time at which the right of succession shall be taxed and the time when the transfer shall take place.

Before the property is distributed the rights of the remaindermen are subject to the conditions, formalities, and administrative control prescribed by the state in the interest of its public order; and, if the state sees fit to impose a tax, there is not constitutional objection to its doing so.

Carpenter v. Pennsylvania, 17 How. 456, 15 L. ed. 127; *Orr v. Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; *Gelsthorpe v. Furnell*, 20 Mont. 310, 39 L. R. A. 170, 51 Pac. 267; *Oyon's Succession*, 6 Rob. (La.) 504, 41 Am. Dec. 274; *Deyraud's Succession*, 9 Rob. (La.) 357.

The power of taxation possessed by the state extends to all species of property within the state, and its exercise does not deprive a person of property without due process of law.

Cooley, Taxn. p. 3; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 423, 55 Am. Dec. 266; *People v. Equitable Trust Co.* 96 N. Y. 395; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685; *Re Dows*, 167 N. Y. 232, 52 L. R. A. 433, 60 N. E. 439; *Re Sherwell*, 125 N. Y. 376, 26 N. E. 464.

Equal protection of the laws does not prohibit classification for taxation, provided the classification is reasonable, and all within the same class are treated the same under like circumstances.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721.

The amendment of 1899, even if retroactive, is not unconstitutional because the right to inherit or receive these future expectant estates, although created in 1863, was a continuing right and, like any other civil right created by the state, can be taxed at any time during its continuance, and

before the right is exhausted by the actual receipt of the property.

People ex rel. Griffin v. Brooklyn, 4 N. Y. 424; *Astor v. New York*, 62 N. Y. 591; *Guliford v. Chenango County*, 13 N. Y. 149; *People ex rel. Crowell v. Lawrence*, 41 N. Y. 141; *Hersce v. Porter*, 100 N. Y. 411, 3 N. E. 338; *Re Seaman*, 147 N. Y. 69, 41 N. E. 401; *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. ed. 127; *Re Vanderbilt*, 50 App. Div. 246, 63 N. Y. Supp. 1079; *Orr v. Gilman*, 193 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; *Re Doica*, 167 N. Y. 227, 52 L. R. A. 433, 60 N. E. 439; *Gelathorpe v. Furnell*, 20 Mont. 310, 39 L. R. A. 170, 51 Pac. 267; *Wright v. Blakeslee*, 101 U. S. 174, 25 L. ed. 1048; *Wilcox v. Smith*, 26 L. J. Ch. N. S. 596; *Atty. Gen. v. Middleton*, 3 Hurlst. & N. 125; *Pennsylvania Co. for Ins. on Lives & G. A. v. McClain*, 105 Fed. 367.

The law can be made retroactive because the tax is imposed on an existing right, which is valuable property.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Re Hoffman*, 143 N. Y. 327, 38 N. E. 311; *Portland Bank v. Apthorp*, 12 Mass. 252; *Re Seaman*, 147 N. Y. 75, 41 N. E. 401.

The circumstance that when the right arose it was not covered by a tax law gives no such vested right as would save it from future taxation.

Re Vanderbilt, 50 App. Div. 246, 63 N. Y. Supp. 1079; *People ex rel. Cunningham v. Roper*, 35 N. Y. 629; *People ex rel. Galatin Nat. Bank v. New York Tax & A. Comrs.* 67 N. Y. 519; *People ex rel. Sears v. Brooklyn*, 84 N. Y. 613.

Bartlett, J., delivered the opinion of the court:

The testator, Walden Pell, 1st, died in the city of New York on the 14th day of April, 1863; and by the terms of his will he gave a life estate in all his property to his widow, with remainders over at her death, in equal shares (after making various bequests of personal property), to his nephews and nieces, and the issue of any deceased nephew or niece, together with one equal share thereof to his sister Emma. The life tenant, the widow, died on the 20th day of December, 1899, at which time all the estates in remainder came into the actual possession and enjoyment of the beneficiaries under the will and codicil. It is not disputed that under this will the bequests of personal property and the estates upon remainder of real estate vested in the beneficiaries at the time of the testator's death. Notwithstanding the vesting of these estates in the year 1863, it is contended on behalf of the comptroller of the city of New York that they are subject to the payment of the transfer tax, under an amendment of the general statute providing for taxable transfers (Laws 1899, chap. 76), being article 10 of an act in relation to taxation, constituting chapter 24 of the General Laws 57 L. R. A.

(Laws 1896, chap. 908, pp. 795, 868), which reads as follows: "All estates upon remainder or reversion, which vested prior to June 30th, 1885, but which will not come into actual possession or enjoyment of the person or corporation beneficially interested therein until after the passage of this act shall be appraised and taxed as soon as the person or corporation beneficially interested therein shall be entitled to the actual possession or enjoyment thereof." This amendment of 1899 became a law on March 14th of that year, the life tenant dying in the following December. It is conceded that the remainders in this case are controlled by this amendment, if it can be sustained as a valid exercise of legislative power.

The appellant insists that this amendment imposing a succession or transfer tax upon estates which vested April 14, 1863, is retroactive, and attempts to tax estates and rights which had vested long before its enactment; that, this being so, it violates the Constitution of the United States, which forbids any law impairing the obligations of contracts, and also the Constitution of the state of New York, which prohibits the taking of private property for public use without compensation. The appellant does not attack the constitutionality of the law simply because it is retroactive, but for the reason that it is both retroactive and effective to impair vested rights.

The language of this amendment of 1899 would seem to include all remainders created by deed or will which come within the restrictive time limitation therein fixed. Legislation which impairs the value of a vested estate is unconstitutional. *Germania Sav. Bank v. Suspension Bridge*, 159 N. Y. 362, 54 N. E. 33. In this case the legislature sought to confer the right of appeal after the expiration of the statutory limitation. In so far as this statute applied to existing judgments, it was held unconstitutional, but valid as to judgments thereafter recovered. *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291; *Sayre v. Wisner*, 8 Wend. 661; *Danks v. Quackenbush*, 3 Denio, 594; *Wood v. Oakley*, 11 Paige, 400; *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160; *New York & O. Midland R. Co. v. Van Horn*, 57 N. Y. 473. This court, in *Re Seaman*, 147 N. Y. 69, 41 N. E. 401, held that the taxable transfer act of 1892, which provided that "such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act," was to be restricted to the case of grants or gifts *causa mortis*, mentioned in the preceding portion of the subdivision, and did not extend to transfers by will or intestacy, so as to subject to taxation rights of succession which accrued before the statute came into existence. Judge Finch said: "We have held that the tax is not upon the property which is transferred, but upon the right of succession which passes to the successor. *Re Swift*, 137 N. Y. 88, 18 L. R. A. 709, 32 N. E. 1096. A right of succes-

sion passed to the four living children of George at the death of testator. It came from him. It was transferred by him, taking effect at his death, and passed then or never. But the right itself, although vesting in the successors at once, had its own peculiar character. It could not ripen into possession or enjoyment until the death of the life tenants, and, before that event, was contingent solely as to the persons who should eventually take, and the proportions to be observed. The legatees, as a class, were certain. The particular individuals were alone uncertain. . . . To say that no beneficial interest passed into hands where it was taxable is very different from saying that no beneficial interest passed at all. The doctrine of the case [*Re Ourtis*, 142 N. Y. 219, 36 N. E. 887], and its manifest trend, was that, where the particular persons who were to have the beneficial possession were uncertain, the appraisal and collection must be adjourned until the uncertainty ended; but no new doctrine of the passing of the right of succession at a date later than that of the will was at all asserted. It is said, however, that the right of succession passing in remainder by the will was, at best, merely technical and nominal, and that the beneficial interest did not pass until the termination of the life estates. In one sense, that is true. The right of succession to specific individuals might prove barren, and for that reason the claim of the state should be adjourned, and the law of 1892 fully recognizes and provides for such an adjournment; but a necessary and admissible delay in appraisal and collection is a very different matter from an assertion that no beneficial right of succession passed at all until after the decease of the life tenants."

Under the original statute of 1885 it was the practice in some of the surrogates' courts of the state to assess the transfer tax on vested remainders not yet in possession, and in regard to which there was a contingency as to the members of a class who would take. This was obviously unjust, and this court determined that the assessment and collection of the tax should be postponed until the persons were known who should ultimately come into possession. *Re Roosevelt's Estate*, 143 N. Y. 120, 25 L. R. A. 695, 38 N. E. 281; *Re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311. The rule thus laid down was clearly just, as otherwise a remainderman named in a will might be called upon to pay a succession tax upon property which he might never enjoy. The legislation of 1899, now under consideration, obviously proceeds upon a misapprehension of the effect of the absolute vesting of a remainder. Expectant future estates, as defined in the statute, expressly include all remainders, whether vested or contingent; and they are by statute descendible, devisable, and alienable. *Moore v. Little*, 41 N. Y. 66, 84. Mr. Fearne, in his work on Contingent Remainders (p. 364), says: "In general, it seems that contingent interests pass to the real or personal representatives, according to the nature of

such interests, as well as vested interests, so as to entitle such representatives to them when the contingencies happen." *Kenyon v. Sec*, 94 N. Y. 563, 568. This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It therefore follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the transfer tax act, there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract, and take private property for public use without compensation.

The learned appellate division reached the conclusion that this amendment of 1899 was unconstitutional, and we agree with them in that regard. They have, however, sustained this legislation on the ground that it is a direct tax upon property, and a legitimate exercise of the taxing power. In so holding, that learned court uses this language: "It may seem incongruous that a transfer tax act, which in principle was intended to impose a tax upon the right of succession, should be construed in such a way as to uphold the tax as one upon property. . . . Our conclusion, therefore, upon the whole case, is that, if the tax sought to be imposed could only be supported upon the ground that it is a tax upon the right of succession, then there would be objections, among them, constitutional ones, to its validity, but that, with reference to the estate here involved, if the act can be construed, — as, with some misgivings, we think it can, — as a tax upon property, it is free from constitutional objections, and the tax may be upheld." We are of opinion that it is a violent presumption as to the intention of the legislature to construe an act, which is avowedly designed to tax the succession of property on the death of its owner, as a direct tax. It would seem to be too clear for argument that the legislative intention in this regard was to deal with the act relating to taxable transfers, and with nothing else. In the first place, we have the title of chapter 76 of the Laws of 1899, enacting this amendment, as follows: "An Act to Amend Chapter 908 of the Laws of 1896, Entitled 'An Act in Relation to Taxation, Constituting Chapter 24 of the General Laws,' as Amended by Chapter 284 of the Laws of 1897, Relating to Taxable Transfers of Property." The 1st section thereof opens with these words: "Section 230 of chapter 908 of the Laws of 1896, . . .

relating to taxable transfers of property, is hereby amended to read as follows," etc. To say that the act was not an amendment of the law relating to taxable transfers of property is to contradict what plainly appears upon its face. We will once more quote the amendment: "All estates upon remainder or reversion, which vested prior to June 30th, 1885, but which will not come into actual possession or enjoyment of the person or corporation beneficially interested therein until after the passage of this act, shall be appraised and taxed as soon as the person or corporation beneficially interested therein shall be entitled to the actual possession or enjoyment thereof."

The intention of the legislature being so absolutely clear in the premises,—for it must be remembered that ever since the death of the testator this property has borne and discharged its annual taxes, just the same as other property,—we might well be justified in declining to further consider the question of whether this is an effort to impose a direct tax upon property.

Assuming, however, that the legislature intended to exercise its power of direct taxation, the learned counsel for the appellant insists that it is invalid for two reasons: (1) The law does not subject to the tax a class of property, but does subject certain designated persons, defined by the character of their ownership, to the payment of the tax; (2) the law does not apportion the burden equally upon all the owners designated, but discriminates between different owners, so that the share of the burden imposed as to some owners is 5 per cent, as to other owners it is 1 per cent, and as to still other owners it is nothing at all.

It is the undoubted rule that the legislature possesses unlimited power of taxation, except as restrained by constitutional provisions. These restraints require the taxation to be imposed according to well-settled general rules. In *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 599, 39 L. ed. 825, 15 Sup. Ct. Rep. 696, the Supreme Court of the United States lays down the following rule: "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax." Mr. Cooley, in his work on Taxation, at page 596 [2d ed. p. 215] says: "It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality. It would lack the semblance of legitimate tax legislation." The Supreme Court of the United States, in a recent case, decided March 10, 1902 (*Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431), have considered the subject of classification very fully. The court says: "The diffi-

culty is not met by saying that, generally speaking, the state, when enacting laws, may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. . . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection.' *Gulf, C. & St. F. R. Co. v. Ellis*, 165 U. S. 150, 155, 159, 160, 165, 41 L. ed. 666, 668, 670, 671, 17 Sup. Ct. Rep. 255. These principles were recognized and applied in *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, sub nom. *Cotting v. Godard*, 46 L. ed. 92, 22 Sup. Ct. Rep. 30, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock-yards company in the state, but which exempted certain stock yards from its operation, was repugnant to the 14th Amendment, in that it denied to that company the equal protection of the laws." The case from which we have quoted above involved the validity of the Illinois trust statute of 1893, which was alleged to be in violation of the 14th Amendment of the Constitution of the United States. The act was held unconstitutional for the reason that the 1st section thereof embraced all persons, firms, corporations, or association of persons who combine their capital, skill, or acts for any of the purposes specified, while the 9th section declares that the statute shall not apply to agriculturists or live-stock dealers, in respect of their products or stock on hand. This discrimination was held to render the statute invalid.

It is to be observed that the amendment of 1899, now under consideration, was further amended in 1900 and 1901 by changing the words, "June 30th, 1885," to "May 1st, 1892." While these changes do not affect the case at bar, still they indicate the legislative intention to narrow the application of this statute to a very limited number of individuals belonging to a larger class. The vice of this legislation is that it does not seek to impose a tax on all estates upon remainder, whether created by will or deed, that vested prior to June 30, 1885, but contains the further provision that the life estate must expire after the passage of the

amendment on March 14, 1899. All the vested estates upon remainder or reversion, as to which the intermediate life estate terminated between June 30, 1885, and March 14, 1899, escape taxation, as they are not within the purview of the amendment of the latter year. The tax is therefore imposed upon a limited class of remaindermen, while others who have come into possession and enjoyment by reason of the termination of the life estate long after the early date fixed of June 30, 1885, are not taxed. The learned counsel for the appellant states a very apt illustration in his brief, as follows: "We often hear it declared that the legislature may designate watches and carriages as a class of property, and subject the same to the payment of duties or taxes; but would anyone claim that a law declaring that all watches or carriages which were purchased prior to June 30, 1885, should be appraised and taxed, could be sustained upon the ground that such law merely designated a class of property for taxation?" Where the statute declares that the owners of a particular class of property, acquired at a particular time, shall be taxed, it is equivalent to naming the owners of such property. It is in no sense a general classification. The principle involved in this mode of taxation is illustrated in *Re Henneberger*, 155 N. Y. 420, 42 L. R. A. 132, 50 N. E. 61, which involved the question whether a statute was a general or a private or local bill. The head-note reads as follows: "Although an act is drawn in general terms, if its provisions are such, in number and in character, as unduly, with reference to the constitutional purpose, to restrict its operation, and, to all intents, to confine it to a particular locality, it comes as much under condemnation as a local bill as though it designated the locality by name."

This amendment is clearly unconstitutional in another aspect, as it does not apportion the burden equally among the owners of estates sought to be taxed, for it imposes on some 5 per cent, on others 1 per cent, and as to other owners nothing at all. It is true, this discrimination was brought about because the legislature was dealing with a succession tax, and consequently maintained the differing rates of taxation found in the act in relation to taxable transfers. This is still further evidence that the intention of the legislature was not to exercise its power of direct taxation.

It follows that the amendment of 1899, whether regarded as a part of the act relating to taxable transfers, or an attempt on the part of the legislature to exercise its general power of taxation, is unconstitutional and void.

The order appealed from should be reversed, with costs, and an order duly entered declaring the estate of Walden Pell, 1st, to be exempt from the transfer tax.

Gray, O'Brien, Haight, Cullen, and Werner, JJ., concur. Parker, Ch. J., concurs only on the ground that chapter 76, § 7 L. R. A.

Laws 1899, does not provide for a direct tax upon property, and, in so far as it aims to tax transfers of estates already vested when the act was passed (which is this case), it is void.

Charles DAVIS *et al.*, *Respts.*,
v.

NIAGARA FALLS TOWER COMPANY,
Appt.

(171 N. Y. 336.)

A landowner will be enjoined from maintaining a tower on his land in such a way that ice formed on it from freezing rain or spray from a cataract falls onto adjoining property so as to injure it and endanger human life.

(O'Brien, J., *dissents.*)

(May 29, 1902.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Niagara County in plaintiffs' favor in an action brought to enjoin the maintenance of a tower on defendant's property. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bissell & Metcalf, for appellant:

The test of the permissible use of one's own land is not whether the use or the act causes injury to a neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, Was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over the property, having regard to all interest affecting his own and those of his neighbors and having in view also public policy?

Booth v. Rome, W. & O. Terminal R. Co. 140 N. Y. 267, 24 L. R. A. 105, 35 N. E. 592.

No negligence being charged and the use being reasonable, the plaintiffs are remediless and the injury is *damnum absque injuria*.

Ibid.; *Negus v. Becker*, 143 N. Y. 303, 25 L. R. A. 667, 38 N. E. 290; *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 17 L. R. A. 220, 31 N. E. 328; *Vanderwiele v. Taylor*, 65 N. Y. 341; *Losee v. Buchanan*, 51 N. Y. 487, 10 Am. Rep. 623; *Moore v. Gadsden*, 87 N. Y. 84, 41 Am. Rep. 352.

NOTE.—As to liability for discharging water from gutter upon neighbor's land, see, in this series, *Fitzpatrick v. Welch* (Mass.) 48 L. R. A. 278.

As to liability for injury by fall of snow from roof, see *Smethurst v. Independent Cong. Church* (Mass.) 2 L. R. A. 695; and *Lee v. McLaughlin* (Me.) 26 L. R. A. 197.

As to liability for injury caused by escape of water from standpipe maintained on premises, see *Defiance Water Co. v. Olinger* (Ohio) 32 L. R. A. 736.

Messrs. Cohn & Chormann, for respondents:

The questions as to whether the tower as maintained is a nuisance and the amount of damages sustained by plaintiffs are both questions of fact, and the findings of the trial court having been unanimously affirmed by the appellate division, no question is presented for determination by this court.

New York Const. art. 6, § 9; N. Y. Code Civ. Proc. § 191, subd. 4; *Niagara Falls v. New York C. & H. R. R. Co.* 168 N. Y. 610, 61 N. E. 185.

The finding that the maintenance of the tower by defendant constituted a nuisance was the only legitimate finding deducible from the evidence.

Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318; *Walsh v. Mead*, 8 Hun, 387; *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *McKeon v. See*, 4 Robt. 449; *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L. R. A. 711, 25 N. E. 246; *Garvey v. Long Island R. Co.* 159 N. Y. 323, 54 N. E. 57; *Fletcher v. Rylands*, L. R. 1 Exch. 265; *Penraddock's Case*, 5 Coke, 100b; *Fitzherbert*, Natura Brevium, 184; *Smith v. Ingersoll-Sergeant Rock Drill Co.* 7 Misc. 374, 27 N. Y. Supp. 907, 12 Misc. 5, 33 N. Y. Supp. 70; *Jarvis v. Baxter*, 20 Jones & S. 109; *Pom. Eq. Jur.* §§ 1350 *et seq.*; 16 Am. & Eng. Enc. Law, p. 959; *Wood*, Nuisances, §§ 103, 104.

The remedy by injunction is proper.

Cogswell v. New York, N. H. & H. R. Co. 105 N. Y. 319, 11 N. E. 518; *Goldschmidt v. New York Steam Co.* 7 App. Div. 317, 40 N. Y. Supp. 169; *Robinson v. Smith*, 25 N. Y. S. R. 647, 7 N. Y. Supp. 38; *Trenor v. Jackson*, 15 Abb. Pr. N. S. 115; *Dean v. Benn*, 69 Hun, 519, 23 N. Y. Supp. 708; 16 Am. & Eng. Enc. Law, p. 959; *Pom. Eq. Jur.* §§ 1350 *et seq.*; N. Y. Code Civ. Proc. § 1662.

Cullen, J., delivered the opinion of the court:

The plaintiffs and the defendant are owners of adjacent properties on a street called the "Riverway," in the city of Niagara Falls. The plaintiffs have constructed on their land a building used for a museum, with large skylights in the roof. The defendant has built on its land a hotel and a tower or observatory. This tower is about 200 feet high, and is constructed of an open iron framework with braces and cross girders. At the top of the tower there is an observatory. Visitors are carried to and from the observatory by elevators. The whole structure is several feet within the limits of the defendant's land. As found by the trial court, during the winter ice is formed on the structure from sleet, melting snow, and spray from the Falls of Niagara, which accumulates, and when a thaw occurs large quantities of ice fall from the tower upon the roof of the plaintiffs' building, in size and with velocity sufficient to

endanger human life, by means of which plaintiffs' building and property have been injured. The action was brought to recover damages, and for an injunction to restrain the defendant from so maintaining the tower as to suffer ice to fall therefrom on the plaintiffs' property. The trial court also found that the injury to plaintiffs' building and the accumulation and fall of ice from the tower on the plaintiffs' property recurred each winter during periods of thaw. It further found that the tower was a safe, substantial, and suitable structure for the purpose for which it was used. On these facts it decided, as a matter of law, that the maintenance and construction of the tower was a private nuisance, and that the plaintiffs were entitled to a perpetual injunction restraining the defendant from so maintaining the structure that ice would form thereon and fall on the building and premises of the plaintiffs. A reference was ordered to ascertain the plaintiffs' damages. On the report of the referee final judgment was entered for an injunction and damages. This judgment was affirmed by the appellate division (67 N. Y. Supp. 1131) and an appeal has been taken to this court.

The affirmance below having been unanimous, the question presented here is whether the facts found entitle the plaintiffs to judgment. The court has not found any negligence in the character or plan of the structure maintained by the defendant. The element of negligence being thus eliminated, the plaintiffs' right to recover depends on the duty that the defendant owed to adjacent owners with reference to ice that might accumulate on its building. The law with reference to rainfall seems well settled. So long as the owner of land leaves it in its natural condition, he is not required to adopt any measures to prevent the flowage of surface waters from his premises on the adjoining land (*Vanderwiele v. Taylor*, 65 N. Y. 341), but when he puts a structure on the land a contrary rule prevails. Then he must take care of the water that falls on his premises, except in the case of extraordinary storms. In *Washb. Easements & Servitudes*, *390, it is said of the right to eaves' drip: "It grows out of the fact that for one to construct the roof of his house in such a manner as to discharge the water falling thereon in rain upon the land of an adjacent proprietor is a violation of the right of such proprietor, if done without his consent, and this consent must be evidenced by express grant or prescription." In *Bellows v. Sackett*, 15 Barb. 96, it was held that the defendant could not maintain a building upon his lot, the water falling from the roof of which injured the plaintiff's building, whether the water actually fell in the first instance on the defendant's land or not. In *Walsh v. Mead*, 8 Hun, 387, it was held that, where the roof of a building was so constructed as to render the snow falling upon it liable to be precipitated on the sidewalk without an adequate guard at the edge to retain it, it is in law a nuisance. The doctrine of *Bellows v. Sackett* was followed

in *Jutte v. Hughes*, 67 N. Y. 267. There this court said: "The proof showed that the defendant had paved the yard, thus causing the water to accumulate, and render the yard less penetrable to the same, and conducted from the roofs of his houses to the privy in leaders and drains an unusual quantity of water beyond the capacity of the drains to carry away. This he had no right to do, and he was bound to take care of such water as fell and accumulated upon his own premises, and to prevent its causing any injury to the property of the plaintiff. *Bellows v. Sackett*, 15 Barb. 96; *Foot v. Bronson*, 4 Lans. 51. It matters not that the defendant did all that he reasonably could do to take the water off, if he suffered it improperly to increase on his own premises, and so as to flow on the plaintiff's premises." The decisions in other states appear to be uniformly to the same effect. In *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318, it was held that maintaining a building with a roof constructed so that snow and ice collecting on it from natural causes will probably fall onto an adjoining highway renders the owner liable to a person injured. It was there said: "It is not at all a question of reasonable care and diligence in the management of his roof, and it would be of no avail to the party to show that the building was of the usual construction, and that the inconvenience complained of was one which, with such a roof as his, nothing could prevent or guard against. He has no right so to construct his building that it will inevitably, at certain seasons of the year, and with more or less frequency, subject his neighbor to that kind of inconvenience; and no other proof of negligence on his part is needed. . . . He must, at his peril, keep the ice or the snow that collects upon his roof within his own limits, and is responsible for all damages if the shape of his roof is such as to throw them upon his neighbor's land, in the same manner as he would be if he threw them there himself." In *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705, the plaintiff's building was higher than the defendant's rear building, on the roof of which, on account of the height of adjacent buildings, water accumulated, and soaked through the plaintiff's wall. The defendant was held liable, and it was there said: "Having pitched his roof so as to carry the rainfall against and into the wall, it was

his duty to raise the apron or flushing so high as effectually to protect the plaintiff's store from being flooded by the water thus brought down. He had no right to carry the rainfall on his premises into and upon the premises of the plaintiff. This was a wrongful act, which he could not justify by averring the openness of the wall of the plaintiff." In *Tanner v. Volentine*, 75 Ill. 624, it is said: "It is well settled that, if the owner of a building causes the water to flow from the roof upon the lot or ground of another, such other may recover of him for the damages sustained, unless prevented by some agreement." *Hazeltine v. Edgmand*, 35 Kan. 202, 57 Am. Rep. 157, 10 Pac. 544, is to the same effect. It is to be observed that the structure of the tower is not on the division line between the land of the plaintiffs and that of the defendant, and therefore the ice that is formed on the posts, beams, and girders is accumulated wholly on the defendant's land. If the shape of the tower was such that rain falling on the defendant's premises would run down the posts and then be cast on plaintiffs' building, plainly, under the authorities cited, the defendant would be liable. It can make no difference on the question of the defendant's liability that the water, instead of being precipitated on the plaintiffs' land, is allowed to congeal and freeze and fall in the form of ice. Nor is it material on the question of liability whether the ice proceeds from the fall of rain or from the spray and mist of Niagara Falls. The latter is just as much a natural phenomenon as the former. In climates where at certain seasons of the year the rain falls in the form of snow, the owner of land must build his structures with guards that would be unnecessary in places where there is no fall of snow. Likewise, where a structure is built so near Niagara Falls as to be subject to the precipitation thereon of spray and water from the falls, the owner is bound to take the necessary precautions against casting the water which falls on his own premises or the ice that is formed therefrom upon those of his neighbor.

I think the judgment below was right, and that it should be affirmed, with costs.

Parker, Ch. J., and Gray, Bartlett, and Werner, JJ., concur. O'Brien, J., dissents. Haight, J., not voting.

GEORGIA SUPREME COURT.

**BROWN & ALLEN et al., Plffs. in Err.,
v.
JACOBS PHARMACY COMPANY.**

(.....Ga.....)

*1. A combination of mercantile deal-

*Headnotes by FISH, J.

ers to compel another dealing in similar goods to sell at prices fixed by it, or, upon his refusal so to do, to prevent those of whom its members are purchasing customers from selling goods to him, is, upon general legal principles, contrary to public policy and void; and the members of such a combination may, collectively or individually, be, by appropriate injunction, restrained from

NOTE.—For a case in this series similar to the one above, see *Doremus v. Hennessy* (Ill.) 57 L. R. A.

43 L. R. A. 797, holding that one whose business is injured by the action of a laundry asso-

carrying into effect such purpose as that indicated above.

2. The act approved December 23, 1898 (Acts 1898, p. 68), commonly known as the "anti-trust act," is unconstitutional, as § 4 thereof, declaring that the provisions of the act "shall not apply to agricultural products or live stock while in the possession of the producer or raiser," makes the act repugnant to that provision of the 14th Amendment of the Constitution of the United States which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws."
3. There was no error in granting the injunction prayed for, save only as to one of the defendants, and the judgment excepted to being, as to all the others, correct, it will be affirmed, with appropriate direction.

(April 30, 1902.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of plaintiff in an action brought to recover damages for injuries to its business and to enjoin further injury by combining to prevent it from purchasing goods. *Affirmed.*

The facts are stated in the opinion.

Messrs. Smith, Hammond, & Smith, for plaintiffs in error:

It is quite legitimate for any trader to obtain the highest price he can for any commodity in which he deals.

1 Eddy, Combinations, § 193.

A combination is simply the co-operation of two or more persons to achieve a given result.

Id., § 167.

Voluntary associations to provide a standard of business integrity among the members, and adopt rules for just and fair dealing among them, and enforce the same by penalties, are of long standing, and recognized as lawful.

Anderson v. United States, 171 U. S. 604-616, 43 L. ed. 300-306, 19 Sup. Ct. Rep. 50.

It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice, or

malice. With his reasons neither the public nor third persons have any legal concern.

Cooley, Torts, 278.

The exercise by one man of his legal right cannot be a legal wrong to another. Whatever one has a right to do, another can have no right to complain of.

Cooley, Torts, 688; *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 676.

Damage occasioned by an act not in itself unlawful, done by a combination in the legitimate pursuit of its own lawful business, and with no intent to injure the party damaged, does not give rise to a cause of action.

1 Eddy, Combinations, § 477; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom. Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.* 21 L. R. A. 337, 55 N. W. 1119; *Macaulay Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 33 Atl. 1; *Brewster v. C. Miller's Sons Co.* 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301; *Beywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 666; *Re Greene*, 52 Fed. 104.

Messrs. King & Spalding and D. A. Loyless also for plaintiffs in error.

Messrs. Hamilton Douglas, Rosser & Carter, John L. Hopkins & Sons, and Arnold & Arnold for defendant in error.

Fish, J., delivered the opinion of the court:

The record in this case discloses that prior to the institution of the present action, and since then, there existed in the United States three organizations, known, respectively, as the Proprietary Association of America, the National Wholesale Druggists' Association, and the National Association of Retail Druggists. These associations occupying each toward the others close and intimate relations, had, among other things, the purpose of keeping up the prices of proprietary medicines, drugs, and other articles usually dealt in by those engaged in the drug trade. A local association was formed in Atlanta, known as the Atlanta Retail Druggists' Association. When it was first organized, Joseph Jacobs, secretary and treasurer of the Jacobs Pharmacy Company, the plaintiff in the present case,

cliation in inducing people engaged in the laundry business not to work for plaintiff because she would not charge prices in accordance with a scale fixed by the association may recover damages therefor.

As to right of retail coal dealer injured by combination between wholesalers and favored retailers to monopolize the business and enhance prices, to damages and an injunction, see *Hawarden v. Youghloheny & L. Coal Co. (Wis.)* 55 L. R. A. 828.

For boycott or conspiracy to injure business generally, see *Van Horn v. Van Horn (N. J. L.)* 10 L. R. A. 184; *Jackson v. Stanfield (Ind.)* 23 L. R. A. 588; *Graham v. St. Charles Street R. Co. (La.)* 27 L. R. A. 416; *Macaulay v. Tierney (R. I.)* 37 L. R. A. 455; *Brewster v. C. Miller's Sons Co. (Ky.)* 38 L. R. A. 505; *Hartnett v. Plumber's Supply Assn. (Mass.)* 38 L. R. A. 194; *Boutwell v. Marr (Vt.)* 43 L. R. A. 803; *Ertz v. Produce Exchange (Minn.)* 48 57 L. R. A.

L. R. A. 90; *Inter-Ocean Pub. Co. v. Associated Press (Ill.)* 48 L. R. A. 568; and *Ertz v. Produce Exchange (Minn.)* 51 L. R. A. 825.

For other cases as to combinations to prevent competition and control prices, see *United States v. Jellico Mountain Coke & Coal Co. (C. C. M. D. Tenn.)* 12 L. R. A. 753, and *note*; *Lovejoy v. Michels (Mich.)* 13 L. R. A. 770, and *note*; *More v. Bennett (Ill.)* 15 L. R. A. 361; *Texas Standard Cotton Oil Co. v. Adoue (Tex.)* 15 L. R. A. 598; *State v. Phipps (Kan.)* 18 L. R. A. 657; *Queen Ins. Co. v. State (Tex.)* 22 L. R. A. 483; *People v. Sheldon (N. Y.)* 23 L. R. A. 221; *Nester v. Continental Brewing Co. (Pa.)* 24 L. R. A. 247; *United States v. Trans-Missouri Freight Assn. (C. C. App. 8th C.)* 24 L. R. A. 73; *United States v. E. C. Knight Co. (C. C. App. 3d C.)* 24 L. R. A. 428; *Ford v. Chicago Milk Shippers' Assn. (Ill.)* 27 L. R. A. 298; and *People v. Milk Exchange (N. Y.)* 27 L. R. A. 437.

was a member of it; but at that time it was distinctly understood and agreed among its members that it was to undertake no action with reference to the cutting of prices by dealers in drugs, or to control prices of the same. Afterwards the plaintiff, either by its methods of advertising, or certain things that it did in the conduct of its business, gave offense to the members of this association, and charges were preferred against Jacobs. He then withdrew from the local association. Some of the members of that association were members of one or more of the large associations above referred to. After the retirement of Jacobs, the local concern put in operation a scheme to prevent the pharmacy company from being able to buy goods with which to conduct its business. The main features of that scheme were that the local concern, by circulars, letters, or otherwise, undertook to notify wholesalers and manufacturers throughout the country that the pharmacy company was an aggressive cutter, and to request the persons or concerns addressed not to sell it any more goods; further, to require all salesmen representing the manufacturers or wholesale houses to procure from the local association a card, in order to procure which such salesmen had to sign an agreement not to sell the pharmacy company any goods; and another part of the scheme was to give the manufacturers and wholesalers to understand that, unless they refused to sell the plaintiff any goods, the members of the local association would not buy any more goods from them. In this condition of affairs, the plaintiff brought its equitable petition against the defendants, alleging, in substance, the facts set forth above, and praying for damages for alleged injuries to its business already done, and for an injunction to prevent the defendants from carrying into effect the scheme above outlined. The petition charged that the scheme was an unlawful conspiracy to destroy the plaintiff's business, and it more fully set out the manner in which this scheme was to be effectuated, by setting forth as exhibits, marked "A," "B," and "C," certain letters, etc., by means of which the defendants were seeking to accomplish the alleged unlawful purpose which the plaintiff was seeking to restrain. These exhibits were as follows:

Exhibit A.

Atlanta, Ga., March 28, 1901.

C. L. Stoney, President; W. B. Freeman, Vice President; R. L. Palmer, Treasurer; W. S. Elkin, Jr., Secretary, Atlanta Druggists' Association.
Gentlemen:—

Inclosed please find a copy of a resolution recently adopted by the Atlanta Druggists' Association. There are fifty-eight retail druggists and three wholesale druggists in this city, and among this number only one, a retailer, is designated as an aggressive cutter. Believing that, from a business standpoint, you would prefer the aid and support of fifty-eight (two of the wholesal-

ers are also retailers) legitimate druggists, rather than that of one cutter, we feel sure that it will afford you pleasure to sign the inclosed agreement.

Awaiting an early reply, I am yours very truly,

[Signed] W. S. Elkin, Secretary.

Exhibit B.

We, the undersigned, hereby agree to sell goods of our manufacture (or manufactured by any other house that we may handle) in the city of Atlanta, Ga., and adjoining districts, only to those druggists who are members of the Atlanta Druggists' Association, and any others who have not been designated as aggressive cutters. We further agree not to sell any goods to department stores in the above-mentioned territory. We reserve the right to cancel this contract by giving notice to the secretary of Atlanta Druggists' Association.

Date, —.

Exhibit C.

A copy of resolution adopted by the Atlanta Druggists' Association, March 22d, 1901: Resolved: (1) That the Atlanta Druggists' Association adopt a card for salesmen reading: "This is to certify that Mr. —, representing—, has qualified, and is hereby recommended to the members of our association. Date, —. —, Secretary. (This card is only good for thirty days from date.)" (2) That salesmen's cards shall be required of all salesmen representing as follows: Drug jobbers; patent medicine manufacturers; pharmaceutical houses; proprietary medicine manufacturers; druggists' sundry houses who carry patent and proprietary medicines, proprietary articles, and medicated soaps; manufacturers of surgical supplies; and manufacturers of paper boxes and labels. (3) That the secretary shall issue cards only to salesmen who sign an agreement not to sell directly or indirectly any aggressive cutter or any department store. This agreement to be binding to house represented by salesmen signing same. (4) That where new remedies are being introduced, the salesmen require each purchaser to sign contract to sell such remedy at full printed or implied price. (5) That a copy of these resolutions be furnished each manufacturer who is requested to sign agreement.

The case was heard before Hon. J. H. Lumpkin, Judge of the Atlanta circuit, upon the application for an interlocutory injunction. A considerable amount of evidence was introduced, concerning which it is sufficient to say that the plaintiff established, substantially, the material allegations of its petition. It claimed an injunction both upon the general principles of the common law, and also under the terms of what is commonly known as the "anti-trust act" (Acts 1896, p. 68), passed by the general assembly of this state in 1896. The defendants attacked the constitutionality of that act, alleging that it is in violation of

the 14th Amendment of the Constitution of the United States, in that it denies to them the equal protection of the law, and deprives them of liberty and property without due process of law, and also abridges their liberties and immunities as citizens of the United States; that it is class legislation, and violates art. 1, § 4, ¶ 1, of the Constitution of Georgia. The judge granted the injunction substantially as prayed. After a careful investigation, we are satisfied that he was right in so doing, except in so far as it was made operative against the Lamar-Rankin Drug Company, one of the defendants which was not a member of the local association mentioned above, and against which, therefore, no injunction should have been granted. This minor error or inadvertency has been corrected by an appropriate direction in the judgment rendered by this court. It would not be profitable to set out, or even summarize, the voluminous evidence which was introduced at the hearing. We have already, in effect, stated that the evidence was sufficient to establish favorably to the plaintiff its contentions of fact. We shall therefore confine our discussion to the questions of law involved in the present writ of error. Their nature will be gathered from what has already been said, and from an examination of the headnotes preceding this opinion. We have been relieved of much labor by reason of the fact that the learned and able judge of the trial court filed in the case an elaborate and carefully prepared opinion. What follows is taken almost literally from the same. We omit, save as to extracts from authorities made by him, the use of quotation marks, for the sake of convenience, as we have seen fit to make some omissions, changes, and additions as to the several propositions stated and discussed by his honor. It is but fair, however, to add that the material which we have rendered available was all supplied by the work done by the judge below.

A conspiracy has been defined as a combination either to accomplish an unlawful end, or to accomplish a lawful end by unlawful means. This form of expression was used by Lord Denman in *King v. Seward* (1834) 1 Ad. & El. 706; *Jones's Case* (1832) 4 Barn. & Ad. 345. And though he is reported to have expressed himself somewhat differently in other cases (see passing remark in *Queen v. Peck* (1839) 9 Ad. & El. 686), this definition has been very widely accepted and quoted. See Bouvier, *Law Dict.*, word, *Conspiracy*. Mr. Eddy, in his recent work on *Combinations*, gives the following definition, as comprehensive in its nature, and including both civil and criminal conspiracies: "Conspiracy is the combination of two or more persons to do (a) something that is unlawful, oppressive, or immoral; or (b) something that is not unlawful, oppressive, or immoral, by unlawful, oppressive, or immoral means; (c) something that is unlawful, oppressive, or immoral, by unlawful, oppressive, or immoral means." 1 Eddy, *Combinations*, § 171, 340. Conspiracies are often spoken of

as civil or criminal. The terms "criminal" and "civil" are used, respectively, to designate a conspiracy which is indictable, or a conspiracy which will furnish ground for a civil action. To render a conspiracy indictable at common law, no overt acts in carrying out the design of the conspirators were necessary. The conspiring was sufficient to authorize an indictment. Yet it will be readily perceived that if the conspirators stopped with conspiring, and did nothing further in execution of the design, no injury would have been done which would furnish a basis for a civil action. But if, in carrying out the design of the conspirators, overt acts were done, causing legal damage, the person damaged had a right of action. *Savile v. Roberts*, 1 Ld. Raym. 378. Hence arose the dictum that the gist of criminal conspiracy is the combination, and the gist of civil conspiracy is the injury or damage. And from this came certain rulings applicable to the two, respectively, which need not be discussed. Mr. Eddy says: "The law of civil conspiracy is a wider development and application of the law of criminal conspiracy. So far as rights and remedies are concerned, all criminal conspiracies are embraced within civil conspiracies,—the definition of the latter embraces the former." 1 Eddy, *Combinations*, § 364. That contracts and agreements in general restraint of trade are contrary to public policy and void is a principle so universally recognized that citation of authority is unnecessary to support it. It has been crystallized in § 3668 of the Civil Code of this state, where the expression is that contracts "in general restraint of trade" are contrary to public policy. Differences of opinion arise only when this general principle is to be applied to a particular case. Thus it is suggested, inasmuch as the evidence shows that not all of the druggists of Atlanta are members of the local association, but only about three fourths of them, that the combination or agreement was not obnoxious to this rule, or the rule declaring agreements or contracts tending to monopoly against public policy, even if it would have been so were all members. We do not think this distinction sound. Nothing is more common than for the courts to declare contracts between only two persons, who by no means control a particular kind of business, void, as contrary to public policy. It is the nature or character and tendency of the agreement which renders it objectionable, whether in fact the parties to it succeed in restraining trade generally, or stifling competition, or not. As to the matter of monopoly, it may also be said that if parties make contracts or agreements seeking to establish a monopoly, and do establish it as far as they can, surely they cannot say that the effort is legal if not completely successful.

In *More v. Bennett* (1892) 140 Ill. 69, 15 L. R. A. 361, 29 N. E. 888, it was held that an association of stenographers, of which one object was to control the prices to be charged for stenographic work by its mem-

bers, by restraining all competition between them, was an illegal combination, although only a small portion of the stenographers of the city belonged to it. In the opinion, Bailey, J., page 80, 140 Ill., page 364, 15 L. R. A., page 891, 29 N. E. says: "Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its goodwill with his vendee, by which the vendor agrees not to engage in the same business within a limited territory; and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased." To this have sometimes been added agreements of partnership or employment. Mr. Tiedeman says: "Following the reason of the rule which prohibits contracts in restraint of trade, we find that it is made to prohibit all contracts which in any way restrain the freedom of trade or diminish competition, or regulate the prices of commodities and services." Tiedeman, Com. Paper, § 190. In *Anderson v. Jett* (1889) 89 Ky. 375, 6 L. R. A. 300, 392, 12 S. W. 670, it was held: "Rivalry is the life of trade. The thrift and welfare of the people depend upon it. Monopoly is opposed to it, all along the line. . . . The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is in the combination or agreement. The practical evil effect of the combination only demonstrates its character; but if its object is to prevent or impede free and fair competition in trade, and may in fact have that tendency, it is void, as being against public policy." See also *Texas Standard Oil Co. v. Adoue* (1892) 83 Tex. 650, 15 L. R. A. 598, 19 S. W. 274; *People v. Sheldon*, 139 N. Y. 251, 263, 264, 23 L. R. A. 221, 34 N. E. 785. Under such circumstances the agreement is void, although the prices fixed at the time may have been reasonable. *India Bagging Assn. v. Kock*, 14 La. Ann. 164. Judge Taft, in the circuit court of appeals of the sixth circuit of the United States, in an able decision in the case of *United States v. Addystons Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, *et seq.*, reviews the authorities on this subject. Among other things, he says (46 L. R. A. 131, 29 C. C. A. 152, 54 U. S. App. 748, 85 Fed. 283): "Much has been said in regard to the relaxing of the original strictness of the common law in declaring contracts in restraint of trade void, as conditions of civilization and public policy have changed; and the argument drawn therefrom is that the law now recognizes that competition may be so ruinous as to injure the public, and therefore that contracts made with a view to check such ruinous competition and regulate prices, though in restraint of trade, and having no other purpose, will be upheld. We think this conclusion is unwarranted by the authorities, when all of them are considered. . . . The manifest danger in the administration of justice according to so shifting, vague, and

indeterminate a standard would seem to be a strong reason against adopting it." After considering a number of authorities, he says (page 136, 46 L. R. A., page 160, 29 C. C. A., page 60, 54 U. S. App., page 290, 85 Fed.): "In the foregoing cases the only consideration of the agreement restraining the trade of one party was the agreement of the other to the same effect, and there was no relation of partnership, or of vendor and vendee, or of employer and employee. Where such relation exists between the parties, as already stated, restraints are usually enforceable, if commensurate only with the reasonable protection of the covenantee in respect to the main transactions affected by the contract. But in recent years even the fact that the contract is one for the sale of property or of business and goodwill, or for the making of a partnership or a corporation, has not saved it from invalidity, if it could be shown that it was only part of a plan to acquire all the property used in a business by one management, with a view to establishing a monopoly. . . . Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly."

This exactly answers one of the arguments advanced in the present case. It is contended that the members of the Atlanta Druggists' Association were not seeking to restrain trade or create a monopoly, but were only seeking to defend themselves against the cutting of prices by the Jacobs Pharmacy Company, and that really they were fighting an effort at monopoly. That fifty-eight druggists in the city of Atlanta should seriously claim to be in danger of a monopoly from one, which is not shown to have any more capital than any of them, or any more facilities for trade, or to be making any combination, or in fact doing anything to cause the present action on their part, except selling some articles of merchandise at low rates, is a position which cannot be sustained. This is the argument which is almost universally advanced by every monopoly or combination in restraint of trade. If it is sustained by the courts, then the rules of law as to such contracts and agreements might as well be wiped off the statute books. The decision just cited was affirmed by the Supreme Court of the United States in 1899, except as to one mere inadvertence in respect to interstate commerce. In the decision the following is quoted approvingly from the opinion of Judge Taft: "It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in 'pay' territory were reasonable. . . . We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with

reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so." 175 U. S. 211, 237, 44 L. ed. 136, 146, 20 Sup. Ct. Rep. 96, 106.

Again, some courts have sought to draw a distinction between what they term "necessaries," or "the necessities of life," or "prime necessities," and contracts or agreements with reference to other articles of commerce or merchandise. But this distinction is not well founded. What is at one time a luxury at another is a necessity. The things which were considered sufficient to satisfy the description of necessities a few years ago, would be considered wholly insufficient now, under present conditions of civilization. How useful must a thing become before it enters the catalogue of necessities, so that contracts to restrain trade in regard to it, or to foster a monopoly in it, are void? The unsoundness in principle of such a distinction was treated of by Judge Taft in the *Case of Addystone Pipe & Steel Co.* already referred to. But if it were sound, it may be of interest to consider some of the articles which have been held of such necessity. In a note to be found in 74 Am. St. Rep. 268, 269, to the case of *Harding v. American Glucose Co.* 182 Ill. 551, 55 N. E. 577, the following are set out as having been held of such necessity as to make a combination in regard to them illegal: Beer, alcohol, distilling products, preserves, gas pipes, powder, harrows, capauls, envelopes, wire cloth, bluestone, cigarettes, etc. Now, if these articles are to be ranked as necessities, within the rule, it might as well be said at once that the rule applies to articles of merchandise generally.

The next position of the defendants, and the one which, on first presentation, seems to be their strongest defense on this part of the case, is that at common law contracts or agreements in general or unreasonable restraint of trade were merely void and unenforceable; that either party could defend against an action based on them, but that they were not illegal, in such sense as to give a right of action to third parties. While there may be conflict among the authorities, it seems to us that some confusion might have been avoided by bearing in mind the distinction between a contract or agreement merely in restraint of trade as between the parties, and a combination or contract to stifle competition, or a conspiracy to ruin a competitor. Thus, if one of two rival merchants, not purchasing the business of the other, contracted with him that the latter should cease business, and never enter mercantile pursuits at any time or place, the contract would be in general restraint of trade, and void, and could not be enforced. But it alone would not give a right of action to third parties; and although the retiring from business of one of the merchants might lessen facilities for trading, and incidentally cause inconvenience, or even put it in the power of the other to raise his prices, the contract, as such, would merely be void. But, on the other hand, suppose that two merchants

should agree that one should retire from business, and that no other person should open a similar business, and, if he did so, that the two would drive away his customers, or break up his business by violence, threats, or like means; it would get beyond the domain of a mere nonenforceable contract, into the domain of a conspiracy. Or suppose that a number of merchants should agree to fix the price of certain goods, and not to sell below that price; if there were no statute on the subject, and the case rested on the common law, the agreement would simply be nonenforceable; but if they went further, and agreed that, if any other merchant sold at a less price, they would force him to their terms, or drive away those dealing with him, by violence, threats, or boycotting, it would cease to be a mere nonenforceable contract, and if, in its execution, damages proximately resulted to such other merchant, he would have a right of action. For two or more people to make an agreement which neither can enforce at law against the other is one thing; but to further agree, and under that agreement proceed to force another who is no party to it, against his will, to be governed by it, under penalty of financial ruin by driving off his customers, or the like, is, to use a favorite expression of Former Chief Justice Warner, "another and quite a different thing." There is no inherent wrong in the mere act of firing a pistol in a place where not prohibited by law, but it may become very wrong if it is fired at the person or property of another, and may give a right of action to him for resulting injury. A combination, like a revolver, should not be aimed maliciously or with a reckless disregard of the rights of others. *Doremus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 802, 52 N. E. 924, 54 N. E. 524, was an action on the case for damages on the ground that the members of an organization known as the Chicago Laundrymen's Association had fixed a scale of prices for laundry work, and had conspired to injure the plaintiff in her good name and credit, and to destroy her business, because she would not charge prices in accordance with such scale, and they were proceeding to carry out the conspiracy. It was held actionable. The court said: "A combination by them to induce others not to deal with appellee or enter into contracts with her, or to do any further work for her, was an actionable wrong. Every man has a right, under the law, as between himself and others, to full and free disposition of his own labor and capital according to his own will, and anyone who invades that right without lawful cause or justification commits a legal wrong, and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong. . . . An intent to do a wrongful harm and injury is unlawful, and, if a wrongful act is done to the detriment of the right of another, it is malicious; and an act maliciously done with the intent and purpose of injuring another is not lawful competition."

Boutwell v. Marr (1899) 71 Vt. 1, 43 L. R. A. 803, 805, 42 Atl. 607, 609, was an action for damages. An association of granite manufacturers prohibited, by resolutions, sales by its members to persons engaged in cutting, quarrying, or polishing granite in the New England states, New York city, and Vermont, who were not members, which enumeration included plaintiffs. There was a by-law which prohibited dealing with members not in good standing, and imposed fines for the violation of its rules. The defense did not concede that such a by-law was more coercive than to attempt to compel, by threats or intimidation, persons not members of the association to withdraw their patronage from plaintiffs, but contended that the by-law was less objectionable, because applying to members only. The court held both to be alike unlawful. It said (page 8, 71 Vt., page 805, 43 L. R. A., page 609, 42 Atl.): "Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of a majority of an organized body, in matters involving the rights of outside parties, is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation. The withdrawal of patronage by concerted action, if legal in itself, becomes illegal when the concert of action is procured by coercion. . . . It is clear that if the association had comprised but a small portion of the manufacturers, and had destroyed the plaintiffs' business by compelling the manufacturers to join them in withholding patronage, its members would have been liable." In *Inter-Ocean Pub. Co. v. Associated Press* (1900) 184 Ill. 438, 48 L. R. A. 568, 574, 56 N. E. 822, 826, an injunction was granted. The court said: "Competition can never be held hostile to public interests, and efforts to prevent competition by contract or otherwise can never be looked upon with favor by the courts. In *People ex rel. McIlhenny v. Chicago Live Stock Exchange*, 170 Ill. 556, 39 L. R. A. 373, 48 N. E. 1062, it is said (page 566, 170 Ill., 39 L. R. A. 376, and page 1065, 48 N. E.): Efforts to prevent competition and to restrict individual efforts and freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions, and in violation of law." Similar language is used in the case last above cited. 184 Ill. 438, 48 L. R. A. 568, 56 N. E. 826. In *Reck v. Railway Teamsters' Protective Union* (1898) 118 Mich. 497, 42 L. R. A. 407, 77 N. W. 13, an application for injunction was sustained. The court said (page 525, 118 Mich., page 418, 42 L. R. A., page 24, 77 N. W.): "The boycott condemned by the law is not alone that accompanied by violence and threats of violence, but that where the means used are threatening in their nature, and intended and naturally tend to overcome, by fear of loss of property, the will of others, and compel them to do things which they would not otherwise

do." *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559, arose on a demurrer to an indictment. In the opinion, Powers, J. (59 Vt. 286, 59 Am. Rep. 713, 9 Atl. 567), said: "The Reports, English and American, are full of illustrations of the doctrine that a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute, or to effect a legal purpose by illegal means, whether such means be illegal at common law or by statute, is a common-law conspiracy. Such combinations are equally illegal, whether they promote objects or adopt means that are *per se* indictable, or promote objects or adopt means that are *per se* oppressive, immoral, or wrongfully prejudicial to the rights of others. . . . The anathemas of a secret organization of men, combined for the purpose of controlling the industry of others by a species of intimidation that works upon the mind rather than the body, are quite as dangerous, and generally altogether more effective than, acts of actual violence." Page 289, 59 Vt., page 715, 59 Am. Rep., and page 568, 9 Atl. In *Carew v. Rutherford*, 106 Mass. 1, 11, 8 Am. Rep. 287, Chapman, J., after giving various illustrations of actionable wrongs, says: "But as new methods of doing injury to others are invented in modern times, the same principles must be applied to them, in order that peaceable citizens may be protected from being disturbed in the enjoyment of their rights and privileges, and existing forms of remedy must be used."

In *Gatzow v. Buening* (1900) 106 Wis. 1, 49 L. R. A. 475, 81 N. W. 1003, it was held that damages were recoverable. It is true that a contract had been made, but the decision was not put upon that ground, but on the broader ground that the conduct of the defendants constituted an actionable conspiracy. Marshall, J., said (106 Wis. 13, 49 L. R. A. 475, 81 N. W. 1007): "This is an age of trusts and combinations of all sorts. There is clamor against them on the one hand, and for the privilege of combining upon the other, as if the law could be changed to fit the opinions and selfish ends of particular classes. There is clamor for laws to prevent combinations, while law exists that condemns most of them, which is as old as the common law itself, and sufficiently severe to remedy much of the mischiefs complained of that is actual; yet violations of such law are so common, and the remedy it furnishes so seldom applied, that its very existence seems in many quarters to be little understood." In *Reg. v. Druiitt*, 10 Cox C. C. 593, it was held that any combination of persons to stifle and prevent the free use of labor and capital within legitimate bounds is unlawful, and that the law furnishes a remedy therefor. The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much the subject of the law's protection as is his body. A combination to do an act tending necessarily to oppress the public or oppress individuals, by unjustly subjecting them to

the power of the confederates, and give effect to the purpose of the latter, whether of extortion or mischief, is unlawful. Bishop, Crim. Law, § 177; Desty, Crim. Law, § 2; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159. Every agreement between two or more persons to accomplish a criminal or unlawful object, or a lawful object by criminal or unlawful means, is an unlawful conspiracy, and any person whose rights are injured by acts done in furtherance of such conspiracy has his action at law for redress in damages."

In *Olive v. Van Patten* (1894) 7 Tex. Civ. App. 630, 25 S. W. 428, where a petition alleged that defendants, who were lumber dealers, had formed an association and sought to prevent sales by manufacturers or wholesale dealers to any person not a dealer, except a railroad, at points where there was a dealer; that because of the refusal of the plaintiff, a sawmill owner and dealer, who was not a member, to join such association, and his exercising the right to sell to others than dealers, they had maliciously distributed circulars asking that patronage be withdrawn from the plaintiff until he agreed not to sell to others than dealers, thereby influencing others not to deal with plaintiff, to his injury,—it was held to state a good cause of action for damages and injunction. In *Barr v. Essex Trades Council* (1894) 53 N. J. Eq. 101, 30 Atl. 881, an injunction was granted, and an able opinion filed by Green, V. C. In *Jackson v. Stanfield* (1894) 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14, it was held that a combination of retail lumber dealers to destroy the business of brokers and commission dealers who did not keep a lumber yard with an assorted stock of lumber, by coercing wholesale dealers to refuse to make sales to such brokers, or lose the business of the members of such combination, was unlawful, and rendered a member who procured action by the association, to the injury of brokers, liable to the latter in damages; also that an injunction might be granted against enforcing an illegal agreement of dealers to injure the business of another person. See also *Lucke v. Clothing Cutters & Trimmers' Assembly No. 7507; K. of L.* (1893) 77 Md. 397, 19 L. R. A. 408, 26 Atl. 505; Code, § 3807; *Witham v. Cohen*, 100 Ga. 670, 28 S. E. 505.

Courts and text writers have not infrequently asserted that, as a general rule, a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action. But if this be advanced as a rule of universal application, it does not stand unchallenged. In *Bailey v. Master Plumbers' Asso.* (1899) 103 Tenn. 99, 46 L. R. A. 561, 52 S. W. 853, 857, it is said: "It is entirely true, as in effect observed in *McCaughey Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 33 Atl. 1, and in *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom. Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 55 N. W. 1119, that, in the first instance, each member of the associa-

tion had a perfect legal right to buy material and supplies exclusively from any dealer or dealers he might choose, and each dealer had an equal right to select members for his customers, and to confine his sales to them only. These were inherent rights, which no competitor was authorized to dispute, no court empowered to control or curtail. But in our opinion, it does not follow from this undoubted freedom of individual member and of individual dealer that all of the members may, as ruled in those cases, lawfully enter into a general and unlimited agreement, in the form of by-laws, that they and all of them will make their purchases from only such dealers as will sell to members exclusively. The premise does not justify the conclusion. The individual right is radically different from the combined action. The combination has hurtful powers and influences not possessed by the individual. It threatens and impairs rivalry in trade, covets control in prices, seeks and obtains its own advancement at the expense and in the oppression of the public. The difference, in legal contemplation, between individual right and combined action in trade, is seen in numerous cases. Any one of several commercial firms engaged in the sale of India cotton bagging had the right to suspend its sale for any time it saw fit. Yet an agreement between all of them to make no sales for three months without the consent of the majority 'was palpably and unequivocally a combination in restraint of trade.' *India Bagging Asso. v. Kock*, 14 La. Ann. 164. Any one of several companies had the right to sell the whole or only a part of its output to only such persons, in only such territory, and at only such prices as it pleased, yet it was inimical to the interests of the public, and unlawful for them to combine and agree that those matters should be determined and controlled by an agency jointly created for that purpose. *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159. The same was held to be true as to the individual company and the combined companies, respectively, in the *Sugar Trust Case*, 22 Abb. N. C. 164, 2 L. R. A. 33, 3 N. Y. Supp. 401, and 54 Hun. 354, 5 L. R. A. 386, 7 N. Y. Supp. 406. So one railroad company has the unquestioned right to charge reasonable rates for transportation, but it is not lawful for competing companies to mutually bind themselves to maintain those rates. *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25. Individual boat proprietors may establish rules and rates for the conduct of their separate business, but the law does not allow them to form a combination, and by mutual agreement establish joint rules and rates. *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282. One grain dealer is perfectly free to decide for himself what price he will offer for grain, but he is not allowed to enter

into an agreement with the other grain dealers of his town, and thereby fix the price that all of them shall offer. *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171. A single brewer may fix his own price for the beer he sells. Nevertheless it is unlawful for an association of brewers to regulate the sales of its members. *Nester v. Continental Brewing Co.* 161 Pa. 473, 24 L. R. A. 247, 29 Atl. 102. Many other cases to the same effect in principle might easily be cited, were their citation deemed at all necessary."

Unquestionably, any person who does not occupy a public or quasi public position, like public officials, railroad companies, etc., or whose property has not become impressed with any public or quasi public use (*Munn v. Illinois* [1876] 94 U. S. 113, 24 L. ed. 77), may ordinarily deal with any other person at his option. It may also be conceded, at least for the sake of the argument, that ordinarily a number of persons may, in concert, decline to sell or to buy from another. Yet the facts of the present case go much further than that. Here there was a combination, not merely agreeing not to deal with the plaintiff, but undertaking also to drive off and prevent others from dealing with it, and seeking to ruin its business by destroying its power to purchase goods unless it should submit to regulate its business or fix its prices as they desired. If the defendants, as individuals, or in any way, claim to have the right to fix the prices at which they will sell, how can they claim that plaintiff has no such right as to its own business? In *Boutwell v. Marr*, 71 Vt. 1, 43 L. R. A. 803, 42 Atl. 607, the supreme court of Vermont said that the view above referred to "would preclude a reliance upon the existence of an illegal purpose, and require that the means used be illegal. The agreeing together to effect an illegal purpose being itself illegal, it might seem that any act done in furtherance of the agreement, and resulting in damage, even though itself not a violation of right, would sustain a recovery. . . . If it be true, as a general proposition, that several may lawfully unite in doing to another's injury, even for the accomplishment of an unlawful purpose, whatever each has a right to do individually, it by no means follows that the combination may not be so brought about as to make its united action an unlawful means." See also *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; the strong opinion of Gibson, Ch. J., in *Com. ex rel. Chew v. Carlisle*, Brightly (Pa.) 36, 41, quoted at some length in one of the opinions in *Knight's Case*, 156 U. S. 35, 39 L. ed. 337, 15 Sup. Ct. Rep. 249; *State v. Glidden*, 55 Conn. 46, 75, 8 Atl. 890, and cases cited in 1 Eddy, Combinations, § 360.

Certain portions of the annual address (in 1899) of the president of the National Association of Retail Druggists, as published in the American Druggist and Pharmaceutical Record, were introduced in evidence, from which it appears that, in discussing the power of combination as com-

pared with individual effort, he said: "Nature, too, forgets the individual always. To the species alone is it kind. In the general uplifting alone does it glory. So must it be with man. Man is of nature, and must follow nature's bent. This tendency to associate, to unite, to combine, everywhere present, strangely active, is as resistless as is yonder great Niagara. Attempt to oppose it, and it spreads far and wide,—spreads with the opposing force, all the while accumulating power, until everything, even the mightiest, is swept before its immensity." And yet, when such mighty power, like a torrent, is turned upon an individual who declines to join or to do the bidding of those who direct the force and sell at prices dictated by them, for the purpose of crushing him and driving off those who would deal with him, under the threat that otherwise they will also be drowned in the resistless Niagara, shall courts of justice find no remedy? To protect the individual against encroachments upon his rights by greater power is one of the most sacred duties of courts. If there is any analogy between a combination of druggists to raise and maintain prices, and a biological species, the Darwinian theory is hardly a rule for a court in administering equity.

In contrast with this idea, the following vigorous language of Mr. Justice Bradley in the *Slaughter-House Cases*, 16 Wall. 116, 21 L. ed. 421, may be quoted: "For the preservation, exercise, and enjoyment of these rights [life, liberty, and the pursuit of happiness], the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of the government to protect, and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed." This occurs in a dissenting opinion, it is true; but there was no difference among the members of the court as to the fact that a man's business is his property, the difference being as to the application of certain amendments of the Constitution of the United States.

It is generally held that, if the injury is malicious, the person injured has a right of action. Indeed, it may be said that malicious injury to the business of another has long been held actionable. See *Barr v. Essex Trades Council*, 53 N. J. Eq. 115, 116, 30 Atl. 881, and citations. In the case of *Mogul SS. Co. v. McGregor*, L. R. 23 Q. B. Div. 608,—a case which will be referred to more fully presently,—Lord Justice Bowen said: "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or trade, is actionable, if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong." The decision in *Barr v. Essex*

Trades Council, 53 N. J. Eq. 115, 116, 30 Atl. 881, after citing this and other cases, proceeds: "When we speak in this connection of an act done with a malicious motive, it does not necessarily imply that the defendants were actuated in their proceedings by spite or malice against the complainant, Mr. Barr, in the sense that their motive was to injure him personally, but that they desired to injure him in his business in order to force him not to do what he had a perfect right to do. . . . If the injury which has been sustained or which is threatened is not only the natural, but the inevitable, consequence of the defendants' acts, it is without effect for them to disclaim the intention to injure. It is folly for a man who deliberately thrusts a fire-brand into a rick of hay to declare, after it has been destroyed, that he did not intend to burn it. . . . The law, as a rule, presumes that a person intends the natural result of his acts, and this is true with reference to civil as well as criminal acts." Courts will look at the real substance of things, and do not stop at the mere forms of words that may be employed. See *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 361, 29 N. E. 88.

We will now refer to some authorities cited by defendants. A leading case, in modern times, is the English case of *Mogul SS. Co. v. McGregor*, L. R. 23 Q. B. Div. 608. It may not be amiss to give briefly its history. It was first heard on application for injunction before Lord Chief Justice Coleridge and Lord Justice Fry in 1885. They held that a confederation or conspiracy by an association of shipowners which was calculated to have, and had, the effect of driving the ships of other merchants or owners, and those of plaintiffs in particular, out of a certain line of trade, even though the immediate and avowed objects were not to injure the plaintiffs, but to secure to the conspirators themselves a monopoly of the carrying trade between certain foreign ports and England, was, or might be, an indictable offense, and therefore actionable, if private and particular damage could be shown. But under the facts disclosed on that hearing, injunction *ad interim* was denied. L. R. 15 Q. B. Div. 476. The case was afterwards heard by Lord Chief Justice Coleridge without a jury, and he rendered judgment for the defendants, holding that the evidence failed to show an actionable conspiracy, as alleged, and that it showed only sharp competition in business, including holding out inducements by rebates, advantages, etc., to those who would deal with defendants exclusively. (1888) L. R. 21 Q. B. Div. 544. He stated, however, that he had long doubted and hesitated in reaching this conclusion. In the court of appeal, the case was heard before Lord Esher, master of the rolls, and Bowen and Fry, L. JJ. Lord Esher was of opinion that the appeal should be allowed, but was overruled by the other two justices. (1889) L. R. 23 Q. B. Div. 598, 601. In the course of the opinion of Fry, L. J., which has been frequently cited in other cases, he says: "The 57 L. R. A.

ancient common law of this country, and the statutes with reference to the acts known as badgering, forestalling, regrating, and engrossing, indicated the mind of the legislature and of the judges that certain large operations in goods which interfered with the more ordinary course of trade were injurious to the public. They were held criminal accordingly. But early in the reign of George III. the mind of the legislature showed symptoms of change in this matter, and the penal statutes were repealed (12 Geo. III. chap. 71), and the common law was left to its unaided operation. This repealing statute contains in the preamble the statement that it had been found by experience that the restraint laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, had a tendency to discourage the growth and enhance the price of the same. This statement is very noteworthy. It contains a confession of failure in the past; the indication of a new policy for the future. This new policy has been more clearly declared and acted upon in the present reign; for the legislature has, by 7 & 8 Vict. chap. 24, altered the common law by utterly abolishing the several offenses of badgering, forestalling, and regrating." He also says a reference to the statutes of 1871 and 1875, enlarging the power of combination among workmen and masters, is indicative of public policy in England at the time of the decision. We will presently compare this with the public policy of this state. The majority of the court of appeal found, as matter of fact, that the defendants were not engaged in a conspiracy or unlawful combination, and were not actuated by malice or ill will toward plaintiff, and did not aim at any general injury to plaintiff's trade,—the object being simply to divert the trade from plaintiff to defendants,—and that the damage to be inflicted was to be strictly limited by the gain which defendants desired to win for themselves; in other words, that it was a case of competition only. Of course, the loss which a rival may suffer from legitimate competition does not give a right of action. The case was carried to the House of Lords, and the judgment of the majority was affirmed. (1892) 61 L. J. Q. B. N. S. 295; [1892] A. C. 25. Very full extracts from these decisions are made in 1 Eddy, *Combinations*, § 249. A careful consideration of the various decisions in this case will show that, in substance, it only held that where competition was lawful, even if sharp and the acts complained of were adopted for the advancement of the defendants' own trade, there was no actionable conspiracy, although plaintiff may have sustained loss thereby. If this decision should be deemed adverse to the views here presented, it may be well to contrast the public policy of this state with that mentioned by Fry, L. J. Engrossing, forestalling, and regrating still stand in our Code as criminal offenses, and the presiding judge is required to give the law in reference to these offenses specially

in charge to the grand jury at each term of court. See Penal Code, §§ 662, 846. Our state Constitution declares that the legislature "shall have no power to authorize any corporation . . . to make any contract, or agreement whatever, with any such corporation [i. e., other corporations], which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses or to encourage monopoly; and all such contracts and agreements shall be illegal and void." Code, § 5800. See *Central R. Co. v. Collins*, 40 Ga. 583, (6), 629; *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781; *Atlanta v. Stein*, 111 Ga. 789, 51 L. R. A. 335, 36 S. E. 932. What was said *arguendo* in *State v. Central R. Co.* 109 Ga. 722, 48 L. R. A. 351, 35 S. E. 37, to the effect that all combinations are not necessarily illegal, has no application to the facts of the present case. As has been shown above, in the light of the evidence, it is futile for these defendants to claim that they were merely resisting an attack on the part of the plaintiff.

The following are some of the cases relied on by the defendants: *Herriman v. Mensies* (1896) 115 Cal. 16, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730, arose on an action to enforce an accounting under an agreement for the formation of an association for doing the business of stevedores. It was held not to be illegal, though one provision included the fixing of prices to be charged by the members. There was no effort to force others to charge such prices; and it was said in the decision that there was nothing to show that the members comprised more than an insignificant part of the trade, in numbers or volume of business, or any such restriction "as to preclude fair competition with others engaged in the business." *Bowen v. Matheson*, 14 Allen, 499, will be found to have been decided on the idea of competition; but it is not a well-considered case, reviews none of the authorities (but one being cited), and decides only as to certain allegations on demurrer. It has been criticised by Mr. Eddy, whose book shows that he approached the subject without any prejudice against combinations. 1 Eddy, Combinations, § 571. Mr. Freeman, in his note to *Harding v. American Glucose Co.* (Ill.) 74 Am. St. Rep. 244, says: "Massachusetts seems also to have gone astray on the question of illegal combinations, . . . having confused the doctrine relating to contracts in restraint of trade and the doctrine against restrictions upon competition." *Longshore Printing & Pub. Co. v. Howell* (1894) 26 Or. 527, 28 L. R. A. 464, 38 Pac. 547, might be quoted as an authority for the plaintiff, except as to the necessity for injunction. The court says (26 Or. 548, 28 L. R. A. 474, 38 Pac. 553): "While conspiracy in itself is not an indictable offense under our law, all these authorities show conclusively that such a combination for the purpose of doing injury to the public or to individuals is *per se* wrongful. Civil consequences are not changed by reason of the fact that the com-

bination is not made a statutory offense." When the court came to consider the question of the necessity shown for an injunction (there having been a demurrer), it said (page 552, 26 Or., page 475, 28 L. R. A., and page 555, 38 Pac.), that, although it might be inferred that a boycott was pending, they [certain notices] were not so positive nor so persistently and wickedly repeated and maintained as to authorize an injunction; and again (page 555, 26 Or., page 476, 28 L. R. A., and page 556, 38 Pac.): "There is no such persistent, aggressive, and virulent boycott now in progress," etc. It would seem to be rather too stringent to limit equity jurisdiction by so many adjectives. But in the present case the injury is in progress, and is still threatened. *McCauley Bros. v. Tierney* (1895) 19 R. I. 255, 37 L. R. A. 455, 33 Atl. 1, is another case relied on by defendants. If this decision is sound, it can only be on the idea that the defendants were seeking to obtain trade for themselves by saying, in effect: "If you deal with us, we will deal with you. If you deal with others, we will withdraw our patronage." Whether such an agreement was legally enforceable need not be discussed. There was no effort to compel or coerce others not members to be bound by their prices or views. If the decision in *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom Bohn Mfg. Co. v. Northwest-Lumbermen's Assn.* 21 L. R. A. 337, 55 N. W. 1119, can be sustained, it must be on the same idea. No compulsory measures seem to have been used to enforce obedience on members; nor does there appear to have been any effort to drive away from plaintiff others than those voluntarily acting together in concert, and no pressure on outsiders to maintain prices or incur ruin. In truth, however, some of what was said in that decision is unsound, and not in accord with cases already cited. It has been considerably criticised. See *Bailey v. Master Plumbers' Assn.* 103 Tenn. 99, 46 L. R. A. 561, 52 S. W. 857; Eddy, Combinations, § 560, p. 476, note; *Jackson v. Stanfield* (1894) 137 Ind. 592, 23 L. R. A. 596, 36 N. E. 345, 37 N. E. 14. *Cote v. Murphy* (1894) 159 Pa. 420, 23 L. R. A. 135, 28 Atl. 191, and *Buchanan v. Kerr*, 159 Pa. 433, 28 Atl. 195, held that where employees had entered into a combination to control by artificial means the supply of labor, preparatory to a demand for an advance in wages, a combination of employers to resist such artificial advance is not unlawful, since it is not made to lower the price of labor as regulated by supply and demand. Certain Pennsylvania statutes were also considered as indicative of public policy on the line of combining to meet combination. The strong statement of Gibson, J., in regard to conspiracies (*Com. ex rel. Chew v. Carlisle*, Brightly (Pa.) 40), is cited with approval. In *Payne v. Western & A. R. Co.* (1884) 13 Lea, 507, 49 Am. Rep. 666, there was no question of combination or conspiracy at all; and the supreme court of the same state rendered the decision in the later case of *Bailey v. Master Plumbers' Assn.*,

already referred to. *John D. Park & Sons Co. v. National Wholesale Druggists' Assn.* 54 App. Div. 223, 66 N. Y. Supp. 615, is cited. We must leave to the honorable courts of that state to reconcile that decision with the principle ruled in *John D. Park & Sons Co. v. National Wholesale Druggists' Assn.* 50 N. Y. Supp. 1064, where, as quoted in 1 Eddy, Combinations, § 330, p. 213, it was held: "It is in restraint of trade and unlawful for a manufacturer to become a party to a combination which shall prevent any of his customers from obtaining other goods of other manufacturers because those customers violate the agreement with him in respect to the cutting of prices;" and also with *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 34 N. E. 785. It seems, too, that in some cases in New York and elsewhere an idea has arisen of determining how much competition is desirable, and apparently of holding that extreme competition is undesirable, and a combination to meet it is not unlawful. The fallacy of such a standard is clearly shown by Judge Taft in *United States v. Addystone Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, and by Mr. Freeman in his note to *Harding v. American Glucose Co.* (Ill.) 74 Am. St. Rep. 268. *Breuster v. O. Miller's Sons Co.* (1897) 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301, held that an association of undertakers might lawfully agree to decline to render service in their business to one who had refused to pay a bill to some member of the association for similar services previously rendered. Here, also, there was no effort to compel persons not members to uphold the prices or obey the dictates of the association, or to coerce members or others, but only a voluntary, united refusal to serve a person who would not pay for similar services. *Continental Ins. Co. v. Fire Underwriters*, 67 Fed. 310, sought to follow the decision in the *Mogul Steamship Case*, and held that the acts there complained of were for the purpose of competition, and not maliciously done. Here, again, there was no effort to drive out of business companies not members, further than nonintercourse, and not having the same agents. So far as the enforcing of these provisions by a penalty is concerned, the decision is in conflict with *Boutwell v. Marr*, 71 Vt. 1, 43 L. R. A. 803, 42 Atl. 607.

Finally, was the plaintiff entitled to an injunction? The usual grounds for the grant of an injunction in such cases are (1) an injury which threatens irreparable damage; or (2) a continuing injury, when the legal remedy therefor may involve a multiplicity of suits. "The difficulty of satisfactorily estimating damages to business is frequently recognized in applying those principles to suits relating to goodwill, trademarks, patent rights, and copyrights. 3 Pom. Eq. Jur. §§ 1352, 1354." *Barr v. Essex Trades Council*, 53 N. J. Eq. 126, 30 Atl. 881 et seq., and authorities cited. Mr. Eddy says: "An injury is irreparable when the damage cannot be measured by any known pecuniary standard. The de-

struction of, or even injury to, a growing business, cannot very well be measured in damages, since it is difficult, if not impossible, to lay down any rule whereby a jury can definitely ascertain the damages inflicted. The owner of the business himself probably could not estimate his loss, and yet the loss would be beyond dispute." Citing authorities. 2 Eddy, Combinations, §§ 1013, 1024, 1026, pp. 1161, 1169, 1170; *Blindell v. Hagan*, 54 Fed. 40, affirmed on appeal in 56 Fed. 696. Several of the cases already cited arose upon applications for injunction, and apply to this feature of the case.

It is urged that the plaintiff was not entitled to equitable relief, because it did not come into a court of equity "with clean hands." The specific claim of uncleanness is that on some occasions it sold one drug or mixture, instead of, or purporting to be, another. This is denied. If it were true, it would be no defense to this case. If it is undertaken to coerce a dealer not to sell at reduced prices, and is sought unlawfully to destroy its business if it does so, an application by it for injunction is not successfully met by saying that it sold some spurious goods, or misrepresented some to customers in certain sales. It was money, not morals, that moved the defendants in their conduct toward it for cutting prices. The doctrine that a suitor must enter a court of equity "with clean hands" has reference to the transaction complained of by him. *Ansley v. Wilson*, 50 Ga. 425. If plaintiff sells adulterated drugs, it and its officers are liable to punishment under the criminal law. Penal Code, §§ 483, 484.

The learned judge did not err in holding that the defendants who are members of the Atlanta Druggists' Association, in the name of such association or otherwise, should be enjoined from sending out to wholesale druggists or proprietors of proprietary medicines, through the mails, or delivering them to them otherwise, the letter and agreement set out in Exhibits A and B to plaintiff's petition, or seeking to cause the latter to be signed by means of the letter set out in Exhibit A, or other like means, or sending out any letter, circular, or agreement of similar character, purpose, directly or indirectly, to wholesalers, jobbers, or proprietors; and from issuing to salesmen, and causing to be signed, the card agreement attached to the petition as Exhibit C, or any card or agreement of similar import or purpose; and from in any manner threatening or seeking to intimidate wholesalers or proprietors, and so prevent them from selling to plaintiff, as a cutter or aggressive cutter; and from conspiring and from seeking to prevent wholesale or other druggists from dealing with or selling to plaintiff by direct or indirect threats of cutting off their means of obtaining goods or merchandise, or of causing such means to be cut off, or of causing them injury or loss of custom if they should deal with or supply the plaintiff; and from taking part in or carrying out any conspiracy or combination for that purpose; and from

designating or pointing out the plaintiff to other druggists' associations or their representatives as an aggressive cutter; and from writing or sending through the mails any card, circular, letter, or other written or printed communication conveying or intended to convey to proprietors or wholesalers throughout the United States that plaintiff is an aggressive cutter, and under the ban of the local organization, or of similar import.

2. The learned trial judge based his judgment, in part, upon the act of the general assembly approved December 23, 1896 (Acts 1896, p. 68), commonly known as the "anti-trust act." The defendants in the court below attacked the constitutionality of this act, and one of the exceptions to the judgment is that the court erred in holding it to be constitutional. Since this case was heard and determined in the lower court and argued here, the Supreme Court of the United States, in a decision rendered March 10, 1902, in the case of *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, held the anti-trust statute of Illinois, which contained a provision that it should "not apply to agricultural products, or live stock in the hands of the producer or raiser," to be repugnant to the provisions of the 14th Amendment of the Constitution of the United States, because it denied the equal protection of the laws of that state to those within its jurisdiction who were not producers of agricultural products or raisers of live stock. The anti-trust act of this state, above referred to, exempts from its operation "agricultural products or live stock while in the posses-

sion of the producer or raiser." Consequently, under the decision of the Supreme Court of the United States, we are constrained to hold that this exemption renders the act unconstitutional. As will have been seen, however, the judgment of the court was right, irrespective of the provisions of this act.

Certain assignments of error in the bill of exceptions complain, in effect, that the injunction was too broad, because it was operative upon the individual members of the association to which the defendants belonged, and therefore had the effect of cutting them off from the exercise of individual rights which it was their privilege to exercise, provided there was no unlawful conspiracy. The reply to this is that the judge found there was a conspiracy. He could not enjoin the combination in the abstract, but, to render any effective protection to the plaintiff, was obliged to enjoin the individual members of the association from doing the unlawful acts which they had conspired to do, and were actually doing when the petition was filed. It was the only possible way in which to make the writ of injunction of any avail. The defendants could not, fresh from the conspiracy, and inspired by the purposes thereof, fail to injure the plaintiff, if allowed to continue their unlawful acts under the guise of doing so upon their individual responsibility.

Judgment affirmed, with direction.

All the Justices concur except **Lewis, J.**, absent on account of sickness.

IOWA SUPREME COURT.

L. L. WATSON, *Appt.*,

v.

W. A. DILTS.

(.....Iowa.....)

1. One frightening a woman so as to cause nervous prostration, by stealthily entering her home in the night-time and committing a trespass on her husband's property, is liable to her in damages therefor.
2. The nervous prostration of a woman may be the proximate result of stealthily entering her home in the night-time and committing a trespass on her husband's property.

(April 10, 1902.)

A PPEAL by plaintiff from a judgment of the District Court for Henry County in favor of defendant in an action brought to recover damages for injuries produced by fright. *Reversed*.

The facts are stated in the opinion.

McGraw, Palmer & Kopp and Watson & Weber, for appellant:

A malicious, wilful, and intentional invasion of the rights of another, an intentional act or trespass which is intended to cause fright and terror, or which as a usual or ordinary result would tend to cause terror and fright, resulting in serious nervous shock, causing physical injury and prostration, and damage, is the basis of an action for damages.

NORM.—As to extent of trespasser's liability for consequential injuries resulting from the trespass, see also *note* to *Wyant v. Crouse* (Mich.) 53 L. R. A. 626, especially cases as to fright on page 633.

For fright as a basis for cause of action generally, see, in this series, *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* (Pa.) 14 L. R. A. 666, and *note*; *Halle v. Texas & P. R. Co.* (C. C. App. 5th C.) 23 L. R. A. 774; *Sloane v. Southern California R. Co.* (Cal.) 32 L. R. A. 57 L. R. A.

193; *Mitchell v. Rochester R. Co.* (N. Y.) 34 L. R. A. 781; *Spade v. Lynn & B. R. Co.* (Mass.) 38 L. R. A. 512; *Mack v. South Bound R. Co.* (S. C.) 40 L. R. A. 679; *Braun v. Craven* (Ill.) 42 L. R. A. 199; *Gulf, C. & S. F. R. Co. v. Hayter* (Tex.) 47 L. R. A. 325; *Smith v. Postal Teleg. Cable Co.* (Mass.) 47 L. R. A. 323; *Denver & R. G. R. Co. v. Roller* (C. C. App. 9th C.) 49 L. R. A. 77; and *Tuttle v. Atlantic City R. Co.* (N. J. L.) 54 L. R. A. 582.

1 Sutherland, Damages, 2d ed. § 43; *Lombard v. Lennox*, 155 Mass. 70, 28 N. E. 1125; *Fillebrown v. Hoar*, 124 Mass. 580; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Mack v. South Bound R. Co.* 40 L. R. A. 679, note, 52 S. C. 323, 29 S. E. 905; *Hill v. Kimball*, 7 L. R. A. 618, note, 76 Tex. 210, 13 S. W. 59; *Barbee v. Reese*, 60 Miss. 908; *Illinois C. R. Co. v. Latimer*, 128 Ill. 163, 21 N. E. 7, 28 Ill. App. 552.

Messrs. McCoid & Finley and Babb & Babb, for appellee:

Fright caused by defendant's negligence, unaccompanied by physical injury to the plaintiff except what might arise from the fright itself, will not serve as a basis for a cause of action.

Braun v. Craven, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. 657; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666, 23 Atl. 340; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *White v. Sander*, 168 Mass. 296, 47 N. E. 90; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L. R. A. 512, 47 N. E. 88, 172 Mass. 488, 43 L. R. A. 832, 52 N. E. 747; *Renner v. Canfield*, 36 Minn. 90, 30 N. W. 435; *Kalen v. Terre Haute & I. R. Co.* 18 Ind. App. 202, 47 N. E. 694; *Haile v. Texas & P. R. Co.* 23 L. R. A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; *Victorian R. Comrs. v. Coultas*, L. R. 13 App. Cas. 222; *Smith v. Postal Teleg. Cable Co.* 174 Mass. 576, 47 L. R. A. 323, 55 N. E. 380; *Mahoney v. Dankwart*, 108 Iowa, 321, 79 N. W. 134; *Lee v. Burlington*, 113 Iowa, 356, 85 N. W. 618.

The allegations of the petition are not sufficient to bring it within the category of wilful injuries. The mere statement that an act was wilfully done, or that it was wrongfully done or maliciously done, is not an allegation of a wilful injury.

Cooley, Torts, 2d ed. *690, p. 832; *Kalen v. Terre Haute & I. R. Co.* 18 Ind. App. 202, 47 N. E. 695.

Wilfulness, or even malice, will not generally make an act actionable which is not so already.

Cooley, Torts, 2d ed. *688, p. 830; *Bishop*, Non Contract Law, § 143.

Damage from fright "is such an unusual occurrence that the law will not consider it the proximate result of the alleged negligence." The damage is "too remote."

Lee v. Burlington, 113 Iowa, 356, 85 N. W. 618; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666, 23 Atl. 340; *Haile v. Texas & P. R. Co.* 23 L. R. A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; *Victorian R. Co. v. Coultas*, L. R. 13 App. Cas. 222; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354; *Renner v. Canfield*, 36 Minn. 90, 30 N. W. 435; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *White v. Sander*, 168 Mass. 296, 47 N. E. 90; *Smith v. Postal Teleg. Cable Co.* 174 Mass. 576, 47 L. R. A. 323, 55 N. E. 380; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L. R. A. 512, 47 N. E. 88, 172 Mass. 488, 43 L. R. A. 832, 52 N. E. 747.

57 L. R. A.

Sherwin, J., delivered the opinion of the court:

The petition alleges that the plaintiff is a married woman, and that on the 9th day of February, 1900, she resided, with her husband and child, on a farm remote from the traveled highway; that in the night-time of said day, at about the hour of 11 o'clock, and after she, her husband, and her child had gone to bed, the defendant wrongfully, surreptitiously, and stealthily entered her said home, and went upstairs to the second story thereof, and, as the plaintiff then believed, to commit a felony; that the identity of the defendant was not known to her at the time she heard him enter the house and go upstairs, and that she called to her husband to follow him, which he did; that in her apprehension for her own, her child's, and her husband's life, from what appeared to her a threatened danger, she followed her husband up to the room where the defendant was found, and where she found him and her husband in what appeared to her to be an encounter, and an assault upon her husband; that she became greatly terrified thereat, and was attacked with a violent nervous chill of such severity that her nervous system completely gave way, and she became prostrated, and was confined to her bed with threatened neurosis, or paralysis, and suffered great mental and physical pain for nearly six weeks, during all of which time she was confined to her bed, and unable to attend to her household duties. The demurrer to the petition is based on the ground that the damages claimed are too remote and speculative, and that the plaintiff seeks recovery for fright and injuries resulting therefrom without any physical injury to her which caused the fright. The petition alleges physical injuries resulting from the fright caused by the defendant, and the demurrer thereto raises the question whether recovery may be had for physical injuries so caused.

Many cases have been before the courts in which the question of a recovery for mental pain alone, and for physical disability produced by fright, unaccompanied by physical impact, have been decided; and the decisions on these questions are in conflict, though it is probably true that the numerical weight of authority denies the right of action. But the cases so holding are not in harmony as to the reasons given for denying the right of action; some of them held that the injury is not the proximate result of the alleged negligent or wrongful act, while others refuse a recovery for the reason that it is practically impossible to satisfactorily administer any other rule and serve the purposes of justice. The latter rule is the one adopted in Massachusetts. *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L. R. A. 512, 47 N. E. 88. We shall not take the time to review the cases in detail which hold to the doctrine that no recovery can be had. A large majority of them are cases in which the simple charge of negligence was made, and in many of them no claim was made for physical disability resulting from the fright. A review of some

of the cases will be found in *Braun v. Craven*, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. 657. See also note in *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* (Pa.) 14 L. R. A. 666. Our attention has not, however, been called to any case in which the facts averred are precisely parallel to the facts in this case, and in no case to which we have been cited, and in no case which our own investigation has discovered, have we found facts alleged which so strongly condemn the unlimited application of the rule contended for by the appellee as do the facts pleaded in the case at bar. This defendant, in the night-time, stealthily and unbidden invaded the home of the plaintiff and her husband and family. When he entered the house and went to an upper room, she did not know who it was, nor his purpose and intent in thus breaking and entering their home. It was an unlawful and lawless trespass on his part, no matter whether he entered with the intent to steal the personal property of the inmates of the house or whether he was in quest of other game. Nor does it matter, in our judgment, that the trespass was committed on property belonging to the husband. It was her home as well as that of her husband; her right to its peaceful and quiet enjoyment day or night was equal to that of her husband; and any unlawful entry or invasion thereof which produced physical injury to her was a wrong for which she ought to recover. Let us go a little further with the case, and suppose that his purpose had been to ransack the house, and steal therefrom; that he went in masked, and with a deadly weapon in his hand. His discovery there under such circumstances might well cause alarm to the boldest man, and, if it produced nervous prostration and physical disability, the theory, no matter what its reason, that would say there was no actionable wrong, would be too fine spun and too cold for our sanction. Nor could it be said, under such circumstances, that the prostration resulting from the fright so caused was not the proximate or probable result of the defendant's act. "Proximate cause is probable cause; and that the proximate consequence of a given act or omission, as distinguished from a remote consequence, is one which succeeds naturally in the ordinary course of things, and which, therefore, ought to have been anticipated by the wrongdoer." 1 Thomp. Neg. § 156. It is within the common observation of all that fright may, and usually does, affect the nervous system, which is a distinctive part of the physical system, and controls the health to a very great extent, and that an entirely sound body is never found with a diseased nervous organization; consequently one who voluntarily causes a diseased condition of the latter must anticipate the consequence which follows it. The nerves being, as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain, it seems to us that the injury resulting therefrom is the direct result of the act producing the fright. *Spade v. Lynn & B. R. Co.* 108 Mass. 285, 57 L. R. A.

38 L. R. A. 512, 47 N. E. 88; *Hill v. Kimball*, 76 Tex. 210, 7 L. R. A. 618, 13 S. W. 59; *Mack v. South Bound R. Co.* 52 S. C. 323, 40 L. R. A. 679, 29 S. E. 905; *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L. R. A. 203, 50 N. W. 1034; *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85, 50 N. W. 238; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Lombard v. Lennox*, 155 Mass. 70, 28 N. E. 1125; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L. R. A. 72, 62 N. W. 1. It is undoubtedly true that the door should not be thrown wide open for trumped-up claims on account of injuries resulting from fright, and we do not intend to so open it in this case. Each case must, of necessity, depend on its own facts. We held in *Lee v. Burlington*, 113 Iowa, 356, 85 N. W. 618, that no recovery could be had for the death of a horse alleged to have been caused by fright, because death therefrom could not be anticipated, and hence it was not the proximate result of the defendant's negligence. In *Mahoney v. Dankwart*, 108 Iowa, 321, 79 N. W. 134, the question before us was not decided. That case was disposed of on the facts there presented, and was a case of simple negligence. The reasoning of the Massachusetts cases should not be applied to this case, for greater evil would result from a holding of no actionable wrong than can possibly follow the rule we announced. We do not concern ourselves with what the trial of this case may disclose, but hold a cause of action stated in the petition.

The demurrer should therefore have been overruled. *Reversed.*

ELLA EDGINGTON by Ida M. Meyers, Her
Next Friend,

v.
BURLINGTON, CEDAR RAPIDS, &
NORTHERN RAILWAY COMPANY,
Appt.

(.....Iowa.....)

1. A child seven years and eight months old cannot be held to be negligent, as matter of law, in playing on an unfenced turntable.
2. A railroad company is liable to infants of tender years for injuries inflicted by a turntable maintained by it in an unfenced lot so near a public way as to be likely to attract children to play on it, unless it exercises reasonable care to keep it safely fastened.
3. The sufficiency of the fastening of a turntable to prevent injury to children

NOTE.—As to liability of railroad company for injuries to children trespassing on turntable, see also, in this series, *Ft. Worth & D. C. R. Co. v. Robertson* (Tex.) 14 L. R. A. 781, and note; *Walsh v. Fitchburg R. Co.* (N. Y.) 27 L. R. A. 724; and *Delaware, L. & W. R. Co. v. Reich* (N. J. L.) 41 L. R. A. 831.

For other cases in this series as to contributory negligence of children, see *Glason v. Smith* (Mass.) 55 L. R. A. 622, and footnotes thereto.

playing on it is a question for the jury where it was undone by one of them.

4. A child cannot be held to any greater degree of care than may reasonably be expected from its years, experience, and intelligence.
5. A railroad company is not relieved from liability to a child injured by an improperly fastened turntable by the fact that the fastenings were undone, and the table put in motion, by playmates of the injured child.

(April 12, 1902.)

APPEAL by defendant from a judgment of the District Court for Muscatine County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Carskaddon & Burk and S. K. Tracy, for appellant:

The manner of constructing and operating railroads is not to be left to the uncertain and varying opinions of jurors.

Chicago & E. I. R. Co. v. Driscoll, 176 Ill. 330, 52 N. E. 923.

The law does not require defendant to so fasten or secure its turntables that boys, or children like the one injured, cannot displace such fastenings and put the table in motion.

Kolsti v. Minneapolis & St. L. R. Co. 32 Minn. 133, 19 N. W. 655.

Plaintiff was, at the date of her injury, seven years and eight months old, and bright in common sense. Children about eight years old are not of such tender years that they may be presumed not to know the danger of being about a railroad track, or not to comprehend the possible result of such an act as plaintiff exposed herself to if she should slip or fall.

Ibid.; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724, 39 N. E. 1068; *Braque v. Northern C. R. Co.* 192 Pa. 242, 43 Atl. 987; *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1014.

The law imposed no duty on defendant to use care to keep this turntable in such a condition that a child might not be injured who should go there uninvited and a trespasser.

Thomas v. Chicago, M. & St. P. R. Co. 93 Iowa, 257, 61 N. W. 967.

Children may be trespassers. Defendant, therefore, owed plaintiff no greater duty than if she had been an adult.

If it was negligence to maintain this pattern of fastening to this turntable defendant is not liable therefor, as it is not, as to a trespasser, liable for mere negligence. If the lock appliance was such as is commonly adopted by railroads, at such places and in general use, it is not negligence to use such a fastening.

Mears v. Chicago & N. W. R. Co. 103 Iowa, 204, 72 N. W. 509; *McCarthy v. Boston Duck Co.* 165 Mass. 165, 42 N. E. 568; *Shadford v. Ann Arbor Street R. Co.* 111 Mich. 57 L. R. A.

390, 69 N. W. 661; *Omaha Bolting Co. v. Theiler*, 59 Neb. 257, 80 N. W. 821.

Where courts have held railway companies liable for such accidents it has always been where there have been no locks or appliances used. Such was not the fact in case at bar.

Walsh v. Fitchburg R. Co. 145 N. Y. 301, 27 L. R. A. 724, 39 N. E. 1068; *Casista v. Boston & M. R. Co.* 69 N. H. 649, 45 Atl. 712; *Twist v. Winona & St. P. R. Co.* 39 Minn. 164, 39 N. W. 403; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573, 41 S. W. 62.

There was no proof in the case showing, or tending to show, that the plaintiff was too young to know that it was dangerous for her to attempt to get upon the moving table. On the contrary, her mother testifies that she was a bright and intelligent child, and had good common sense. Upon this proof, and with no evidence in conflict with it, the law must pronounce the plaintiff *sui juris*, and guilty of contributory negligence.

Dull v. Cleveland, C. C. & St. L. R. Co. 21 Ind. App. 571, 52 N. E. 1018; *Wendell v. New York C. & H. R. R. Co.* 91 N. Y. 425; *Thomas v. Chicago, M. & St. P. R. Co.* 93 Iowa, 252, 61 N. W. 967; *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 776; *Ritz v. Wheeling*, 45 W. Va. 262, 43 L. R. A. 148, 31 S. E. 993; *Murphy v. Brooklyn*, 118 N. Y. 575, 23 N. E. 887; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915; *Braque v. Northern C. R. Co.* 192 Pa. 242, 43 Atl. 987; *Talty v. Atlantic*, 92 Iowa, 135, 60 N. W. 516; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573, 41 S. W. 62; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847, 28 S. W. 1070; 3 *Elliot, Railroads*, §§ 1259, 1260 et seq.; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724, 39 N. E. 1068; *Merryman v. Chicago, R. I. & P. R. Co.* 85 Iowa, 634, 52 N. W. 545; *Carson v. Chicago, R. I. & P. R. Co.* 96 Iowa, 583, 65 N. W. 831.

When the question is, Did a person use ordinary care in a particular case? the test is the amount of care ordinarily used by men in general in similar circumstances.

Kolsti v. Minneapolis & St. L. R. Co. 32 Minn. 133, 19 N. W. 655; 1 *Bailey, Personal Injuries Relating to Master & Servant*, §§ 22, 72, 74; *Fuller v. New York, N. H. & H. R. Co.* 175 Mass. 424, 56 N. E. 574; *Black, Accident Cases*, p. 45.

Messrs. C. A. W. Kent and Clymer A. Coldren for appellee.

Weaver, J., delivered the opinion of the court:

The defendant company owns and operates a line of railroad entering the city of Muscatine, Iowa. In connection with its station and yards at this place, it maintains and uses a turntable, a well-known machine or device for turning locomotives. This table turns about a central point or axis, and, when unfastened, is easily revolved by hand power applied to bars or levers. At and prior to the time of the accident upon which

this action is based the table, when not in use, was ordinarily fastened by a pin, bolt, or latch of some kind, the exact description of which is not disclosed by the record before us. This machine stood upon an unfenced lot, owned by the defendant, near the line of a public alley, and at a distance from the street variously estimated at from 80 to 300 feet. Children of the neighborhood were to some considerable degree in the habit of passing through the alley, and at times loitered and played upon and about the turntable. This practice does not seem to have been with the express knowledge or consent of the defendant, and upon at least one occasion its employees drove the children away. There was a box factory not far distant, to which also children resorted by way of the alley, and near the turntable, to gather scraps of wood for fuel. On the 16th day of June, 1899, the plaintiff, then a child of seven years and eight months, living in that neighborhood, started from her home, with several little girls somewhat older, intending to go to the box factory for wood. Passing down the alley, they stopped to play upon the turntable. One of them removed the bolt or catch which fastened the machine, and soon afterward two small boys arrived, and began to revolve it, while the other children rode upon the platform or frame. Under these circumstances the plaintiff in some manner stepped or fell into the space between the outer edge of the table and the wall of the pit in which it revolved, receiving severe, painful, and permanent injuries. Negligence is charged against the defendant upon the theory or claim that the turntable was a dangerous machine, and of such nature and construction as to be specially attractive to children; and that, having placed it upon an open lot near a public way, where they might reasonably be expected to pass or gather to play, it was defendant's duty to use reasonable care to so guard or fasten said machine as to prevent injury to young and inexperienced children who might be tempted to play upon it. Defendant denies that it was charged with any such duty, and denies that it failed to exercise all reasonable and proper care in the premises. It further insists that the children, in playing upon the turntable, were trespassers, and the law imposed upon the defendant no duty to exercise any care for their safety except to refrain from wilful or wanton injury to them after discovering them upon its property. It also claims that in entering upon the company's property without permission and in playing upon the turntable the plaintiff was guilty of contributory negligence, and therefore is not entitled to recover damages.

The question of the liability of a railroad company for injuries to children playing upon its turntables is one of interest and importance. During the last thirty years it has called for the consideration of many courts, both state and Federal, throughout the United States, and has developed two opposing and irreconcilable lines of decisions, to which more extended reference is herein-

after made. Two cases of the kind have heretofore been presented to this court (*Carrson v. Chicago, R. I. & P. R. Co.* 96 Iowa, 583, 65 N. W. 831, and *Merryman v. Chicago, R. I. & P. R. Co.* 85 Iowa, 634, 52 N. W. 545); but in each instance the party injured had reached an age and maturity to be properly chargeable with contributory negligence, and a recovery was denied, without considering whether the company may be held liable under other circumstances. In this case, however, the child is of such tender years that we cannot say, as a matter of law, she was guilty of negligence contributing to her own injury, and we are thus called upon for the first time to assume a position upon the controverted question. In view of its importance, and the wide divergence in the views of eminent courts and lawyers, we have endeavored to give the subject that careful attention which it deserves, and, in our judgment, the conclusion at which we have arrived has the support of the greater weight of authority, and is most nearly in accord with the principles which underlie and pervade the laws of civilized society.

That the ordinary turntable is a very dangerous machine for children to play with, and possesses strong attractions to their sportive instincts, is manifest from the numerous cases of injuries thus received which come before the courts for adjudication. These cases are all strongly alike in their circumstances, and, generally speaking, the story of one is the story of all,—an open lot; a turntable insecurely fastened, or wholly unfastened; children gathering upon it, some riding while others work the levers; a misstep, a fall, and a little body is maimed, or a young life is extinguished. It is useless to moralize upon the instinct for play which controls the action of a child, or argue for its control by parental authority and guidance. It exists, ingrained in the child's being, and we must deal with it as we find it. Nothing seems to appeal to it more strongly than some device in the form of a merry-go-round; and the temptation to ride it, if the opportunity offers, is practically irresistible, until approaching maturity brings some reasonable measure of judgment and discretion. Accepting these facts, we come to the vital question raised by the issue now before us: Is a landowner who exposes dangerous but attractive machinery upon an open lot in close proximity to a public way or other place where he may reasonably expect young children will pass or resort for play under any duty to fasten or guard such machinery, or to exercise care to provide against children interfering with it to their injury? The first instance in which this question, as applicable to turntables, was presented for judicial consideration, appears to have been in the Federal courts. See *Stout v. Sioux City & P. R. Co.* 2 Dill. 294, Fed. Cas. No. 13,504, and the same case on appeal to the Supreme Court of the United States, 17 Wall. 657, 21 L. ed. 745. In some of the reviews of this case it is assumed that this decision announces a new principle, and marks the abandonment

of rules which prior thereto defined the extent of a man's dominion over his own property. This, as we shall try to demonstrate, is an error. It is true, the facts involved in the *Stout Case* were new to the courts, but the principle which controlled its decision has its root and life in the fundamental doctrines of the common law. The principle remains invariable, but its application must, of necessity, be extended and adjusted to the varying circumstances of business and of life. With the steady advance in industrial arts and sciences, the rapid expansion and diversification of business interests, and the increasing density of population forcing men into closer contact, and compelling them, in gradually increasing measure, to yield something of individual right for the general good, there arise from day to day for settlement by the courts disputes which are without precedent in their facts and circumstances. But their settlement requires no mere judicial experimentation, for somewhere in the treasure house of the law there is to be found the principle upon which the rights of parties may be justly determined. The basic principles of our jurisprudence have their birth in the enlightened conscience and the ineradicable distinction between right and wrong, and are unchangeable; but, as we have already noted, their use and application extend and expand to meet the demands of changing conditions.

The law thus presents the seeming paradox of a structure which is at once a finished product and a ceaseless evolution, developing new strength with each new demand upon its energies. The exercise of the sovereign power of eminent domain by private citizens for private profit; the extension of railroads to every city and every hamlet; the development of electricity as a source of heat, power, and light; the discovery and development of oil, gas, and other riches concealed beneath the earth's surface,—are but samples of a multitude of new and vastly important interests with which the courts have had to deal as matters of first impression within the memory of living men, and in each instance the seeming chaos of conflicting rights and theories has been reduced to order, and adjusted according to old-time rules wisely construed in the light of the conditions calling for their application. Not that every case has been correctly decided, or that every judicial opinion with which the books are filled is sound; but the great body of the law, as pronounced by the courts, is alive with the spirit of justice, and its tendency is uniformly and irresistibly toward the right. The rules which assure to a person dominion over his own property, and deny protection to the trespasser in his wrongdoing, are of the most ancient origin, and their justice is undisputed; but they are not entirely without limitation or restriction. Ordinarily, the owner of property, real or personal, may use or deal with it as he likes; but this right can never be divorced from the responsibility suggested by the maxim, *Sic utere tuo alienum non lēdas*. In other words, no

man is at liberty, under the law, to so use his own as to endanger the person or property of his neighbor. This is a necessary result of social organization, and an indispensable requisite of social order. So long as one lives in comparative isolation, this rule rests lightly upon him, and he need scarcely feel its restraint; but, as population multiplies, and he is brought into proximity with his kind, he finds the range in which he may exercise absolute control over his own is constantly being narrowed. As a lone dweller upon the prairie, he may indulge in target shooting, may store tons of dynamite in his dwelling, may erect a slaughter house upon his premises, may leave undrained his malaria-breeding swamps, may leave unguarded pits and traps in his open fields; for these things affect none but himself. When neighbors arrive, or his home becomes one of the many in a city or town, he must adjust himself to the changed conditions, and at all times have due regard for the effect which his conduct in the use of his property may have upon others. Railroad companies are comparatively new entities or agencies in the world of business, but in the law they are persons, and hold and manage their property subject to the same limitations and obligations which characterize ownership in the hands of the individual citizen. But we are told that, conceding all this, the law makes no provision for the protection of a trespasser, and that he who enters unbidden upon the land of another assumes all risk of pitfalls, traps, and other sources of danger which may be there encountered, and that he who officiously or needlessly intermeddles with property of any kind to which he has no legal right has no cause of complaint if thereby injured. This is a general rule of unquestioned authority and justice, but, as we have said, like other rules, is not without limitation. If the owner of a lot build a fence around it, or if he cultivate or reside upon it, or beautify it with lawn and ornamental shrubbery, he gives notice to the world of his desire for its exclusive enjoyment, and he who disregards this notice takes upon himself the risk to which his trespass may expose him. If, however, the owner take away the fence, throwing his lot open in unused and unimproved condition, leaving the public to swarm over and across it and children to play upon it, he cannot be held innocent of wrong if by his act this semi-public use of his property is made hazardous to human life, and he fails to take reasonable precaution against the danger thus occasioned. Nor is such responsibility confined entirely to vacant and unused property. Assume, for instance, that a manufacturer of merry-go-rounds desires to erect one, not for public use, but to test the machinery, or to advertise his business to the people passing by, and he chooses for that purpose an open lot, owned by him, bordering immediately upon a much-used street, or immediately adjoining the unfenced grounds of a primary school building. He knows that the sight of this device

with its gaudy trappings will be absolutely certain to attract to it a swarm of children, who will just as certainly play with it; and, if he leave it thus exposed and unfastened, and thereby some inexperienced and immature child is caught and crushed in the machinery, it would be a shocking distortion of sound principle to hold that no liability is here incurred. Nor has the law, in its wonderful adaptation to the prosecution of order and promotion of right conduct, waited for the advent of turntables before settling the rule which governs this case. The rule did not have its origin in the *Stout Case*, nor is its application to turntable accidents an exceptional proposition by which railroad companies are singled out for a liability which does not, under similar circumstances, attach to every property owner. For many years the courts have been gradually approaching unanimity upon the idea that the law which withdraws its protection from the trespasser applies to the unheeding infant with less harshness than to the adult, and under some circumstances does not apply in any degree. So, too, the once prevalent doctrine, based upon mistaken precedent rather than principle, which held the unconscious child by imputation or substitution guilty of the negligence of its parent, has been relegated in most jurisdictions to its proper place among the barbarisms from which the law has happily been redeemed.

Let us now turn to some of the leading authorities bearing upon this discussion. No case directly bearing upon the duty which a property owner may owe to an infant (even when such child is technically a trespasser) has been more often quoted than *Lynch v. Nurdin*, 1 Q. B. 29. The facts giving rise to this case were as follows: The defendant, being the owner of a horse and cart, left them standing unhitched in the street while he entered a shop. During his temporary absence a little child climbed into the cart, while another undertook to lead the animal, with the result that an accident occurred, and the child upon the cart was injured. The court held the defendant liable, Lord Denman pronouncing the judgment. It is there said: Suppose the plaintiff "merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse. . . . The defendant cannot be permitted to avail himself of that fact. The most blamable carelessness . . . having tempted the child, he ought not to reproach the child with yielding to that temptation." Speaking also of the claim that the plaintiff could not recover because of contributory negligence, Lord Denman says: "The child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them." That this decision was not at once recognized by all English courts is shown by the later case of *Mangan v. Atterton*, L. R. 1 Exch. 239, in which a child was denied damages for injuries received while meddling with a machine left unguarded upon the street. The reason made use of to justify this result has been the

subject of severe criticism, and is now, in effect, overruled by *Clark v. Chambers*, L. R. 3 Q. B. Div. 327, where it is said: "It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine, which may be fatal to anyone who touches it, . . . is not only guilty of negligence, but of negligence of a very reprehensible character." Of *Mangan v. Atterton* it is said by an able law writer: "Nothing worse than this as a specimen of judicial reasoning can be found in the reports." Beach, Contrib. Neg. § 139; and a like opinion is expressed in *Thomp. Neg.* 1045. In *Abbott v. Macfie*, 2 Hurlst. & C. 744, we have a somewhat peculiar case. A property owner had set up a shutter on his own premises, but without secure fastening, near where children were wont to play. A child tampered with the bolt, and the shutter, falling, injured both this child and another. The latter was permitted to recover damages, the court saying that, while the fastening was sufficient for ordinary purposes, yet, "having regard to the risks to which, in the locality where it was, it was exposed," the jury was authorized to find the owner negligent. The other child was not allowed to recover, because of its direct interference with the shutter,—a nice distinction, which, assuming both children to be too young to exercise care or prudence, few courts of this day would be willing to follow. The relaxation of the strict rule of the law in favor of children is again to be noted in *Jewson v. Gatti*, 2 Times L. R. 441. Here a little girl, loitering by the way, was looking into a cellar, where persons were engaged in scene painting. While thus engaged, a railing against which she leaned broke, and precipitated her into the area. In discussing the case the court used the following language: "There was painting going on in the cellar, and it must have been known that painting would attract children; and then a bar was put up, ostensibly as a protection, against which children would naturally lean while looking down into the cellar. This was almost an invitation—certainly an inducement—to the children to lean against the bar." In *Harrold v. Watney*, 78 L. T. N. S. 788, decided by the English court of appeal in 1898, the doctrine of *Lynch v. Nurdin* is expressly approved; the court saying of it: "That case has never been overruled or questioned." The authority is there cited in support of the right of action for damages in a child who was injured by the falling of a rotten fence upon which it climbed by the roadside, and, among other things, the court says: "When considering whether the nuisance was the cause of the accident, it is a good test to see whether what the child did was something which ought to have been present to the mind of the defendant as a possible and probable result of leaving the fence in a dangerous condition." But, whatever may be said as to the prevailing rule in England, the doctrine of *Lynch v. Nurdin* has been followed with very little dissent in

this country. To this point we have the authority of Mr. Beach (see Beach, Contrib. Neg. § 141) for the statement that the supreme judicial court of Massachusetts "is the only court in this country that has not affirmed *Lynch v. Nurdin*," and our own investigation tends to confirm the assertion, although in some states the principle involved has been obscured by inconsistent decisions. *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Brennan v. Fair Haven & W. R. Co.* 45 Conn. 284, 29 Am. Rep. 679; *Brinkley Car Co. v. Cooper*, 60 Ark. 545, 31 S. W. 154; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 12 N. E. 451; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Schilling v. Abernethy*, 112 Pa. 437, 56 Am. Rep. 320, 3 Atl. 792; *Kinchlow v. Midland Elevator Co.* 57 Kan. 374, 46 Pac. 703; *Price v. Atchison Water Co.* 58 Kan. 551, 50 Pac. 450; *Schmidt v. Kansas City Distilling Co.* 90 Mo. 284, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417; *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206, 39 N. E. 484; *Siddall v. Jansen*, 168 Ill. 43, 39 L. R. A. 112, 48 N. E. 191; *Coppner v. Pennsylvania Co.* 12 Ill. App. 600; *Young v. Harvey*, 16 Ind. 314; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 183, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Kentucky C. R. Co. v. Gastineau*, 83 Ky. 119; *Passamaunuck v. Louisville R. Co.* 98 Ky. 205, 32 S. W. 620; *Mackey v. Vicksburg*, 64 Miss. 778, 2 So. 178; *Powers v. Harlow*, 53 Mich. 514, 51 Am. Rep. 154, 19 N. W. 257, 57 Mich. 107, 23 N. W. 606; *Tully v. Philadelphia, W. & B. R. Co.* 2 Penn. (Del.) 537, 47 Atl. 1019; *Westerfield v. Lewis*, 43 La. Ann. 63, 9 So. 52; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175; *Gunderson v. Northwestern Elevator Co.* 47 Minn. 161, 49 N. W. 694; *Biggs v. Consolidated Barb-Wire Co.* 60 Kan. 217, 44 L. R. A. 655, 56 Pac. 4; *Woods v. Trinity Parish*, 21 D. C. 540; *Hutson v. King*, 95 Ga. 271, 22 S. E. 615; *Barnes v. Ward*, 9 C. B. 420, 2 Car. & K. 661; *Lowe v. Salt Lake City*, 13 Utah, 91, 44 Pac. 1050; *Morrow v. Sweeney*, 10 Ind. App. 626, 38 N. E. 187; *Marble v. Ross*, 124 Mass. 44; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *Kopplekom v. Colorado Cement-Pipe Co.* (Colo. App.) 64 Pac. 1047; *Ricketts v. Markdale*, 31 Ont. Rep. 610.

Some critics have sought to weaken the force of *Lynch v. Nurdin*, and to distinguish it from the line of cases to which we have referred, by saying that in the former the child was in the public street, and therefore the rule as to trespassers did not apply to it. The suggestion is fallacious and misleading. The cart was also on the public street. It was rightfully there; and the child, when he climbed into it without leave, was as much a trespasser in the eye of the law as it was possible that a child of its years could be,—as much, indeed, as if he had wandered across the boundary line of defendant's land. The defendant was held

liable, not because the plaintiff was not a trespasser, nor because the horse and cart were not rightfully upon the street, but because he knew, or, as a reasonable man, ought to have known, that in thus leaving his property exposed he was offering a dangerous temptation to the thoughtlessness of childhood, and used no care to prevent injury therefrom. None of the many precedents we have above cited are turntable cases and in nearly every instance the injured person was a technical trespasser. They unite, however, in giving vigorous expression to the rule that whether the attractive character of the danger and its unguarded condition are to be construed as an implied invitation to the child to enter upon the property of another, or whether such use of one's own property is a violation of the fundamental doctrine requiring the owner to have a care that his neighbor suffers no harm at his hands, no man, even upon his own premises, may rightfully expose to the approach of young children a temptation which is likely to attract them into danger, without using care to avoid their injury. It by no means follows that a property owner is an insurer of the safety of children who come upon his premises. His obligation is simply that which attaches to every member of society when he undertakes to exercise a personal right in a manner which may affect the welfare or safety of another member,—the obligation of reasonable care. Discharging that obligation, he has done his duty, and assumes no liability, whatever happens; but, failing therein, he is justly responsible for the effects of his negligence. In *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261,—a Connecticut case,—the defendant placed a heavy gate upon his own land on or near the border of a private lane, where children were wont to pass. A child took hold of the gate, and it fell upon him. It was held a proper case for the jury to say "whether such child ought to be chargeable with fault, so as to defeat his recovery, or whether or not the acts done by him were not rather the result of childish instinct, which the defendant might easily have foreseen." In *Hydraulic Works Co. v. Orr*,—a Pennsylvania case,—the defendant was the proprietor of a factory within the limits of a city. For its private use it maintained an alley, closed with gates, upon which the words "Private" and "No Admittance" were conspicuously posted. In the alley was a heavy platform, so hinged as to be lifted and lowered for some purpose in connection with the business. The gate was sometimes left open, and on one such occasion several small children strayed into the alley, and were playing under the upraised platform, when it fell, crushing them with its weight. The court says: "It is true that, where no duty is owed, no liability arises; . . . but it has been often said duties arise out of circumstances. Hence where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to accident, the rule will vary.

. . . Can it be righteously said that the owner of such a dangerous trap, held by no fastening, . . . so often open and exposed to the entries of persons on business, by accident or from curiosity, owes no duty to those who will be probably there? The common feeling of mankind, as well as the maxim, *Sic utere tuo ut alienum non lœdas*, must say this cannot be true; that this spot is not so private and secluded as that a man may keep dangerous pits or deadfalls there without a breach of duty to society. On the contrary, the mind, impelled by the instincts of the heart, sees at once that in such a place, and under these circumstances, he had good reason to expect that one day or other someone, probably a thoughtless boy in the buoyancy of play, would be led there, and injury would follow,—especially, too, when prompted by knowledge that a fastening was needed." In a later case (*Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684), while holding the circumstances insufficient to entitle plaintiff to recover, the court says of *Hydraulic Works Co. v. Orr*: "No case was ever more justly decided. . . . The children were trespassers certainly; but then they were children, and the defendants were bound to have regard to the reckless and thoughtless tastes and traits of childhood." The Kansas court (*Price v. Atchison Water Co.* 58 Kan. 551, 50 Pac. 450), applying the rule to the owner of a reservoir which was so constructed that a person falling into it or entering it could not easily escape, by reason of which a young boy was drowned, makes use of this language: "Without doubt the common law exempts the owner of private grounds from obligation to keep them in a safe condition for the benefit of trespassers, idlers, . . . or others who go upon them, not by invitation, express or implied, but for pleasure, or through curiosity. . . . The common law, however, does not permit the owner of private grounds to keep thereon allurements to the natural instincts of human or animal kind without taking reasonable precautions to insure the safety of such as may be thereby attracted to his premises. To maintain upon one's own property enticements to the ignorant or unwary is tantamount to an invitation to visit and to inspect and enjoy, and in such cases the obligation to endeavor to protect from the dangers of the seductive instrument or place follows as justly as though the invitation had been express." The same principle was approved in a somewhat similar case by the supreme court of Illinois. *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206, 39 N. E. 484. The question engaged the attention of the Kentucky court in a case (*Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193) where the defendant piled lumber upon his own land, where children were in the habit of playing. One of the piles, being negligently built, fell, killing plaintiff's young son. The rule is there expressed as follows: "As a general rule, the owner of land may retain to himself the sole and exclusive occupation of it; but, as property in lands depends upon municipal law

for its recognition and protection, the individual use and enjoyment of it are subject to conditions and restraints imposed for the public good and from a reasonable and humane regard for the welfare and rights of others. Hence, according to the maxim, *Sic utere*, etc., a party may be made liable for the negligent use of his property whereby the person or property of another has been injured. It has been held that a party is guilty of negligence in leaving anything in a place when he knows it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third person. . . . It is a reasonable and necessary rule that a higher degree of care should be exercised toward a child incapable of using discretion commensurate with the perils of his situation than one of mature age and capacity; hence conduct which, toward the general public, might be up to the standard of due care, may be gross or wilful negligence when considered in reference to children of tender age and immature experience. While, therefore, the owner of land is not bound to provide against remote and improbable injuries to children trespassing thereon, there is a class of cases which hold owners liable for injuries to children, although trespassing at the time, when, from the peculiar nature and open and exposed position of the dangerous defect or agent, the owner should reasonably anticipate such an injury to flow therefrom as actually happened." In a later case (*Kentucky C. R. Co. v. Gastineau*, 83 Ky. 119), the same court says: "Undoubtedly children of tender years should not be treated strictly as trespassers when, guided by childish instincts, they stray upon the track or into the yard of a railroad. . . . One may incur liability for an injury to a child of tender years by leaving dangerous machinery where it is accessible to him, although there would be no liability to an adult, or child of years of discretion, under the like circumstances. . . . A child without discretion, although a trespasser, occupies a legal attitude to the company similar to that of an adult who is not a trespasser. . . . Of course, we do not mean by this to say that a railroad company is an insurer against accidents to children, and that it is liable for injuries to them which cannot well be foreseen; but, if they are of such tender years as to be devoid of discretion, then justice and the dictates of humanity require the exercise of reasonable care to prevent their being placed in danger, even though they may be technically trespassers." The Mississippi court, in the case of the death of a child by falling into an excavation, says (*Mackey v. Vicksburg*, 64 Miss. 778, 2 So. 178): "Whether what was done was reasonably calculated to entice a child, following its instincts of curiosity or love of liberty, to escape from the yard, and enter upon the dangerous path, is determinable as a question of fact, and not of law. If the defendant, by the exercise of reasonable forethought, could have anticipated the probability of the child's action, it should

have guarded against the danger. . . . If it failed so to do, it failed in a duty which rested upon it, and is not relieved from responsibility even though the child was a trespasser in going upon the premises." In a Tennessee case (*Whirley v. Whiteman*, 1 Head, 614) the defendant was the owner of a mill standing upon his own premises and 20 feet away from the street. Upon the outer wall of the mill, near the ground, was some uncovered gearing. Children sometimes played in the space between the mill and street, and a child of three years, being attracted to the place, was caught in the wheels. Judgment for defendant in the trial court was reversed upon appeal, the court saying: "We are of opinion that the verdict is against the evidence. According to the maxim of the common law, *Sic utere*, etc., every person is held responsible in law for the consequences of his own negligence." The Indiana court speaks of the same doctrine (*Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 183, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70) as follows: "This is a reasonable and humane rule, and any other would be a cruel reproach to the law. But the law merits no such reproach, for throughout all its branches, whether of tort or contract, there runs, like the marking red cord of the British navy, a line distinguishing children of years too few to have judgment or discretion from those old enough to . . . exercise those faculties. This is a doctrine taught by every man's experience and sanctioned by our law. A departure from it would shock everyone's sense of justice and humanity." In the same court, *Penso v. McCormick*, 125 Ind. 116, 9 L. R. A. 313, 25 N. E. 156. The defendants deposited ashes containing fire in their own mill yard, where children were in the habit of playing, and were held in damages to a young boy who was thereby burned. It is there said: "It is a well-recognized doctrine that persons are required to use greater care in dealing with children of tender years than with older persons, who have reached the age of discretion, and that greater care is required to avoid injury to them even when they are trespassers." This doctrine was also approved by the Michigan court (*Powers v. Harlow*, 53 Mich. 514, 51 Am. Rep. 154, 19 N. W. 257) in an opinion written by Judge Cooley, the magnitude of whose fame and the weight of whose authority are unexcelled in modern jurisprudence. The defendant in that case had left a box of dynamite cartridges under an open shed on his own land, but near a path along which his tenant's young son had occasion to pass. The boy's attention being attracted to the box, he went to it, removed the cover, took out a cartridge, and was injured by its explosion. The court says: "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are charged with a duty of care and caution towards them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting

to them, and which they, in their immature judgment, might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken." On a second appeal of the same case Judge Cooley again pronouncing the opinion, the court approved the following instruction to the jury: "If, therefore, gentlemen, you find . . . that this box containing these 'exploders' was placed under the shed in question, and was placed there in such a manner that children . . . who had the right to pass to and fro near it might, in following out their . . . childish instincts, go to it, and get at its contents, I charge you that it would be an act of negligence . . . for which he [defendant] would be liable." In a late case in the United States Supreme Court (*Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619), this doctrine is again enforced against the owner of a coal mine, which deposited its slack in an open space near a path upon its own land, where it was permitted to burn, and a boy was injured by falling into it. In holding the defendant liable, the court quotes approvingly the language of Lord Denman: "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will wrongfully set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress against both or either of the two, but unquestionably against the first." "In the present case there was no express invitation to the plaintiff to come upon the premises of the railroad company for any purpose. But, if the company left its slack pit without a fence or anything to give warning of its really dangerous condition, and knew, or had reason to believe, that it was in a place where it would attract the interest or curiosity of passers, can the plaintiff, a boy of tender years, be regarded a mere trespasser for whose safety and protection, while on the premises in question, against the unseen danger referred to, the railroad company was under no duty or obligation whatever to make provision?" This question the court answered in the negative, and affirmed the judgment against the defendant.

This somewhat extensive citation of authorities, though but part of the many bearing in the same direction, we have thought necessary in view of the claim persistently put forth by those who reject the authority of the *Stout Case* that it is not in harmony with the general principles of the law, and holds railroad companies to a stricter measure of liability than is applied to natural persons. Taking up now the turntable cases proper, we find the pioneer case just referred to was tried at circuit before that distinguished jurist, Judge Dillon. 2 Dill. 294, Fed. Cas. No. 13,504. From his charge to the jury, which was affirmed on appeal, we quote: "Now, the ground of complaint . . . is that the turntable, as it was constructed, was of a dangerous nature and character

when unlocked or unguarded; and that, being, as it is alleged, in a place much resorted to by the public, and where children were wont to go and play, it was the duty of the defendant to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded so as to prevent injuries such as befell the plaintiff. The basis of this action, therefore, is that the defendant owed plaintiff a duty of this kind, that in failing to discharge this duty, the defendant was guilty of negligence. . . . The machine in question is part of the defendant's road, and was lawfully constructed where it was. If the . . . company did not know, and had no good reason to suppose, that children would resort to the turntable to play, or did not know, or had no good reason to suppose, that . . . they would be likely to get injured thereby, then you cannot find a verdict against them. But if defendant did know, or had good reason to believe, under the circumstances of the case, the children of the place would resort to the turntable to play, and that, if they did, they would or might be injured, then if they took no means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence." This judgment, upon appeal (17 Wall. 657, 21 L. ed. 745), was unanimously affirmed by the Supreme Court of the United States, and its authority is reaffirmed in *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619. The authority of this precedent has had the express recognition of the courts of every state west of the Mississippi having occasion to pass upon a like question, as well as a large portion of the courts east of that line. Indeed, the courts of New Hampshire, Massachusetts, and New York, and more recently the courts of New Jersey and Michigan, are all that seem to be committed to the opposing view; and even in each of these states, unless we except New Hampshire and Massachusetts, the principle which underlies the *Stout Case* had often been applied to other than turntable accidents. In California (*Barrett v. Southern P. Co.* 91 Cal. 296, 27 Pac. 666), the court, referring to *Frost v. Eastern R. Co.* 64 N. H. 220, 9 Atl. 790,—a leading authority in opposition to the *Stout Case*,—says: "In our judgment, the rule, as broadly announced and applied in that case, cannot be maintained without a departure from well-settled principles. It is a maxim of the law that one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible. . . . This rule, which only imposes a just restriction upon the owner of property, seems not to have been given due consideration in the case referred to. But this principle, as a standard of conduct, is of universal application, and the failure to observe it is in respect to those who have a right to invoke its protection a breach of duty, and, in a legal sense, constitutes negligence." 57 L. R. A.

. . . If defendant ought reasonably to have anticipated that leaving this turntable unguarded and exposed, an injury such as plaintiff suffered was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. It is no answer to this to say that the child was a trespasser, and, if it had not intermeddled with defendant's property, it would not have been hurt, and that the law imposes no duty upon the defendant to make its premises a safe playground for children. In the forum of law as well as of common sense a child of immature years is expected to exercise only such care and self-restraint as belongs to childhood; and a reasonable man must be presumed to know this, and is required to govern his actions accordingly." The rule was reaffirmed by the same court in *Callahan v. Ecl River & E. R. Co.* 92 Cal. 89, 28 Pac. 104. In *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 691, 31 Am. Rep. 203, the rule is thus stated: "No person has a right to leave, even on his own land, dangerous machinery, calculated to attract and entice boys to it, there to be injured, unless he first take proper steps to guard against all danger; and any person who thus does leave dangerous machinery exposed without first providing against all danger is guilty of negligence. It is a violation of the beneficial maxim, *Sic utere*, etc." In *Minnesota (Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393) the same result is reached on a full discussion of the principle largely independent of the *Stout Case*. The court says: "Now, what an express invitation would be to an adult the temptation of an attractive plaything is to a child of tender years. If the defendant had left his turntable unfastened for the purpose of attracting young children to play upon it, knowing the danger into which it was thus alluring them, it certainly would be no defense to an action by the plaintiff, who had been attracted upon the turntable and injured, to say that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass. In *Townsend v. Wathen*, 9 East, 277, it was held unlawful for a man to tempt even his neighbor's dogs into danger by setting traps on his own land baited with strong-scented meat, by which the dogs were allured to come upon his land and into his traps. In that case Lord Ellenborough asks: 'What is the difference between drawing the animal into the trap by his natural instinct, which he cannot resist, and putting him there by manual force?' And Grose, J., says: 'A man must not set traps of this dangerous description in a situation to invite his neighbor's dogs, and, as it were, to compel them, by their instinct, to come into the traps.' . . . The defendant therefore knew that, by leaving this turntable unfastened and unguarded, it was not merely inviting young children to come upon the turntable, but was holding out an allurements, which, acting upon the natural instincts by which such children are controlled drew them, by

those instincts, into a hidden danger; and, having thus knowingly lured them into a place of danger without their fault (for it cannot blame them for not resisting the temptation it has set before them), it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves. We agree with the defendant's counsel that a railroad company is not required to make its land a safe playground for children. . . . We merely decide that when it sets before young children a temptation which it has reason to believe will lead them into danger it must use ordinary care to protect them from harm. What would be proper care in any case must, in general, be a question for the jury upon all the circumstances of the case." In *Kolsti v. Minneapolis & St. L. R. Co.* 32 Minn. 134, 19 N. W. 655, cited by defendant in the present case, a judgment for the defendant was sustained, and an instruction to the jury that the company was not bound to so fasten its turntable as to make it impossible for children to unfasten it was sustained, the duty of the company being only to exercise reasonable care. In a later decision—*Twist v. Winona & St. P. R. Co.* 39 Minn. 167, 39 N. W. 402,—the plaintiff was not permitted to recover, because he was evidently of sufficient age to exercise care and discretion for himself; but in announcing its decision the court expressly disapproves of the New Hampshire doctrine, which applies to a young child the rule that a trespasser cannot recover damages for injuries received, and adds: "Applied to one of sufficient mental capacity to be a conscious trespasser, this is undoubtedly a sound rule, but, if applied to children of tender years, strictly *non sui juris*, it would seem harsh and inhuman. Properly qualified, and limited in its application, the doctrine of the *Keffe Case* is, in our judgment, in accordance with both the reason and the dictates of humanity." To the same effect is the opinion in *O'Malley v. St. Paul, M. & M. R. Co.* 43 Minn. 289, 45 N. W. 440.

Upon the strength of some of the language employed in the *Twist Case* it has been asserted that the Minnesota court has limited the application of the rule of the *Stout Case* to turntable cases alone. In *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899, the court takes occasion to correct this error, saying: "We did not mean by this [by what was said in the *Twist Case*] that we would not apply the doctrine to any but 'turntable cases,' but merely that we would not extend the doctrine to cases which, upon their facts, did not come strictly and fully within the principle upon which those cases rest." Sustaining the same doctrine, see *Ferguson v. Columbus & R. R. Co.* 75 Ga. 637, 77 Ga. 102; *Union P. R. Co. v. Dunden*, 37 Kan. 1, 44 Pac. 501; *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592; *Nagel v. Missouri P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418; *Bridger v. Asheville & S. R. Co.* 25 S. C. 24; *Houston* 57 L. R. A.

& *T. C. R. Co. v. Simpson*, 60 Tex. 103; *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 358, 14 S. W. 26; *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332, 9 N. W. 50; *Iluaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335.

The Illinois courts are sometimes quoted as being in line with those opposing the doctrine of the *Stout Case*, but this is a mistake. It is true that in a turntable case decided in that state (*St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269) the plaintiff was not allowed to recover, but the refusal was expressly placed upon the ground that the turntable was shown to be so far removed from any public place, and was so secluded, that it could not properly be said to offer any temptation to children to trespass upon it. The same court, in a later case (*Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206, 39 N. E. 484), takes occasion to approve the *Stout Case*, and cites the *Bell Case* as in effect so holding. Again, in *Siddall v. Jansen*, 168 Ill. 43, 39 L. R. A. 112, 48 N. E. 191, and in *Coppner v. Pennsylvania Co.* 12 Ill. App. 600, the principle is expressly approved and followed.

The principal cases which are out of harmony with the cases we have cited are *Frost v. Eastern R. Co.* 64 N. H. 220, 9 Atl. 790; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248, 23 N. E. 283; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724, 39 N. E. 1068; *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L. R. A. 831, 40 Atl. 682. A late case from Michigan—not a turntable case, however—also holds adversely to the doctrine of the *Stout Case*. *Ryan v. Toucar* (Mich.) 8 Det. L. N. 727, 87 N. W. 644. This decision was by a bare majority of the court, and, in our judgment, the dissenting opinion by Montgomery, Ch. J., is supported by the stronger reasoning and a greater weight of authority. These cases are founded upon the one unvarying proposition that, without regard to the age of the trespasser,—whether a mature adult or a creeping infant,—he is in law a wrongdoer, and the landowner owes him no duty except to refrain from his wilful or wanton injury after discovering his intrusion upon the premises; and that, too, without regard to the temptations or enticements which the premises may offer to the childish mind. Hence, if a child too young to have any conception of right and wrong or of the ownership of property, is attracted across the boundary of an unfenced lot by a piece of dangerous and attractive machinery left there exposed without guard or fastening, and such child, led by an instinct as powerful and controlling as that which led the dog into the trap as hereinbefore referred to, is caught and mutilated in the machine, the owner is charged with no liability, although he well knew the habit of children to use the lot as a playground, and as a reasonable man must have known they would be tempted to play with the machine, and, if they yielded to the temptation, were

sure to be injured. Not only this, but if one child is caught in the trap thus set, and another, seeing its peril, runs to its rescue, and in his work of mercy is also caught in the relentless machine and injured, he, too, is without remedy because, forsooth, he is a trespasser, and should politely have waited outside of the boundary until he had received due permission to enter and go to the relief of his playmate. That this is no exaggeration, see *Delaware, L. & W. R. Co. v. Reich and Ryan v. Towar*, above cited, in both of which cases the plaintiff was injured in attempting to save a younger child from the death to which the defendant's carelessness had exposed him, but was sent from the court without redress, because, in answering a call of duty as imperative as the voice of God, she had made herself a "trespasser!" If this be the law, it well merits the witty thrust which Mr. Beach administers the doctrine of imputed negligence: "On the one hand, it is held that the negligence of a person having charge of a child is the negligence of the child, and imputable to it when the child comes into a court of justice and asks damages for an injury negligently inflicted upon him by the defendant. *Waite v. North Eastern R. Co.* El. Bl. & El. 719 [and *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273]. But *per contra*, where a donkey is carelessly run down in the highway, where it is negligently exposed, the defendant is held liable (*Davies v. Mann*, 10 Mees. & W. 546); and, though oysters are negligently placed in a river bed, it is an injury redressible at law in damages for a vessel negligently to disturb them (*Colchester v. Brooke*, 7 Q. B. 377). It appears, therefore, that the child, were he an ass or an oyster, would secure a protection which is denied him as a human being of tender years in such jurisdiction as enforce the English or New York rule in this respect." Beach, Contrib. Neg. Crawford's ed. § 127.

Of the cases referred to as opposing the doctrine to which we adhere, one of the earliest and most often quoted is *Frost v. Eastern R. Co.* 64 N. H. 220, 9 Atl. 790. The writer of that opinion sees in the principle for which we contend great hardship for the landowner and a source of peril to him in every fruit tree, ladder, fence, and blueberry thicket upon his premises. This language is cited with approval by most courts following that decision, and, in addition thereto, *Ryan v. Towar* vividly depicts the woes which children inflict upon society in general. We quote: "There is no more lawless class than children, and none more annoyingly resent an attempt to prevent their trespasses. The average citizen has learned that the surest way to be overrun by children is to give them to understand that their presence is distasteful. The consequence is that they roam at will over private premises, and, as a rule, this is tolerated so long as no damage is done. The remedy which the law affords for the trifling trespasses of children is inadequate. No one ever thinks of suing them, and to 57 L. R. A.

attempt to remove a crowd of boys from private premises by gently laying on of hands, and using no more force than is necessary to put them off, would be a roaring farce, with all honor to the juveniles." If this sweeping indictment of boyhood and these gloomy prophecies are intended as a sober argument, they demonstrate a failure upon the part of the author to fairly interpret the doctrine against which they array themselves; and, if intended as sarcasm, it is proper to observe that there is not a rule known to the law, no matter how sacred or universally recognized, which cannot, by an extreme and exaggerated application of its principle, be made to appear ridiculous. But what, in fact, are the workings of the doctrine thus strongly depreciated? For many years the rule of *Lynch v. Nurdin*, *Birge v. Gardiner*, *Stout v. Sioux City & P. R. Co.*, and *Harriman v. Pittsburgh, C. & St. L. R. Co.* has been recognized as authority in a large majority of the states. Can it truthfully be said that youthful trespassers are any more annoying, or the ownership of property any more burdensome, in Connecticut, Ohio, Kansas, and Minnesota than in New Hampshire, New York, New Jersey, and Michigan? We think the question will receive a negative answer in every unprejudiced mind.

Returning to our quotation from the Michigan case, it is sufficient to say that the hoodlums there described find no immunity or protection in the law as we interpret it. Their mental acuteness is open to no discount or disparagement. They know the difference between right and wrong, and understand the meaning of trespass as well as the property owner. Ordinarily, they are at no loss to care for themselves. They disregard property rights from mere love of mischief, and take risks out of mere bravado, or in conscious defiance of moral and legal restraint. When a boy is thus injured, we may pity his folly, but justly say, as the law says, that, having intelligently assumed the risk, he ought not to recover damages. This has no application whatever to infants who are yet without judgment or discretion, and the argument built upon such circumstances is wholly irrelevant to the question in controversy. The majority opinion in the *Ryan Case* gives evidence that, while declaring fealty to what it believes the law, it recognizes the rule to which it adheres as being inconsistent with the spirit of civilization, of which law is, and ever must be, the foundation and framework. It says: "However 'Draconic' the common-law rule may be considered, it is the province of the courts to enforce it until changed by the legislature." Draconic, indeed, if the interpretation given in that opinion is correct; but we prefer to believe, as we think a careful investigation justifies us in believing, that the common law does not deserve the reproach thus laid at its door, and that no act of legislature is required to make it reasonable and humane. Montgomery, Ch. J., in his dissenting opinion, well says: "You

may call the doctrine of these cases [turntable cases] the result of evolution of the law, or what you please. It is a humane doctrine. . . . I do not feel justified in ignoring the overwhelming weight of authority which makes for this rule, as well as the expressions of our own court." It is noticeable that in the two cases last cited—*Ryan v. Towar* and *Delaware, L. & W. R. Co. v. Reich*—there is expressed a solicitude for the protection of a defendant in a case of this kind from "the risk of having the question of his negligence left to a sympathetic jury." Without for an instant denying or deprecating the inherent power of a court of record to direct a verdict when the case warrants it, or to set aside a verdict which is palpably wrong, we venture the opinion that it is not the province of the courts to stand between a defendant and a jury of his countrymen upon a fair question of fact in an action at law, nor to give the probable sympathies of a jury any weight or influence in determining the question of his liability.

The courts upon whose decisions appellants rely go also to the extent of holding that long, open, and notorious use by the public of a beaten path across a railroad track or a vacant lot, without objection from the owner, makes him who ventures to travel such a path none the less a trespasser, and imposes no duty upon the owner to consider his safety. In the language of *Ryan v. Towar*: "The pedestrians who insist upon risking their lives by making a footpath of a railroad track and others who habitually shorten distances by making footpaths across the corners of village lots are none the less trespassers because the owners do not choose to resent such intrusion." This court has already refused to follow such precedent. *Clampit v. Chicago, St. P. & K. O. R. Co.* 84 Iowa, 71, 50 N. W. 673; *Thomas v. Chicago, M. & St. P. R. Co.* 103 Iowa, 649, 39 L. R. A. 399, 72 N. W. 783. These cases, while not directly in point with the facts of the one now before us, have a legitimate bearing upon the principle involved, and indicate that the extreme theory of the law of trespass which obtains in those jurisdictions is not the law of this state. See also *Scott v. St. Louis, K. & N. W. R. Co.* 112 Iowa, 54, 83 N. W. 818.

It is profitless to discuss further the decisions of the courts. We have thus far referred only incidentally to the text writers, but the gravity of the question renders it proper to make some reference to the views of authors of repute. This we do by direct quotation without comment: "It is negligent to leave such an [dangerous] instrument on a place of public access, where persons are expected to be constantly passing and repassing, and where such persons are not required to be on their guard, or where children are accustomed to play." Wharton, Neg. § 112. "It is no defense to a suit for negligence in . . . leaving a dangerous machine in a place frequented by children that a child hurt in the machine was a trespasser." Id. § 343. If the own-

er is aware that persons are in the habit of passing over his grounds, trespassers though they may be, he is liable if he leaves in their way dangerous instruments by which they are injured. Id. § 824a. "The severity of the rule as to trespassers upon railroad property is essentially relaxed in the case of trespassers of tender years." Beach, Contrib. Neg. § 204. "A well-grounded exception to the foregoing principles is that one who artificially brings or creates upon his own premises any dangerous thing, which, from its nature, has a tendency to attract the childish instincts of children to play with it, is bound as a mere matter of social duty to take such reasonable precautions as the circumstances admit of to the end that they be protected from injury while so playing with it or coming in its vicinity." Thomp. Neg. 1024. Referring to the rule which prevails in Massachusetts and New York, Mr. Thompson further says: "This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed, his inability to be a trespasser in sound legal theory, and visits upon him the consequences of his trespass, just as though he were an adult." Id. § 1026. "The rule seems to be well settled that one who recklessly and without necessity leaves exposed dangerous weapons or things by meddling with which ignorant persons or infants may be injured, are liable for such injuries, although in so meddling the injured person was a trespasser." Buswell, Personal Injuries, § 75. "It is apprehended that the rule . . . rests upon the general principle . . . expressed in the maxim, *Sic utere*, etc." Id. § 76. "But where dangerous instrumentalities, in their nature attractive to children, are left in an exposed and accessible place where children are likely to be, the law is well settled that the proprietor cannot shield himself in an action for injuries caused thereby to an infant by showing that the machine or article was not dangerous, and would have done no harm if the plaintiff had not meddled or tampered with it." Barrows, Neg. p. 69. The turntable cases described as "settled law of the country." 1 Shearm. & Redf. Neg. 5th ed. 73. "The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in a safe condition; for they, being without judgment, and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees." 2 Shearm. & Redf. Neg. 5th ed. 122. "The owner of any machine which he knows to be dangerous to children too young to know the danger, and of too immature judgment or discretion to control their natural instinct to amuse themselves with anything that may attract them as a plaything, and which he knows or ought to know may attract them, and who knows it is so placed that it does attract them to play with it,—is under a duty as to such children to exer-

cise the degree of care which an ordinarily prudent person would use to prevent its injuring them. Whoever, therefore, does anything in or immediately adjacent to a public street, park, or locality where children may rightfully congregate and are accustomed so to do, calculated to attract children into danger which they cannot appreciate, or are too untrained and inexperienced to resist, owes the imposed duty of protecting them against the temptation he places before them by suitably guarding the source of danger." 1 Ray, *Negligence of Imposed Duties*, 28. "It is said that one owes no duty to . . . a trespasser. . . . Is this true as to a young child, known to be in danger of being injured? Is there not an active duty owing to protect the helpless child from known dangers on one's own land? If this duty exists, the doctrine laid down in the New Hampshire . . . cases cannot be true. . . . The real question is not whether a duty is owing to a child which under the same circumstances would not be owing to a grown person, but, putting the case personally, whether, knowing that an act of yours is liable to induce anyone to expose himself to danger, it is not your duty to anticipate such action on his part, and use care to avoid injuring him." *Id.* 32. A railroad company "may incur liability for injuries to children by leaving dangerous machinery where it is accessible to them, although it would not, under the same circumstances, be liable to an adult." Pierce, *Railroads*, 336. "The law requires of persons having in their custody instruments of danger that they should keep them with the utmost care." 1 Hilliard, *Torts*, 3d ed. 127; Pollock, *Torts*, 407. "The duties which men owe to others are made greater by their greater needs." Bishop, *Non-Contract Law*, § 589. "A child too young to be controlled by reason, therefore not improperly led by its instincts, receives from the law the protection which its special nature requires. For example, a man who leaves on his own ground, open to the highway, or upon or beside any public place, a dangerous machine likely to attract children, will be liable to one injured while playing with it, if he neglected precautions against such an accident." *Id.* § 854. "There is a manifest tendency in the cases to recognize the duty of the owner of premises and instrumentalities to avoid doing harm to other persons, even though they be wrongdoers." 2 Jagard, *Torts*, 890. "Extreme youth of a child is always an important circumstance in its bearing on the question of negligence in the party by whose act or neglect he is injured." Cooley, *Torts*, 2d ed. 822. "Leaving a tempting thing for children to play with, exposed where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use of it." *Id.* 356. "Children, being incapable, at a tender age, of exercising the same care and discretion as an adult, are entitled to more consideration, and the greater degree of care should be exercised to avoid injury to them." Harris, *Damages by Corp.* § 430.

57 L. R. A.

Speaking of the turntable cases: "These cases have been made the subject of some severe criticism, but we are inclined to think that the doctrine finds support both in principle and authority. A man's dominion over his own land is not entirely absolute, but is qualified by that time-honored maxim, *Sic utere*, etc." 2 Wood, *Railway Law*, 1291. "A party's liability to trespassers depends on the former's contemplation of the likelihood of their presence on the premises and the probability of injuries from contact with conditions existing thereon. While, as a rule, a party will not be deemed to anticipate the commission of a wilful wrong, yet where, under the circumstances, a technical trespass may reasonably be anticipated, the owner of premises will be liable for a failure to take reasonable precautions to prevent injuries to the trespasser." Watson, *Damages for Personal Injuries*, p. 288. "The doctrine of the weight of authority seems to be that the owner of uninclosed premises of a situation and character calculated to attract children thereupon is liable in damages if such premises are maintained in a condition likely to cause injuries to infant trespassers, and injuries in fact result from such negligent condition." *Id.* 290.

There is an opinion in an early Ohio case (*Kerchacker v. Cleveland, C. & C. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246), which is in itself a very learned and exhaustive commentary on some phases of the law of the case before us. It was called forth by the destruction of a farmer's trespassing pigs upon a railroad track, and we may therefore hope the law it announces is none too good to be invoked in behalf of children: "A maxim of the law, tested by the wisdom of centuries, exacts of every person in the enjoyment of his property the duty of so using his own as not to injure the property of his neighbor. It is in accord with this principle that it has been held that, though a person do a lawful thing, yet, if any damage thereby befalls another, which he could have avoided by reasonable and proper care, he shall make reparation. . . . The right of the defendant to the free, exclusive, and unmolested use of its railroad is nothing more nor less than the right of every other land proprietor in the actual occupancy and use of his lands, and does not exempt it from the duty enjoined by law upon every person so to use his own property as not to do any unnecessary injury to another."

A doctrine which numbers among its adherents such names as Denman, Cockburn, Dillon, Harlan, Cooley, and the other distinguished jurists and law writers, whose opinions and works we have made reference to, is not to be easily discredited.

2. It is urged by the defendant that its turntable is admitted to have been fastened, and therefore no negligence is shown upon its part. It is our opinion that, under the evidence, the question of the fastening was still a matter for the consideration of the jury. The exact description of the method

employed is not shown in the abstract, and it is proved that it was unfastened by one of the little girls in the party with plaintiff. If there was any duty upon defendant to fasten or secure the table to prevent its being revolved by children, it must necessarily follow that the fastening employed should be reasonably sufficient for that purpose, and such sufficiency is peculiarly a question of fact. Such, with one exception, seems to be the holding of all the courts which have passed upon this proposition. This does not require the company to furnish the best or most perfect fastening, or to make the table absolutely secure, but simply that it shall exercise the care of an ordinarily prudent and cautious person under the circumstances as they then existed. *Kolsti v. Minneapolis & St. L. R. Co.* 32 Minn. 134, 19 N. W. 655. "If the owner [of a turntable], instead of preventing such children getting to it, relies to prevent injury to them upon fastening it so as to prevent their playing with it, it is evident that the character of the means used for fastening must be considered. . . . If such means have no tendency to prevent them so exposing themselves; if they are entirely futile, and leave the machine just as dangerous to such children as before,—it can hardly be said he has used the degree of care required of him. . . . Certainly the mere fact that it used some fastening would not, without regard to the character of the fastening, absolve the company from liability." *O'Malley v. St. Paul, M. & M. R. Co.* 43 Minn. 289, 45 N. W. 440. In the same case it was said: "It may be taken as established by the evidence that the methods adopted for fastening the turntable . . . were those ordinarily used by railroad companies." But this fact was held not sufficient to permit the court to pass upon the sufficiency of such fastening as a matter of law. In *Ilwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335, the turntable was fastened or tied with a rope, which was cut or removed by children; and the question of defendant's care was held to be one for the jury. Such, also, was the holding in *Barrett v. Southern P. Co.* 91 Cal. 296, 27 Pac. 666, where it is said: "The fact that the turntable was latched in the way such tables are usually fastened, or according to the usual custom of other railroads, although a matter which the jury had a right to consider, . . . was not of itself conclusive proof of the fact." To the same effect, see *Callahan v. Eel River & E. R. Co.* 92 Cal. 89, 28 Pac. 104. Further, to the effect that proof of the customary method of fastening is not conclusive. *Kelly v. Southern Minnesota R. Co.* 28 Minn. 98, 9 N. W. 588.

3. Appellant also contends that plaintiff was guilty of contributory negligence, and therefore cannot recover. Whatever may have been the rule in earlier times, and whatever may be the holding still in a few states, it is now established beyond all question in this country that a child cannot be held to any greater degree of care

than may reasonably be expected from its years, experience, and intelligence, and that it cannot be charged by imputation with the negligence of its parents or guardians. This doctrine is so reasonable, and so consonant with the spirit of justice which pervades the law, that it commands our respect and observance; and if, as claimed, there be precedents for holding infants of five to seven years of age guilty of negligence as a matter of law, we have only to say they do not commend themselves to our reason or judgment. Whether the plaintiff was of sufficient age and intelligence to appreciate the danger to which she exposed herself in going upon the turntable was properly left to the jury. *Dowd v. Chicopee*, 116 Mass. 93; *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645; *Kay v. Pennsylvania R. Co.* 65 Pa. 269, 3 Am. Rep. 628; *Chicago & A. R. Co. v. Becker*, 84 Ill. 483.

4. It is finally said that the negligence, if any, of the defendant, was not the primary cause of the injury complained of, and that no injury would have occurred had not a third person removed the fastening, and still another revolved the table. This contention is not supported by the authorities. In the very nature of things, a child cannot well be injured upon a turntable without the intervention of some other person to revolve the machine. In the very first of the leading cases we have cited—*Lynch v. Nurdin*—this element was presented and urged as a defense without avail. The company's negligence, if it exist, is in the leaving, without proper care, of a dangerous instrument, in a place where it might reasonably have expected children to resort and put it in motion to the injury of themselves or others. See *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Clark v. Chambers*, L. R. 3 Q. B. 327; *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 776; *Nagel v. Missouri P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418.

The several questions discussed sufficiently dispose of other legal propositions raised by the appeal. The charge of the trial court to the jury was in substantial harmony with the opinions we have expressed, and the objections made thereto are not well taken. We are aware that the doctrine announced by this decision holds railroad companies to what may be thought an irksome responsibility. It is inevitable that in the rush and haste with which the business of railroading is performed, and the handling and care of ponderous machinery, the movements of which cannot be instantly controlled, accidents will happen, by which both old and young are maimed or killed, without any fault being justly chargeable to the company or its employees; and in such cases, of course, no action lies. But the very fact that the business and appliances are of such dangerous nature imposes a corresponding obligation to avoid casualties which reasonable care may anticipate and guard against. Reasonable care may, at times, seem to be

a burden, but its enforced observance is never a wrong, whether applied to railroad companies or to individuals. If it be observed, no liability follows; if it be neglect-

ed, it is simple justice that reparation be made to one who is thereby injured.

The judgment of the District Court is affirmed.

KANSAS SUPREME COURT.

N. F. FRAZIER, *Piff. in Err.*,

v.

Clara A. JEAKINS.

(.....Kan.....)

- *1. Trustees for the sale of land will not be permitted, directly or indirectly, to make profit for themselves out of the trust estate.
2. The guardian of the property of a minor cannot legally buy it at his own sale; nor can his wife or her husband buy at such sale; nor, if they do, will the non-existence of fraud and the payment of full consideration validate the purchase.
3. It seems that if a guardian, or her husband or his wife, wishes to buy at the guardian's sale, the proper practice is to obtain leave of court to do so on a showing of reasons therefor.
4. The confirmation of a guardian's sale is *res judicata* as to irregularities only, and not as to matters of substance.
5. A deed that recites that the grantors are husband and wife, the names of which grantors are identical with those of the grantor and grantee in a recent guardian's deed of the same land, imparts notice to the purchaser that his grantors were also husband and wife at the date of the former deed.
6. The title of land sold and deeded by a guardian to her husband does not pass to a purchaser who has notice of their relationship, and ejectment for its recovery may be maintained by the ward.

(Cunningham, J., dissents.)

(March 8, 1902.)

ERROR to the District Court for Butler County to review a judgment in favor of plaintiff in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Buck & Spencer, for plaintiff in error:

Where no actual fraud is present, but the trustee at the sale becomes the purchaser directly, or through the intervention of a third person who pays no consideration, nearly all the courts hold such sale voidable only.

*Headnotes by DOSTER, Ch. J.

NOTE.—As to power of guardian to sell or lease lands of ward, see, in this series, *Wilson v. Hughes* (W. Va.) 39 L. R. A. 292.

As to right of guardian to mortgage ward's property, see *Warren v. Union Bank* (N. Y.) 43 L. R. A. 256, and *Andrus v. Blazzard* (Utah) 54 L. R. A. 854.

As to right of person acting in a fiduciary capacity to purchase trust property, see also

notes to Tyler v. Sanborn (Ill.) 4 L. R. A. 218; *Wilson v. Brookshire* (Ind.) 9 L. R. A. 792; *Anderson v. Butler* (S. C.) 5 L. R. A. 166; *Manhattan Cloak & Suit Co. v. Dodge* (Ind.) 6 L. R. A. 369; and *Hindman v. O'Connor* (Ark.) 18 L. R. A. 490.

Brannan v. Oliver, 2 Stew. (Ala.) 47, 19 Am. Dec. 37; *Wiswall v. Stewart*, 32 Ala. 433, 70 Am. Dec. 549; *Carter v. Thompson*, 41 Ala. 375; *James v. James*, 55 Ala. 525; *Hindman v. O'Connor*, 54 Ark. 627, 13 L. R. A. 490, 16 S. W. 1052; *Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec. 146; *VanDyke v. Johns*, 1 Del. Ch. 93, 12 Am. Dec. 76; *Smith v. Granberry*, 39 Ga. 381, 99 Am. Dec. 464; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Flanders v. Flanders*, 23 Ga. 249, 68 Am. Dec. 523; *Grubbs v. McGlawn*, 39 Ga. 674; *Houston v. Bryan*, 78 Ga. 181, 1 S. E. 252; *Candler v. Clarke*, 90 Ga. 554, 16 S. E. 645; *James v. Kelley*, 107 Ga. 446, 33 S. E. 425; *Martin v. Wyncoop*, 12 Ind. 266, 74 Am. Dec. 209; *Crawford v. Gray*, 131 Ind. 53, 30 N. E. 885; *Murphy v. Teter*, 56 Ind. 545; *Morgan v. Wattles*, 69 Ind. 263; *Comegys v. Emerick*, 134 Ind. 148, 33 N. E. 899; *Thorpe v. McCullum*, 6 Ill. 615; *Lagger v. Mutual Union Loan & Bldg. Asso.* 146 Ill. 283, 33 N. E. 946; *Tyler v. Sanborn*, 128 Ill. 136, 4 L. R. A. 218, 21 N. E. 193; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Sypher v. McHenry*, 18 Iowa, 232; *Price v. Thompson*, 84 Ky. 219, 1 S. W. 408; *Tracy v. Roberts*, 88 Me. 310, 34 Atl. 68; *Yeackel v. Litchfield*, 13 Allen, 417, 90 Am. Dec. 207; *Harrington v. Brown*, 5 Pick. 519; *Litchfield v. Cudworth*, 15 Pick. 23; *Blood v. Hayman*, 13 Met. 231; *Clark v. Blackington*, 110 Mass. 369; *Ives v. Ashley*, 97 Mass. 198; *White v. Iselin*, 26 Minn. 487, 5 N. W. 359; *Pearson v. Moreland*, 7 Smedes & M. 609, 45 Am. Dec. 319; *Scott v. Freeland*, 7 Smedes & M. 409, 45 Am. Dec. 310; *Tutt v. Boyer*, 51 Mo. 425; *Grayson v. Weddle*, 63 Mo. 523; *Den ex dem. Runyon v. Newark India Rubber Co.* 24 N. J. L. 467; *Bassett v. Shoemaker*, 46 N. J. Eq. 538, 20 Atl. 52; *Voorhees v. Bailey*, 59 N. J. Eq. 292, 44 Atl. 657; *Mulford v. Bowen*, 9 N. J. Eq. 797; *Culver v. Culver*, 11 N. J. Eq. 215; *Smith v. Drake*, 23 N. J. Eq. 302; *Lovell v. Briggs*, 2 N. H.

221; *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316; *Roulston v. Roulston*, 64 N. Y. 652; *People v. Open Bd. of Stockholders Bldg. Co.* 92 N. Y. 98; *Schoole v. Schoole*, 101 N. Y. 172, 4 N. E. 334; *Harrington v. Erie County Sav. Bank*, 101 N. Y. 257, 4 N. E. 346; *Munson v. Syracuse, G. & C. R. Co.* 103 N. Y. 58, 8 N. E. 355; *Terrill v. Auchauer*, 14 Ohio St. 80; *Riddle v. Roll*, 24 Ohio St. 579; *Musselman v. Eshleman*, 10 Pa. 394, 51 Am. Dec. 493; *Pennock's Appeal*, 14 Pa. 446, 53 Am. Dec. 561; *Bruch v. Lantz*, 2 Rawle, 392, 21 Am. Dec. 458; *M'Clure v. Miller*, Bail. Eq. 107, 21 Am. Dec. 522; *Tomlinson v. Detestatus*, 3 N. C. (2 Hayw.) 284; *Stallings v. Foreman*, 2 Hill. Eq. 405; *Erskine v. De La Baum*, 3 Tex. 406, 49 Am. Dec. 751; *Dodd v. Templeman*, 76 Tex. 57, 13 S. W. 187; *Buckles v. Lafferty*, 2 Rob. (Va.) 292, 40 Am. Dec. 752; *Bailey v. Robinson*, 1 Gratt. 4, 42 Am. Dec. 540; *Melms v. Pabst Brewing Co.* 93 Wis. 153, 66 N. W. 518; *Gibson v. Gibson*, 102 Wis. 501, 78 N. W. 917; *Michoud v. Girod*, 4 How. 503-555, 11 L. ed. 1076-1099; *Stephen v. Beall*, 22 Wall. 340, 22 L. ed. 788; *Hoyt v. Latham*, 143 U. S. 553, 36 L. ed. 259, 12 Sup. Ct. Rep. 568; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418.

Messrs. Redden & Kramer, for defendant in error:

It is absolutely necessary for the protection of minors that the guardians be required in all respects to comply with both the letter and spirit of the law before they can dispose of the property of the minors.

9 Am. & Eng. Enc. Law, p. 127; *Stilwell v. Svarthout*, 81 N. Y. 109.

A sale made by a guardian of the property of a ward, by and under which the guardian becomes, directly or indirectly, the beneficiary, or is interested, is absolutely void.

Michoud v. Girod, 4 How. 503-555, 11 L. ed. 1076-1099; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Davous v. Fanning*, 2 Johns. Ch. 252; 2 Freeman, Executions, § 292; *Hamblin v. Warnecke*, 31 Tex. 92; *Morgan v. Wattles*, 69 Ind. 263; *Howell v. Tyler*, 91 N. C. 209; *Scott v. Gorton*, 14 La. Ann. 111, 33 Am. Dec. 576; *Rome Land Co. v. Eastman*, 80 Ga. 690, 6 S. E. 586; *Riddle v. Roll*, 24 Ohio St. 579; *Hoffman v. Harrington*, 28 Mich. 90; *Webb v. Branner*, 59 Kan. 195, 52 Pac. 429.

If there had never been any decision upon the above subject, and even if the law had been otherwise prior to the adoption of our statute, the latter is so plain in its language that it needs neither interpretation nor construction, for it in unmistakable language prohibits guardians from purchasing, either directly or indirectly, the property of their wards.

2 Webb, Stat. 1897, § 132, p. 538; *Hampton v. Hampton*, 9 Tex. Civ. App. 497, 29 S. W. 423; *Hoffman v. Harrington*, 28 Mich. 90; *Forbes v. Halsey*, 26 N. Y. 63.

The wife is interested in the real estate of her husband.

Busenbark v. Busenbark, 33 Kan. 577, 7 57 L. R. A.

Pac. 245; *Munger v. Baldridge*, 41 Kan. 243, 21 Pac. 159; *Overman v. Hathaway*, 29 Kan. 437; *Warner v. Broquet*, 54 Kan. 650, 39 Pac. 228; *Union P. R. Co. v. Barnard, & L. Mfg. Co.* 1 Kan. App. 28, 41 Pac. 201; *Green v. Hugo*, 81 Tex. 452, 17 S. W. 79; *Riddle v. Roll*, 24 Ohio St. 572; *Hampton v. Hampton*, 9 Tex. Civ. App. 497, 29 S. W. 423; *Rome Land Co. v. Eastman*, 80 Ga. 693, 6 S. E. 586; *Hoffman v. Harrington*, 28 Mich. 90; *Davous v. Fanning*, 2 Johns. Ch. 252; *Bassett v. Shoemaker*, 46 N. J. Eq. 538, 20 Atl. 52; *Scott v. Gorton*, 14 La. 115, 33 Am. Dec. 578.

Mr. Frazier was bound to take notice of what his title papers showed, and if they showed that Permilley and Carl Scheel were husband and wife, or if they gave notice of facts which would put a reasonably prudent man upon inquiry that would lead to such knowledge, then he was bound to take notice of the illegality of the sale, and the suit would lie against him the same as it would against the husband, who bought it at guardian's sale.

Taylor v. Mitchell, 58 Kan. 194, 48 Pac. 859; *Knowles v. Williams*, 58 Kan. 221, 48 Pac. 856; *Green v. Ugo*, 81 Tex. 452, 17 S. W. 79; *Hamblin v. Warnecke*, 31 Tex. 93; *Caldwell v. Walters*, 18 Pa. 85, 55 Am. Dec. 592; *Hampton v. Hampton*, 9 Tex. Civ. App. 497, 29 S. W. 423; *Hoffman v. Harrington*, 28 Mich. 90; *Higginbotham v. Thomas*, 9 Kan. 328; *Valle v. Fleming*, 19 Mo. 454, 61 Am. Dec. 566; *Carder v. Culbertson*, 100 Mo. 271, 13 S. W. 88; *Campbell v. Knights*, 26 Me. 224, 45 Am. Dec. 107; *Capital Bank v. Huntoon*, 35 Kan. 592, 11 Pac. 369; *De Jarnette v. Verner*, 40 Kan. 230, 19 Pac. 666; *Houbert v. Heyle*, 47 Kan. 64, 27 Pac. 116; *Watts v. Cook*, 24 Kan. 278; *Winter v. Truax*, 87 Mich. 324, 49 N. W. 605; *McKay v. Williams*, 67 Mich. 547, 35 N. W. 159.

A minor may recover lands unlawfully sold by his guardian without returning the purchase money or consideration.

Chandler v. Simmons, 97 Mass. 514, 93 Am. Dec. 117.

Every administrator or guardian, when he reports a sale of real estate, is required to make an affidavit that "he did not, directly or indirectly, purchase such real estate, or any part thereof, or any interest therein."

Webb v. Branner, 59 Kan. 190, 52 Pac. 429; *McKay v. Williams*, 67 Mich. 547, 35 N. W. 159; *Winter v. Truax*, 87 Mich. 324, 49 N. W. 604; *Den ex dem. Obert v. Hamel*, 18 N. J. L. 83.

Ejectment is equitable as well as legal; all rights to the property can be adjudicated, and all relief that a person is entitled to in connection with the property can be adjusted.

Atchison, T. & S. F. R. Co. v. Pracht, 30 Kan. 71, 1 Pac. 319.

If a disaffirmance on the part of the plaintiff in this case was necessary, the bringing of the suit by her amounted to such

disaffirmance, and was all that any court would require at her hands.

Litchfield v. Cudworth, 15 Pick. 23.

Dexter, Ch. J., delivered the opinion of the court:

This was an action of ejectment to recover land which had descended to a minor on the death of her ancestor, but which had been wrongfully sold and conveyed by the minor's guardian. Serena J. Jeakins, the owner of the land, died intestate, leaving as her heirs a husband and children. One of the latter was Clara A. Jeakins, a minor. The others were adults. Mrs. Permilly Scheel was appointed guardian of the property of the minor, and thereafter maintained the ward at her expense. She purchased the interests of the adult heirs in the land, taking conveyances therefor in her own name. She procured from the probate court an order to sell the minor's interest in payment of the cost of her maintenance. She sold this interest at private sale to her husband, Carl Scheel. The sale was confirmed and guardian's deed approved. Some claims of fraud in making the sale and of lack of full consideration for the land are made by counsel, but we do not take a view of the case which requires us to advert to them. We shall treat the sale as made on fair consideration, and free from fraud in fact. About three years after the guardian's sale, Mrs. Scheel and her husband sold the entire tract to N. F. Frazier. The record of proceedings in the probate court did not disclose the relationship existing at the time of the guardian's sale between Permilly Scheel, the guardian, and Carl Scheel the purchaser, but Frazier knew they were then husband and wife. Besides, the deed he received from them recited their relationship, and the identity of names in that deed with those of the grantor and grantee in the guardian's deed imparted a notice the equivalent of knowledge. 15 Am. & Eng. Enc. Law, 2d ed. subject *Identity*. A purchaser of land is always chargeable with the knowledge of whatever facts are suggested by the recitals in his title papers. *Knowles v. Williams*, 58 Kan. 221, 48 Pac. 856. Clara A. Jeakins brought ejectment against Frazier to recover her undivided interest in the land. Although the cause of action stated was not joined with one for partition, the defendant made no objection in the court below on the ground of the irreclaimability of undivided interests by cotenants. On the argument of the case in this court counsel for Frazier disclaimed a desire to raise the question; therefore we are not concerned with any doubts which may exist as to the right to maintain the action. Certain it is that objections to its maintenance, if any can be properly made, do not go to the jurisdiction of this court. Judgment went for plaintiff in the court below, and the defendant has prosecuted error.

The sole question in the case relates to the validity of the guardian's sale and deed of the land of her ward made to her husband, made, as before stated, on fair con-

sideration, and free from actual fraud. Are they valid? If not, are they of the class denominated "void," and therefore subject to collateral attack? Our judgment is they are void, and, their nullity being known to Frazier, the purchaser, no title passed to him, and therefore the collateral action will lie. Nothing in the law of fiduciary trusts is better settled than that the trustee shall not be allowed to advantage himself in dealings with the trust estate. He shall not be allowed to serve himself under the pretense of serving his *cestui que trust*. The most usual way in which evasions of this salutary rule are attempted is in purchases of the trust estate by or in the interest of the trustee. That such purchases shall not be allowed the realization of their purpose is the universal holding of the courts. A citation to the multitudinous decisions would encumber an opinion more than it would elucidate the rule. A large number of the cases are collected in the notes to *Tyler v. Herring* (Miss.) 19 Am. St. Rep. 263; *Tyler v. Sanborn*, 128 Ill. 136, 4 L. R. A. 218, 21 N. E. 193; *Wilson v. Brookshire*, 126 Ind. 497, 9 L. R. A. 792, 25 N. E. 131, and this court, in *Webb v. Branner*, 59 Kan. 190, 52 Pac. 429, recently added another to the list. Nor, in such cases, does the fact that the sale and purchase were bona fide, and on full consideration, avail to constitute an exception to the rule. That was distinctly so declared in *Webb v. Branner*, 59 Kan. 190, 52 Pac. 429, in which it was said: "It was shown that a fair price was obtained for the lot, but, there being a manifest conflict between the duties of the trustee and his personal interests, the courts, for the purpose of removing all opportunity for fraud, generally hold such transfers to be void, whether they appear to be fair or not." The above-quoted remarks imply that there may be, perhaps, exceptions to the rule; but we know of none. In fact, the main rule that a trustee may not profit himself out of the trust estate is no better settled than the subsidiary one that lack of fraud in the trustee's dealings will not validate the transaction. The fiduciary relation of trustee and *cestui que trust* is one which does not call so much for rules to redress accomplished wrong as for rules to prevent its accomplishment. The one in question, therefore, is not intended to be merely remedial of wrong actually committed, but rather to be preventive or deterrent in effect. The opportunities which are open to an unfaithful trustee to advantage himself out of the trust estate are so many and so tempting and the condition of the beneficiary in the trust ordinarily so helpless and confiding, that the law gives warning in advance against all transactions out of which it is possible for the former to make gain at the expense of the latter. Hence, as was tersely and wisely said by Chief Justice Beasley in *Staats v. Bergen*, 17 N. J. Eq. 554, "so jealous is the law upon this point, that a trustee may not put himself in a position in which to be honest must be a strain upon him." Do the foregoing consid-

erations apply to a sale by a guardian of the ward's land to the guardian's husband or wife, as the case may be? We have no hesitation in affirming that they do. It is true that the common-law fiction of the legal identity of the husband and wife, and the very nearly complete merger of the latter in the former, does not now have recognition. In this state, as allowed by statute, the wife may contract with her husband. They may own separate estates, free from any present claim of interest by one in the property of the other,—that is, as against the other; but it is not true that as to their respective possessions they are strangers in such a sense as to take a trustee's sale by one to the other from out the operation of the rule in question. Upon the death of either of them one half of his or her property descends under the statute to the survivor, and under the statute neither one, without the other's consent, can, by will, devise more than one half his or her property. It is true the interest of the one in the property of the other is contingent and uncertain, and dependent on survivorship. It is true that the interest of the one in the land of the other is not of the character of any of the estates known to the common law, but it nevertheless possesses the elements of property. This was distinctly so ruled in *Busenbark v. Busenbark*, 33 Kan. 572, 7 Pac. 245, and on the strength of the quality of property attaching to the inchoate interest of a wife in her husband's land she was allowed in that case to maintain an action to prevent its fraudulent alienation. However, over and beyond that property interest which husband and wife have in each other's estate, and which possesses the element of pecuniary value, there is a larger consideration. It was well expressed by counsel for defendant in error, who said: "The affection existing between husband and wife; the marital relation, which in a sense makes them one; the implicit confidence which each must have in the other; their natural desire for each other's material prosperity; the relation which enables one to derive and enjoy personal comfort and pleasure from the property of the other, independent of the question of direct or indirect ownership in such property,—are all so well recognized in law and understood by all civilized people that it would be arguing against the experience of centuries to contend that one would not be interested in the welfare of the other, and do all that could be done to enhance the pecuniary interests of the other. Therefore, by reason of the relation, no guardian could be impartial in the sale to husband or wife of the property of the ward." In *Tyler v. Nandorn*, 128 Ill. 136, 4 L. R. A. 218, 21 N. E. 193, the supreme court of Illinois, after adverting to the fact that under the statutes of their state husband and wife may contract with each other, that the wife may own property separate from the husband, but that each has contingent interests in the other's property dependent on survivorship (being in such respects substantially like

our statute), and after holding that such mutuality of interest forbade one to sell trust property to the other, further remarked: "There is, moreover, apart from this pecuniary interest, an intimacy of relation and affection between husband and wife, and of mutual influence of the one upon the other for their common welfare and happiness, that is absolutely inconsistent with the idea that the husband can occupy a disinterested position as between his wife and a stranger in a business transaction. He may, by reason of his great integrity, be just in such a transaction, but, unless his marital relations be perverted, he cannot feel disinterested; and it is precisely because of this feeling of interest that the law forbids that he shall act for himself in a transaction with his principal. It is believed to be within general observation and experience that he who will violate a trust for his own pecuniary profit will not hesitate to do it, under like circumstances, for the pecuniary profit of his wife. In our opinion, the policy of the law equally prohibits the wife of the agent, as it does the agent himself, from taking title to the property which is the subject of his agency, without the knowledge and express consent of the principal." One of the earliest cases on the particular question was *Davoue v. Fanning*, 2 Johns. Ch. 252. In that case it appeared that an executor had sold the testator's property to a person to be held by him in trust for the executor's wife. Chancellor Kent held that the sale could not stand, because, as he said, "whether a trustee buys in for himself or his wife, the temptation to abuse is nearly the same." In *Dundas's Appeal*, 64 Pa. 325, it appeared that an executor had sold part of the testator's estate to his wife. The court said: "We cannot doubt that a sale by a trustee to his own wife would be set aside on the application of the *cestui que trust*, not on the ground of coverture, but of her relationship to the trustee. It would be evidence of unfairness quite as much as if the sale were made to the trustee himself, and falls within the spirit of the rule which forbids his own purchase." However, in that case the sale was allowed to stand, because the court, by previous order, had permitted the wife to become a bidder. The making of such precedent order was admitted to be within the authority of the court, but it was said: "The power is a delicate one, and should always be cautiously exercised, and the sale itself watched with jealousy." In *Bassett v. Shoemaker*, 46 N. J. Eq. 538, 20 Atl. 52, it appeared that an executor had sold to his wife a farm of the testator. It was held that the sale should be set aside as of course, on the application of a *cestui que trust*. Among other things it was said: "The exclusion of the wife as a purchaser, where the husband sells as a trustee, is not so much for the reason that he may subsequently become entitled to some interest in her lands as on account of the unity which exists between them in the marriage relation. The case falls clearly within the spirit of the principle which excludes

the husband himself." There are other cases the decisions of which were more or less influenced by the considerations expressed in the foregoing quotations. See *Riddle v. Roll*, 24 Ohio St. 572; *Rome Land Co. v. Eastman*, 80 Ga. 683, 6 S. E. 586; *Bachelor v. Korb*, 58 Neb. 122, 78 N. W. 485. Admit the separate legal status of husband and wife to be as absolute and clearly differentiated as their physical lives, there is yet, as a matter of fact, an identity of interests and affections between them which utterly precludes the idea of a trustee's sale by one to the other being different in effect than a sale by the trustee to himself. To say that a husband acting in a fiduciary capacity in effecting a sale would be disposed, as against his wife, to diligence of effort in finding someone who would pay more for the trust estate than she would, is to fly in the face of nature itself, and deny the experience of the ages. Nor can we conceive of any reason why it might be different in the case of a wife were she the trustee negotiating the sale. To the rule declared by us there is but one opposing decision, so far as we are aware. It is *Crawford v. Gray*, 131 Ind. 53, 30 N. E. 895. The sale in question in that case was made at public auction to the wife as the highest bidder, differing in that respect from the sale under consideration by us. The opinion fails to cite any cases in its support, and, if it can be considered as applicable to private sales by trustees, we have no hesitation in declaring it unsound in principle, and opposed to all the authorities. There may be exceptional circumstances justifying sales by trustees to their wives or husbands, or even to the trustee himself. It is said that the sale under consideration was one of the exceptional character. The wife owned all the other interests in the land, and therefore could effect a better sale to her husband as a cotenant to be, than to a stranger. The claim is a reasonable one, but for such cases the law has a practice which must be followed. It is to apply to the court controlling the sale for leave to purchase. That was ruled in *Dundas's Appeal*, 64 Pa. 325, and *Bassett v. Shoemaker*, 46 N. J. Eq. 538, 20 Atl. 52. In *Michoud v. Girod*, 4 How. 503, 557, 11 L. ed. 1076, 1100,—one of the leading authorities on the subject of purchases by trustees at their own sales,—the Supreme Court of the United States, considering the proper practice in such cases, ruled that "it is that, when a trustee for one not *sui juris* sees that it is absolutely necessary that the estate must be sold, and he is ready to give more for it than anyone else, that a bill should be filed, and he should apply to the court by motion to let him be a purchaser. This is the only way he can protect himself. There are cases in which the court will permit it."

It is said, however, that the confirmation of the sale by the probate court was a judicial approval of it, which put it in the category of *res judicata*, and hence beyond collateral attack. The law in this state does not give such an effect to a mere order of

sale confirmation. The act concerning guardians and wards (Gen. Stat. 1899, chap. 46, § 18) appropriates as the rules governing guardians' sales those prescribed by the statute relating to sales made by executors and administrators. This latter statute (Gen. Stat. 1899, chap. 37, § 132) reads as follows: "And the court, after having carefully examined such return [the return of sale], and being satisfied that the sale has in all respects been legally made, shall confirm the sale, and order the executor or administrator to make a deed to the purchaser." The above-quoted statute does not differ in any substantial particular from the statute in relation to the confirmation of sales by the district court as such statute existed prior to 1893. The Civil Code (§ 458) provided that, "if the court . . . shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has, in all respects, been made in conformity to the provisions of this article, the court shall direct the clerk to make an entry on the journal that the court is satisfied with the legality of such sale, and an order that the officer make to the purchaser a deed for such lands and tenements." Whatever may be the law in other states, in this one it is settled that under the statute last quoted the order of the court confirming the sale becomes *res judicata* as to irregularities only, and cures nothing of substance; certainly not unless the matter of substance is exhibited on the face of the sale proceeding itself. This has been the uniform holding since *Koehler v. Ball*, 2 Kan. 161, 83 Am. Dec. 451. In *De Jarnette v. Verner*, 40 Kan. 224, 19 Pac. 666, it was ruled that, "where a sheriff's sale of real estate has been made, and the owner thereof moves to set aside the sale for the reason that the property was not sold for two thirds of its appraised value, and for other reasons, and the motion is overruled by the court, and the sale confirmed, he does not thereby waive his right to afterward treat the sale as void, or to sue the sheriff for an injury which he may have sustained by reason of such sale. By being a party to a motion to set aside or confirm a sheriff's sale, which motion is decided against such party, he does not thereby and for the future waive or cure anything of substance, but only irregularities."

We come now to the final question, Was the sale void in the sense that it was subject to collateral attack? Our judgment is that it was, and, inasmuch as its nullity was known to Frazier, the purchaser, no title passed to him, and therefore the collateral action will lie. We do not understand that courts, by their use of the term "void," always mean that utter negativeness which is the equivalent of nonexistence, but they more often mean that which, relatively to persons, circumstances, conditions, or forms of action, may be treated as though it were nonexistent. In this latter sense there is little distinction between it and the word "voidable." Really, as often used in the law, there is an interchangeability of mean-

ing between the two words. This is well pointed out in *Ewell v. Daggs*, 108 U. S. 148, 27 L. ed. 684, 2 Sup. Ct. Rep. 408; *Pearsoll v. Chapin*, 44 Pa. 9; *Kearney v. Vaughan*, 50 Mo. 287; *Brown v. Brown*, 50 N. H. 542. Therefore, in order to characterize the guardian's sale and deed as "void" in the sense in which that word is most frequently used in the law, it is not necessary to regard them as inexistent. They have a form of existence, and under certain circumstances they may be allowed or may acquire the substance of existence. The plaintiff in this case might have ratified them by express act or deed. She might have estopped herself by some course of conduct to question their validity, or she might have allowed lapse of time to bar her right to recover on the score of their invalidity. But until by ratification, estoppel, or limitation she has given effect to them, she is privileged to treat them as void and of no effect. As to her they are void and of no effect, because they failed to pass the title to her land. In order to characterize an act or transaction as void, it is not necessary that it should be a nullity as to everybody, and for all time, and under all circumstances. If the act or transaction failed to deprive interested persons of their rights or titles, failed to confer them on someone else, the act of transaction is void as to such persons. If the act or transaction requires ratification, estoppel, or limitation to transfer the right or title, it is void until the ratification has been made, the estoppel has occurred, or the time has elapsed; and even then the right or title does not pass by virtue of the original act or transaction, but passes by virtue of the ratification, or is founded on the estoppel, or is set at rest by the lapse of time. The authorities seem to us strong and convincing that ejectment, although a collateral proceeding, will lie to recover a title claimed under a trustee's sale to himself, or in effect to himself, as in this case. In *Den ex dem. Overt v. Hammel*, 18 N. J. L. 73, it appeared that an administrator had masked a purchase by himself under the form of a sale and conveyance to another. The transaction was attacked through ejectment by an heir of the estate. The court ruled that the sale was fraudulent in law, and therefore void, and might be shown to be such in a law action without compelling the heir to go into equity. In *McKay v. Williams*, 67 Mich. 547, 35 N. W. 159, it appeared that an attorney in fact had executed a deed to the land of his principal, and on the same day took back from the grantee a deed to himself, and a few weeks thereafter conveyed the land to another. It was held that the deed by the attorney and the deed back to him were prima facie fraudulent and void on their face, that they did not show that title had passed, that they imparted notice to the subsequent purchaser, and that title could be recovered in ejectment. Many of the cases are reviewed in the opinion. In *Winter v. Truax*, 87 Mich. 324, 49 N. W. 604, the same holding was made in a case identical in all its facts with *McKay v. Wil-*

liams, except that the sale was made by a guardian, instead of an attorney in fact. Now, in this case, as hereinbefore shown, the deed under which Frazier claimed showed on its face the relationship existing between Scheel the guardian and Scheel the purchaser at her sale; that is, it contained a recital sufficient to charge him with notice. This was sufficient.

The judgment of the court below is affirmed.

Johnston, Smith, Greene, Ellis, and Pollock, JJ., concur.

Cunningham, J., dissenting:

I would be false to my convictions if I failed to announce my dissent to the conclusion reached by the majority of the court in this case. It is admitted that the sale by the guardian to her husband was free from actual fraud, so that the question presented is, Can a sale be made for a full consideration, in the best of faith, by a husband or wife acting in a fiduciary capacity, to the consort? My brethren say not, and that such sale is not only voidable, but absolutely void, and can be avoided by anyone in interest at any time without tendering or paying back the consideration received. I do not find ground for that conclusion in reason or authority. I find no fault with the proposition that an agent or trustee cannot sell to himself. Such a sale is void; is no sale; for one cannot sell to himself. The same person cannot be seller and purchaser at the same time. But that principle finds no application to the facts at bar, although the opinion of the court seems to be based largely upon it. Nothing is more strongly fixed in Kansas law, both by statutory provision and judicial decision, than that, so far as property rights and interests are concerned, husband and wife are as distinct as though they were strangers. The statute provides that a married woman may deal with her property, real or personal, and enter into any contract with relation to the same, in the same manner, and to the same extent, and with like effect, as a married man may in relation to such property. While in the marital relation, her property remains to her sole and separate use to the same extent as though she were not married. She may sue, and is liable to be sued, in the same manner as if she were unmarried; may carry on any trade or business, perform any labor or services, on her sole account. The earnings arising from such trade, business, labor, or services shall be her sole and separate property, and may be exclusively used and invested by her in her own name. She may deal with her husband, with respect to her property, exactly as though she were a stranger to him; and in all these respects our common everyday observation gives us to know that these privileges are frequently exercised by and between those occupying the marital relation. Although our ancestors feared that great calamities might come were these things to exist, thus far we see no indication of the heavens falling or the social fabric collap-

ing because of them. This court in many cases has sustained to the fullest the rights of a married woman in these respects. What logic is there in the claim that the wife may legally sell and convey her own property to her husband while acting herself, and at the same time condemn as utterly void and of no force whatever a like conveyance made by her in the best of faith, and for a full consideration, when she is acting in a fiduciary capacity for another; and especially how out of harmony with logic is such conclusion when we couple with it the thought that such sale has passed the scrutiny and received the commendation and approval of a court vested with full jurisdiction to supervise and order such sale? I am free to say, in my opinion, such a sale is perfectly valid, and is not even voidable. The only case to which we are cited of a similar nature to the one at bar is *Crawford v. Gray*, 131 Ind. 53, 30 N. E. 885, which was a case where a wife purchased at an executor's sale conducted by her husband and another as executors. No fraud or collusion was there charged, and it was there urged, as here, that the wife could not become the purchaser because of considerations growing out of her relation to the executor. The court, on pages 54, 55, 131 Ind., and page 885, 30 N. E., in part said: "Under the law of this state as it is now and was at the time of this sale by the executors and purchase by the appellee, the wife had quite as distinct and individual an existence relating to her right to contract for and purchase real estate and take title in her own name, and hold, use, and enjoy the same, as did her husband. She has the same right to invest her own money in the purchase of real estate as her husband, and regardless of the will of her husband. When once the title is vested in her, true, she cannot convey or encumber the same except by deed in which her husband joins; but there are no restrictions on her right to purchase and take title in herself. This she can do without his aid or consent, and he has no legal power to restrain or prevent her from doing so. At the executor's sale the land was offered at public auction. In offering the land for sale the executors were acting under and in pursuance of an order of court. All who desired had the right to bid and become purchasers. The wife of one of the executors having the right to use her individual means as she willed, she had the same right to bid and to become a purchaser in good faith as did any other individual, and to authorize an agent to act for and bid the land off for her, and take title in her own name. Before the purchase the wife had no interest in the land. The husband was acting in a fiduciary capacity. It was not necessary that the wife join him in a deed to pass title. The title was not even in the husband. It was the title which the testator held at his death that the executors conveyed to the wife. There is no fraud charged upon the part of either the appellee or the executors, or any collusion between the appellee and her husband." In *Tyler v. Sanborn*, 128 Ill. 136, 4 L. R. A. 218, 21

N. E. 193, cited in the majority opinion, the court held that a sale like the one herein described was voidable, not wholly void, to which conclusion the Chief Justice and Justice Bailey dissented, and from this dissenting opinion I quote (pages 146, 147, 128 Ill., and page 196, 21 N. E.): "It is assumed in the opinion of the majority of the court, and, I think, correctly, that no fraud in fact is shown, the decision being based wholly upon the assumption that there was such fraud in law as must necessarily invalidate the transaction. I make no question as to the soundness of the doctrine that an agent employed by another to sell his property cannot, either directly or indirectly, become the purchaser, and that, if he does so, his principal may interpose, and avoid the sale. But that is not this case. The purchaser here was not the agent, but another person, who was *sui juris*, and capable of acquiring, owning, and controlling her separate property wholly independent of any control or interference on the part of her husband. The opinion treats the purchase by the wife as being the same in legal effect as though made by the husband. This doubtless would be the case if the wife were still laboring under the disabilities imposed by the rules of the common law. But our statute has so far emancipated her from those disabilities as to place her in all essential respects in the same legal position, so far as property rights are concerned, as though she were a *feme sole*. Her separate estate is no longer subject to either the rights or the control which, at common law, resulted to the husband from the marital relation. She now has the same control over her estate that her husband has over his. She has the same legal power to acquire property, to buy and sell, or engage in business, she would have if she were unmarried. In respect to property rights and business transaction she is, in contemplation of law, a stranger to her husband, and may act independently of him, or assume a position adverse to his."

But perhaps I do violence to the argument contained in the majority opinion in assuming that the conclusion reached grows of necessity out of the marital relation. I am not sure but the argument is that it grows out of the close personal interests based upon this relation, as that seems to be the idea running through the quotation from the brief of counsel for the defendant in error, and also the quotation from *Tyler v. Sanborn*, 128 Ill. 136, 4 L. R. A. 218, 21 N. E. 193. This consideration would be a very potent one if the question were one of actual fraud. The relation of husband and wife is, indeed, or should be, one of the closest and most intimate known to humanity; and it generally is so, but not always. It is not infrequent that the relation of parent and child, brother and brother, or even friend and friend, is more intimate and confidential, especially in relation to property, than that of husband and wife. How can we say, as a matter of law, that a sale in the one case would be good, and in the other absolutely void? My brethren, by this decision, say

that, no matter how adverse the interests of husband and wife actually are, how antagonistic and at arm's length their dealings may be, all this cannot be considered when one acting as a trustee comes to sell the trust estate to the other; that the sole fact that the relation of husband and wife exists between them makes the transaction, as a matter of law, fraudulent and void, which, as a matter of fact, is not fraudulent, but for the highest interest of the *cestui que trust*. Could legal absurdity be carried farther? But, granting that a sale made by husband or wife in a fiduciary relation to the consort is voidable, I most strenuously insist that such sale, having received the approbation of a court which had full jurisdiction of the parties and the subject-matter, is not so absolutely void as to be disregarded on a collateral attack. It is granted in the majority opinion that an attack by an action in ejectment is a collateral one. In this case we find that the guardian, duly appointed by the probate court, filed a petition in all respects regular in that court; received its proper legal order to sell the minor's interest in the real estate involved; such real estate was sold for a full consideration, without any fraud; such sale was reported to the court, and the court, after due consideration, presumably knowing all the facts relative thereto, confirmed such sale, and directed the issuance and delivery of a deed to the purchaser. In doing so it at no point exceeded its jurisdiction. It, following the supreme court of Indiana, held that the sale was good. Admit in this it was wrong; that it should have held, with the supreme court of Illinois, that it was voidable; or admit, following this court, now for the first time in this country announcing that such sale was void, the probate court adjudged that it was good,—surely this adjudication was not void, even though the sale was. If the court was wrong, it was but an error of law, and we revolutionize all of our ideas concerning the inviolability of the orders and judgments of courts of competent jurisdiction when we say such an order may be disregarded upon a collateral attack. The statute (§ 133 of the executor's and administrator's act, Gen. Stat. 1901, § 2938) says of a deed executed as was the one in this case, it shall "be received in all courts as presumptive evidence that the executor or administrator in all respects observed the directions and complied with the requisitions of the law, and shall vest the title in the purchaser in like manner as if conveyed by the deceased in his lifetime." Is it possible that this statute goes for naught, and in a collateral attack all errors committed

57 L. R. A.

by the court in ordering such deed may be brought to light? I confess myself unable to say where such a rule will lead us. The authorities opposing such rule are so abundant that I shall not cite them. Let us illustrate: A guardian, being ordered to dispose of a minor's property for his sustenance, education, or other proper purpose, makes a sale to the husband or wife for a full consideration. The consideration is paid and the sale is confirmed. Everyone has acted in the best of faith, and in the honest belief that the law has been in all respects fully complied with. The money received by the guardian is expended for the purposes desired. Some years thereafter the ward brings an action in ejectment. The purchaser, without being recompensed in any manner for the money paid by him, is wholly deprived of his title,—as it will be remembered that the court in this case holds that such a sale is absolutely void, and, if so, no necessity for a tender or repayment exists as a prerequisite for recovery. I have searched the books in vain to find warrant or authority for such injustice. None of the cases cited in the majority opinion go to that extent. It is only where a trustee sells to himself—that is, where there is no sale—that this rule obtains. Take, for instance, the case of *Tyler v. Sanborn*, 128 Ill. 136, 4 L. R. A. 218, 21 N. E. 193, where an executor sold to his wife. Such sale was held to be voidable only, the court directing that the conveyance should be canceled upon repayment of the amount received by the executor, with interest thereon. In the case of *Davoue v. Fanning*, 2 Johns. Ch. 252, which is the leading case in this country, where the executor caused lands to be purchased for the benefit of his wife, such sale was ordered to be set aside upon condition that the consideration money be repaid. The same is true in the case of *Riddle v. Roll*, 24 Ohio St. 572. In the other cases cited where sales were held void the sale was made by the trustee to himself, or indirectly in his interest.

It is urged in this case that the form of the action is such that the setting aside of the sale cannot be conditioned upon an equitable adjustment of the price paid. If this is so, so much the worse for the plaintiff. It was she who selected the form of the action. Surely, the defendant ought not to be wronged because she selected such an action as would not permit him to be dealt with honestly. I do not believe the plaintiff ought to be permitted to recover the land and retain the price honestly paid for it.

Rehearing denied.

IOWA SUPREME COURT.

Sophia LAWRENCE
v.
Agnes NELSON, *Appt.*

(113 Iowa, 277.)

1. A court will not inquire into the validity of a divorce obtained by a man since deceased, for the mere purpose of satisfying a sentiment as to who is his widow.
2. For the purpose of determining the proper recipient of a pension due to the widow of a deceased person, the court will inquire into the validity of a divorce which he had obtained.
3. Adult heirs of a deceased person are not necessary parties to a proceeding by his former wife to contest the validity of a divorce which he had obtained from her, for the purpose of establishing her right to a pension as his widow.
4. Where the statute requires plain-

tiff's residence in the county for one year, in good faith, and not for the purpose of obtaining a divorce, to give jurisdiction of a divorce proceeding, the decree may be set aside after plaintiff's death if the record shows that the residence was not in good faith, but merely to obtain the divorce.

(*Decmer, J., dissents.*)

(February 6, 1901.)

APPEAL by defendant from a judgment of the District Court for Dallas County in favor of plaintiff in an action brought to set aside a decree granting a divorce. *Affirmed.*

The facts are stated in the opinion.

Messrs. Shortley & Harpel, for appellant:

In cases to set aside divorces, courts pro-

NOTE.—*Right to contest the validity of a divorce decree after the death of one or both of the parties.*

I. Introduction, 583.

II. Attack by surviving party.

a. In direct proceeding to set aside or vacate decree.

1. Appeal, 583.

2. Motion or petition filed in the original cause, 584.

3. Writ of error, 587.

4. New suit, 588.

b. In collateral proceeding, 593.

III. Attack by stranger to the decree.

a. In direct proceeding, 599.

b. In collateral proceeding, 600.

IV. Death of one party pending appeal, 603.

V. Conclusion, 605.

I. Introduction.

The question of the right to contest the validity of a divorce decree after the death of one of the parties is one which has been little discussed in the text-books, but three or four cases being usually cited, and one of those cited most frequently—that of *Bomsta v. Johnson*, 38 Minn. 230, 36 N. W. 341—being scarcely more than a *dictum*. The authorities on the subject are not numerous, and a large number of the cases here treated do not pass directly upon the effect of the death upon the right to contest the validity of the decree, that point not being raised in the contentions of counsel and apparently not being considered as of importance; but, since the courts do pass upon the question of the validity of the divorce, and the facts show that one or both of the parties were dead, these cases are included as impliedly sustaining the right to reopen a divorce decree notwithstanding the death of one or both of the parties. Cases as to the conclusiveness of a decree pronouncing a marriage null and void from the beginning, though not strictly within the scope of the note, are also included, the principle governing the right to contest a decree in such a case being the same as if it were one of divorce.

In a few cases decrees in suits for facilitation of marriage have been questioned after the death of one of the parties, but these have not been included, as the doctrine in regard to the conclusiveness of a decree in such a suit is somewhat different from that in regard to the conclusiveness of a decree of divorce or

annulment of marriage, since, in pronouncing against the marriage in a jactitation suit, the court does not hold positively that there is no marriage, but only that, "as far as yet appears," there is no marriage. In speaking of such decrees, Chief Justice DeGrey, in the famous case of the *Duchess of Kingston*, 20 How. St. Tr. 355, in which the validity of a decree in a jactitation suit was attacked, said that such a suit ranks as a cause of defamation only, and not as a matrimonial cause, except when the defendant pleads a marriage; and that, even when a marriage is pleaded, the sentence has only a negative and qualified effect, *viz.*, that the party has failed in his proof, and that the libellant is free from all matrimonial contract "as far as yet appears," leaving it open to new proofs of the same marriage in the same cause, or to any proofs of that or any other marriage in another cause; and that, if such a sentence is no bar to a new suit in the same court, it cannot conclude a court in which the decree is offered in evidence from going into new proofs to make out that or any other marriage. He therefore stated that, admitting such a sentence in its fullest extent and import, it only proves that at the time of the jactitation suit it "did not yet appear" that the parties were married, and not that they were not married at all. None of these cases of attacks on decrees in jactitation suits, so far as found, passes directly upon the effect of the death of one of the parties on the right to contest the decree. The question has usually been as to the right to attack the decree in the temporal courts.

II. Attack by surviving party.

a. In direct proceeding to set aside or vacate decree.

1. Appeal.

A bill of divorce having been brought by a husband, and a decree rendered in his favor, shortly after which he died leaving a considerable estate, an appeal by the defendant, taken after his death but within the period allowed by statute for appeals in chancery, was held, in *Shafer v. Shafer*, 30 Mich. 163, to be authorized. There was a motion to dismiss the appeal on the ground that it was not authorized, though the grounds of objection are not stated, but the court held that the statute regulating chancery appeals was broad enough to

ceed with great caution and with anxious care for the intervening rights of strangers.

1 Black, Judgm. § 320; *Parish v. Parish*, 9 Ohio St. 534, 75 Am. Dec. 483; *Burgess v. Lovengood*, 55 N. C. (2 Jones, Eq.) 457; 11 Enc. Pl. & Pr. p. 1184.

A controlling reason why the court should not now set aside the decree is the fact that the husband is dead and his legal representatives are not made parties.

There is no property right whatever involved, directly or indirectly. It is only claimed that a pension from the United States is involved; but clearly that is not derived from the husband; nor is it property within this state.

U. S. Rev. Stat. 2d ed. 1878, §§ 4702 *et seq.*

If the decree in controversy is void for

cover an appeal in a cause thus circumstanced, although before the appeal could be brought to a hearing, or any further proceedings had in the cause, proper steps must be taken to bring in as parties the representatives of the deceased and his heirs at law.

But in *Barney v. Barney*, 14 Iowa, 189, it was held that where complainant in a divorce suit died after a decree in her favor, but before the expiration of the time allowed for an appeal, the action ended with her death, and could not be revived or continued against her representatives. The statute under which the right to an appeal was claimed provided that no action should abate by the death, marriage, or disability of either party, if from the nature of the case the cause of action could survive or continue, and the court held that from the nature of the case, in so far as the proceeding related to the divorce, the cause was ended by the death of the complainant, and was one which could not survive or continue; that it could not be revived because there was nothing to survive, death itself having settled the question of separation beyond all controversy. The decree also provided that the wife should have the custody of the children and the control and enjoyment of all rights of property which she had before marriage, or which had accrued from her separate estate, free from all interference or control of the defendant; but the court held that that portion of the decree in regard to the children ceased to have any effect upon the death of the mother, and that the husband stood in the same relation towards his children that he would have occupied had the decree never been made; and that, as it did not appear from the record that the complainant in the divorce suit was possessed of any property, either real or personal, to which any right could survive, the whole cause must, under the statute, abate by the death of the wife, as there was nothing to survive. The court does not indicate what would have been its decision if the wife had possessed property in which the husband, except for the divorce, would have had an interest at her death.

As to the effect of the death of one party pending appeal, see *infra*, IV.

2. Motion or petition filed in the original cause.

A decree of divorce in favor of a husband was set aside on motion, in *Gambe v. Gambe*, 22 Pa. Co. Ct. 23, at the suit of the wife, because of lack of jurisdiction, although the petition to vacate the decree was filed more than thirty years after the divorce was granted and long after the husband's death. The court 57 L. R. A.

any reason, it can be disregarded by the pension department.

Neff v. Beauchamp, 74 Iowa, 92, 36 N. W. 905.

The right to apply for a pension is not a property right.

Where the husband is dead, and no property derived from or through him is affected, an application to set aside a decree of divorce will not be granted.

Moyer v. Koontz, 103 Wis. 22, 79 N. W. 50.

Messrs. White & Clark for appellee.

Ladd, J., delivered the opinion of the court:

Each party to this record is a single woman. This is inevitable, whatever the character of the decree of divorce. If val-

said: "This is certainly a novel proceeding at this time, the libellant having been dead for many years. The proof adduced in this rule clearly shows that this court had no jurisdiction, and therefore all its proceedings were void *ab initio*. . . . Where there is no jurisdiction there is no authority to pronounce judgment; consequently a judgment so entered is so but in form and semblance, and has no substance, force, or authority." The purpose of the petition in the present proceeding was to apply for a widow's pension from the United States government, the deceased having been a soldier in the Civil War, and the court held that, the decree of divorce having been procured through a fraud of the husband, it could see no good reason why the petitioner was not entitled to have it declared vacated.

So, in *Fidelity Ins. Co.'s Appeal*, 93 Pa. 242, it was held that a decree of divorce should be vacated for fraud in obtaining it, although the rule to vacate it was not filed until thirteen years after the decree was entered and until after the death of the party obtaining it, where the defendant in the divorce suit had no notice or knowledge of the divorce having been applied for or obtained, until after her husband's death. This case was said to be clear of certain elements which have embarrassed the consideration of others of a similar nature, since here there was no subsequent marriage, and the petitioner offered to release her interest in all property conveyed by her husband without her joining therein after the date of the divorce. It was therefore held that upon her filing in court an agreement to release all grantees of property conveyed by her husband during coverture and after the decree of divorce, without her joining, from all claims of dower, the decree would be vacated. Counsel for the defendant argued that there was no authority for setting aside a divorce decree after so great a lapse of time; that the application to set it aside resolved itself into a question of distribution of the deceased's estate after his death; and that it would be inequitable in such a litigation to take from his heirs and personal representatives an inheritance cast upon them by law solely to give it to a woman from whom he had been divorced, and who had, while her husband lived, acquiesced in the decree for over twelve years, and who did not present her petition to set the decree aside until nearly three months after his death. But the court found that the evidence proved that the wife had no notice of the divorce proceeding, and no knowledge thereof, until after her husband's death. See the same case in

id, it merely fixes the plaintiff's status as such a few years earlier than otherwise was accomplished by the death of Henry Lawrence. If invalid, setting it aside will not affect her status as an unmarried woman. And the court will not, for the mere purpose of satisfying a sentiment, inquire which is the widow of the deceased. But, where some property right hinges on the question, the past status of these parties may become the subject of judicial investigation. *Johnson v. Coleman*, 23 Wis. 452, 99 Am. Dec. 193; *Rawlins v. Rawlins*, 18 Fla. 345; *Bomsta v. Johnson*, 38 Minn. 230, 36 N. W. 341. See *Webster v. Webster*, 54 Iowa, 155, 6 N. W. 170; *Barney v. Barney*, 14 Iowa, 189. The deceased left no property subject to administration, but was a pensioner under the laws of the

United States, and had established his right to the bounty of the government under §§ 4692 and 4693 of the United States Revised Statutes, as we understand. Upon his death, as is conceded, his widow was entitled to a pension commencing from that time. See § 4702, and act of Congress approved June 7, 1888. This pension, though a mere bounty of the government, is as certain as the right to property while the particular statute authorizing it stands. The right to it depends upon the status of these parties immediately before the death of Henry Lawrence. Which was then his wife? Ordinarily this inquiry is solely for an appropriate department of the general government. But here is a decree, regular on its face, apparently foreclosing investigation,—an obstruction to the acquirement by plain-

lower court, reported as *Peterson v. Peterson*, 6 W. N. C. 449.

A decree of divorce fraudulently obtained by a man on *ex parte* proceedings was also vacated after his death on a rule filed by the wife, in *Smith v. Smith*, 3 Phila. 489, and a delay of ten months in making the motion to vacate the decree was held not to constitute such laches as would deprive the wife of her right to relief. The fact of the husband's death is spoken of as making the case a somewhat novel one, and as presenting questions of embarrassment requiring of the court the exercise of no ordinary caution in disposing of the rule to vacate. The court also said that a sentence more effective than that of any earthly tribunal had separated the parties, so that, in determining whether the decree should stand or fall, they were to settle only the status of the surviving party to the matrimonial contract with relation to property of which the husband died seized, and which by his will was given to parties other than the petitioner. The decision of the motion was said to be of importance in two other ways: First, because of the right of the wife to be allowed to vindicate herself from the charge of wilful and malicious desertion; and, secondly, because of the duty which the court owed to itself to vindicate its own integrity and see that it was not made an instrument of injustice and wrong. After reviewing the facts in the case, the court held that the evidence "requires of us, in justice to the petitioner, who stands convicted by our judgment of a wilful violation of her marriage vow, that the judgment passed in her absence, without hearing, without knowledge of the proceedings until their consummation, should be opened, and that the effect of that sentence which declared her no longer the wife of the libellant should be removed." This petition was filed in the court of common pleas, which had granted the divorce. Upon appeal by the administrator of the deceased husband's estate from this decision of the court of common pleas to the supreme court the order striking off the decree of divorce was affirmed. *Boyd's Appeal*, 38 Pa. 241. On this appeal it was contended by counsel that the court had no power to strike off the decree after such a lapse of time (something like ten months), and especially as the libellant in the divorce suit had died in the meantime. But the court said that this objection had all its force,—if indeed it had any,—on the basis of supposed rights acquired through the deceased, and held that, even though the rights of the devisees under the will of the deceased would be affected by setting aside the decree, this was no reason in it-
57 L. R. A.

self against the act; that, without deciding the rights of the claimants under the will, they appeared to stand in no better position, so far as the claim of the widow was concerned, than their testator, if living, would have stood after the reversal of the decree, adding: "It can hardly be maintained that his death concluded her. The act of God injures no one; but this might be doubted were it to be held that death sealed up and sanctified a fraud upon her rights, if it existed. If the devisees claim, as they do, under him, they must stand in his shoes. And if, by reason of imposition practised on the court, he could not maintain the decree, upon what ground can they? That it might have been reversed on appeal no one can doubt, for the time for taking it had not elapsed. His death could not have prevented that. The result would have been precisely the same, as far as his devisees are concerned, as it is in the present aspect of the case. And . . . an appeal was not the only mode of correcting the error."

But in *Kirschner v. Dietrich*, 110 Cal. 502, 42 Pac. 1084, a motion by the defendant in a divorce suit after the death of the plaintiff, in whose favor a judgment had been entered, upon notice to her administrator, to vacate the judgment and allow him to answer the complaint, upon the ground that the summons had not been personally served upon him and that the judgment was void and procured by false testimony, was held to be properly denied, the court saying: "The action was solely for the purpose of procuring a judgment of divorce between the parties,—a purely personal action which would not survive the death of either party, and which, upon the death of the plaintiff, could not be further prosecuted or defended, whether her death was before or after judgment. If she had died prior to the entry of judgment, there could have been no judgment in the case, and her death subsequent to the entry of judgment deprived the court of all power to review its action and determine her right to a divorce. The action having been brought to change the personal status of the plaintiff in her relations toward the defendant, it is evident that upon the termination of her life there was no personal status which a judgment could change." The motion to vacate the judgment was made under a provision of the Code authorizing the court to allow a defendant, in case he had not been personally served with the summons, to answer to the merits of the original action within a year after the rendition of judgment therein; but this section was held to have had no application to a case in which, by the death of the

tiff of property rightly belonging to her. The source of the property can be given little weight in determining whether it furnishes a proper basis for the investigation of her past status. What difference can it make whether this be decided to enable a person to obtain property through the probate court or the commissioner of pensions? None save that in the one case title thereto is settled, and in the other the right to its immediate acquirement. The case differs from that of *Moyer v. Koontz*, 103 Wis. 22, 79 N. W. 50, in that both parties submit to the jurisdiction of the court. As the heirs were not interested in the result, all being adults, they were not necessary parties. We conclude that the property interest is sufficiently certain to warrant inquiry into the validity of the decree, and the determination of plaintiff's status as widow of the deceased.

plaintiff, the action had abated and all opportunity of controverting its merits had been removed. It was also held that the effect of the plaintiff's death upon the action was not changed by reason of the question of property, which was suggested by the husband, the court saying that the complaint and judgment were silent upon the subject of property, and that, although there was an allegation in reference thereto in the answer which the husband proposed to file, this did not prevent the abatement of the action; that the primary and substantive subject of litigation in a suit for divorce is the personal relation of the parties, and their rights as to the community property are but incidental thereto; that if, before a decision upon that question is made, one of the parties dies, the action cannot be continued for the purpose of determining property rights; and that, if there was originally no issue upon the subject, the action cannot be revived in case of death after judgment for the purpose of having this question adjudicated. The court does not intimate what would have been its decision upon the husband's right to have the judgment vacated and be permitted to defend, if there had been a question of property involved in the original suit.

A motion to set aside a judgment of divorce in favor of one since deceased, on notice simply to the administrator of his estate, because of fraud and irregularity in the divorce proceedings, was also denied in *Watson v. Watson*, 1 Hun, 267, 47 How. Pr. 240. It was, however, said that, if the facts stated in the moving papers as to the fraud and irregularity were true, there certainly should be some relief for the wife, but that the question was whether that relief could be obtained on motion and on notice simply to the administrator of the estate, and the conclusion was that it could not, since the administrator had no power to consent to setting aside the judgment, nor any control or authority over it, nor any legal interest in it whatever. The court said that it seemed that the only mode in which the relief sought could properly be obtained was by an action in the nature of a bill of revivor, bringing before the court all the heirs at law and other persons interested in the real estate left by the decedent, and such persons as might have taken conveyance thereof subsequent to the decree, as well as his representatives.

Upon the authority of this case, a motion to set aside a judgment of divorce, made more than a year after the death of the successful party in the divorce suit, was denied in *Groh* 57 L. R. A.

2. The decree attacked was entered in the district court of Dallas county July 25, 1893. The ground alleged was desertion in 1855, and service was had by publication. That the plaintiff therein, Henry Lawrence, had lived in that county during the year previous, cannot be questioned. But the statute exacts more. This must appear to have "been in good faith, and not for the purpose of obtaining a divorce." Code, § 3172. Unless this, preliminary to hearing on the merits, was fully established, the action should have been dismissed. *Id.*, § 3173. The record has convinced us that residence was for the sole purpose of obtaining this decree, and not with a view of remaining in the state. He was started in this direction by a prosecution begun by the plaintiff in Jefferson county, Indiana, in January, 1892, from which he fled, but appears to have tarried in Chicago long

v. Groh, 35 Misc. 354, 71 N. Y. Supp. 985, without costs and without prejudice, on the ground that a motion was not the proper method of procedure; that a separate action should have been brought against all the heirs and other persons interested in the real estate left by the deceased, and such persons as might have taken conveyance thereof subsequent to the decree of divorce, as well as the representatives of the deceased.

And a defendant in a divorce suit, who, after the death of the other party, files a petition to have the decree set aside on the ground of fraud, is held, in *Zoellner v. Zoellner*, 46 Mich. 511, 9 N. W. 831, to obtain by such a proceeding no standing in court to attack the decree, her only course, if the decree is assailable at all by her, being to proceed by a new suit with the proper parties representing the property interests liable to be affected; the court saying that this application was not such a suit, but a petition in the divorce case. The court, however, went further, and stated that, waiving all objections based on the manner in which the relief sought was applied for, it was of opinion that the petition must be dismissed because of laches. The petitioner, though having knowledge of the divorce decree shortly after it was rendered, and the defects in the proceedings which were set up in this case being open to detection by the least attention to facts which must have been obvious to her, took no steps to have the decree set aside until more than eight years after it was rendered, during which time her husband had remarried, and until nearly a year after his death. The court said that the sole motive in assailing the decree was to get, through a kind of post mortem adjudication, a share of the property left by the deceased; that the petitioner did not attack the proceedings during his lifetime, when, if successful, the result would have been a revival of the marriage state, but designedly waited until, in consequence of his death, the property interests might be pursued without the risk of any restoration of conjugal connection.

This case being dismissed because of a mistake in the procedure, the subsequent remarks of the court are hardly more than *dicta*, but they are cited and approved in *Roberts v. Roberts*, 19 R. I. 349, 33 Atl. 872, in which, a divorce having been granted to a wife after due service of process upon her husband, who failed to appear, a petition filed in the cause after her death, seeking to set aside the decree and reinstate the case on the docket because of al-

enough to file a petition for a divorce, in which he falsely asserted a residence of two years in Illinois. While in Dallas county he acquired no property, save that essential to following his trade as painter, and went under an assumed name until the decree was entered, precisely one year from the month he arrived. Shortly afterwards, in October, he married defendant, with whom he had lived since 1861, and finally left the state in March of the following year for the county of Jefferson, Indiana, from whence he came, and there resided until death. And the evidence shows, without dispute, that he deserted plaintiff, rather than she him, as alleged in the petition; that during the period of their cohabitation he was guilty of excessive cruelty, and wilfully and without fault on her part left her penniless, with six small children to care for and maintain. Not until thirty years had passed, and only when pursued by her

whom he had so wronged, did he undertake to procure a decree by which to shield himself from punishment; and then in a state distant from his residence, on substituted service, and living in the concealment of an assumed name. As he was not a bona fide resident of Iowa at any time, the decree is of no validity. *Hinds v. Hinds*, 1 Iowa, 36; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Dunham v. Dunham*, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841; *Watkins v. Watkins*, 125 Ind. 163, 25 N. E. 175.

3. It is quite immaterial whether defendant at the time of her marriage knew of the relation between plaintiff and deceased. *Rush v. Rush*, 46 Iowa, 648, 26 Am. Rep. 179; *Allen v. Maclellan*, 12 Pa. 328, 51 Am. Dec. 608.

Affirmed.

Deemer, J., dissents.

leged fraud practised on the court in that the charges in the divorce petition and the testimony in support of them were false, was dismissed on the ground that, if the charges were false, the petitioner must have known of their falsity before the decree was granted, and should either have employed counsel to appear for him and suggest their falsity, or have notified the court himself that they were false. The court said: "We should have regarded the petition with more favor if the respondent's solicitude for the court and the interests of the public had prompted him to move in the matter before the death of Mrs. Roberts. We cannot resist the feeling that the respondent is more solicitous to obtain the \$7,000 left by the deceased than to protect the court from imposition and uphold the interests of justice." It was further held that, even if the petition had been filed in the lifetime of Mrs. Roberts, no sufficient ground was stated for granting a new trial.

Likewise, a petition to open and vacate a decree of divorce on the ground of fraud in obtaining it because the petitioner was never served with notice, filed in the original cause seventeen years after the divorce was granted and after the death of the successful party, was dismissed in *Potts v. Potts*, 10 W. N. C. 102, where it appeared that the petitioner had ceased to live with her husband a year before the divorce was obtained, and had later married another man; and where, although she averred that she had no notice of the decree until a short time before presenting the present petition, the evidence showed that she knew of it eleven years before the petition was filed. The entire opinion of the court was as follows: "Whether or not the petitioner was really ignorant of the decree when it was made, she certainly knew of it eleven years before she made this application, and during that time she had 'married' another man. She comes here now, not for redress against a fraud, but with an impudent claim for a share of the dead man's property."

3. Writ of error.

In *Wren v. Moss*, 7 Ill. 72, the plaintiff in a divorce suit having died after a decree in his favor, a writ of error was issued, on the petition of the divorced wife, at a subsequent term of court, making defendants the husband's administrator, the legatees under his will, and parties to whom in his lifetime he had transferred property in which the wife had not re-

linquished her dower. The wife asked a rule upon the defendants to join in error, which was resisted on the ground that no writ of error would lie in such a case because by the death of the husband the suit abated as to the subject-matter, and, if reversed, could not be retried; and also because error would not lie against persons who were interested only in the consequences of a suit, and who had no interest in the subject-matter. But the court said that the wife complained that she had been injured by an erroneous decree, and that, if so, she ought to find a remedy, and if she could not bring error she was remediless, since, under the practice, an appeal would not lie in such a case; and that, although by the husband's death the parties were divorced and no further proceedings could be had, yet the mode of effecting the same object by a decree, if erroneous, would unjustly deprive the wife of all right of dower or interest in the personality. It was also held that the defendants were properly made parties, since, although none of them could have an interest in the subject-matter of the divorce suit, they all had an interest in the effects, and consequently in the reversal, of the decree. It was therefore ordered that such a writ of error should be framed as would secure the interest of all who might be affected by it, and the motion for rule to join in error was allowed. One judge dissents from this opinion on the ground that the decree of divorce was complete in the court below before the death of the husband; that there was nothing decreed but the divorce of the parties from the bonds of matrimony, and that this was a matter purely personal to the parties, and no right survived to the representatives of the deceased in respect to the subject-matter of the decree, saying: "I have not been able to find an adjudged case where a writ of error has been allowed in a case like this. A writ of error is regarded as of the nature of the commencement of a new suit, and not, like an appeal, the continuance of the suit already commenced and prosecuted to judgment in the court below. The sole question to be litigated here relates exclusively to the correctness, or otherwise, of the decree granting the divorce, although the rights of others not parties to the original suit may be seriously affected, injuriously or beneficially, according to the decision of this court upon the writ of error. Ought the respondent, therefore, to be permitted to reverse this decree after the death of the complainant by prosecuting a writ of er-

ror to this court under the circumstances? I think not."

This case is cited by the court in *Danforth v. Danforth*, 111 Ill. 236, in which it is said, in answer to the contention that the death of either party in a suit for divorce puts an end to all further proceedings, that while both parties live a writ of error lies to reverse an erroneous decree of divorce, the effect of which is to restore both parties to their former status of husband and wife in law, and that, after the death of one, it ought to lie in favor of the other party, not for the same purpose, but to restore the survivor to his or her rights of property divested erroneously by the decree. This, however, was not a case of writ of error, but an appeal from an order refusing to set aside on motion a decree of divorce rendered against a woman upon *ex parte* hearing, and to permit her to defend the suit, pending which appeal the husband died. For a fuller statement of the case see *infra*, IV.

And a motion to dismiss a writ of error, sued out by a woman after the death of her husband to reverse a decree of divorce obtained by him against her, was denied in *Israel v. Arthur*, 6 Colo. 85, against the contention that a writ of error would not lie in a case of this nature; that, inasmuch as the decree of the court below concerned only the marriage relations of the parties thereto, after the husband's death there was no one who could represent him in this relation; and that, if the decree were adjudged erroneous, the lower court would be without jurisdiction to retry the cause, for the reason that the bonds of matrimony had been dissolved by death, and the marriage relation no longer existed between the parties. The court said: "If a decree of divorce affected the marriage relation only, there would be great force in the argument; but when it is considered that the decree in this case, as in other cases, affects the property rights of the parties as well as their marital rights, it would seem that the same reasons exist for determining its validity as in civil cases generally, notwithstanding the death of one of the parties, and regardless of the fact that the primary relief sought by the bill and afforded by the decree has been confirmed by death." The court also said that the authorities agree that a decree of divorce may be reviewed, even after the death of one of the parties, differing only as to the mode of review, and, after discussing some of the authorities, held that a writ of error was a proper manner in which to review such a decree, the Colorado Constitution providing that writs of error shall lie from the supreme court to every final judgment of the county court. In this case only the administrator of the deceased had been summoned as defendant, and it was held that the heirs at law should also have been made parties; but this failure to bring in the heirs was held no ground for dismissing the writ of error, since the defect could be remedied in another way.

On final hearing of this case (*Israel v. Arthur*, 7 Colo. 12, 1 Pac. 442) the court reversed the decree of divorce in a brief opinion, referring to the decision on the motion to dismiss the writ of error as follows: "This court has held that the decease of the husband after a decree of divorce is granted, and before proceedings in error thereon are instituted, does not operate to prevent a review and reversal of the decree. That when property rights are involved, as in this case, the same reason exists for determining its validity as in civil cases generally," citing the former decision.

4. *New suit.*

One of the oldest cases on this question in 57 L. R. A.

the courts of the United States is that of *Owens v. Sims*, 3 Coldw. 544, decided in 1866, in which a decree of divorce against a wife was set aside on her petition denying the allegations of the divorce bill and alleging that she was not served with process and had no notice of the existence of the divorce proceedings, and the wife was given permission to make defense against the bill. Immediately after this order was entered the petitioner suggested the death of her husband, and thereupon the husband's heirs and devisees moved the court to revive the cause in their names, which was refused and an appeal prosecuted by them. The court, on appeal, sustained the action of the lower-court judge in refusing to revive the cause, on the ground that it had abated by the death of the husband, but held that he erred in opening the decree and permitting the wife to defend, saying: "The circuit judge admitted the defendant after final decree and the death of the complainant to appear and defend. Defend what? Surely not a suit for a divorce, for that had abated and passed beyond the limits of revivor. The circuit judge so decided, and we think correctly; and yet, on the *ex parte* statement of the defendant, he set aside the decree dissolving the bonds of matrimony solemnly pronounced upon the evidence, . . . and admitted the wife to appear and defend in a case not in existence, nor which could by revivor be brought to life again." It is not clear whether the circuit-court judge knew of the death of the husband when he set aside the decree and gave permission to defend. The language of the upper court would indicate that he did, but the facts as stated seem rather to show a shrewd attempt on the part of the wife to have the decree set aside and permission given to defend without informing the court of the death of her husband, and then, by suggesting his death, prevent any further proceedings in the cause. As the opinion in the upper court states that by the positive declaration of the statute the only method for reviewing a decree of divorce is by appeal, and as the time for taking an appeal had expired, it would seem that, even if the husband had been alive, the application to set aside the decree must have been dismissed. Nevertheless the court expressly states that by the death of the husband the suit had abated and passed beyond the limits of revivor. The application to set aside a decree of divorce after the death of one of the parties is spoken of as a peculiar one, and the court says: "From the total absence of authorities produced in argument to sustain it, we take it as *prima facie*, at least, that it is as unique as it is peculiar." The application, however, was not without precedent, since in the case of *Wren v. Moss*, 7 Ill. 72 (*supra*, III. a, 8), decided in 1845, it is held that a divorce may be set aside on writ of error after the death of the successful party.

A frequently cited case is that of *Johnson v. Coleman*, 23 Wis. 452, 99 Am. Dec. 193, in which a judgment of divorce in favor of a husband was annulled after his death at the suit of the wife, who claimed an interest as widow in his estate, where it was shown that gross fraud was practised upon the court in obtaining the decree. But it is stated that it is doubtful whether the court would take jurisdiction and annul the judgment of divorce, the husband being dead, unless it appeared that he left property in which the plaintiff might possibly have some interest. It was also held that equitable relief against the decree would not be denied simply because it might have been set aside on motion on the ground of a want of jurisdiction, the court saying that there is no substantial objection to the practice of in-

attituting a suit in equity to have vacated a void decree of divorce, and that it seems quite as suitable a method to review the questions involved and to adjudicate upon the rights of the parties as would be afforded by motion. There was also an objection that the joinder of the administrator of the deceased husband with the heirs at law was improper, but this objection was held untenable, it being said that, if the judgment were permitted to stand, there might arise a question whether the wife would be entitled to dower in the husband's real estate, and to such a portion of the personal property as the law would otherwise allow her, and that, as the administrators had a right to the possession of all the real and personal estate of the deceased until the estate should be settled, they were directly interested in the question whether the wife had any rights therein, and so would seem to be proper parties to this suit, which necessarily involved that question; and that the interest of the heir in the same question was quite as obvious and direct, since, if the judgment should be declared void and of no effect, it would open the door for the widow to come in and claim her share of the estate, and the heir would thus be deprived of a portion of the inheritance; and that therefore he had a common interest with the administrators in defeating the wife's petition.

Likewise, *Bomsta v. Johnson*, 38 Minn. 230, 36 N. W. 341, is universally cited as sustaining the right to set aside a decree of divorce obtained by fraud notwithstanding the death of the one in whose favor the divorce was granted. But this is of doubtful authority, since the case was dismissed on other grounds, and the decision of this question was not necessarily involved. In this case the husband, after obtaining the divorce, had married again and at least one child had been born of the marriage, but the court said that the weight of authority upholds the right to vacate and set aside a decree of divorce obtained through fraud, even where there has been a subsequent marriage and the birth of issue, and that the death of one of the parties is no bar to the action; adding that the statute under which the action was brought imposed no restrictions, giving in plain words the right to bring such an action within three years after discovering the fraud, and that the right thus conferred did not terminate with the life of the wrongdoer, but might thereafter be pursued in the manner pointed out by the statute, and that courts of equity would also exercise jurisdiction in such cases where the remedy at law is not plain, adequate, and complete. A demurrer to the complaint in this case on the ground that it failed to state a cause of action was sustained in the lower court because of a defect in the pleadings, and this holding was approved by the court on appeal. But the lower court not only sustained the demurrer, but directed that defendants have judgment, and that plaintiff take nothing by this action; and it appears that counsel for defendants had argued at length that plaintiff's right of action ended upon the decease of her husband. Therefore, the court on appeal said that, since they were not advised of the reason which actuated the court below in thus, in effect, ordering judgment of dismissal; and as it might have been a conviction that an action of this kind could not, in any event, be successfully maintained,—they deemed it judicious, in view of the importance of the questions suggested by the case, and the fact that the trial court might yet have to determine the merits of the controversy, to discuss somewhat in detail the law relative to the effect and stability—in the ab-

sence of positive legislation upon the point—of a judgment dissolving the marriage contract, with the conclusion stated above. Though this ruling of the court was not necessary to the decision of the case, the complaint being subject to demurrer, nevertheless, since the question appears to have been argued by counsel, and the trial court indirectly passed upon the merits of the controversy by in effect ordering a judgment of dismissal, it can hardly be considered a mere *dictum*. It was also held that the second wife, the administrator, and all the heirs should be made parties.

In *Rawlins v. Rawlins*, 18 Fla. 345, in which a wife, after the death of her husband, filed an original bill in the nature of a bill of review, in her own right and on behalf of her minor children born during the pendency of and after divorce proceedings instituted by the husband in his lifetime, seeking to vacate, on the ground of fraud, the decree therein obtained by him, a demurrer was sustained because of defects in the bill, but the court said that, not only was the fraud admitted by the demurrer, but that the evidence clearly showed that the complainant in the divorce suit had been guilty of gross fraud both upon his wife and upon the court, and clearly implied, without expressly deciding it, that the plaintiffs were entitled to relief. In fact, the right to have a decree of divorce obtained by fraud set aside, even after the death of one of the parties, does not seem to have been questioned. The defense seems rather to have been based on the mode of procedure adopted, and upon defects in the pleadings, than upon any claim that the divorce decree was conclusive, or that the remedy was barred by the husband's death. On the question of procedure, it was contended that this remedy by original bill in the nature of a bill of review was not such as equity would sustain, but the court held that this proceeding had been sanctioned by many courts of equity, and that there was no objection to it, adding that, while in cases where the husband was living and the wife sought to set aside a decree of divorce for fraud the usual method was a proceeding in the same cause, after notice to him, here the husband was dead, and that it was at a loss to see how the purposes of this suit could be affected by proceedings in the suit for divorce. Objections to the bill on the ground of multifariousness and misjoinder of parties in joining the infant plaintiffs and the wife were also overruled, the court saying: "Their rights, while not identical in degree or in interest, are mutually dependent upon setting aside the decree, and as a consequence of a decree of this character they have each an interest in the subject-matter of the suit which can be here readily adjudicated. The primary relief sought is the setting aside the decree of divorce, and all the plaintiffs are interested upon the same side of this question. We can see no necessity for requiring this administrator to be subjected to four distinct suits, all concerning the distribution of the property of the estate, the principal question in each of which . . . would be the same." The demurrer to the bill was sustained on other grounds, and the case remanded with directions to enter an order sustaining the demurrer, with leave to amend the bill in such particulars as the opinion of the court indicated to be necessary.

A rather peculiar case which, while not deciding the exact question, impliedly admits the right to review a divorce decree notwithstanding the death of the successful party, is *McCraney v. McCraney*, 5 Iowa, 232, 68 Am. Dec. 702, in which a bill in equity was filed by a woman after the death of her former husband,

asking to have a decree of divorce obtained by him in his lifetime so far vacated and set aside as to give complainant her dower and a distributive share of one third in the personal estate of the deceased husband, on the ground of fraud and lack of jurisdiction, though the wife had personal notice of the pendency of the action. This bill was filed fourteen years after the divorce was granted, and the husband had married again, three children having been born of the second marriage. The relief prayed for was granted by the lower court, and the decision affirmed upon appeal to the supreme court, the decree expressly reciting that the sentence of divorce should not be considered as vacated in any other respect except to the extent of allowing the wife to recover her dower and distributive share; but upon a rehearing the supreme court held that the decree setting aside the sentence of divorce and declaring it void so far as to allow the wife dower in her husband's estate, and at the same time leaving so much of the decree as dissolved the marriage contract in force, was inconsistent, and not to be supported either upon principle or authority; that, if the sentence of divorce was void for fraud or duress, then it was void, not in part, but in all its parts, and should have been so declared. The opinion states that in concluding, as a majority of the court did before, that such a decree might be rendered, they, though with some hesitation, regarded the testimony as sufficient to sustain the charge of fraud made in the bill, but that, if the decree of divorce must be entirely vacated to let the wife into the relief prayed for, the judges concurred in saying that the testimony was not sufficient to justify such a decree of vacation, adding that, if the decree could legitimately act alone upon the property, and not upon the state and condition of third persons, they might more readily accept the conclusion contended for by the complainant from the proof made; but, since it must bring wretchedness and misery to the innocent wife and children of the second marriage, it was but right that the judicial mind should want more testimony than if its effect was merely to take property from one and give it to the other. The decree was therefore reversed and the bill dismissed. There is nothing in the opinion to indicate whether or not the court regarded the fact of the husband's death as of any importance on the question of the right to set aside the decree of divorce, but from the fact that it considered the evidence in regard to the fraud alleged, and held it was not sufficient to justify setting aside the decree in its entirety, it would seem that it impliedly admitted the right to set aside a decree of divorce, even after the death of one of the parties, where fraud is proved. But counsel for the second wife contended that this was contrary to the rule of the common law. He admitted that, according to the canonical rule, a sentence of divorce might be dissolved at any time, even after the death of the parties, following the ecclesiastical maxim, *Sententia contra matrimonium numquam transit in rem judicatam*, but contended that this rule had been discarded by the common law, and that, at least when there had been a second marriage, and the effect of a decree dissolving the sentence of divorce would render this marriage void and bastardize the issue, a sentence of divorce could not be questioned after the death of one of the parties, adding that a court of chancery should not put forth its peculiar power to disturb decrees upon the continued validity of which depend so many interests and relations, both in regard to property and status, since such decrees could hardly be disturbed in any case

57 L. R. A.

without causing more harm and suffering to the innocent than good to the aggrieved.

Fraud on the jurisdiction of the court is held to be a sufficient reason for vacating a divorce decree after the death of one of the parties, in *Rine v. Hodgson*, 9 Ohio Dec. Reprint, 275, notwithstanding a statute providing that no appeal shall be allowed in divorce cases from any judgment of the court of common pleas, except from an order dismissing the petition without final hearing, or from a final order or judgment granting or refusing alimony. In this case a petition was filed in the Ohio court of common pleas by a husband after the death of his wife, to set aside a decree of divorce in her favor, because it was obtained by fraud, without his knowledge or the knowledge of his wife, who was insane, by her relatives and heirs. The petition was demurred to on the ground that under the Ohio statutes a decree of divorce is not subject to review, either by appeal or by petition in error, and that a decree once entered dissolving the marriage relation *vinculo* is final and conclusive between the parties. This demurrer was sustained in the lower court (*Rine v. Hodgson*, 9 Ohio Dec. Reprint, 104), the court holding itself bound by the decision in *Parish v. Parish*, 9 Ohio St. 534, 75 Am. Dec. 482, that a decree of divorce, although obtained by fraud and false testimony, cannot be set aside on an original bill filed at a subsequent term. In that case both parties were living at the time the petition to set aside the decree was filed, and the fraud charged was of the most flagrant character, but the court held that the statute-law of the state prohibiting appeals from the judgment of the court of common pleas in divorce cases was "a recognition of the principle of public policy . . . that a judgment or decree which affects directly the status of married persons by sundering the matrimonial tie and thereby enabling them to contract new matrimonial relations with other and innocent persons should never be reopened;" and that, notwithstanding the fraudulent conduct and the manner in which the jurisdiction was invoked, the court pronouncing the decree had jurisdiction of the subject-matter and of the parties, of the husband by his appearance and of the wife by publication, which, under the Ohio statutes, were as effective in conferring jurisdiction as actual service. In the case of *Rine v. Hodgson* it was shown that the court granting the divorce had jurisdiction of the subject-matter, and that the husband was properly served by publication, and a case relied on by him was distinguished by the lower court on the ground that in that case no jurisdiction was obtained by the court over either party, while in the *Parish* case and the case of *Rine v. Hodgson* the court pronouncing the decree had legal jurisdiction of both parties, though by publication only as to the defendant therein. This case is spoken of in the opinion of the court of common pleas as being complicated by the death of the wife and the fact that setting aside the decree would be in law to restore the marital relation,—at least as of the date of her death; and, as the action was confessedly to enable the husband to take the wife's property, the court said he was asking a court of equity to go a long way to aid him in a matter of property merely, and not in the interest of marital happiness, the wife not being there to defend, and not only the reputation of the living, but the reputation and memory of the dead, being involved, and that, while its first impression was against the demurrer, the reading of the case of *Parish v. Parish*, and other authorities on the subject had convinced it of the dangers to which any innovation upon the

principle of public policy therein recognised might lead. But on appeal to the district court the judgment of the court of common pleas was reversed (9 Ohio Dec. Reprint, 275), on the ground that, while fraud would be insufficient to permit the setting aside of a divorce decree, the question of the jurisdiction of the court pronouncing the decree could be inquired into, and that in this case there was no jurisdiction over the wife, as she did not file the petition, and was not brought before the court in any way, and the trial was had without her knowledge or consent, the court saying that a judgment is binding only upon parties and privies, and that inquiry into who were parties cannot be precluded by the names used, since this would be to give the conclusive effect of a judgment to a fiction, and that this action was not in fact an action to set aside a decree in a divorce suit, but to declare the record of the suit a nullity. It was also held that the only parties necessary to be made defendants were the heirs of the wife, who would have inherited her property if she had died unmarried. The effect of the death of the wife is not discussed in the opinion of the district court.

So, the right to maintain an action for the vacation of a divorce decree procured by fraud on the jurisdiction of the court is upheld in *Frits v. Frits*, 6 Ohio, N. P. 258, and an unexplained delay of nearly two years in bringing the action after the discovery of the fraud is held not to be such laches as will create an estoppel. The divorce had been obtained by the fraud of the defendant therein, who procured the filing of a petition in the name of his wife without her knowledge or authority, and in a state in which neither she nor her husband resided, although one of the essential requisites to the jurisdiction of the court in divorce cases was that the plaintiff should have been a bona fide resident of the state for a year preceding the filing of the petition. The wife did not know of the pendency of the suit, was not present at the hearing, and never heard of it until after her husband's death, twenty-eight years later. The effect of the husband's death on the right to set aside the decree was not discussed. In this case, also, the rule established in *Parish v. Parish*, that a decree of divorce, though obtained by fraud and false testimony, cannot be set aside on an original bill filed at a subsequent term, is referred to, and the *Parish* case distinguished on the ground that in that case jurisdiction of the parties had been obtained, the court in the present case saying: "What position the court would have taken if it had appeared that the court of common pleas [granting the divorce] had not obtained jurisdiction, we do not know; but it is difficult to believe that, if that fact had been apparent, the court would have used the sweeping language . . . quoted. . . . The decision of that case, while it may be, not having been reversed, authority for the proposition that when a court has jurisdiction of the subject-matter and of the parties the decree taken in a divorce case will not be set aside by reason of the fraud of either, yet it is not authority for the proposition, however broad its language, that a court has no power to set aside a decree for divorce obtained by fraud upon the jurisdiction of the court."

In harmony with this decision is *Brown v. Grove*, 116 Ind. 84, 18 N. E. 387, in which it is held that a husband who procures a petition for divorce to be filed in the name of his wife against himself, without her knowledge, and answers the complaint filed by his own procurement, whereupon a divorce is granted, perpetrates a fraud upon her and upon the court, 57 L. R. A.

entitling the wife, upon discovering the fraud long after her husband's death, and twenty years after the date of the decree, to have the judgment of divorce annulled. It is said that to uphold a decree obtained by such fraud would be a mockery, and that courts have inherent power to annul decrees obtained by such means. There was an objection to the competency of the wife as a witness on the ground that, as plaintiff's claim affected the estate and the heirs were parties, she was incompetent, under the statutes of the state, to testify as to matters prior to her husband's death. But the court held that the plaintiff had a right to testify as to what she did or did not do concerning the petition in the divorce; that what she did or did not do was a matter neither within the spirit nor the letter of the law prohibiting parties from testifying where heirs are interested. This is the only direct reference in the case as to the effect of the husband's death upon the right to review the decree, and the court disposes of the objection in very few words. At the end of the opinion is a statement that the issue tried and determined was whether the wife had a right to have the decree of divorce annulled, and that the question whether property rights acquired upon the faith of the validity of the decree were affected was not considered.

And an action seeking to have what purported to be a judgment divorcing plaintiff from her husband, since deceased, set aside and declared void, and to have plaintiff recognized as the widow of the deceased and entitled to share in his estate, was sustained in *Willman v. Willman*, 57 Ind. 500, without passing on the effect of the husband's death, the court holding that, it being made affirmatively to appear that no summons was issued or served upon the defendant in the divorce proceeding, and there being no voluntary appearance by her, all proceedings in the divorce suit were without jurisdiction, and hence inoperative and void. It was stated to be a well-settled rule of law that there can be no proceedings to review a judgment of divorce; but it was held that this rule does not prohibit proper proceedings by a party interested to annul and set aside a so-called judgment of divorce which is void for want of jurisdiction either of the subject-matter or the parties.

But one who, knowing of the institution of divorce proceedings against her, made no effort to defend the suit, and who, after receiving notice of the decree, accepted the alimony awarded her and remained quiet, without seeking to have the decree set aside, for ten months thereafter, was held, in *Maier v. Title Guarantee & T. Co.* 95 Ill. App. 365, to be barred by laches from contesting the validity of the decree, where the husband had married a second time. The facts that the husband cohabited with plaintiff as his wife for nine months after the decree, and that she failed to defend the action and allowed judgment to be entered against her by default because she was under his influence and threats, and that she refrained from seeking to have the decree set aside after receiving notice thereof because of his assurances that it was a fraud and did not affect their relation to each other,—were held not to excuse her laches. In this case the husband died shortly after the filing of a bill in the nature of a bill of review to vacate the decree, and his administrator was substituted as defendant in his place. But the husband's death does not seem to have been considered as affecting the question, except in so far as it prevented the wife from testifying in her own behalf, the decision being based entirely on the fact that the rights of an innocent third

person had intervened, that the wife, by prompt action, might have prevented the second marriage, and that, having by her delay made the second marriage possible, she could not now, notwithstanding the gross and flagrant fraud practised on her and on the court by the husband in procuring the decree, be granted relief at the expense of the second wife, who had relied upon the validity of the decree. There is a strong dissenting opinion contending that, as the wife had been deceived and deluded by the assurances of her husband that there was no divorce, and as in all she did she acted under his influence and coercion, she was not barred by her delay in moving to have the decree set aside.

So, also, a petition filed after the death of the successful party in a divorce suit, to set aside the decree on the ground that it was obtained by fraud and collusion, the defendant therein having been induced by the threats and undue influence of her husband not to defend the suit and to permit a judgment by default, was held, in *Brigham, Petitioner*, 176 Mass. 223, 57 N. E. 328, to be subject to demurrer because of laches, the court saying that, assuming that in any case such a proceeding as this to set aside a decree of divorce is possible, the utmost diligence and good faith are the conditions without which it cannot be entertained, and that the petitioner in this proceeding, relying on getting the advantages of a widow without any of the troubles which she found incident to being a wife, and thinking that she would be better able to prove her case if the opposition of her husband was removed, waited until his death before she took a step; and that, whether it be called laches, or be given a harsher name, such a course put an end to any claim she ever may have had to be heard. The court also said that divorce proceedings generally are ended by the death of one of the parties, and that on the question whether there is an exception where it is sought to set aside a decree of divorce on the ground that it was obtained by the fraud of the deceased party they express no opinion.

And a woman was held to be guilty of such laches as would prevent a court of equity from inquiring into the validity of a divorce decree on the ground that it had been entered without notice or her knowledge or consent, where, for thirty years and until after her husband's death, she made no effort to have the decree set aside, but took advantage of the benefits of it by accepting the custody of the children and a sum of money awarded her thereby. During this period the decree had been spread upon the proper record, the husband had married a second time and died, and by his will had provided for the children of both marriages. The court said that the general rule without doubt is that no lapse of time or delay in bringing a suit to impeach a decree for fraud will bar the remedy in equity if the injured party during the interval was ignorant of the fraud, but that such ignorance must not have been negligent, and, if by reasonable diligence he could have discovered the fraud or ought to have known it, he will be deemed guilty of laches and equity will refuse to interfere, the effect of the husband's death not being directly considered. *Sedlak v. Sedlak*, 14 Or. 540, 13 Pac. 452.

And on the ground of a want of jurisdiction a suit brought by the guardian of an incompetent against the administrators and heirs of her deceased husband, praying that a decree of divorce obtained by the husband be declared void and of no effect because of gross fraud in procuring it, was dismissed in *Moyer v. Koontz*, 103 Wis. 24, 79 N. W. 50. The defendants in this case being nonresidents, an order

of publication was obtained, and the summons and complaint served personally on them without the state. They appeared specially, and moved that the order of publication be vacated, that the summons be quashed, and the action dismissed for want of jurisdiction, which motion was granted, and an order entered accordingly. The court stated that, while a cause of action arising in the state existed against the defendants, which under the statutes of the state would authorize service by publication, still courts of a state could not so acquire jurisdiction over nonresidents for the mere purpose of personal adjudication against them, nor, indeed, for any purpose except to adjudicate either with reference to property within the state or the status of one of its own citizens. It was admitted that under the rule in *Johnson v. Coleman*, 23 Wis. 453, 99 Am. Dec. 193, *supra*, there seemed to be no doubt that a wife might bring suit to annul a decree of divorce against her, and confer jurisdiction by substituted service; but this was said to be for the reason that the purpose of the suit was to adjudicate and act upon her status in relation to her absent husband, the same as if she were suing for a divorce. The court said that the object of such a suit by a woman, when the husband is alive, is to adjudicate that whereas, by the existing fraudulent decree, the plaintiff is made single, she shall, by the demanded judgment, be adjudicated to be still married; but that in a case like the present, where by the irrevocable act of death her status as to her deceased husband has become fixed as that of a celibate, no such question can exist to be acted upon; that no decree can change her status, and a decree then becomes a mere adjudication as to a record, for the purpose of satisfying a sentiment or affecting property rights. It was therefore held that, there being no property within the state to be affected by the decree, and there being no question of status to be decided, since by the death of the husband the status of the plaintiff had become fixed, the court would not be justified in reaching its hands beyond the limits of the state and seeking, upon substituted service, to subject nonresidents to a decree, ostensibly to cure a record, the only purpose of which was to affect property rights without the state. This was held to be in excess of the powers of the court because infringing the principle of international law that the jurisdiction of a state does not extend beyond its boundaries, and because, if the decree were carried into effect, it would violate U. S. Const. 14th Amend., as a deprivation of property without due process of law. This case was distinguished from *Johnson v. Coleman* on the ground that the defendants in the latter case were residents of the state.

The principal case of *LAWRENCE v. NELSON*, holding that a fraudulent decree of divorce may be set aside after the death of the successful party where property rights are involved, is in harmony with the majority of the foregoing authorities. The existence of some property right depending on the validity of the decree is held to be a necessary prerequisite to the right to review it, the court saying that it would not inquire as to who was the widow of the deceased for the mere purpose of satisfying a sentiment. But the question which of the two women claiming to be the wife of the deceased was entitled to a pension from the United States government as his widow is held to be a property right of sufficient certainty to justify an inquiry into the validity of the decree.

b. In collateral proceeding.

The question of the validity of a divorce decree frequently arises after the death of one of the parties in a contest as to the rights of the surviving wife or husband in the property of the deceased; and in such cases the effect of the death is usually not directly discussed, the validity of the divorce decree being decided on its merits, or the attempt to impeach it being defeated by laches or estoppel.

Re Ellis, 55 Minn. 401, 23 L. R. A. 287, 56 N. W. 1056, was an appeal by one claiming to be the widow of a deceased person from an order appointing a second wife as administratrix. The question to be decided was, Who was the lawful widow of the deceased? and this depended on the validity of a judgment of divorce between the deceased and his first wife. The appellant offered, in order to impeach the judgment of divorce, to prove that she brought the action under duress because of her husband's conduct toward her in urging her to bring the action, in abandoning her at various times, and leaving her unprovided with the necessities of life, and in threatening to continue such treatment unless she consented to bring the action. The court held that this evidence was properly excluded, saying: "Whether at any time, and especially whether after she has received and enjoyed the fruits of the action, and has acquiesced for years, until the defendant has married again and has died, and there is left solely the matter of distributing his property, a woman plaintiff could, because of such facts, obtain any relief in the same action, we will not undertake to say. Certainly it would be no ground for assailing the judgment in a collateral proceeding at any time." But the principal objection urged to the validity of the divorce was that the court granting it had no jurisdiction because at the time neither party was a resident of the state in which the action was brought. As to this, it was held that the decree was valid as between the parties, though it would not be valid as against the state: that they could not set up their own fraud and collusion in bringing the suit in a state other than that of their residence to escape the consequences of the judgment which they procured the court to render. It was said that, "while the state cannot be bound by its resident citizens appearing in and consenting to the jurisdiction of a court in another state in an action for divorce, the parties may so bind themselves in respect to their individual interests;" and again: "It may seem anomalous that a judgment of divorce can be so far effectual between the parties as to extinguish all rights of property dependent on the marriage relation, without being effectual to protect them from accountability to the state for their subsequent acts. One reason why they ought not to be permitted, by going into another state and procuring a divorce, to escape accountability to the laws of their state, is that their act is a fraud upon the state and an attempt to evade its laws, to which it in no wise consents, and it may therefore complain. But the parties do consent, and why should they be heard to complain of the consequences to them of what they have done?" This case is criticised in *Nelson on Divorce & Separation*, § 1055, where it is said that, so far as the opinion asserts the validity of this collusive decree, it is clearly wrong, because the fundamental principle of jurisdiction is overlooked; that jurisdiction over the subject-matter cannot be conferred by consent of the parties; and that the same result could have been reached by holding that the decree was void for lack of jurisdiction, and that the wife was

estopped from attacking the decree by her fraud and collusion, by accepting the alimony awarded by it, and by permitting the decree to remain in force until the husband had married again.

The validity of a divorce obtained by a man in a foreign state was attacked after his death in *Re James*, 99 Cal. 374, 33 Pac. 1122, in a contest as to dower between the divorced wife and a woman whom the husband had married subsequent to the divorce decree. Letters of administration had been granted to the second wife, and on the refusal of the superior court to revoke them and grant letters to the divorced wife she appealed to the supreme court. The grounds on which the decree was attacked were want of jurisdiction in the court rendering it because the plaintiff therein had not been a resident of the state for a sufficient length of time, and defective service of process. There was some conflict in the evidence as to whether or not the husband was a bona fide resident of the foreign state at the time of obtaining the divorce decree, and the supreme court held that, this being so, it would not disturb the implied finding of the lower court to the effect that he was such a resident. The defect in the service of process was held to be a defect in a mere matter of form, which was cured by the entry of judgment and not to be assailable in a collateral proceeding. It was also held that the fact that in an action brought by the wife against the husband in the state of New York for a divorce from bed and board, in which the decree of divorce in his favor was not brought to the attention of the court, the defendant failed to plead the decree obtained by him in bar of his wife's right to a divorce, and that a judgment was rendered in her favor did not have the effect to change the status of the deceased from that of a single man, which was given him by the decree of divorce obtained by him.

Notwithstanding that a husband consented to his wife obtaining a decree of divorce against him in order that she might marry another man, and furnished her with evidence for the purpose, and accepted a sum of money from her as a consideration therefor, it was held, in *Hardy v. Smith*, 136 Mass. 328, that he was entitled, nevertheless, to a distributive share in the estate of his wife after her death. The divorce had been obtained in another state, and in this action the executrix, to show that the petitioner was not entitled to a husband's share in the personal estate of the testatrix, offered the decree in evidence, but the court held that it was incompetent to prove a divorce, saying that it was not only a decree procured in another state "by an inhabitant of this commonwealth for an alleged cause which occurred here while the parties resided here, and therefore by statute of no force or effect here, . . . but it was a decree of a court which had no jurisdiction of the parties, both of them being inhabitants of this commonwealth and neither of them having ever been in Utah, and was wholly void." It was contended that petitioner's consent to the divorce, and his receiving money therefor, estopped him from denying the validity of the decree; that, while the proceedings relating to the divorce might be incompetent to affect the status of the petitioner as husband of the testatrix, they were competent to affect an incident of that relation, and to estop him from claiming any of the rights of a husband. But the court said that no estoppel could arise between the parties to such a transaction as the collusive agreement by which this divorce was obtained; that a party must be in condition to assail a right before he can maintain it by estoppel; and

that the evidence was as clearly incompetent to sustain a right of one of the conspirators to require another to carry out his part of the scheme of fraud upon the law as it was to establish the legal status of a party to the infamous transaction.

A similar case is *Rundle v. Inwegan*, 9 N. Y. Civ. Proc. Rep. 328, in which the validity of a divorce procured by one since deceased was attacked on the ground of lack of jurisdiction in the court granting it, in an action to recover dower in the estate of the deceased by the divorced wife claiming as widow. It appeared that the divorce had been obtained in the state of Indiana without service of process upon the defendant, who resided in New Jersey and who did not appear in the action, and the divorce was held to be absolutely void because the court had no jurisdiction over the defendant, notwithstanding her knowledge of the divorce proceedings and acquiescence therein and her subsequent marriage and the birth of issue. The judge writing the opinion said that he would be glad to reach a different conclusion if he were able, but that he had no discretion in deciding the case; that plaintiff asserted a legal right, and, if the judgment of the Indiana court was not effectual to dissolve the marriage between her and her first husband, she was his widow and entitled to dower in the real estate of which he died seised.

So, also, a woman who obtained a divorce in Massachusetts upon personal service upon her husband in the state of New York, who did not appear in the action or in any way submit himself to the jurisdiction of the Massachusetts court, is held, in *Starbuck v. Starbuck*, 62 App. Div. 437, 71 N. Y. Supp. 104, to be entitled, nevertheless, after her husband's death, to dower in his real estate, although he had after the decree married again in the state of Pennsylvania, on the ground that the Massachusetts court had no jurisdiction over the defendant in the divorce suit, and that it was therefore of no avail in the state of New York.

And a legislative divorce procured by a wife in New Jersey while her husband was a resident of New York was held, after the death of the husband, to be void in *Todd v. Kerr*, 42 Barb. 317, on the ground that the husband was not within the jurisdiction of the state, and to have no effect on property rights in the state of the husband's residence. This was an action by the wife for dower in property of her deceased husband acquired after the passage of the divorce act. It was contended on the part of the defendants that the plaintiff was estopped to deny the force and effect of the legislative divorce, but the court held that the elements of estoppel were lacking, that there was no evidence that the husband did anything in consequence of the divorce which he would not have done if such act had not been passed, and that, since an estoppel must be reciprocal and binding on both parties, and the husband was not bound or affected by the divorce act, neither he nor his heirs could claim the advantages of it.

But in another New York case (*Re Swales*, 60 App. Div. 599, 70 N. Y. Supp. 220), it is held that a woman who, after separating from her husband, leaves the state where they both reside, and goes to another state and commences, on service of process by publication, an action for absolute divorce upon grounds not recognized in the former state, and, after obtaining a decree in her favor upon failure of her husband to appear, marries another man and lives with him until the death of her first husband, cannot impeach the validity of the divorce decree, and claim the right to administer upon her former husband's estate as his

widow. The court said that the wife, in order to obtain an absolute divorce from her husband, elected to go into another state where the laws were less rigid, and that, she having made this election and secured to herself all the benefits that were attainable therefrom and married another man, it would seem like a travesty of justice to permit her to repudiate the same and by impeaching the validity of the decree under which she had lived for eighteen years, to administer and appropriate the personal estate of a man from whom for that period of time she had proclaimed to the world that she was absolutely divorced. It was also said that, while it would not, probably, be technically correct to say that any or all of the plaintiff's acts constituted an estoppel within the ordinary acceptance of that term, for the reason that they were not designed to, and did not, influence the decedent to do anything which he would not otherwise have done, yet the case justified the application of a somewhat similar principle, which is, that where a party has invoked the jurisdiction of any court and submitted himself thereto he cannot thereafter be heard to question such jurisdiction.

In *Thoms v. King*, 95 Tenn. 60, 31 S. W. 983, the validity of a decree of divorce obtained by a husband in another state was attacked after his death by the wife in an action to recover dower in his estate, on the ground of fraud in the suppression of facts, and that the husband was not a bona fide resident of the foreign state at the time of procuring the divorce. But the court held that the charges of fraud and nonresidence were not sustained, and that the decree was valid.

And in an action to obtain dower, as widow, in lands of one deceased, the validity of a divorce decree obtained by the deceased against the defendant in his lifetime in Illinois was sustained against her contention that it was void because of fraud and lack of jurisdiction in the court granting it, where it appeared that, on a libel brought by the defendant in the supreme court of Massachusetts against her husband, praying for a divorce on the ground of adultery, the husband filed an answer denying the adultery and setting up the divorce obtained by him in Illinois, and that upon the cause being argued to the full court the libel was dismissed. The court held that the decree of the Massachusetts court dismissing the wife's libel for divorce and upholding the validity of the Illinois decree was conclusive upon her, and estopped her, as between herself and her husband, from contesting the decree; and that, while the general rule in regard to estoppels is that they are good only between the parties of record and their privies, and cannot be set up in collateral proceedings between one of the parties and third persons, the effect of the judgment in the Illinois case was to determine the status of the defendant, and that, so far as it did that, it was conclusive to all the world. *Hood v. Hood*, 110 Mass. 463.

In the case of *Carr v. Carr*, 92 Ky. 532, 18 S. W. 453, the plaintiff brought an action to recover dower against the administrators and heirs of her deceased husband, who prior to his death had obtained a decree of divorce against her, claiming that the judgment of divorce was void, and that she was, therefore, entitled to share in his estate as his widow. The husband had sued the wife for divorce on the ground of abandonment, and, she being a nonresident, a warning order was made against her to appear at the next term of court, more than sixty days thereafter, and an attorney was appointed to defend her. The attorney filed a report, and, the evidence having been taken, a judgment for absolute divorce was

rendered in favor of the husband. He soon after died, and, although the plaintiff in the present action knew of the pendency of the divorce suit, she remained silent until a month after her husband's death, when she brought this action. She claimed that the court granting the divorce had no jurisdiction over her because the affidavit upon which the warning order was made was substantially defective, and therefore the order of warning was void. The defect in the affidavit was a failure to state the postoffice address of the wife, or the affiant's ignorance thereof, as required by statute. The court said that, if the court granting the divorce had no jurisdiction, then, of course, its action was void, but held that this defect in the affidavit did not render the decree void, but merely erroneous, and that, it appearing that the defendant in the divorce suit had no defense thereto, the judgment should not, under these circumstances, be reopened and vacated as erroneous, even if this were allowable in an action of such a character.

And in an action to obtain dower in property conveyed by a man since deceased, brought by one claiming to be his widow, in which the validity of a decree of divorce procured by the wife against her husband in his lifetime, which was set up as a defense, was attacked on the ground that the subpoena was issued in vacation and but twelve days before the ensuing term, whereas the statute required the interval to be at least thirty days, it was held that, the court having jurisdiction of the cause of action and of the parties, this was a mere irregularity, which did not render the decree void, but voidable only upon objection in due time by a party having a right to object. The court said: "This is a novel objection to come from the complainant in that proceeding after a decree in her favor acquiesced in and acted upon by her for more than seven years and until after her husband's death." There was an exception to the refusal to admit evidence that the decree was procured by fraud and collusion, the wife having been coerced into signing the petition and carrying on the suit by the oppression and cruelty of her husband, who furnished the evidence to procure the divorce and paid the costs, for the alleged purpose of defrauding the wife of her dower. But the court held that the evidence was inadmissible, and that one who had aided in procuring a collusive divorce could not be heard to thus attack its validity in a collateral proceeding. *Miltimore v. Miltimore*, 40 Pa. 151.

So, in *Richardson's Estate*, 132 Pa. 292, 19 Atl. 82, it is held that one against whom a divorce is obtained, who accepts the benefits of the decree and acts in a way which would be illegal but for the divorce so granted, cannot, after a long lapse of time and after the death of the other party, deny its validity, or assert that it was obtained without due notice. This case was an appeal from a decision of the orphans' court denying to plaintiff any interest as widow in the estate of a decedent. It was proved that plaintiff and the decedent had been married forty years before his death, but there was a question as to the validity of the marriage, there being some evidence that plaintiff had a lawful husband living at the time, and the evidence showed that she lived with decedent only eighteen months, and made no claim on him from the time of their separation until his death, that he had twice married after their separation without any objection on her part, and that she herself had married another man, who was living at the time of the death of the first husband. It was therefore held that she was estopped to claim any interest in the estate of decedent as widow, and the ques-

tion of the validity of the divorce and its effect upon her rights seems to have been only a secondary one. It is mentioned simply at the end of the opinion of the court as having been referred to in the adjudication, and no facts are set out in regard to the manner in which it was obtained, or as to the grounds on which it was attacked.

And one who accepts the benefits of a void decree of divorce against her by contracting a second marriage thereafter, and who makes no effort to have the decree set aside during the life of her first husband, is held, in *Mohler v. Shank*, 93 Iowa, 273, 34 L. R. A. 161, 61 N. W. 981, to be estopped, after the death of the first husband, from contesting the validity of the decree and from claiming any part of his estate as widow. In this case the action for divorce was instituted by the guardian of the husband, who was insane, the wife was properly served with notice, appeared in the action, and made a contract as to the amount of alimony she was to receive in case of a decree against her, and after the decree was entered accepted the alimony and married another man. The court therefore held that, although the decree was void because a guardian has no authority to institute an action for divorce on behalf of his ward, still, the wife having accepted the decree as valid and acted upon it by marrying again, she could not now be permitted to come into a court of justice and masquerade as the widow of her first husband, and at the same time claim that she was the wife of the man whom she married and with whom she lived for about eight years before the first husband died; that both good law and good morals forbid it.

On the ground of estoppel, also, a wife was held, in *Arthur v. Israel*, 15 Colo. 147, 10 L. R. A. 693, 25 Pac. 81, to have no right to attack, after her husband's death, the validity of a divorce decree obtained by him during his lifetime, for the purpose of securing his estate. Upon a former hearing of this case (7 Colo. 5, 1 Pac. 438) the supreme court of Colorado had reversed a judgment of the county court in an action brought by the wife to establish her right to the estate of her former husband against his administrator, on the ground of error in admitting in evidence the record of two divorce proceedings against her, which showed plainly on their face a lack of jurisdiction in the court over the defendant therein because of defective service of process. Thereupon, by leave of the county court to which the case was remanded, the wife filed an amendment to her original petition, in which the facts of such review and reversal by the supreme court and the conclusions reached by the reviewing tribunal were set forth, and the administrator filed a supplemental answer thereto, in which it was averred that after the divorce decrees were entered the petitioner, with full knowledge thereof, had voluntarily, during the lifetime of her husband, entered into a contract of marriage with another man, and had lived with him as his wife until after the death of her first husband. A demurrer to this answer was sustained, and final judgment entered for the petitioner, but the supreme court, on proceedings instituted to reverse this judgment, held that, upon the state of facts set forth in the supplemental answer, the petitioner would not be allowed to set up the invalidity of the divorce decree for the purpose of sharing in the decedent's estate, since, by acquiescing in and accepting the benefits of the decree, she had estopped herself to question its validity. The court put the question thus: "When the wife without cause deserts her husband and home, and for years lives in adultery

with another man, and afterwards, upon learning that a divorce has been obtained by her deserted husband, causes a marriage ceremony with her paramour to be solemnized, and continuously lives and cohabits with him as his wife, may she, upon the subsequent decease of her abandoned husband, take advantage of the fact that the divorce decree is void for want of proper service of process, and successfully assert against other heirs her right under the statute of descents and distributions to the deceased's estate as his widow?" An affirmative answer to this question, the court says, would be shocking to good morals, to sound public policy, and to the simplest principles of justice, and adds that the petitioner, having voluntarily elected to postpone action until such time as she might secure all the benefits of the marriage contract without discharging any of its burdens, would not now be allowed to set up the invalidity of the divorce decree for the purpose of securing the estate of her former husband. But this is on the express ground that the petitioner had estopped herself by her conduct, and the court adheres to its former decision as to the invalidity of the decree and its inadmissibility in evidence. For a discussion of the effect of the husband's death on the right to attack the decree, see *Israel v. Arthur*, 6 Colo. 85, 7 Colo. 12, 1 Pac. 442 (*supra* II. a, 8).

And a suit for maintenance, charging desertion, having been brought by a wife against her husband, a consent decree made after the court had announced that it would grant a divorce, in which there was a stipulation as to alimony, "to be in full of all claims of said complainant against said defendant or his property," was held, in *Owen v. Yale*, 75 Mich. 256, 42 N. W. 817, to be valid and to estop the wife from claiming dower in the property of her deceased husband. In this case the plaintiff, as grantee of lands formerly owned by the deceased husband, filed a bill to quiet title thereto as against the claim of dower of the defendant, who, he claimed, had relinquished her dower by the consent decree of divorce obtained during her husband's lifetime. From a decree granting the relief prayed the wife appealed, but the supreme court affirmed the decree. It appeared that the alimony stipulated for in the consent decree had been paid to and received by the wife, and that she had likewise acted upon the decree by contracting a second marriage. Nothing is said as to the ground upon which she claimed the right to dower.

And in an action to partition certain lands of a decedent, brought by one claiming a dower interest therein as widow, in which the defendants set up a decree of divorce procured by plaintiff from her husband many years before and the payment of a certain sum as alimony to her, which the wife attacked as void for lack of jurisdiction in the court decreeing it because the petition failed to show that she had been a resident of the state for six months, as required by statute, it was held that, having authorized the prosecution of the suit, and having received the alimony allowed her, she was estopped to deny the jurisdiction; that after she had enjoyed the benefits she sought and gained from the decree she could not be heard to claim that it was void for want of jurisdiction. The wife also denied that she ever gave the attorney who prosecuted the suit in her name authority to appear for her, and alleged that she had no knowledge of the proceedings, that no notice was served upon her, and that she never received the money collected as alimony, also that she was insane at the time; but the court held that the evidence

failed to sustain these claims. *Ellis v. White*, 61 Iowa, 644, 17 N. W. 28.

Likewise, a woman who, through her attorney, instituted a suit for divorce from bed and board in a court of general jurisdiction, but which had no jurisdiction of the action because neither she nor her husband resided in the county where suit was brought; and whose attorney thereafter filed an amended petition seeking an absolute divorce, which was granted, —was held in *Asbury v. Powers*, 23 Ky. L. Rep. 1822, 65 S. W. 605, to be estopped, after the lapse of twenty-seven years and the remarriage and death of her husband, to attack the decree because of such lack of jurisdiction, although she alleged that the suit was instituted in such court, and the amended petition filed, by her attorney without her knowledge or consent, and that the decree for absolute divorce was granted without her knowledge and against her desire, on default of answer and in the absence of proof, and that it was procured by the fraud of her husband in collusion with her counsel. It was held that, as the petition in the divorce suit was not a part of the record, it must be presumed that the averment as to citizenship necessary to confer jurisdiction must have appeared therein; and that, as she had stood by for twenty-seven years without making any claim or assertion of her rights, knowing, as she must have known, that her husband had married another, with whom he lived as husband for fifteen years before his death, and without making any investigation as to the kind of judgment rendered in the action brought by her, or by what claim her husband had married another, —it would be inequitable and unjust to permit her to attack the judgment she had obtained as void. Whether any person could, by impeaching the averment of a jurisdictional fact, destroy the judgment of a court of general jurisdiction after the lapse of twenty-five years, was considered a debatable question; but the court said it was clear that a party to the record, and especially the plaintiff invoking the jurisdiction, could not, after so great a lapse of time, impeach, in a collateral proceeding, a decree of divorce or other decree fixing the status of the parties. The question of the validity of the divorce in this case arose in a contest between the divorced wife and one whom the husband had subsequently married as to the settlement of his estate.

So, also, a man who leaves his wife and home, and goes to another state, and never lives with her again or supports her, during whose absence his wife obtains a decree of divorce against him on the ground of desertion, which is void because of defective service of summons, is held, in *Marvin v. Foster*, 61 Minn. 154, 63 N. W. 484, to be estopped to take advantage of the invalidity of such decree after the death of his wife, about fourteen years later, and to assert a right to her estate as her surviving husband, where he had actual notice of the pendency of the divorce proceedings, and took no steps to investigate the validity of the decree, but, upon learning that the divorce had been granted, married another woman, to whom, for the purpose of inducing her to marry him, he showed a newspaper notice of the divorce decree and represented himself as a single man, and with whom he lived as his wife, and who had a child by him. The court said that, having voluntarily accepted the privileges, benefits, and fruits of the void judgment of divorce, the husband was thereby estopped from claiming any portion of the estate of his deceased wife, adding also: "The innocent second wife should not be made the victim of his turpitude, and the helpless child should not have the stain of illegitimacy resting upon it

by Foster [the husband] now asserting that he is the husband of a former wife. He may publish his own shame to the world for a money consideration; but this court will not aid him to stigmatize his second wife as living an adulterous life, nor hold that her child is a bastard." It is further stated, however, that a void judgment of divorce cannot be legalized by the acts of the divorced parties, and that the doctrine of estoppel is applied to this case on the ground that it is one relating solely to property rights, unaffected by any considerations which give to the marriage relation its precise status, and that the court does not wish to be understood as lending any countenance to the idea that parties may become divorced upon the ground of estoppel by conduct. This attack on the divorce decree was made in an action to partition the wife's estate, by one to whom the husband had assigned his alleged interest therein, and therefore was really an attack by a third party, but the court treats it as if made by the husband himself. As the husband's assignee took with knowledge of all the facts in the case, he stood in no better position than the husband. (See also *infra*, III., b.)

In *Bourne v. Simpson*, 9 B. Mon. 454, an action was brought against the owner and occupant of land sold under execution against one since deceased by one claiming to be the widow of the deceased, praying to have dower allotted to her in such land. It appeared that in a suit for divorce brought by her against the deceased a consent judgment was entered for alimony, and that later, in an action brought by the husband for divorce, a decree was made divorcing both parties and restoring them to all the rights and privileges of unmarried persons. The wife had accepted the provisions as to alimony, and both parties had married again. The court stated that under the Kentucky act of 1816 no writ of error could be sued out to reverse any decree of any court granting a divorce, and that, therefore, whether the decree was right or wrong, or authorized or not by the facts of the case, it could not be disturbed by this court so far as the divorce alone was concerned; but that, if the court in rendering the decree did not make a suitable provision for the wife, the court could, at the instance of the party who complained of it, examine the decree, and, if a wrong had been done, reverse it, if the party complaining was not precluded from prosecuting the writ of error or appeal. But in this case the wife was held to be precluded from complaining of the provision made for her by the decree, since it was rendered by her consent; and it was also held that the fact that she was an infant at the time did not render the decree void; that it was voidable merely, and, if injustice was done her, might have been reversed by seeking a reversal in apt time; but that, having failed to prosecute a writ of error, she could not now, in a new and different suit, effect her object, particularly after she had received and enjoyed the property decreed her, and not only had done this, but had again entered into the marriage relation. The court said: "Having used all the privileges conferred upon her by the decree, she is too late in complaining of its burdens, if any such exist."

In an action brought by a wife to set aside the will of her deceased husband, and to have the estate disposed of thereby declared to belong to her, in which a decree of divorce obtained by the husband in his lifetime was set up in defense, but attacked by the wife as fraudulent in a reply filed by her, it was held that the falsity of affidavits made by the husband in the divorce suit, to the effect that the defend-

ant was a nonresident, and that he did not know her address and could not ascertain the same by any means within his control, by means of which he secured service by publication and was relieved from sending a copy of the petition and publication notice to the defendant, as required by statute in case of service by publication, did not render the decree an absolute nullity and void in a collateral proceeding, on the ground that, the affidavits being sufficient on their face, the service by publication thus secured was valid, and that the affidavits could only be impeached in a direct action brought for that purpose. After deciding this, the court goes on to say that, treating the decree as not void, but merely voidable, the wife was not entitled to relief, since she failed to state in her pleadings that she did not have knowledge of the divorce proceedings in time to appear in court and defend, as it was her duty to do if she had such knowledge, and that she did not discover the fraud perpetrated upon her until within less than two years before filing her reply, the statute requiring that, where fraud is perpetrated upon a person, he must bring his action to defeat the same within two years next after he has knowledge thereof, and this action having been brought more than two years after the divorce decree was obtained. The court in thus discussing the effect of the wife's delay seems, for the purpose of determining her right to relief, to treat the present action as a direct attack upon the validity of the decree, or to impliedly hold that, even if this were a direct attack, the wife's pleadings were not sufficient to entitle her to defeat the divorce judgment. *Larimer v. Knoyle*, 43 Kan. 338, 23 Pac. 487.

The right to contest the validity of the decree is usually sustained, however, where the party attacking it has not been guilty of laches, and has not estopped himself or herself by taking advantage of the benefits conferred thereby.

Thus, a divorce decree was held subject to collateral attack on the ground of fraud after the death of the successful party, in a suit for partition of his estate, brought by the divorced wife, in which it was contended that the plaintiff had no interest in the estate because at the time of his death she was not his wife, he having obtained an absolute divorce from her during his lifetime. The plaintiff in her bill set forth her marriage to the decedent, and that he, having wrongfully driven her from his home, induced her while ill and mentally irresponsible, through fraud and misrepresentations, to consent, in consideration of a sum of money, to the institution by him of a suit for divorce on the ground of abandonment, but on no other ground, and to make no defense thereto, and to come into the jurisdiction of the court and accept service of a writ of summons in the suit, believing the ground for divorce therein alleged to be abandonment and desertion, but which really charged adultery, after which she left the state and did not learn until a year later that the decree of divorce had been procured on a charge of adultery, which she alleged to be absolutely and wholly false, whereupon she immediately instituted a suit in the court in which the divorce had been obtained to have such decree set aside and canceled, which suit was still pending when her husband died. It was held that the complaint set up facts sufficient to constitute a cause of action, and to authorize the relief prayed, and that, as the divorce had been procured by fraud extrinsic or collateral to the matter tried by the court rendering the decree, it was subject to

collateral attack in the suit for partition. *Daniels v. Benedict*, 50 Fed. 347.

In an action brought by one claiming as widow to have dower allotted her in land devised to others by her deceased husband the defendants set up a decree of divorce obtained by the husband in another state, which was held void because the husband had not been a resident of the state where the divorce was obtained a sufficient length of time before filing his petition, and because there was no personal service of process on the wife. *Chaney v. Bryan*, 15 Lea, 589. The court said: "There can be no doubt that when a decree of divorce granted by the courts of another state is relied upon in this state in bar of the rights of the wife or widow she may contest the validity of the same by showing the want of some jurisdictional fact, although the record show or recite the existence of the fact."

So in *Newcomb v. Newcomb*, 13 Bush, 544, 26 Am. Rep. 222, which was an action in equity instituted by an incompetent by her next friend, claiming as widow of a deceased person a right to dower in his realty and her distributable share of his personality, a decree of divorce obtained by the husband prior to his death, which was set up in bar of the present action, was attacked as void upon the ground, among others, that it was obtained upon constructive service of process, and that, the husband having placed his wife in an asylum in another state, and she being under his control and subject to his will, she was neither a non-resident nor absent from the state in the sense of the statute authorizing constructive service of process. The court held that a decree of divorce thus obtained was void, and subject to collateral attack when pleaded as a defense in an action to recover dower and distribution in the husband's estate, and this notwithstanding the husband had married a second time.

And a decree of divorce obtained by a husband in another state upon service of process by publication was held, in *Re House*, 2 Connoly, 524, 14 N. Y. Supp. 275, after the death of the husband, to be absolutely void in New York as against the wife, who was not personally served and did not appear in the action, though she had notice thereof. In this case the husband had married again and returned to the state of New York, and upon his death both the first and second wife made application, as widow, to be appointed administratrix, and the court held that the first wife was entitled to be appointed.

Clayton v. Clayton, 4 Colo. 410, was an action in ejectment brought as heir at law by one claiming to be the wife of a person deceased, against his administrators, to recover the possession of certain property. The defendants offered in evidence a decree of divorce between the plaintiff and the deceased, to which plaintiff objected on the ground that the court granting the divorce had no jurisdiction over her and that the decree for that reason was absolutely void. The defendants contended that the plaintiff could not attack the decree of divorce because she had failed to take any steps to have it reviewed or reversed within the three years prescribed by statute, and also on the ground that the decree could not be attacked collaterally. But the court held that the three years' statute of limitations applied only to a review of the decree on its merits, and had no bearing on the question of the admissibility in evidence of the record in the divorce suit; that the jurisdiction of a court is always a proper subject of inquiry when its record is sought to be interposed by a party claiming a benefit therefrom; and that, the record in the divorce suit showing affirmatively a want of

jurisdiction in the court, because of lack of notice to the defendant therein on account of defective service of process, it was properly rejected as evidence.

In an action between these same parties (*Cheely v. Clayton*, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 828), the court held that a decree of divorce granted to a man on merely constructive service of process which was defective for lack of sufficient notice to the defendant is wholly void, and is therefore no bar to an action by the wife to recover, as the husband's widow, a share in his real estate. In this, as in the other case, the defendants attempted to set up the decree of divorce in bar of the plaintiff's right to recover. The court said: "The true question in this case is which of the two Sarah A. Claytons was the lawful wife of James W. Clayton at the time of his death, and as such entitled by the statutes of Colorado to inherit one half of his real estate," and then proceeded to discuss the validity of the divorce without saying anything in regard to the effect of the death of the husband on the right to contest the validity thereof.

And a divorce obtained by a husband in a foreign state upon service of notice upon his wife by publication only was held, in *Reel v. Elder*, 62 Pa. 308, 1 Am. Rep. 414, in an action brought after the death of the husband, by the wife, to obtain dower in land which he had aliened during his lifetime, to be void because of lack of jurisdiction in the court granting it, and not to bar the wife's right of dower.

On appeal from a decree granting letters of administration on the estate of a decedent to one claiming to be his widow the appellants alleged that the decedent left no widow, having some years before his death obtained a divorce from the petitioner in the present proceeding. It was proved that a divorce in his favor had been granted in Ohio, but the petitioner attacked the decree as void for lack of jurisdiction in that the deceased had not complied with the requirements of the Ohio statutes that, in case the defendant in a divorce proceeding is not a resident of the county, and notice is served by publication, a summons and copy of the petition shall be mailed to defendant, unless her residence is unknown to the applicant and cannot be ascertained with reasonable diligence, in which case publication in a newspaper shall be sufficient. It appeared that the divorce had been granted on constructive service by publication in the newspapers only, no copy of the petition having been mailed to defendant, and the record alleged that defendant's residence was unknown to the applicant and that he had used due diligence to ascertain the same, and that defendant had no notice of the proceedings until after the decree was made. It being proved by the evidence that at the time of the pendency of the divorce proceedings the residence of the defendant therein was well known to the applicant, it was held that the court had no jurisdiction over defendant, and that the decree had been obtained by falsehood and fraud practiced upon the court, and should be treated as a nullity, the court saying that while, as a general rule, it is true that fraud in obtaining a judgment cannot be set up in a collateral proceeding by a party or one in privity with him, this rule relates only to fraud which involves the merits of the judgment, and does not govern the case of jurisdiction fraudulently attempted to be obtained. It was urged that the petitioner, by omitting after notice of the decree of divorce to take steps to set it aside and otherwise acquiescing in it, waived her right to object to its validity, but it was held that, as she had taken no benefit under the decree, and had done nothing to in-

duce the deceased or his representatives to any line of action prejudicial to their interests, there could be no estoppel. *Stanton v. Crosby*, 9 Hun, 370.

A legislative divorce procured by a husband was held, in *Gaines v. Gaines*, 9 B. Mon. 306, 48 Am. Dec. 425, in a contest between the wife and the husband's representatives as to dower rights, after the husband's death, to be inoperative, so far at least as it affected her dower rights. It appears that, the wife having filed a bill against her husband, alleging ill treatment and that she had been forced to leave him with an inadequate provision for her support, and praying alimony, the husband answered, denying the allegations of the bill and praying for a divorce on the ground of abandonment, and at the next term of court filed a supplemental answer, in which he stated that since the filing of his original answer the legislature had granted him a decree of divorce from his wife, filing a copy of the act, which he pleaded and relied upon as a bar to the claim for alimony. The husband died within less than a year, and the wife thereupon filed a bill of revivor against his representatives, claiming dower in his lands, to which bill the defendants set up the legislative divorce as a bar to all claims to dower or distribution. The court said that the main question presented was as to the effect of the legislative divorce upon the respective rights of the parties, and that this involved the question of the constitutional power of the legislature to pass special acts of divorce, but that the question was not simply whether the legislature might under any circumstances constitutionally enact that one person be divorced from another, but "whether, when it is manifest that a party after having sought a divorce in a judicial tribunal, and while his suit is there pending, abandons that forum and resorts to the legislative power for the sole purpose of affecting and defeating the legal and equitable rights of his wife in his property, the divorce granted by the legislature on such application can, without disregarding the division of powers and distinction of departments as established by the Constitution and the security of private rights of contract and of property therein granted, be considered as asserting to any extent the rights of property involved in the question of divorce," and expressed the opinion that it could not. It was therefore held that, without deciding upon the effect of legislative divorces so far as they might operate upon the personal relations and abilities or disabilities of the parties, the divorce in this case was inoperative so far as it respected the rights of property involved, and could not deprive the wife of her interest in the estate of her husband as it would have existed had there been no divorce.

And a divorce decreed in favor of a husband, by a court of a state in which the cause of action did not accrue, and where the parties never lived as husband and wife, and where the wife was never served with process and never appeared or participated in any way in the proceedings, was held, in *Platt's Appeal*, 80 Pa. 501, after the death of the successful party, to be void in Pennsylvania, where the husband resided at his death, and the wife was held entitled to dower in his estate as widow. In this case a bill had been filed by the wife in the court granting the divorce to have the decree set aside during her husband's lifetime, but he died pending the action.

Jordan v. Van Epps, 58 How. Pr. 338, was an action of ejectment to recover an alleged dower interest as widow against the defendant, a purchaser under partition sale. Among other defenses, the defendant set up a decree of di-

vorces between plaintiff and her deceased husband, which plaintiff attacked as fraudulent. Counsel for defendant argued that plaintiff, being a party to the divorce suit, could not collaterally impeach the decree for fraud or irregularity as against a third person, but this question was not decided, the case being disposed of on other grounds, and the court saying that in the disposition which they proposed to make of the case it was not necessary to consider the various objections to the validity of the divorce.

In *Wright v. Wright*, 8 N. J. Eq. 143, a bill filed by a woman as widow, asking for dower in her deceased husband's property, and which, anticipating that a decree of divorce obtained by the husband in his lifetime would be set up in defense, alleged that such divorce was void because obtained by fraud and without notice to the defendant therein, was held good on demurrer, the court saying the defense should have been by bill and answer, and not by demurrer. Nothing is said in the opinion as to the merits of the case, or the effect of the death of the husband on the right to review the decree of divorce, but one of the grounds of the demurrer was that the bill was exhibited for the purpose of setting aside and making void or inoperative the divorce decree, and that the plaintiff in the divorce suit had departed this life long prior to the commencement of the present suit.

A judgment of separation from bed and board, entered at the instance of a wife, on the mere acknowledgment by the husband of the truth of the allegations of the wife's petition, and which she set up in bar of the husband's right to a divorce in a later proceeding instituted by him, was attacked by the wife after the husband's death, in a contest as to property rights, in *Welgel's Succession*, 18 La. Ann. 49. The court cited another case holding that the acknowledgment by the defendant of the truth of the facts alleged was insufficient to support a demand for a divorce, and said that, while they wholly approved of the rule, yet when a judgment had been solemnly rendered upon such evidence, subsequently recognized and invoked by both parties in a judicial proceeding, and acquiesced in for more than thirty years, it should not be treated as a nullity.

III. Attack by stranger to the decree.

a. In direct proceeding.

There seems to be only one case in which a direct action has been brought by third parties to set aside a decree of divorce alleged to be fraudulent,—that of *Richardson v. Stowe*, 102 Mo. 33, 14 S. W. 810, in which, on appeal from a judgment dismissing a bill brought by the heirs of a deceased person to have annulled a decree of divorce in favor of one claiming to have been the wife of the decedent, and a money judgment for maintenance and costs of suit, which was made a lien on the real estate of the defendant, on the ground of fraud in procuring the decree in that the plaintiff in the divorce suit was never legally married to the defendant because at the time of the alleged marriage he had a lawful wife living and was of unsound mind and incapable of contracting, and to vacate a sale of the real estate under execution issued on such judgment, it was held that, as it appeared that the court in which the divorce proceedings were instituted had jurisdiction to hear and determine finally all the issues attempted to be raised in the present suit, and as it had found them for the plaintiff in that case, they were adjudicated and could not be again raised in this case, no fraudulent act be-

ing alleged or shown to have been perpetrated by the wife in obtaining the decree of divorce. It further stated that the fraud for which a judgment may be vacated or enjoined in equity must be in the procurement of the judgment; that, if the cause of action be vitiated by fraud, this is a defense which must be interposed, and, unless its interposition be prevented by fraud, it cannot be asserted against the judgment. Nothing was said in the opinion as to the effect of the death of the husband, though there was a contention in the brief of counsel that whatever right, if any, may have existed to set aside the decree, was in the defendant, and, being personal to him, died with him and did not descend.

b. In collateral proceeding.

In several cases the validity of a divorce decree has been attacked in collateral proceedings after the death of one or both of the parties by strangers to the decree, but in only one of them—that of *Thomas v. Thomas*, 88 Wis. 88, 59 N. W. 504—is the question of the effect of the death squarely passed upon.

In an action of debt brought by an administrator for the purchase price of land sold by his decedent without the joinder of his wife, the sale being conditioned upon the procuring of a discharge of the wife's interest in the land, there was a question as to whether the wife's interest was extinguished by a decree of divorce obtained by the husband in his lifetime. The divorce was obtained in a foreign state of which the husband was a bona fide resident at the time, upon service of process by publication, the wife having no actual notice thereof, and the court held that it could have no extraterritorial force, and was not binding on the wife in Pennsylvania, where the marriage took place and the offense upon which the divorce was based was committed, and that it did not bar her right to dower in the property of her husband situated in that state. *Colvin v. Reed*, 55 Pa. 375.

Burge v. Burge (Mo. App.) 67 S. W. 703, was an action by one claiming to be the wife of a deceased person to revoke letters of administration granted to a son of the deceased, and to secure the grant thereof to herself. The point on which the case turned was whether or not plaintiff was the lawful wife of the decedent at the time of his death. The deceased had been thrice married. The first wife died, and it was claimed by the plaintiff that he was divorced from the second, and that she, being the third and having survived him, was his lawful widow. To maintain the issue, she put in evidence a certificate of her marriage with decedent. The defendant thereupon put in evidence a certificate of the solemnization of the marriage of decedent with his second wife, coupled with parol evidence that she was living at the time of this trial, whereupon plaintiff introduced the record of the divorce proceedings between decedent and this second wife, from which it appeared that judgment was given therein on constructive notice or notice by publication. The defendant contended that the record on its face showed that the court was without jurisdiction because the order of publication upon which the divorce was granted did not describe the defendant therein by her proper name. The court found that the notice by publication was defective in failing properly to describe the defendant, and that the judgment of divorce was therefore without notice and void. But the plaintiff contended that, even if the divorce judgment was void, defendant in this case was estopped to deny its validity. It was held, however, that, as the

defendant was claiming no property rights under the decree, the only purpose of invoking the application of the doctrine of estoppel was to validate a void marriage, and that this could not be allowed; that, even if the decree had been valid as against the defendant therein, there was not that privity between the decedent and the defendant in this action which is an essential element of an estoppel in cases of this kind, since, to make one a privy to an action, he must have acquired an interest in the subject-matter thereof, either by inheritance, succession, or purchase, or he must hold the property subordinatedly. As it was not pretended, that the defendant had acquired any interest in the subject-matter of the divorce proceeding, and as he could not do so, since the only matter determined therein related solely to the marriage status, it was held that there was no ground upon which to claim that the defendant was privy to the divorce proceedings or in any way bound thereby, and that therefore he was not estopped to impeach the divorce decree on the ground of a want of jurisdiction in the court giving it.

In *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723, which was an action to recover lands, by persons claiming as heirs of a woman who had been divorced by legislative act, the divorce was attacked as void on the ground that the wife had no knowledge or notice thereof, that there was no cause for divorce, and that the legislature had no authority to pass the act. Both parties to the divorce were dead at the time this action was brought. The court held that the divorce was valid, that the granting of divorces was a rightful subject of legislation, and that the fact that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, could not affect the validity of the act, though saying that, if the true state of facts had been brought to the attention of Congress, that body might, and probably would, have annulled the act.

And a decree of divorce on the ground of adultery, obtained in Ohio by one domiciled there, against his wife domiciled in New York, on service by publication, was held valid in *Re Morrison*, 52 Hun, 102, 5 N. Y. Supp. 90. Affirmed without opinion in 117 N. Y. 638, 22 N. E. 1130, after the death of both parties, on appeal by the next of kin of the wife from a decree of the surrogate court awarding distribution of the wife's estate to the representatives of the deceased husband. It was contended by the husband's representatives that the divorce proceedings in Ohio were absolutely void in New York, but the court held that, since the parties were married in Ohio, the husband was domiciled there, and the adultery was committed there; and since, under precisely the same circumstances, a divorce would be granted in New York,—by thus upholding the foreign divorce it did not run counter to the public policy of the state or abstract justice or pure morals, but simply recognized the principle of comity of states, and gave due effect to the judgment of a sister state. It was held, moreover, that, the husband, having invoked the jurisdiction of the Ohio court and submitted himself thereto, could not be heard to question such jurisdiction, and that his representatives could occupy no better position than he would have occupied if living.

And a divorce obtained by a woman against her husband in a state to which she had gone after he had deserted her, after service on the husband and continuance twice granted to permit him to appear and defend, which he failed to do, was held good in another state when attacked as void by third parties after the hus-

band's death on the ground that the court granting it had no jurisdiction over either party because the husband was not a resident of the state and the wife had no legal domicile there, since she could not acquire a domicile different from that which she had when her husband deserted her, except by following him. *Harding v. Allen*, 9 Me. 140, 23 Am. Dec. 549. There seems to have been no question but that the divorce was valid in the state where granted, and the question in this case seems rather to have been, What credit should be given to the decree when rights were claimed under it in another state? The court held that the protection of innocent persons and the purity of public morals required that divorces lawfully pronounced in one jurisdiction, and the new relations thereupon formed, should be recognized as operative and binding everywhere, though to this might be excepted cases of fraud and collusion, which when pleaded and verified vacated all judgments. But in giving effect to the divorce decree it was explicitly stated that the grounds upon which the decision was placed were limited to the dissolution of the marriage, and that, had the action been one to enforce an allowance of alimony granted by the decree, a different question would be presented.

In a proceeding against executors to vacate and set aside the settlement by their decedent, as administratrix, of the estate of her deceased husband, and the final order of distribution, assigning the whole estate to her, brought by the heirs of the husband, on the ground that she was never his lawful wife because having a lawful husband living at the time of her second marriage, and that she fraudulently procured such order of distribution by concealing this fact from the court, the defendants set up a divorce procured by the decedent from her first husband, which the plaintiffs attacked as invalid. The court refused to consider the validity of the divorce decree for the reason that it considered the final order of distribution of the husband's estate as conclusive. It was contended that this order was not conclusive because the wife had been guilty of fraud in procuring it by concealing the fact of her prior marriage, and that the plaintiffs knew nothing of such marriage and divorce until after her death. But the court held that the evidence failed to show any fraud on her part as to such marriage or attempt to conceal it, and that the former marriage and divorce were matters of common repute in the neighborhood where she lived; also that the plaintiffs had been guilty of laches in failing for six years after the order of distribution was made, and until after the death of the wife, to investigate the validity of the divorce proceedings, since the facts within their knowledge were sufficient to put them on inquiry; that, "not having made any inquiry . . . when they ought to have made it, they will not be allowed to make it six years later, when the opposing party is dead and the main source of evidence thereby cut off." *Thomas v. Thomas*, 88 Wis. 88, 59 N. W. 504.

In *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761, an action of debt was brought against a man on a judgment for alimony rendered against him in a divorce proceeding in another state. Shortly after the commencement of the action the defendant died and his administrator was substituted as defendant in his place. Three days before trial and seventeen months after issue joined defendant asked leave to file additional pleas, which was refused. One of the alleged facts which it was thus proposed to plead was that the recovery of alimony was based upon a fraudulent divorce obtained by collusion and agreement between the

plaintiff and deceased. But the court held that the husband, if alive, could not set up as a defense to the present action that the decree of divorce from his wife had been obtained by collusion with her, on the well-settled principle that in a court of justice a man cannot complain of a wrong done by himself or by another's wrong in which he was a partaker, and that such defense was as much forbidden to the administrator of the deceased as to the deceased himself, saying: "If the defendant in a divorce decree cannot attack it because it was obtained by his own fraud, it would seem to be true that his administrator could not attack it because of such fraud. If he cannot take advantage of his own wrongs in his lifetime, for the purpose of saving his estate from liability, his representative after his death ought not to be allowed to save his estate from liability by taking advantage of that same wrong."

In an action brought against the administrator and widow of a deceased person to require them to account for certain personal property of the decedent which had come into their hands, and to pay to the plaintiffs their just proportion thereof, there was involved a question as to the legality of the marriage between decedent and his wife, which depended on the validity of a divorce decreed between her and a former husband, who was dead at the time of the bringing of this action. The wife was a resident of North Carolina and the divorce was procured in Tennessee, and it was held that the decree was altogether inoperative and null because the wife did not appear in the suit, was not served with process, and was not a subject of Tennessee, but was a citizen and inhabitant of North Carolina and not subject to the jurisdiction of the Tennessee court. It was therefore held that the second marriage was void. *Irby v. Wilson*, 21 N. C. (1 Dev. & B. Eq.) 568.

In *Marvin v. Foster*, 61 Minn. 154, 63 N. W. 484, an attack was made on the validity of a divorce decree in favor of a wife after her death, in a suit to partition her estate, by one to whom the husband had transferred all his alleged rights in the wife's estate. The decree was void because of defective service of process on the husband, but, as he had estopped himself to question its validity by taking advantage of the benefits thereof and marrying a second time, judgment was rendered against his assignee. The assignee had taken the conveyance from the husband with knowledge of all the facts in the case, and therefore stood in no better position than the husband. The court, however, treated this attack on the divorce decree as if made by the husband himself. (See *supra*, II. b.)

In an action to recover, as widow, dower in certain lands conveyed by one since deceased it was alleged in defense that the plaintiff was not the wife of the deceased at the time of his death, he having previously obtained a divorce from her in another state. After the action commenced the plaintiff died and her administrator was substituted as plaintiff. It was proved that the divorce was obtained by the deceased without the knowledge of his wife, and that she knew nothing thereof until after his death, and there was nothing in the record to show on what ground it had been granted. It was held that the decree acted only on the marital relation between the parties, and did not affect, or purport to affect, the property rights of the wife in the state of Ohio. The court also said that, as the wife had no opportunity to defend, all that could be claimed for the decree was that it dissolved the marital relation between the parties and restored the husband to the status of an unmarried man,

saying: "This the court could do; but, as it had no jurisdiction of the person of the wife, it was not competent to the Indiana court to affect such rights as she had acquired in the property of the husband under the laws of this state." There is nothing in the opinion of this case, or in the facts stated, to show whether the validity of the foreign decree of divorce was attacked, or whether it was contended simply that it did not affect the dower right of the plaintiff in her husband's property. *Doerr v. Forsythe*, 50 Ohio St. 726, 35 N. E. 1055.

A divorce decreed by the ecclesiastical court on the ground that at the time of contracting the marriage the parties, or one of them, had not reached the age of consent, which in effect amounted to an annulment of the marriage, was attacked in the court of wards after the death of the husband, by a daughter born of such marriage, in a bill filed to traverse an office found whereby a child by a later wife was adjudged to be the lawful heir, in which it was alleged that both the parties were above the age of consent at the time of their marriage. It was contended that, if in truth the husband and wife were of the age of consent at the time of the marriage, no divorce, after pretending that they were within the age of consent, should conclude the parties or their heirs, but that they might prove the contrary at common law,—and especially in the present case, because it concerned inheritance and the true descent thereof. But it was held that, as the ecclesiastical court had sentenced the marriage to be void and of no effect, and had decreed a divorce, that decision was binding on the court of wards, the court saying that, as the ecclesiastical judge is judge of the original matter, *vis.*, the lawfulness of the marriage, "we will never examine the cause, whether it be true or not; for of things (the cognizance whereof belongs to the ecclesiastical court) we ought to give credit to their sentences, as they give to the judgments in our courts." It was therefore held that the divorce, as long as it remained in force, was binding and concluded the heirs of the divorced parties. *Kenn's Case*, 7 Coke, 42b. This case does not seem to decide anything as to the right to review a decree of divorce after the death of one of the parties by a proceeding in the proper court, but only to decide that, owing to the peculiar jurisdiction of the ecclesiastical court over matrimonial causes, a final decree of that court cannot be attacked collaterally in the temporal courts. But the statement that the divorce was binding "as long as it remained in force" seems to indicate that on a suit brought in the ecclesiastical court the judgment might be reversed, and Hargrave in his "Treatise on the Effect of Sentences of Courts Ecclesiastical in Cases of Marriage when Pleaded or Offered in Evidence in the Courts Temporal," published in his "Tracts Relative to the Law of England," says, on page 455, in discussing *Kenn's Case*: "It seems to have been agreed by the judges that the sentence, being *contra matrimonium*, was not conclusive on the issue of . . . [the divorced parties] in the spiritual court."

Upon this case being referred by the King's especial commandment to a committee of the justices and chief justices, it was resolved, in *Robertson v. Stallage*, Cro. Jac. 186, that "a divorce being by sentence in the spiritual court between . . . [a man] and his wife *causa præcontractus* or other cause, the parties being dead between whom it was, the court of wards cannot now examine it to prove another heir against that sentence." The headnote says that a sentence of divorce cannot be re-examined after the death of the parties, and in 57 L. R. A.

Comyn's Digest, *Baron and Feme*, C, the case is also cited to the proposition that a divorce by sentence in the life of the parties cannot be re-examined after their death. But in view of the decision in *Kenn's Case*, and of the opinion which seems to have very widely prevailed, though there is some conflict on the point, that a sentence in the spiritual courts in a matrimonial cause was conclusive in the temporal courts, it seems probable that all the judges intended to decide was that the sentence of the ecclesiastical court must be given full credit in the court of wards until set aside in the proper court, or, at most, that it could not be reviewed in the temporal courts after the death of the parties. It hardly seems to go so far as to decide that a party interested could not impeach the sentence for fraud in the ecclesiastical courts, even after the death of the parties.

In *Corbet's Case*, 22 Edw. IV. Fitzh. Abr. title, *Consultat.* 5, as elaborated in *Kenn's Case*, 7 Coke, 42b, an infant was married while under the age of consent but after reaching full age cohabited with his wife and afterwards put her away, having no issue, and married another, by whom he had a son. After his death a younger brother sued in the spiritual court to reverse the second marriage. It was stated in this case that, if the elder brother and his first wife had had issue and been unjustly divorced and the husband had thereafter married another and died, the issue of the first marriage might sue in the ecclesiastical court to avoid the divorce; and a distinction is made between the annulment after the death of the parties of a sentence of divorce given in their lifetime and a divorce granted after the death of the parties, it being said that a divorce may be annulled after the death of the parties, but that, if either of the parties be dead before any divorce is granted, the surviving party cannot sue to declare the marriage void. However, as in the *Case of Corbet* there was no divorce, these statements must be considered mere *dicta*.

And in *Shaw v. Gould*, L. R. 3 H. L. 55, 37 L. J. Ch. N. S. 433, 18 L. T. N. S. 833, there was a query raised, which was not decided, as to whether collusion would be a sufficient reason for setting aside a decree of divorce after the death of all the parties to the proceeding. In this case a divorce decreed in Scotland between parties who were married in England, and who had gone to Scotland for the purpose of obtaining the divorce, but who had resided there a sufficient length of time to give the court jurisdiction under the law of Scotland, was held to be invalid in England, and therefore the children of a second marriage celebrated in Scotland were held not to be "lawfully begotten" within the meaning of a will executed in England, devising a fund in trust for their mother for life and after her death to her children lawfully begotten. The decision was rested on the lack of jurisdiction in the Scotch court to decree a divorce between parties married and domiciled in England, but one of the judges said that, even if the Scotch court had jurisdiction, he would still be of opinion that the decree was not binding as having been obtained collusively, the husband having entered into an agreement not to do anything to prevent the decree being entered, although he abstained from resting his decision on that ground because he entertained a doubt as to whether collusion could be a sufficient reason for setting aside the decree after the death of the parties. Another judge, who concurred in the decision that the divorce was invalid because the parties were not legally domiciled in Scotland, seems also to entertain

some doubt as to whether or not the motives of the parties in resorting to Scotland could be questioned after such a lapse of time for the purpose of rendering their children illegitimate, saying: "There was a valid divorce and a capacity to marry in the territory, and when that marriage has resulted in the birth of children, who have the status of legitimate children according to the law of their own country, are we in reference to them and their rights to revert to an inquiry, at whatever distance of time, as to whether Buxton's [the husband's] resort to Scotland was or was not for the purpose of facilitating the divorce? That has not been directly decided in any of the cases, . . . but I think the cases tend in that direction so strongly that I cannot . . . take upon myself to suggest a doubt as to their being the law of England, although I do not see my way to reconciling it with general principles of jurisprudence or the generally recognized rules of international law."

Conway v. Beazley, 3 Hagg. Eccl. Rep. 639, was an action to declare the nullity of a marriage on the ground that the husband had a wife living at the time the marriage was contracted, a divorce which he had obtained from his first wife, who had since died, being alleged to be unlawful. The husband and his first wife were married in England, and the divorce was procured in Scotland, both parties being at the time domiciled in England. It was held that a Scotch divorce between parties married and domiciled in England at the time of the granting of the divorce was invalid.

It was also held in Dolphin v. Robins, 7 H. L. Cas. 390, 29 L. J. Prob. N. S. 11, 5 Jur. N. S. 1271, 7 Week. Rep. 674, that a Scotch divorce between parties married and domiciled in England, and who had gone to Scotland for the purpose of obtaining the divorce, was void for lack of jurisdiction in the court granting it. In this case the divorced wife had married a second time in Scotland, and the question of the validity of the divorce arose after her death in a contest as to which of two wills made by her, one while domiciled in England and another revoking the former, made after her second marriage while domiciled in France, should be probated, the validity of the second will depending on the Scotch divorce.

So, in McCarthy v. Decaix, 2 Russ. & M. 614, as reported in 2 Clark & F. 567, a divorce granted in Denmark between a Dane and an Englishwoman, who were married in England, was held in a suit instituted after the death of both parties between their personal representatives respecting some property the right to which had accrued to the wife subsequent to the divorce, to be invalid, as no foreign divorce could affect an English marriage, the effect of the death of the parties not being considered.

The validity of a decree of annulment of marriage in the consistorial court was attacked in Meddowcroft v. Huguenin, 3 Curt. Eccl. Rep. 403, in a collateral proceeding after the death of one of the parties, by a son of the deceased, on the ground of fraud and collusion in obtaining it, but the suit failed because the court held there was no sufficient evidence of fraud in obtaining the decree to justify them in setting it aside. There was a query, which was not decided, as to whether the issue of a marriage pronounced to be null and void by the sentence of a consistorial court could impeach such sentence in the prerogative court, and the court said that they were of opinion that they could not question this sentence on any ground, unless it might be on the ground that it was obtained by fraud and imposition in the consistorial court, and on appeal (4 Moore, P. C. C. 386) it was said that a collusive suit is not

a real judgment, but something obtained by fraud from the court, which is not binding, and that it had been laid down in law and in equity, in reference to ecclesiastical cases, that collusion would make a nullity of a judgment if it were between the parties. But the judgment of the lower court that fraud was not sufficiently shown was affirmed. In a later action brought by the same plaintiff, reported as Perry v. Meddowcroft, 10 Beav. 122, it was said, in answer to the contention that, if a sentence, decree, or judgment of any court could be shown to have been obtained by fraud or collusion, it was not to be used in any court as evidence against the right of the party who might be precluded by a sentence properly obtained, that that proposition did not seem to have been disputed, that a sentence might be refused the respect which would otherwise be due it if it could be shown that it was obtained by fraud and collusion. However, in this case also it was held that the evidence failed to show fraud.

A decree of annulment of marriage by the ecclesiastical court was reversed in Harrison v. Southampton, 21 Eng. L. & Eq. 343, after the death of one of the parties, in a suit to establish a claim to the property of the deceased, on proof that the decree had been procured by the fraud and collusion of the parties. This decision reversed Harrison v. Southampton, 17 Eng. L. & Eq. 364, in which the court said that there was no doubt that fraud would vitiate the decree if there were clear evidence of the fraud, but held that there was no sufficient proof of collusion, and that the sentence of annulment was conclusive.

In Ryan v. Ryan, 2 Phillim. Eccl. Rep. 332, a divorce had been decreed by royal ordinance in Denmark between parties domiciled there, and the husband had married again. After his death the second wife applied to the prerogative court of Canterbury for letters of administration upon his estate, and the daughters of the first marriage opposed her interest, apparently upon the ground that the divorce was invalid, though this is not expressly stated. The case having been delayed for various causes for many years, and the daughters having withdrawn their opposition, the court finally decided in favor of the wife's right to the administration, saying the wife's interest was denied but she had propounded it and established it according to the law of Denmark, since, according to the evidence of Danish lawyers, a divorce by the King of Denmark is a divorce *a vinculo matrimonii*, and such a dissolution of an existing marriage is good. The judge therefore said that under the circumstances of the case he considered the proof sufficient, the parties being both domiciled in Denmark, and that whether they would have been sufficient in a matrimonial cause it was not necessary to decide, but on the mere question whether the widow should take out the administration *semper præsuntur pro matrimonio*, and that, the parties who opposed the widow having withdrawn their opposition, he pronounced for her interest, guarding himself against its operating in the same way in a matrimonial cause, where both the burden and the nature of the proof would be different.

IV. Death of one party pending appeal.

Where property rights are involved it is usually held that the action does not abate on the death of one of the parties pending an appeal from a judgment granting a divorce, though the rule is otherwise where a divorce has been refused.

In Nickerson v. Nickerson, 34 Or. 1, 48 Pac.

423, 54 Pac. 277, it is held that the death of the defendant pending an appeal by him from a decree of divorce does not abate the action or the appeal where property rights are involved, but that both survive to the heirs of the deceased, under statutes providing that no action shall abate by the death of a party if the cause of action survive or continue, and that an action for a wrong shall not abate by the death of any party after the verdict has been given therein, but the action shall proceed thereafter in the same manner as in cases where the cause of action survives. The court says that, while from the nature of things the cause of suit does not survive the death of a party where the only relief sought is the dissolution of the marriage relation, since death effectuates more surely the very end which it is the especial purpose of the suit to accomplish, still, "where the consequences of the divorce are such as affect the property rights of the parties to the suit, the heirs or personal representatives may have such an interest in the litigation as that the cause will survive, not for the purpose of continuing the controversy touching the rights of divorce within itself, but for the ascertainment of whether the property has been rightfully diverted from its appropriate channel of devolution."

And a decree of absolute divorce having been rendered in favor of a husband, and an appeal taken therefrom by the wife, it was held in *Thomas v. Thomas*, 57 Md. 504, that the death of the husband pending the appeal did not abate the suit, except so far as the question dissolving the marital relation was concerned, where it appeared that the husband left real and personal property, the court saying: "So far as the question of the marital relation was concerned, that question was forever concluded by the death of the appellee, and no one had any longer any interest in reviving it. But the decree which granted the divorce at the same time determined the property rights of the appellant, and, if unreversed, deprived her of all rights in her late husband's property. With respect to that question, her interest survived, and, if the decree was erroneous, she was aggrieved thereby and had a standing in court to prosecute an appeal therefrom for the purpose of having the decree reversed." In this case, however, the appeal was dismissed because the persons upon whom by the death of the husband the right to his property devolved had not been made parties.

So, in *Danforth v. Danforth*, 111 Ill. 236, it was held that where, pending an appeal from an order refusing to set aside on motion a decree of divorce rendered against a woman upon *ex parte* hearing, and to permit her to defend the suit, the husband died, and the appellate court, after his death, entered a judgment reversing the order of the lower court refusing to set aside the decree, such judgment was not void, but binding upon those succeeding to the husband's estate; and that the appellate court had the right, on motion of the wife, to amend the record so as to show entry of judgment before the death of the husband. The court having been clothed, by the act of the parties and the law, with full jurisdiction and rightful authority to render the judgment it did, the death of the appellee—not brought to its notice—was held not to deprive it of such jurisdiction lawfully acquired. It was urged that, conceding that where after jurisdiction has been acquired over a party he dies, judgment rendered against him subsequently to his death is not void, this rule has no application to a suit for a divorce,—that in such an action the death of either party puts an end to all further legal proceedings. This was conceded to be true where the

death takes place before any final decree of divorce, but the court said that where a decree has been improperly obtained, and the proceedings are erroneous, the party whose property rights have been injuriously affected by such decree ought not to be concluded by reason of the subsequent death of the other party; that while both parties live a writ of error lies to reverse an erroneous decree of divorce, the effect of which is to restore both parties to their former status of husband and wife in law; and that after the death of one it ought to lie in favor of the other party, not for the same purpose, but to restore the survivor to his or her rights of property devastated erroneously by the decree. *Wren v. Moss*, 7 Ill. 72 (*supra*, II. a, 3), is cited in the opinion as an authority for the contention that a divorced wife, after the death of her husband, may prosecute a writ of error to reverse the decree of divorce, and thereby be restored to all her rights as widow in the estate of her deceased husband, the court saying: "If, then, the appellant could have prosecuted her appeal or writ of error to reverse the decree of divorce even after her husband's death, and thus remove the bar of that decree to the assertion of her property rights as widow of the deceased, no reason is seen why she may not do the same thing where her husband dies after the appeal is taken or writ of error brought, and after the cause is submitted."

There is a *dictum* to the effect that an appeal from a divorce decree abates on the death of one of the parties, in *McCollum v. McCollum*, 1 Helsk. 566, note, in which it was held that a bill to vacate or modify a decree of alimony may be revived after the death of the complainant in the bill to review, the court saying that the death of the complainant did not have the effect of abating either the appeal or the suit, and that in this respect an appeal from a decree of divorce differs from an appeal from a decree for alimony.

So, also, the court says, in *Downer v. Howard*, 44 Wis. 82, that in case of the death of either party after appeal brought from a judgment granting a divorce it is probable that, if rights of property depended upon the reversal or affirmance of such judgment, the court would permit the appeal to be revived in favor of those whose rights were so affected, since, in case of a judgment of divorce against either party, the descent of all the property is changed, and the death of either party after an appeal from such judgment ought not to bar those interested in the estate from reviewing the judgment of the court below. However, the court expressly states that it does not decide that question; and in this case the appeal was taken from a judgment denying a divorce.

And in *Boyd's Appeal*, 38 Pa. 241 (*supra*, II. a, 2), in which a decree of divorce in favor of a husband was vacated on motion after his death for fraud in procuring it, it was said in the opinion that no one could doubt that the decree might have been reversed on appeal if the time for taking an appeal had not elapsed; that the husband's death could not have prevented that.

And where on appeal from a decree of divorce in favor of a wife the husband dies before entry of judgment of affirmance, but after the case is argued and submitted, judgment will be entered as of the day on which the case was taken under advisement. *Mead v. Mead*, 1 Mo. App. 247.

In *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345, where, pending an appeal from a decree of divorce in favor of a wife, the husband died, his administrator was substituted in his place without any question of the right to do so.

Nothing is said in the opinion or in the contentions of counsel as to the effect of the death of one of the parties pending an appeal from a divorce decree, and upon the decree in favor of the wife being affirmed in the main, but modified in some particulars and sent back to the lower court, where judgment was again entered for the wife, the administrator appealed a second time (84 Cal. 424, 23 Pac. 1100).

V. Conclusion.

The authorities are practically unanimous that, in the absence of statutory qualifications, a decree of divorce may be vacated after the term at which it was rendered, where it is shown that it was obtained by fraud; and in most of the cases the death of one of the parties seems not to be considered of importance,—at least where property rights are involved. Where the courts have refused to set aside, after the death of one of the parties, a decree of divorce obtained by fraud, it has usually been because of laches in bringing the action to vacate the decree, or because of estoppel by having accepted the benefits thereof. In *Nelson on Divorce & Separation*, § 1054, it is said that "the same rule of public policy that requires the decree to be vacated although a second marriage has taken place will require the same relief although one of the parties is dead," but that "the fact that the party is dead who is alleged to have procured the decree by fraud should justify the court in requiring clear and satisfactory evidence of the fraud, for the dead can make no denials or explanations."

Tennessee and California seem to be exceptions to the general rule that a decree of divorce may be set aside after the death of one of the parties, for fraud in procuring it. (See *Owens v. Sims*, 3 Coldw. 544, *supra*, II. a, 4, and *Kirschner v. Dietrich*, 110 Cal. 502, 42 Pac. 1064, *supra*, II. a, 2, holding that by the death of one of the parties a suit for divorce abates and passes beyond the limits of a revivor.) But, as in Tennessee there is a statute providing that the only method for reviewing a decree of divorce shall be by appeal, and as in the case of *Owens v. Sims* the time for appeal had expired, and it would seem that the suit must have been dismissed even if both parties had been living, it is possible that in the absence of that statute the court might have decided otherwise as to the effect of the death. And in *Kirschner v. Dietrich* the judgment of divorce was silent on the question of property, and there is at least some indication in the opinion that, if there had been an issue as to property rights involved, the decision might have been different, since, in refusing the husband's petition to open the decree, and in deciding that the effect of the wife's death upon the action was not changed by the question of property suggested by the husband in the answer which he asked leave to file, the court said that, "if there was originally no issue on the subject," an action for divorce could not be revived in case of death after judgment for the purpose of having a question of property rights adjudicated.

These two decisions are the only ones which squarely decide against the right to vacate a decree of divorce after the death of one of the parties where fraud is alleged and rights of property are involved. In *Barney v. Barney*, 14 Iowa, 189 (*supra*, II. a, 1), it is held that where complainant in a divorce suit died after a decree in her favor but before the expiration

of the time allowed for an appeal, the action ended with her death, and could not be revived. But in this case no fraud was alleged, and no property rights were involved; and the same court, in the principal case of *LAWRENCE v. NELSON*, allows a decree of divorce to be set aside after the death of the successful party, because of lack of jurisdiction in the court granting it.

In states where there are statutory provisions forbidding the review of a judgment of divorce after the term at which granted, it has usually been held that such statutes do not preclude the vacation of a divorce decree where the court granting it had no jurisdiction, although some cases hold that fraud in any other matter than in obtaining jurisdiction is not sufficient to justify a review in defiance of statute. (See *Richardson v. Stowe*, 102 Mo. 33, 14 S. W. 810, *supra*, III. a, and *Rine v. Hodgson*, 9 Ohio Dec. Reprint, 275, *supra*, II. a, 4.)

Where a direct attack is made on the validity of the decree, it is usually done either by motion or petition filed in the original divorce suit itself to have the decree set aside, or by an original bill in the nature of a bill of review, bringing in all the parties who may be affected by the annulment of the decree, though in some cases the decree has been set aside on writ of error or appeal. In only a few of the cases, however, has the question of the procedure necessary to be followed been raised and discussed.

There is no English case deciding the exact point involved in this note, unless it may be *Robertson v. Stallage*, Cro. Jac. 186, which seems doubtful, for the reasons stated in III. b, *supra*. This may be due to the theory that under the policy of the ecclesiastical law a decision *contra matrimonium* was regarded as never final, but always open to revision and reversal upon a proper proceeding in the proper court, though there has been some dissent from this doctrine by several English judges, and it is of rather doubtful authority. But it was undoubtedly the rule under the old canon law. The only English cases in which the validity of a divorce has been attacked after the death of one or both of the parties have been those in which the validity of a foreign divorce has been called in question in some collateral proceeding, or those in which in an action in the temporal courts an attempt has been made to impeach the validity of a decree of divorce or annulment of marriage pronounced by the ecclesiastical courts. As to the conclusiveness of a sentence in the spiritual courts when introduced in evidence in the temporal courts there has been some controversy, some judges contending that because of the peculiar jurisdiction of the ecclesiastical courts over matrimonial causes their decrees, so long as they remain in force, must be considered absolutely conclusive in the temporal courts. (See *Kenn's Case*, III. b, *supra*.) But the weight of authority seems to hold that, while ordinarily such decrees are conclusive in the temporal courts, they may always be attacked for fraud. And it has been claimed that a distinction should be made between the right to set aside a divorce decree after the death of the parties in cases where there has been no subsequent marriage and in cases where the deceased had before his death contracted a second marriage, which would, of course, be dissolved by the vacation of the divorce sentence, and the issue thereof bastardized.

F. H. L.

SOUTH CAROLINA SUPREME COURT.

PROTESTANT EPISCOPAL CHURCH OF
THE PARISH OF ST. PHILIPS

v.

William H. PRIOLEAU, County Auditor.

(.....S. C.....)

The renting of a church parsonage, and using the rent to procure another residence for the parson, do not deprive it of its exemption from taxation, under a provision that exemption of parsonages shall not extend beyond the buildings and premises actually occupied as such.

(March 7, 1902.)

APPPLICATION for a writ of mandamus to compel the correction of a tax duplicate by striking therefrom an assessment against petitioner. *Granted.*

Statement by Jones, J.:

The following petition was filed in this cause:

"The petition of the Protestant Episcopal Church of the Parish of St. Philips, in Charleston, in the state of South Carolina, respectfully sheweth: (1) That your petitioner, the Protestant Episcopal Church of the Parish of St. Philips, in Charleston, in the state of South Carolina, is a body politic and corporate, by virtue of and under an act of the general assembly of the said state of South Carolina, ratified 20th December, 1791, and has been and is the owner of (*inter alia*) a lot of land and the building thereon, situate on the east side of Glebe street, between George and Wentworth streets, in the city of Charleston, in the county of Charleston and in the state of South Carolina, measuring about 100 feet by about 150 feet, being lot numbered 9 on the plan of the glebe lands of St. Philips, made by R. Q. Pinckney, surveyor, and of record at page 126 of Plat Book A No. 1, in the office of the register of mesne conveyances for the said county of Charleston, and known as Nos. 6 and 8 Glebe street. That the above-named William H. Prioleau is the duly appointed, commissioned, and qualified county auditor of the said county of Charleston. (2) That the said lot of land was very many years ago set apart and the building thereon was originally erected as a parsonage, and that they have been ever known as 'St. Philips' Parsonage,' and ever exempted from taxation until the year 1898, when they were assessed and valued for taxation by the board of assessors on your petitioner's, 'return' for that year (although stated by your petitioner in said 'return' to be exempt from taxation), and were there-

upon placed by the county auditor on the tax duplicates of the said county of Charleston, and have since appeared on said duplicate, and taxes have been charged and levied thereon by the county auditor from year to year. (3) That your petitioner is advised that the said lot of land and the building thereon is exempt from taxation under § 4, art. 10, of the Constitution of the state of South Carolina, which said § 4 reads as follows: 'Sec. 4. There shall be exempt from taxation all county, township, and municipal property used exclusively for public purposes, and not for revenue, and the property of all schools, colleges and institutions of learning, all charitable institutions in the nature of asylums for the infirm, deaf and dumb, blind, idiotic and indigent persons, except where the profits of such institutions are applied to private uses; all public libraries, churches, parsonages, and burying grounds; but property of associations and societies, although connected with charitable objects, shall not be exempt from state, county, or municipal taxation; provided, that as to real estate, this exemption shall not extend beyond the buildings and premises actually occupied by such schools, colleges, institutions of learning, asylums, libraries, churches, parsonages, and burial grounds, although connected with charitable objects.' (4) That on or about the 9th day of March, 1899, your petitioner presented to the comptroller general of the state of South Carolina a petition setting forth the facts of the case and asking relief, as will fully appear by reference to the said petition, hereunto annexed as part and parcel hereof, and to which reference is craved as often as may be necessary; but that the said comptroller general, by and under the advice of the attorney general of the state, refused to grant the prayer of the said petition, which said advice of the attorney general is embodied in the letter dated May 9, 1899, hereto annexed as part and parcel hereof, and reference thereto is craved as often as may be necessary. (5) That your petitioner has resorted to all the lawful means known to your petitioner to procure an exemption from taxation of the said lot of land and the building thereon, and is advised that there is no adequate remedy other than a writ of mandamus to procure such exemption. Wherefore your petitioner, asking the aid of this honorable court, prays that a writ of mandamus be issued, directed to the said county auditor, commanding him to correct your petitioner's said 'return,' and also the said tax duplicates, either by striking therefrom and omitting altogether

NOTE.—As to effect of using property of a religious, charitable, or educational institution in secular business, or for revenue, upon its right to exemption from taxation, see Book Agents of M. E. Church, South v. Hinton (Tenn.) 19 L. R. A. 289, and note; Montana Catholic Mission v. Lewis & C. County (Mont.) 57 L. R. A.

22 L. R. A. 684; American Sunday School Union v. Taylor (Pa.) 23 L. R. A. 695; Portland Hibernian Benev. Soc. v. Kelly (Or.) 30 L. R. A. 167; Fitterer v. Crawford (Mo.) 50 L. R. A. 191; and Young Men's Christian Asso. v. Douglas County (Neb.) 52 L. R. A. 123.

the said lot of land and the building thereon, or else by striking out the assessment and valuation of the same placed on the said 'return' and tax duplicates, and marking and declaring the same to be exempt from taxation. And that your petitioner may have such further or other relief, or both, as may be just and meet. And your petitioner will ever pray, and so forth."

Mr. T. W. Bacot for petitioner.

Mr. U. X. Gunter for respondent.

Jones, J., delivered the opinion of the court:

This is an application in the original jurisdiction of this court for a writ of mandamus to compel the county auditor of Charleston county to correct the tax duplicate by striking therefrom the assessment of the lot in the city of Charleston known as "St. Philips Parsonage," which it is claimed by petitioner is exempt from taxation under article 10, § 4, of the Constitution. The only question in the case arising on demurrer to the petition, which is reported herewith, is whether said property is exempt from taxation. It appears from the petition and exhibits that the lot and buildings claimed to be exempt from taxation is the property of the Protestant Episcopal Church of the Parish of St. Philips, in Charleston, in the state of South Carolina, which was incorporated under an act approved December 20, 1791; that said lot and buildings thereon have constituted and have been known as the parsonage of said church for over one hundred years, and have never been taxed until the year 1898, when said property was placed on the tax books, and taxes levied thereon then and ever since; that said lot and buildings at the time of their assessment for taxation in 1898 were not actually occupied by the rector or parson of said church, but were rented out, the rector or parson hiring another residence in a different locality for his personal convenience, and the rent derived from said parsonage was appropriated to the salary of the rector, and so to the hiring of such other residence. We are of the opinion, upon the facts stated, that said property is exempt from taxation. Article 10, § 4, of the Constitution, provides: "There shall be exempt from taxation . . . all . . . parsonages: . . . provided, that as to real estate this exemption shall not extend beyond the buildings and premises actually occupied by such . . . parsonages, . . . although connected with charitable objects." The premises in question constituting and known as "St. Philips Church Parsonage," and being set apart for the actual use and occupancy of its parson, does not lose its character as a "parsonage" merely because the parson, for his personal convenience, should permit another to occupy said premises, and use the rent thereof in procuring another more convenient residence. It does not appear that said premises, used as a parsonage for over one hundred years, has ceased to be such.

It is therefore the judgment of this court
57 L. R. A.

that the writ of mandamus issue as prayed for in this petition.

Maud SIMMONS *et al.*, *Respts.*,
v.

WESTERN UNION TELEGRAPH COMPANY, *Appt.*

(.....S. C.....)

1. **Allegations that plaintiff "was made sick, forced to take her bed, and call in the services of a physician, and expended large sums of money in medicines, care, and nursing," are not irrelevant in an action to recover damages for neglect to promptly transmit and deliver a telegram.**
2. **A statute rendering telegraph companies liable for mental anguish caused by failure to promptly transmit and deliver messages does not deprive them of property without due process of law, or deny them the equal protection of the laws.**

(April 11, 1902.)

A PPEAL by defendant from a judgment of the Common Pleas Circuit Court for Greenville County in favor of plaintiffs in an action brought to recover damages for alleged negligent failure to deliver a telegram. *Affirmed.*

The facts are stated in the opinion.

Mr. George H. Fearons, with **Messrs. Smythe, Lee, & Frost**, for appellant:

Damages which are unattended by any physical injury, and which consist wholly in mental suffering, are not of the character of which our law takes cognizance, and therefore are not recoverable.

Martin v. Columbia & G. R. Co. 32 S. C. 592, 10 S. E. 960; *Lewis v. Western U. Teleg. Co.* 57 S. C. 325, 35 S. E. 556.

The act of 1901 affects none excepting telegraph companies.

The act of 1901 has denied to telegraph

NOTE.—For conflicting authorities as to right to damages for mental suffering on account of default of telegraph company, see *note* to *Western U. Teleg. Co. v. Rogers* (Miss.) 13 L. R. A. 859.

For subsequent cases in this series denying the right, see *Wilcox v. Richmond & D. R. Co.* (C. C. App. 4th C.) 17 L. R. A. 804; *Connell v. Western U. Teleg. Co.* (Mo.) 20 L. R. A. 172; *Western U. Teleg. Co. v. Wood* (C. C. App. 5th C.) 21 L. R. A. 706; *International Ocean Teleg. Co. v. Saunders* (Fla.) 21 L. R. A. 810; *Francis v. Western U. Teleg. Co.* (Minn.) 25 L. R. A. 408; *Morton v. Western U. Teleg. Co.* (Ohio) 32 L. R. A. 735; *Peay v. Western U. Teleg. Co.* (Ark.) 39 L. R. A. 463; *Western U. Teleg. Co. v. Robinson* (Tenn.) 34 L. R. A. 431; *Western U. Teleg. Co. v. Ferguson* (Ind.) 54 L. R. A. 846; *Connolly v. Western U. Teleg. Co.* (Va.) 56 L. R. A. 663; and the case of *Robinson v. Western U. Teleg. Co.* (Ky.) *post*, 611.

For cases sustaining the right, see *Mentzer v. Western U. Teleg. Co.* (Iowa) 28 L. R. A. 72; *Cashion v. Western U. Teleg. Co.* (N. C.) 45 L. R. A. 160; and *Gray v. Western U. Teleg. Co.* (Tenn.) 56 L. R. A. 301.

companies "the equal protection of the laws" of this state.

Cooley, Const. Lim. p. 484; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *San Antonio & A. P. R. Co. v. Wilson* (Tex. App.) 19 S. W. 910.

Powers which can be justified as police regulations, and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort, and well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it.

Tiedeman, Pol. Power, pp. 12, 196, 197; *Slaughter-House Cases*, 16 Wall. 62, 21 L. ed. 404; *McCandless v. Richmond & D. R. Co.* 38 S. C. 109, 18 L. R. A. 440, 16 S. E. 429; *Stehmeyer v. Charleston*, 53 S. C. 259, 31 S. E. 322.

Statutes somewhat similar to that of 1901 have been held unconstitutional, because they created distinctions not justified as an exercise of police power.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Williamson v. Liverpool, L. & G. Ins. Co.* 105 Fed. 31.

The classification created by the act of 1901 is not "based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification," but is a mere arbitrary selection.

San Antonio & A. P. R. Co. v. Wilson (Tex. App.) 19 S. W. 912; Cooley, Const. Lim. 484; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; *Johnson v. Goodyear Min. Co.* 127 Cal. 4, 47 L. R. A. 338, 59 Pac. 304; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Railroad Tax Cases*, 8 Sawy. 238, 13 Fed. 733; *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 694; *Williamson v. Liverpool & L. & G. Ins. Co.* 105 Fed. 34; *People ex rel. Valentine v. Berrien Circuit Judge*, 124 Mich. 664, 83 N. W. 594; *Park v. Detroit Free Press Co.* 72 Mich. 560, 1 L. R. A. 599, 40 N. W. 731; *Middleton v. Middleton*, 54 N. J. Eq. 692, 36 L. R. A. 221, 35 Atl. 1065, 37 Atl. 1106; *Stehmeyer v. Charleston*, 53 S. C. 259, 31 S. E. 322.

The sickness of the plaintiff, and her expenditure on doctors and for medicines, were not natural results of the failure to deliver the telegram.

Hadley v. Bowendale, 9 Exch. 341; *Mood v. Western U. Teleg. Co.* 40 S. C. 524, 19 S. E. 67; *Livingston v. Exum*, 19 S. C. 223; *Lapscomb v. Tanner*, 31 S. C. 49, 9 S. E. 723; *Western U. Teleg. Co. v. Smith*, 76 Tex. 253, 13 S. W. 169; *Western U. Teleg.* 67 L. R. A.

Co. v. Ragland (Tex. Civ. App.) 61 S. W. 421; *Yazoo & M. Valley R. Co. v. Foster* (Miss.) 23 So. 581; *Western U. Teleg. Co. v. Bryant*, 17 Ind. App. 70, 46 N. E. 358; *Leonard v. New York, A. & B. Electro-Magnetic Teleg. Co.* 41 N. Y. 544, 1 Am. Rep. 446; *Western U. Teleg. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. 775; *Stafford v. Western U. Teleg. Co.* 73 Fed. 273.

When the only damage complained of consists in the continuation of an anxiety, or in a mental suspense, which would have been set at rest if there had been no default on the part of the defendant, then the damage is too remote, vague, shadowy, and uncertain to be cognizable at law.

Rowell v. Western U. Teleg. Co. 75 Tex. 26, 12 S. W. 534; *Ricketts v. Western U. Teleg. Co.* 10 Tex. Civ. App. 226, 30 S. W. 1105; *De Voegler v. Western U. Teleg. Co.* 10 Tex. Civ. App. 229, 30 S. W. 1107; *Western U. Teleg. Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549; *Akard v. Western U. Teleg. Co.* (Tex. Civ. App.) 44 S. W. 538; *McCarthy v. Western U. Teleg. Co.* (Tex. Civ. App.) 56 S. W. 568; *Western U. Teleg. Co. v. Giffin*, 93 Tex. 530, 56 S. W. 744.

Mr. B. A. Morgan, for respondents:

Damages are proximate when they are the natural and necessary consequences.

If plaintiff's anxiety was engendered or multiplied by defendant's conduct until it reached the point of overcoming her physical strength, that giving in of strength and creation of sickness was the direct and proximate result.

Mood v. Western U. Teleg. Co. 40 S. C. 524, 19 S. E. 63; *Wood's Mayne, Damages*, § 39.

The complaint charges, not only "negligence," but that the message never was delivered because of defendant's wanton, or wilful, or reckless conduct. This is sufficient.

Proctor v. Southern R. Co. 61 S. C. 189, 39 S. E. 351; *Glover v. Charleston & S. R. Co.* 57 S. C. 228, 35 S. E. 510; *Appleby v. South Carolina & G. R. Co.* 60 S. C. 48, 38 S. E. 237.

Legislation is not open to the charge of depriving one of his property or rights without due process of law, if it be general in its operation upon the subjects to which it relates.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.

This law is not void if all persons subject to it are treated alike.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Western U. Teleg. Co. v. Indiana*, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345.

Jones, J., delivered the opinion of the court:

This was an action for damages for neg-

ligerly failing to deliver a telegraphic message. The appeal comes from a judgment for \$500 against the defendant.

The first question presented is whether the court erred in refusing defendant's motion to strike out certain allegations of the complaint. We therefore incorporate herein such allegations of the complaint as will make clear the question presented. It is alleged: "That on the 22d day of March, 1901, F. M. Simmons, the husband of the plaintiff Maud Simmons, was in Greensboro, North Carolina. The said Maud Simmons had in some way heard her husband was sick, but could not ascertain whether he was slightly or seriously so. To be able to ascertain his condition, and to relieve herself of the terrible suspense and stress of mind, she did on said day deliver to the defendant, at Greenville, South Carolina, for transmission and delivery, the following prepaid message, to wit:

"Greenville, S. C. March 22d, 1901.

"F. M. Simmons, Care Keely Institute, Greensboro, N. C.:—

"Are you sick? Answer at once.

"Mrs. F. M. Simmons.

"(6) This message was promptly delivered by the defendant to the said F. M. Simmons, at Greensboro, North Carolina, whereupon he at once caused to be delivered to the defendant, at Greensboro, North Carolina, for transmission and delivery to the plaintiff, Maud Simmons, and the defendant for such purpose received the following message to wit:

"Greensboro, N. C. March 22, 1901.

"Mrs. F. M. Simmons, Greenville, S. C.:—

"Have been sick. Am better now. Don't be uneasy.

"F. M. Simmons.

"(7) That the defendant had notice of the importance of said message, and of the annoyance, anxiety, pain, and suffering that would result to the plaintiff Maud Simmons if the message was not transmitted and delivered. (8) That the defendant so negligently performed its duty that said message was not transmitted and delivered within a reasonable time, and its conduct in that behalf was so wanton or wilful or reckless that said message has never been delivered. (9) The plaintiff Maud Simmons received no response to her said message. That the reason therefor was the negligence, or wantonness, or wilfulness, or recklessness of the defendant in transmitting or delivering the said message addressed to her. That she relied upon the prompt delivery of her message of inquiry, before described, and, believing it had been delivered, and receiving no response, was because of the aforesaid reasons subjected to all the annoyances, anxiety, pain, and trouble of mind incident to the conditions thereby created. In consequence of the negligence, or wantonness, or wilfulness, or recklessness of the defendant as aforesaid

57 L. R. A.

she was made to suffer great and grievous mental anguish, pain, and suffering, and was made sick, forced to take her bed, and call in the services of a physician, and expended large sums of money in medicine, care, and nursing, all to her damage \$2,000."

The motion was to strike out the words in the last sentence above, "and was made sick, forced to take her bed, and call in the services of a physician, and expended large sums of money in medicines, care, and nursing," as irrelevant and surplusage, and not legally connected with or resulting from the cause of action set out in the complaint. We think the motion was properly refused. The allegations were relevant to the cause of action, the action being for damages resulting from mental anguish and physical suffering alleged to have been caused by the defendant's negligence. The court could not say, as matter of law, that bodily illness is not a natural and proximate result of negligence in delivering certain messages. It was the province of the jury to determine whether such was the fact upon the testimony given.

The next and main question presented is whether the "mental anguish" act, approved February 20, 1901, violates the 14th Amendment to the United States Constitution in depriving telegraph companies of property without due process of law, and in denying them the equal protection of the laws, and also § 5, art. 1, of the state Constitution, containing similar provisions. This question was presented to the court below on demurrer to the complaint and requests to charge, and is renewed here by proper exceptions. The act is as follows:

"An Act to Allow Damages against Telegraph Companies Doing Business in This State, for Mental Anguish or Suffering, even in the Absence of Bodily Injury Caused by Negligence in Receiving, Transmitting, or Delivering Messages.

"Sec. 1. Be it enacted by the general assembly of the state of South Carolina: That from and after the passage of this act, all telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering even in the absence of bodily injury for negligence in receiving, transmitting, or delivering messages.

"Sec. 2. That nothing contained in this act shall abridge the rights or remedies now provided by law against telegraph companies, and the right and remedies provided for by this act shall be in addition to those now existing.

"Sec. 3. That in all actions under this act the jury may award such damages as they conclude resulted from negligence of said telegraph companies."

23 Stat. at L. p. 748.

We hold with the circuit court that the act is not unconstitutional in the particulars named. "Due process of law" means the same as "the law of the land," and, as a general rule, involves an opportunity before a proper tribunal under established procedure to make contest in defending or

enforcing a legal right. *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 282, 15 L. ed. 376; *Pennoy v. Neff*, 95 U. S. 734, 24 L. ed. 572. The legislature cannot, without violating this provision, arbitrarily deprive one of his fundamental rights appertaining to life, liberty, and property. But this legislation deprives telegraph companies of no right. Its design is to compel the performance of a duty imposed by law and their own contract. They have no right to be negligent in the conduct of their duties and business, which so largely affects the public welfare. It is neither arbitrary nor oppressive that they shall be liable for such damages, including mental suffering, as a competent legal tribunal shall determine to be the result of their negligence. Legislation is not unequal nor discriminatory in the sense of the equality clause of the Constitution, merely because it is special or limited to a particular class. The decisions of the United States Supreme Court establish that the legislature has power to make a classification of persons or property for public purposes, provided such classification is not arbitrary, and bears reasonable relation to the purpose to be effectuated, and that the equality clause is not violated, when all within the designated class are treated alike. In the case of *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, the court said: "Class legislation discriminating against some and favoring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application if within the sphere of its operation it affects alike all persons similarly situated, is not within the [14th] Amendment." "Neither the Amendment,—broad and comprehensive as it is,—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." In *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730, the court said: "The specific regulations for one kind of business which may be necessary for the protection of the public can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions." In *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 111, the court said: "There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances." In the case of *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, the court affirmed the constitutionality of a Kansas statute imposing upon railroad

corporations future liability for damages to employees by negligence of their fellow servants, notwithstanding no such liability existed against any other person or corporation, because the court considered that the legislation met a particular necessity, and all railroad corporations without distinction were made subject to this same liability. The case of *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, recognized the rule stated, emphasizing that such classification must not be arbitrary,—that is to say, "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed;" or, in other language used by the court, such classification must be "based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection." In this last-mentioned case the court, applying the principle stated, held unconstitutional a Texas statute providing that a railroad company failing to pay certain claims under \$50 within thirty days after presentation shall be liable for an attorney's fee not exceeding \$10, on the ground that such statute deprived such company of the equal protection of the law, no other delinquent debtor being subject to such penalty. The court considered such classification arbitrary, because the business of railroads carried with it no special necessity for prompt payment of debts,—a duty resting upon all debtors,—and therefore the classification was not based upon any difference among delinquent debtors which would make a distinction among them natural and reasonable. In a case recently filed (*Porter v. Charleston & S. R. Co.* 41 S. E. 108), this court held that the "act to require all common carriers to pay all loss of, or damages for loss, damage, and breakage of, any article shipped over their lines, or to refuse to do so within a certain time," approved February 25, 1897 (22 Stat. at L. p. 443), did not violate the constitutional provisions cited, the classification with reference to the purpose sought being within the competency of the legislature. Further illustrating the rule stated, the United States Supreme Court, in the case of *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243, held (in accord with the case of *McCandless v. Richmond & D. R. Co.* 38 S. C. 116, 18 L. R. A. 440; 16 S. E. 429), that a statute making railroad companies liable for property destroyed by fire communicated by their locomotive engines did not violate the 14th Amendment, even though the liability did not depend upon any negligence of the railroad company. In that case the special legislation as to railroad liability had relation to the prevention of a peculiar danger arising from the operation of the locomotives, and hence has a reasonable basis for classification. It will be observed that in this case, as in *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8

Sup. Ct. Rep. 1161, the property of the classification for the imposition of special liability was not affected by the fact that there were other common carriers operating with steam,—as, for example, steamboat companies,—which might communicate fires, or whose employees might sustain injuries through the negligence of fellow servants. This shows that a classification need not include all engaged in a general business,—as the business of carrying freight and passengers,—but may simply embrace a more limited class, who carry freight and passengers in a particular way, or by particular instrumentalities. Testing the question before us by the principles stated, we think the act is constitutional. Telegraph companies, as carriers of intelligence through the agency of electricity, are peculiarly the subject of distinct classification. Their business consists in the speedy transmission of intelligence without regard to distance. They subserve a useful public purpose when and because they communicate news with greater despatch than any other agency. Such business, when conducted in accordance with the duty imposed by the franchises or privileges granted to them, promotes public safety, education, convenience, prosperity, and adds to the peace, comfort, and happiness of the thousands who rely on this means of communication in time of need or distress. It is surely within legislative power to constitute them a class by themselves, and insure the performance of duties so closely interwoven with the public welfare by imposing

liability for all damages resulting from their negligence. The classification is based upon a particular necessity arising out of the peculiar duties assumed by such companies. It is argued that the legislation is discriminatory, because the statute does not also include telephone companies or other agencies for the transmission of news. This view is answered by the principle stated in *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, as telegraph companies are as distinct from telephone companies as a railroad company is distinct from a steamboat company. In the case of a telegram the telegraph company delivers the sender's message; in the case of a message by telephone company the sender delivers his own message to the person, and in the language of his own choice. In one case the telegraph company actively controls the receiving, transmission, and delivery of the message; in the other there is no control by the telephone company except in the mere furnishing of the mechanical instruments of communication for the patron's use. It is therefore manifest that legislation designed to promote care in the receiving, transmission, and delivery of messages may have a just and reasonable relation to telegraph companies, and be wholly inapplicable to telephone companies.

The foregoing disposes practically of all the material questions presented. The exceptions have all been considered by the court, and are overruled.

The judgment of the Circuit Court is affirmed.

KENTUCKY COURT OF APPEALS

C. B. ROBINSON, *Appt.*,

v.

WESTERN UNION TELEGRAPH COMPANY.

(.....Ky.....)

1. Damages cannot be recovered for mental anguish caused by breach by a telegraph company of its contract to transmit money promptly.
2. Tender of a check is not a compliance with a contract by a telegraph company to promptly transmit and deliver money.

(June 5, 1902.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in his favor for a less amount than was demanded in an action brought to recover damages for failure to deliver money which it had contracted to transfer for him. *Reversed.*

The facts are stated in the opinion.

NOTE.—As to right to recover for mental anguish caused by failure to deliver telegram, see the preceding case of *Simmons v. Western U. Telegr. Co.* (S. C.) and footnote thereto. 57 L. R. A.

Messrs. Bingham & Davis, for appellant:

Appellant had the right to make and sustain his claim for damages by reason of mental suffering, humiliation, and mortification.

Chapman v. Western U. Telegr. Co. 90 Ky. 265, 13 S. W. 880; *Western U. Telegr. Co. v. Cleaver*, 13 Ky. L. Rep. 301; *Beasley v. Western U. Telegr. Co.* 39 Fed. 181; *Stuart v. Western U. Telegr. Co.* 66 Tex. 580, 59 Am. Rep. 623, 18 S. W. 351; *Houston & G. N. R. Co. v. Randall*, 50 Tex. 261; *Field, Damages*, 76; *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504; *Smith v. Overby*, 30 Ga. 241; *Smith v. Pittsburg, Ft. W. & C. R. Co.* 23 Ohio St. 17; *Cooley, Torts*, 646; 1 *Sutherland, Damages*, 17, 18; *So Relle v. Western U. Telegr. Co.* 55 Tex. 308, 40 Am. Rep. 805; *Western U. Telegr. Co. v. Robinson*, 97 Tenn. 638, 34 L. R. A. 431, 37 S. W. 545; *Mentzer v. Western U. Telegr. Co.* 93 Iowa, 752, 28 L. R. A. 72, 62 N. W. 1; *Western U. Telegr. Co. v. Adams*, 75 Tex. 531, 6 L. R. A. 844, 12 S. W. 857; *Reese v. Western U. Telegr. Co.* 123 Ind. 294, 7 L. R. A. 583, 24 N. E. 163; *Young v. Western U. Telegr. Co.* 107 N. C. 370, 9 L. R. A. 669, 11 S. E. 1044; *Gulf, C. & S. F. R. Co.*

v. *Wilson*, 69 Tex. 739, 7 S. W. 653; *Western U. Telegr. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734; *Western U. Telegr. Co. v. Simpson*, 73 Tex. 423, 11 S. W. 385; *Western U. Telegr. Co. v. Carter*, 2 Tex. Civ. App. 624, 21 S. W. 688; *Womack v. Western U. Telegr. Co.* (Tex. Civ. App.) 22 S. W. 417; *Wadsworth v. Western U. Telegr. Co.* 86 Tenn. 695, 3 S. W. 574; *Newport News & M. Valley R. Co. v. Griffin*, 92 Tenn. 694, 22 S. W. 737; *Western U. Telegr. Co. v. Newhouse*, 6 Ind. App. 422, 33 N. E. 800; *Western U. Telegr. Co. v. Stratemeier*, 6 Ind. App. 125, 32 N. E. 871; *Western U. Telegr. Co. v. Henderson*, 89 Ala. 510, 7 So. 419; *Logan v. Western U. Telegr. Co.* 84 Ill. 468; *Western U. Telegr. Co. v. Burgess* (Tex. Civ. App.) 43 S. W. 1033; *Western U. Telegr. Co. v. Fisher*, 21 Ky. L. Rep. 1293, 54 S. W. 830; *Western U. Telegr. Co. v. Van Cleave*, 22 Ky. L. Rep. 53, 54 S. W. 827; *Graddy v. Western U. Telegr. Co.* 19 Ky. L. Rep. 1455, 43 S. W. 408; *Roach v. Jones*, 18 Tex. Civ. App. 231, 44 S. W. 677; *Renihan v. Wright*, 125 Ind. 536, 9 L. R. A. 514, 25 N. E. 822; *Sherrill v. Western U. Telegr. Co.* 109 N. C. 527, 14 S. E. 94; *Marr v. Western U. Telegr. Co.* 85 Tenn. 529, 3 S. W. 496; *Loper v. Western U. Telegr. Co.* 70 Tex. 689, 8 S. W. 600; *Western U. Telegr. Co. v. Cooper*, 71 Tex. 507, 1 L. R. A. 728, 9 S. W. 598; *Rowell v. Western U. Telegr. Co.* 75 Tex. 26, 12 S. W. 534; *Western U. Telegr. Co. v. Feegles*, 75 Tex. 537, 12 S. W. 860; *Western U. Telegr. Co. v. Moore*, 76 Tex. 66, 12 S. W. 949; *Western U. Telegr. Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70; *Gulf. C. & S. F. Telegr. Co. v. Richardson*, 79 Tex. 649, 15 S. W. 689; *Erie Telegr. Co. v. Grimes*, 82 Tex. 89, 17 S. W. 831; *Western U. Telegr. Co. v. Beringer*, 84 Tex. 38, 19 S. W. 336; *Western U. Telegr. Co. v. Nations*, 82 Tex. 539, 18 S. W. 709; *Potts v. Western U. Telegr. Co.* 82 Tex. 545, 18 S. W. 604; *Western U. Telegr. Co. v. Ward* (Tex. App.) 19 S. W. 898; *Logan v. Western U. Telegr. Co.* 84 Ill. 468; *Cutts v. Western U. Telegr. Co.* 71 Wis. 46, 36 N. W. 627; *Thompson, Electricity*, § 378; *Shearm. & Redf. Neg.* §§ 605-756; *Sedg. Damages*, §§ 43-50.

Messrs. Richards & Ronald, for appellee:

A telegraph company is not responsible for mortification, humiliation, or any other kind of mental suffering, nor disappointments in traveling, occasioned by its failure to either transmit or pay over a money order.

De Voegler v. Western U. Telegr. Co. 10 Tex. Civ. App. 229, 30 S. W. 1107; *Ricketts v. Western U. Telegr. Co.* 10 Tex. Civ. App. 226, 30 S. W. 1105.

Courts, where the mental anguish doctrine has gained a foothold, have shown a tendency to throw around it wise limitations to discourage a multiplicity of harassing suits.

Western U. Telegr. Co. v. Steenbergen, 21 Ky. L. Rep. 1289, 54 S. W. 829; *Western U. Telegr. Co. v. Ayers* (Ala.) 31 So. 78; *Western U. Telegr. Co. v. Ferguson*, 157 Ind. 64, 54 L. R. A. 846, 60 N. E. 674, 1080; *Reese* 57 L. R. A.

v. *Western U. Telegr. Co.* 123 Ind. 294, 7 L. R. A. 583, 24 N. E. 163; *Western U. Telegr. Co. v. Burgess* (Tex. Civ. App.) 43 S. W. 1033.

Mr. George R. Fearons also for appellee.

O'Rear, J., delivered the opinion of the court:

Appellant, a citizen of Louisville, was in Duluth, Minnesota, on August 21, 1900. He says he was an entire stranger there. Some friends were with him, and they had engaged to leave the city that day. It was on Saturday. Appellant had some money with him, and was preparing to furnish it to his companions, providing he could first be assured that he could receive returns on a draft by telegraph that day. He approached appellee's agent at Duluth, and gave him the foregoing information, and was assured by the agent that, if the draft was honored in Louisville, the point on which it was being drawn, he could get the money that day, and, if the draft was made then, that he could return for the money about 4 o'clock in the afternoon. Appellant claims that he then delivered to his friends the money he had with him, and they left the city. He telegraphed as follows, paying appellant for the message and the charge for transmitting the money:

August 21, 1900.

To Robinson-Hughes Co.,
Louisville, Ky.:—

Wire me one hundred. Waive identification. Be home last of week.

C. B. Robinson.

This message was delivered to Robinson-Hughes Company at Louisville about 1:30 P. M. on the day on which it was sent. They immediately complied with the telegraphic draft, and deposited with appellee at Louisville, Kentucky, the sum of \$100 cash for payment by an equivalent sum in cash immediately to appellant in the city of Duluth. Appellant returned to the Duluth office a few minutes before the hour designated, and was informed that the draft had been honored, and was tendered a check of the Western Union Telegraph Company for \$100, drawn upon one of the banks of Duluth. The banks had closed for the day at 2 o'clock P. M. Appellant informed the agent that he was unknown in the city, and that a check was useless to him, because he could not be identified, and that he wanted the money; that he had engaged passage on a steamer for Canada, and was due to depart about 6 o'clock in the evening. The agent said that he had not that much money, and declined to make any other payment than the check. Appellant importuned the agent to go upon the street, and have the check cashed by some acquaintance. The agent refused. Appellant told the agent of his condition and needs; that he was on a trip for his health and for pleasure; that he was moneyless, far away from home, and in a strange city, and had neither friends nor

acquaintances there. Appellee's agent still declined to make other tender than the check. Appellant refused it. He brought this suit to recover the \$100, the costs of sending the message, and \$1,000 damages to compensate him for the mental anguish and suffering he endured by reason of defendant's wrongful conduct; also as punitive damages. He also alleged that he had been required to expend \$3 as extraordinary expenses incurred in Duluth while detained on account of appellee's conduct. The circuit court refused to entertain the action for any part of appellant's demand except for the \$100, \$2.86, and \$3, and gave judgment accordingly. As to the remainder of the claim the petition was dismissed. Appellant prosecutes this appeal, seeking a reversal upon the ground that annoyances, worry, and mental anguish suffered by him, and caused by appellee's breach of its contract under such circumstances as detailed, were elements of damage for which he was entitled to be compensated.

There was nothing upon which to base a recovery of exemplary damages; no charge of malice or oppression. This court is committed to the doctrine that a telegraph company is answerable in damages for mental suffering caused by its failure to deliver a social message by reason of which the sender or person addressed is prevented from attending at the bedside at the death, or at the funeral, of a near relative. *Chapman v. Western U. Teleg. Co.* 90 Ky. 265, 13 S. W. 880, and subsequent cases. We have not applied the doctrine, however, further than to the class of cases referred to, and then the liability has been restricted to those of the first degree of relationship. It may be difficult to distinguish that class of cases from the one at bar in point of reason. But it should be borne in mind that the general rule is, in actions for breach of contract, damages for mental suffering occasioned by the breach are not recoverable. The telegraph cases, to the extent allowed at all, appear to constitute an exception to this general rule. We say "to the extent that they are allowed at all," for all telegrams are not subject to the rule. Telegraphic messages of a business nature should be and are subject to the law applicable to other business transactions. The measure of recovery is then regulated by the nature of the transactions involved, but in every case subject to these cardinal rules applicable to the defining of the measure of damages, *viz.*, that the damages must be proximate, certain, and the necessary result of the breach. They must not be conjectural nor speculative. In the case at bar the message was solely concerning a business transaction; in fact was the hiring of appellee to collect a sum of money at a distant city for, and immediately transmit it to, the hirer. The telegraph company undertook to render the service for him. It failed to discharge its undertaking; in other words, it broke its contract. Although it collected the draft, it did not transmit the money promptly to the person to whom it had engaged to de-

liver it. The contract sued on is not different in any material degree from one where a bank accepts for collection for its customer a draft on a remote locality, and, after collecting it, fails to turn over the money to the person entitled. This person may, and under similar circumstances doubtless would, suffer the same degree of anxiety, worry, mental pain, and mortification that appellant did. Yet the only difference between the contracts—the one sued on and the one imagined—is in the time required to perform them. It is probably true that every breach of contract occasions some mental disturbance, varying, perhaps, more in proportion to difference of temperament of the persons than to the circumstances of the case. Although it is said, "wherever the common law gives a right or prohibits an injury, it also gives a remedy by action" (3 Bl. Com. 123), yet this ancient boast of our race must be considered with other well-known, tried, and practical rules, among which is the one recognizing *damnum absque injuria*. In defining what damages are recoverable, and why, Sedgwick, in his work on Damages (vol. 1, p. 291), says: "In all cases of civil injury and of breach of contract the declared object of awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if the contract had been performed, or the tort not committed." The author is not speaking of those cases where exemplary damages are allowed, nor does he include breaches of contract of marriage, which seem to be also an exception to the rule. Suppose this action was permitted, what would be the inquiry? Manifestly, it must turn upon these two propositions: Did the plaintiff in fact suffer mental anguish? What was its extent? To do justice between litigants before the courts must be the law's effort. This necessarily involves the inquiry into the truthfulness of the matter of fact put in issue. Both sides must have a chance. If the plaintiff says because of the defendant's failure to deliver a message directing his broker to sell his stocks on the then market he lost money because of the subsequent falling of the market, the defendant has an opportunity to show (1) that plaintiff in fact then owned no such stocks; (2) that the market did not fall; (3) or, if it did, it immediately, and before plaintiff sold, recovered, and continued better; and (4) the exact difference—that is, damage—caused in plaintiff's condition in any event. So, if the plaintiff sustains a physical injury, his accompanying and consequent mental suffering is less easily simulated or exaggerated. In any event, the nature, features, extent, etc., of injury, and plaintiff's conduct then, are all capable of being proved or disproved by eyewitnesses. But in the instance of mental suffering alone no such means of testing the truth is available. We are invited to depart from the conservative paths beaten clear, whether or not straight, by long experience, to enter the speculative field of psychology, in allow-

ing elements of damage heretofore unknown to the common law in such cases. As the common law has never allowed it, and as no statute has been enacted permitting it, we must decline the step. In *De Voegler v. Western U. Teleg. Co.* 10 Tex. Civ. App. 229, 30 S. W. 1107, the plaintiff alleged that he was an inexperienced youth in Poughkeepsie, New York, among strangers, and, desiring to go to his home in Sherman, Texas, had requested his mother to send him money immediately; that his mother had wired him the amount, paying the charges therefor, but that the defendant failed to keep its contract, etc., by which plaintiff was occasioned great mental suffering, apprehension, anxiety, etc. The court denied the recovery. In *Ricketts v. Western U. Teleg. Co.* 10 Tex. Civ. App. 226, 30 S. W. 1105, the sender of the money order alleged that she had paid defendant company \$2.30 for sending \$30 to her son in New York. The company failed to deliver the money as it had agreed to do. The sender sued for damages on account of her mental suffering. Said the chief justice in denying the recovery: "The fact that a loving mother, in the dark hours of midnight, may conjure up a thousand forebodings of evil to her distant boy when he is in no real danger, even, of losing a single hour's repose, may furnish trouble enough to her; yet it gives no solid basis for damages in a practical business transaction." We are of opinion, upon precedent and principle, that appellant was not entitled to recover anything for his mental anguish or annoyance suffered because of appellee's breach of the contract.

We agree with the court below that there was a breach of the contract. Appellee was bound to deliver to appellant the money; not its check. We are further of the opinion that appellant was entitled to recover the \$100 and 6 per cent per annum interest on it from August 21, 1900, till it was tendered in court; also he was entitled to recover the costs of sending the message, \$2.86, and any additional actual expenses incurred by him necessarily because of appellee's breach of the contract, alleged in this case to be \$3.

The judgment failed to give appellant all that he was entitled to, and is consequently reversed, and cause remanded for proceedings not inconsistent herewith.

COMMONWEALTH of Kentucky, Appt.,
v.
WESTERN UNION TELEGRAPH COM-
PANY.

(.....Ky.....)

A telegraph company is not guilty of

NOTE.—As to the obligation of a telegraph or telephone company to serve the public, see, in general, note to *Rushville v. Rushville Natural Gas Co.* (Ind.) 15 L. R. A. 321; *Kirby v. Western U. Teleg. Co.* (S. D.) 80 L. R. A. 612; and *State ex rel. Gwynn v. Citizens' Teleph. Co.* (S. C.) 55 L. R. A. 139.
57 L. R. A.

maintaining a common nuisance because it delivers at a place not under its control, which is used and resorted to for selling pools and betting on horse races, by idle and evil-disposed persons, to the common nuisance and annoyance of all good citizens of the neighborhood, messages containing the information necessary to such transactions.

(December 18, 1901.)

APPEAL by complainant from a judgment of the Circuit Court for Jefferson County sustaining demurrers to an indictment against defendant for maintaining a common nuisance. *Affirmed.*

The facts are stated in the opinion.

Mr. E. J. Breckinridge for appellant.
Messrs. Kohn, Baird, & Spindle and Richards & Ronald, for appellee:

It is sought to make the telegraph company liable by reason of the use which third parties make of the messages after they have passed out of its hands,—a doctrine so monstrous that we trust the Kentucky courts will not be the first to announce it.

Western U. Teleg. Co. v. Ferguson, 57 Ind. 495.

Operating a place where idle and evil-disposed persons are permitted to congregate and engage in betting is not a public nuisance by virtue of any statute, but all prosecutions for such offenses are necessarily based upon the common law.

All common gaming houses are nuisances in the eye of the law.

1 Russell, Crimes, p. 741.

It seems that in the indictment it is necessary to make a particular statement of the offense, which is the keeping of the house.

1 Russell, Crimes, p. 745; 2 Clark, Crim. Law, 1126; 2 Bishop, Crim. Proc. § 278; *Burton v. State*, 16 Tex. App. 156; *King v. State*, 17 Fla. 191; *State v. Bell*, 5 Port. (Ala.) 375; *People v. Townsend*, 3 Hill, 480; *Gay v. State*, 90 Tenn. 645, 18 S. W. 260.

The distinction between acts which amount to maintaining the nuisance and those which do not is one of degree. The misdemeanor of unlawfully selling, committed by a servant, cannot be said, as a matter of law, to amount to maintaining a nuisance, unless he has assumed a temporary control of the premises, or in some other way emerged from his subordinate position to aid directly in maintaining it.

Com. v. Churchill, 136 Mass. 150. See also, to the same effect, *Nelson v. Territory*, 5 Okla. 512, 49 Pac. 920; *Com. v. Galligan*, 144 Mass. 171, 10 N. E. 788.

In each of the cases, whether for keeping a disorderly house or maintaining a common nuisance, our court of appeals has been careful to point out, if not emphasize, the fact that the premises were under the control of the defendant.

Cheek v. Com. 79 Ky. 360; *Bollinger v. Com.* 98 Ky. 575, 35 S. W. 553; *Com. v. Enright*, 98 Ky. 636, 33 S. W. 1111; *Cheek v. Com.* 100 Ky. 2, 37 S. W. 152; *Com. v. Respass*, 21 Ky. L. Rep. 140, 50 S. W. 549; *Respass v. Com.* 21 Ky. L. Rep. 789, 53 S. W. 24; *Carwein v. Com.* 22 Ky. L. Rep. 1734, 61 S. W. 275.

Paynter, Ch. J., delivered the opinion of the court:

The indictments charge the appellee with the offense of unlawfully keeping and maintaining a common nuisance. It is averred in them that Ed. Alvey and others had a house in the city of Louisville, commonly called "The Kingston," in their occupation and under their control, and habitually sold pools upon horse races run at various cities and places in the United States, and did habitually suffer, permit, and procure divers idle and evil-disposed persons to habitually assemble in that house, who engaged in betting, winning, and losing money on horse races, to the common nuisance and common annoyance of all good citizens of the neighborhood, and those passing and repassing, etc. As to the appellee it is averred that it is a corporation organized for the purpose of conducting the business of common carrier of intelligence by telegraph in the United States; that it, unlawfully designing to assist and aid and abet Alvey and others in the pool selling in the house mentioned, habitually received from divers race courses in the United States messages and intelligence concerning horse races, to wit, the names of horses entered in races, names of owners, trainers, riders, drivers, and distances of the races, terms, conditions, and state of betting at the races, condition of the weather and tracks of race courses, with the design to enable the persons assembled at the house of Alvey and others to bet upon races. It is further averred that the appellee transmitted and delivered to Alvey and others, at the Kingston, the information as to the result of races, with the view of enabling him and others to pay the bets made on races; that the information and intelligence transmitted and services rendered by the appellee was a necessary and essential service and means of carrying on and maintaining the existence of pool selling by Alvey and others, of which fact the appellee was aware.

It will be observed that the Kingston is averred to be under the control and management of Alvey and others. It is not averred that the appellee had any control of or management of the building. Neither is it averred that it was engaged in keeping or maintaining a common nuisance except as stated. The essence of the charge against it is that it transmitted over its line information which enabled Alvey and the evil-disposed persons who assembled at the house to engage in betting on races at distant points and to pay bets upon their result. At common law a common gaming house is a nuisance. It is detrimental to the public, because it promotes cheating and other corrupt practices; it encourages idleness and excites the desire to obtain money in an improper way. Persons who are in the occupation and control of such houses are guilty of maintaining a common nuisance. 1 Russell, Crimes, 741; 2 Bishop, Crim. Proc. 278. As it is not averred that the appellee is in the occupation and control of the house, the question arises whether it is

guilty of keeping the house by the transmission of information. It is a common carrier of intelligence and information, and was created and organized for that purpose. Ky. Stat. § 1346, denounces a penalty of not less than \$10 nor more than \$500 against an agent, officer, or manager of a telegraph or telephone line who, from corrupt or improper motives, or wilful negligence, shall withhold the transmission or delivery of messages of intelligence for which the customary charges have been paid or tendered. If a person desires to transmit a message over a telegraph line, if it is couched in decent language, it is the duty of the company to receive and transmit it upon the tender or payment of the customary charges for such services. The very purpose of its creation is to serve the public, and it cannot refuse to do so without making itself liable for its refusal. It has no more right to refuse to send a message when the charges are paid or tendered, when the message is couched in decent language, than a railroad company has to refuse to carry a passenger who tenders or pays his fare. A railroad company has a right to refuse to carry a passenger who is disorderly, or whose conduct imperils the lives of his fellow passengers or the officers or the property of the company. It would have no right to refuse to carry a person who tendered or paid his fare simply because those in charge of the train believed that his purpose in going to a certain point was to commit an offense. A railroad company would have no right to refuse to carry persons because its officers were aware of the fact that they were going to visit the house of Alvey, and thus make it possible for him and his associates to conduct a gambling house. Common carriers are not the censors of public or private morals. They cannot regulate the public and private conduct of those who ask service at their hands. It was certainly no wrong *per se* for the appellee to transmit over its line the information which it is charged to have transmitted. The simple fact that persons who received the information, and as a result of it, were guilty of unlawful acts, does not make the appellee a violator of the penal or criminal law. If in doing so it violated the penal or criminal law, it would be likewise guilty in transmitting information to the newspapers of the country as to prospective prize fights and horse races, because the information thus published induced persons to engage in betting on their results. The case of *Com. v. Churchill*, 136 Mass. 148, is not exactly analogous to the case under consideration, but it serves to illustrate the difference between the principal in control of premises upon which a nuisance is maintained and an agent whose act in some degree contributed to it. In that case the nuisance consisted in selling intoxicating liquors, etc. The defendant made some of the illegal sales. In passing upon the effect of his acts, the court said: "The Massachusetts decisions have never pressed the liability of a servant for keeping or maintaining a nuisance, consisting of a tenement in the pos-

session of his master, under circumstances like the present, beyond cases where the servant had had charge and control of the place, for a short time at least. . . . It is true that sales in the presence of the master do in some degree aid the master in keeping the tenement. But so do purchases, which, nevertheless, are not misdemeanors of any description. . . . The distinction between acts which amount to maintaining the nuisance and those which do not is one of degree. We do not think that the misdemeanor of unlawfully selling, committed by a servant, can be said, as a matter of law, to amount to maintaining a nuisance, unless he has assumed a temporary control of the premises, or in some other way emerged from his subordinate position to aid directly in maintaining it. . . . And none of our cases have gone further than to leave

the general question to the jury, whether the defendant aided in keeping the tenement, when it appeared that he did so by exercising some form of control." In that case the agent might have been prosecuted for selling liquor, but the court held that he was not guilty of maintaining the nuisance, because he was not in the occupation and control of the premises. He was guilty of an illegal act which contributed to the nuisance, yet the court would not hold that he maintained it. In the case at bar it was legal for the appellee to furnish the information, but it is claimed that it is liable because, after that information was obtained, parties used it in such a way as to make their acts unlawful. The court properly sustained a demurrer to the indictments.

The judgment is affirmed.

OREGON SUPREME COURT.

F. L. RICHMOND, *Respt.*,
v.
SOUTHERN PACIFIC COMPANY, *Appt.*

(.....Or.....)

An agreement by a passenger when procuring a mileage ticket at a reduced rate, not to hold the carrier liable for injuries received while riding on freight trains, is unenforceable with respect to such freight trains as are designated by the carrier to carry passengers generally.

(March 8, 1902.)

A PPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by Moore, J.:

This is an action to recover damages for a personal injury. The facts are that plaintiff having secured from the defendant a 3,000-mile passenger ticket over certain parts of its lines of railway, at 2½ cents a mile, subscribed his name to the following stipulation, among others, indorsed thereon, to wit: "When used upon any freight train designated to carry passengers, the Southern Pacific Company is absolved from all liability as a common carrier for loss of life, personal injury, or loss or damage of

baggage or property of the party so using this ticket." The plaintiff, while riding as a passenger, in pursuance of said ticket, in the caboose of a freight train from Oakland to Eugene, was injured by the sudden checking of the speed of the train. At the time he was injured said train had been designated by the defendant to carry passengers, and its agents sold tickets to all persons applying therefor at the lawful rate of 4 cents per mile, and such passengers were permitted, without any restriction, to ride upon said train to or from any station on the defendant's railway in Oregon between Junction City and Roseburg, though two passenger trains passed daily over said railway line. The cause being at issue, a trial was had resulting in a verdict and judgment for plaintiff in the sum of \$925, and defendant appeals, assigning as error the action of the court in refusing to grant a judgment of nonsuit, and in giving certain instructions to the jury over its objection and exception.

Messrs. Fenton & Muir, for appellant:

A passenger upon a freight train, as a condition to be carried thereon, where the carrier is performing its public duties as to those who desire to become passengers by supplying passenger trains for the accommodation of the public, may lawfully contract, in consideration of the carriage upon such freight train, for his own convenience or purposes, to exempt such carrier from all liability for personal injury, whether caused by negligence or otherwise; and it does not affect the validity of such contract that the carrier may waive its right to insist upon such contract, as to all passengers who may be carried thereon, or who may pay a single fare at the full lawful rate.

Robertson v. Old Colony R. Co. 156 Mass. 525, 31 N. E. 650; *Hosmer v. Old Colony R. Co.* 156 Mass. 506, 31 N. E. 652; *Bates v. Old Colony R. Co.* 147 Mass. 255, 17 N. E.

NOTE.—For another case in this series as to validity of agreement releasing carrier from liability for injuries to passenger received while riding on freight train, see *Central of Georgia R. Co. v. Lippman* (Ga.) 50 L. R. A. 673.

As to what risk is assumed by passenger on freight train generally, see *note* to *Ohio Valley R. Co. v. Watson* (Ky.) 19 L. R. A. 310; *Bogess v. Chesapeake & O. R. Co.* (W. Va.) 23 L. R. A. 777; and *Illinois C. R. Co. v. Beebe* (Ill.) 43 L. R. A. 210.
57 L. R. A.

633; *Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 38 L. R. A. 93, 44 N. E. 796; *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196, 40 L. R. A. 101, 46 N. E. 917, 47 N. E. 464; *Doyle v. Fitchburg R. Co.* 166 Mass. 492, 44 N. E. 611; *Blank v. Illinois C. R. Co.* 182 Ill. 332, 55 N. E. 332; *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; *Arnold v. Illinois C. R. Co.* 83 Ill. 273, 25 Am. Rep. 383; *Bissell v. New York C. R. Co.* 25 N. Y. 442, 82 Am. Dec. 369, *Reversing* 20 Barb. 602; *Wells v. New York C. R. Co.* 24 N. Y. 181, *Affirming* 26 Barb. 641; *Perkins v. New York C. R. Co.* 24 N. Y. 196, 82 Am. Dec. 281; *Poucher v. New York C. R. Co.* 49 N. Y. 263, 10 Am. Rep. 364; *Magnin v. Dismore*, 56 N. Y. 168; *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75; *Ulrich v. New York C. & H. R. Co.* 108 N. Y. 80, 15 N. E. 60; *Kenney v. New York C. & H. R. Co.* 125 N. Y. 422, 26 N. E. 626; *Illinois C. R. Co. v. Read*, 37 Ill. 485, 87 Am. Dec. 260; *Annas v. Milwaukee & N. R. Co.* 67 Wis. 46, 58 Am. Rep. 848, 30 N. W. 282; *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215; *Chicago, M. & St. P. R. Co. v. Wallace*, 30 L. R. A. 161, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 506; *Muldoon v. Seattle City R. Co.* 7 Wash. 528, 22 E. R. A. 794, 35 Pac. 422; *Rogers v. Kennebec S. B. Co.* 86 Me. 261, 25 L. R. A. 491, 29 Atl. 1069; *Meuer v. Chicago, M. & St. P. R. Co.* 5 S. D. 568, 25 L. R. A. 81, 59 N. W. 945; *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L. R. A. 846, 23 N. E. 205; *Trenton Pass. R. Co. v. Guarantors' Liability Indemnity Co.* 60 N. J. L. 246, 44 L. R. A. 213, 37 Atl. 609; *Kinney v. Central R. Co.* 32 N. J. L. 407, 90 Am. Dec. 675; *Griswold v. New York & N. E. R. Co.* 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261; *Hutchinson, Carr.* 2d ed. § 586; *Higgins v. New Orleans, M. & C. R. Co.* 28 La. Ann. 133; *Honeyman v. Oregon & C. R. Co.* 13 Or. 352, 57 Am. Rep. 20, 10 Pac. 628; *Forepaugh v. Delaware, L. & W. R. Co.* 128 Pa. 217, 5 L. R. A. 508, 18 Atl. 503; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 30 L. R. A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 175 U. S. 92, 44 L. ed. 86, 20 Sup. Ct. Rep. 33; *Griswold v. Illinois C. R. Co.* 90 Iowa, 285, 24 L. R. A. 647, 57 N. W. 843.

Messrs. Chamberlain, Thomas, & Kraemer for respondent.

Moore, J., delivered the opinion of the court:

The only question involved in this appeal is whether a passenger's agreement to absolve a transportation company from all liability as a common carrier, while riding as a passenger upon its freight train, entered into in consideration of his securing a railway ticket at a reduced rate, is void as against public policy. It is contended by defendant's counsel that the railway company in the discharge of the duty imposed upon it, having furnished adequate passen-

ger trains to accommodate the traveling public, may lawfully enter into a contract with a passenger whereby, in consideration of being carried on a freight train, he exempts the company from all liability for personal injury caused by its negligence or otherwise, and that the validity of such agreement is not impaired by waiving its right to insist upon such contract as to all passengers who may be carried on such train or who may ride thereon by paying a single fare at the full lawful rate. They concede that the rule is general in the state and Federal courts, except in Illinois and New York, that a common carrier cannot escape liability from the consequences of its negligence in carrying passengers on trains provided for that purpose; that they maintain that a railway company, not being obliged to carry passengers on a freight train, may contract in relation thereto as a private carrier, and that an agreement of that character is not violative of public policy. Plaintiff's counsel maintain, however, that the defendant having designated the train upon which their client was riding at the time he was injured to carry passengers, and permitted its agents to sell tickets therefor and allowed passengers generally to ride thereon, thereby made it a passenger train to all intents and purposes, thus rendering the exception inapplicable, and hence no error was committed in refusing to grant the judgment of nonsuit or in instructing the jury as complained of.

Public policy forbids a railway company from relying upon the terms of a contract entered into with a passenger, whereby he releases it from liability resulting from its negligence while performing a duty it owes the public as a common carrier; but it may become a private carrier, and escape such liability to contract, when as a matter of convenience to, or by special agreement with, a passenger, it undertakes to carry him by means not designated to accommodate the traveling public. *Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 38 L. R. A. 93, 44 N. E. 796. Thus, an agreement of an express agent to assume all risks of accident, in consideration of being carried in a baggage car, to facilitate his own business, releases a railroad company from liability of injury resulting from a casualty, because the agent is not a passenger, and the carrier is under no obligation to transport him in such car. *Blank v. Illinois C. R. Co.* 182 Ill. 332, 55 N. E. 332; *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196, 40 L. R. A. 101, 46 N. E. 917, 47 N. E. 464; *Bates v. Old Colony R. Co.* 147 Mass. 255, 17 N. E. 633; *Hosmer v. Old Colony R. Co.* 150 Mass. 506, 31 N. E. 652; *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385. The reason assigned for the conclusions reached in the cases cited is based upon the theory that the railroad companies permitted the express messengers to ride in places where the companies were under no obligation to carry them, and without such license the agents would have been trespassers and could have

been ejected from such cars. In *Bates v. Old Colony R. Co.* 147 Mass. 255, 17 N. E. 633, Mr. Justice Allen, in speaking of the plaintiff's agreement to assume the risk incident to riding in the place agreed upon, says: "The contract did not diminish the liability of the defendant. It left the risk assumed by the plaintiff in riding in the baggage car what it would have been without the contract; it only secured him against being ejected from the car." In *Hosmer v. Old Colony R. Co.* 156 Mass. 506, 31 N. E. 652, Mr. Justice Lathrop, in speaking of the plaintiff's assumption of the risk of all injuries received while riding in the baggage car, says: "The place where he was riding was one in which the defendant was under no obligation to carry him. The contract gave the plaintiff a privilege which he sought for his own convenience." In *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196, 40 L. R. A. 101, 46 N. E. 917, 47 N. E. 464, the court, in speaking of the agreement entered into between the express company in whose service the decedent was an employee, and the right of the latter thereunder, says: "His rights were those of the express company, and could not be greater. He was there by the license given the express company, and he could not accept the license, and reject the conditions upon which it was granted." Where railroad companies, furnishing trackage and motive power, haul the cars of circus and menagerie companies over their lines of railway, in consideration of the latter assuming the risk of injuries incident to the journey, it has been held that such companies and their employees, sustaining damage or injury, could not recover therefrom from the railroad companies. *Chicago, M. & St. P. R. Co. v. Wallace*, 30 L. R. A. 161, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 506; *Robertson v. Old Colony R. Co.* 156 Mass. 525, 31 N. E. 650; *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215; *Forepaugh v. Delucare, L. & W. R. Co.* 128 Pa. 217, 5 L. R. A. 508, 18 Atl. 503. The reason assigned in these cases for enforcing the contracts of exemption from liability is that, as the railroad companies were under no legal obligation to haul such cars, they might lawfully enter into any contract to do so, and as a condition precedent therefor were authorized to limit their liability in case of accident, thus becoming private carriers in respect to such cars. In *Wells v. Steam Nav. Co.* 2 N. Y. 204, Mr. Justice Bronson, in speaking of the right of such a carrier to restrict its liability, says: "They are not, like common carriers and innkeepers, bound to accept employment when offered, nor, like them, are they tied down to a reasonable reward for their services. They are at liberty to demand an unreasonable price before they will undertake any work or trust, or to reject employment altogether, and they may make just such stipulations as they please concerning the risk to be incurred. They may become insurers against all possible hazards, or they may say, 'We will answer for nothing but a loss happening through

our own fraud or want of good faith.' In short, the parties stand on equal terms, and can in this matter, as they may in others, make just such a bargain as they think will answer their purpose."

In the case at bar the question of the defendant's liability, or its exemption therefrom, under the contract, must be solved by determining whether it was a common or a private carrier in respect to the plaintiff at the time he suffered the injury of which he complains; for if it sustained the relation of a private carrier to him his agreement exonerates it from liability, but if it was a common carrier in respect to him at that time the contract is contrary to public policy, and therefore void. "A common carrier," says Mr. Justice Bradley in *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, "may undoubtedly become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character." The principle thus so ably illustrated was adopted by this court in *Honeyman v. Oregon & C. R. Co.* 13 Or. 352, 57 Am. Rep. 20, 10 Pac. 628, in which it was held that where the carrier does not hold itself out as a common carrier of dogs, but, as a matter of accommodation to a passenger who was notified of its rules, permits its servant to receive them, such arrangement can only charge the carrier as a bailee or private carrier. In the case at bar a special engagement was entered into between the parties, but such agreement was not wholly a matter of accommodation to the plaintiff. It was rather for their mutual advantage, for it may safely be assumed that, when passenger tickets can be secured at low rates, many persons who would not otherwise travel purchase them for their own advantage. Such purchases necessarily increase passenger traffic, and, if the rate established leaves a margin of profit above the cost of transportation, the increase in the number of passengers ordinarily results in advantage to the railroad company, so that the purchase and sale of the ticket in question may be considered as a source of profit to each party. The question whether the defendant sustained the relation of a common carrier to the plaintiff at the time he was injured, and therefore is liable to

him for the damages sustained, notwithstanding his agreement to assume the risk of injury, and to absolve the defendant from all liability therefor, must hinge upon a proper solution of the inquiry whether it was the defendant's business and duty to carry him on its freight train between the stations indicated. The law imposes upon the railroad company, as a common carrier, the duty of transporting over its lines all ordinary freight delivered to it for that purpose, and of carrying all passengers against whom no legal objection can be successfully interposed, who have complied with the rules of the company in respect to securing tickets before entering the cars, if there be sufficient room for their accommodation, leaving to the carrier the privilege of dividing the traffic, and of furnishing separate trains for the accommodation of each; and having exercised the discretion with which it is vested, thereby regulating the manner in which its business is to be transacted, it is under no legal obligation to carry passengers on freight trains or freight on passenger trains. *Hobbs v. Texas & P. R. Co.* 49 Ark. 357, 5 S. W. 586; *Arnold v. Illinois C. R. Co.* 83 Ill. 273, 25 Am. Rep. 386; *Thomas v. Chicago & G. T. R. Co.* 72 Mich. 355, 40 N. W. 463; *Elkins v. Boston & M. R. Co.* 23 N. H. 275; *Murch v. Concord R. Corp.* 29 N. H. 9, 61 Am. Dec. 631. "A common carrier of passengers," says Judge Thompson in his work on Carriers of Passengers (p. 26), "is one who undertakes for hire to carry all persons, indifferently, who may apply for passage." The defendant, having voluntarily designated its freight train to carry passengers between Junction City and Roseburg, thereby became, under the definition adverted to, a common carrier of passengers by the means so adopted, and its special contract in respect to the attempted limitation did not divest it of that character; for if it is the habit of a railroad company to carry passengers on a freight train, it becomes a common carrier of passengers by that means, and thereby assumes the liabilities of such carriers. *Flinn v. Philadelphia, W. & B. R. Co.* 1 Houst. (Del.) 469. The defendant was under no legal obligation to carry passengers on its freight trains, but, having notified the public that it would do so between the stations indicated, the train, as long as it was used for that purpose, was a mixed freight and passenger train, thereby imposing upon the defendant all the duties of a common carrier in respect to any passenger riding thereon. The train in question was designed by the defendant to accommodate the traveling public generally, and was not provided for plaintiff's advantage alone, nor did he enjoy any special privileges thereon that were not extended to others. The defendant's undertaking to carry him by the means adopted for that purpose was a part of the performance of its business, and within the line of its public duty, as long as such train was used to carry passengers. The ticket purchased by plaintiff was secured for five eighths of the regular local fare, and, while he was a com-

mercial traveler whose business compelled him to make extensive journeys, we understand from the transcript that any person could secure such tickets upon application by paying the same price therefor.

Plaintiff having paid value for his ticket, the contract of carriage could not be canceled at pleasure by the defendant, and we do not think a rebate in the price of a local ticket affords a sufficient consideration for the assumption of the risk undertaken, where no special privileges are conferred; for, if this were so, it would follow that the smallest remission from the regular price of a ticket might suffice for exemption from liability.

No error having been committed as alleged, the judgment is affirmed.

R. B. BOYD, Respt.,

v.

PORTLAND GENERAL ELECTRIC COMPANY, Appt.

(.....Or.....)

1. A presumption of negligence on the part of an electric company arises when injury results to a traveler in a public street from one of its live wires, which has broken and is hanging so near the ground as to be within reach therefrom.
2. An allegation in an action to recover for injuries to a passerby from a broken live electric wire, that it was weak and defective, and insufficiently stretched and fastened, does not require proof of these facts, since the happening of the accident is presumptive evidence of negligence in that regard.
3. The presumption of negligence arising from an injury to a passerby in a public street from a broken electric wire is not overcome, so as to require the case to be taken from the jury, by testimony of de-

NOTE.—For other cases in this series as to presumption of negligence in case of injury from broken or fallen electric wires, see *Denver Consol. Electric Co. v. Simpson* (Colo.) 31 L. R. A. 566, and note; and *Snyder v. Wheeling Electrical Co.* (W. Va.) 39 L. R. A. 499.

As to liability for injuries by electric wires in highways generally, see *City Electric Street R. Co. v. Conery* (Ark.) 31 L. R. A. 570; *Western U. Teleg. Co. v. State use of Nelson* (Md.) 31 L. R. A. 572; *Mitchell v. Charleston Light & P. Co.* (S. C.) 31 L. R. A. 577; *McKay v. Southern Bell Teleph. & Teleg. Co.* (Ala.) 31 L. R. A. 589; *Huber v. La Crosse City R. Co.* (Wis.) 31 L. R. A. 583; *Suburban Electric Co. v. Nugent* (N. J. L.) 32 L. R. A. 700; *Atlanta Consol. Street R. Co. v. Owings* (Ga.) 33 L. R. A. 798; *Newark Electric Light & P. Co. v. Garden* (C. C. App. 3d C.) 37 L. R. A. 725; *Bergin v. Southern New England Teleph. Co.* (Conn.) 39 L. R. A. 192; *Gannon v. Laclede Gaslight Co.* (Mo.) 43 L. R. A. 505; *Mooney v. Luzerne* (Pa.) 40 L. R. A. 811; *Brush Electric Light & P. Co. v. Lefevre* (Tex.) 49 L. R. A. 771; *Boyd v. Portland General Electric Co.* (Or.) 52 L. R. A. 509; *Thomas v. Maysville Gas Co.* (Ky.) 53 L. R. A. 147; and the case next following, of *Newark Electric Light & P. Co. v. Buddy* (N. J. L.) post, 624.

defendant's employees that the wire was properly constructed and put up.

4. There is no error in submitting to the jury a phase of the case which defendant's pleadings and the conduct of the court and parties throughout the trial show was understood to be presented by the complaint.
5. An electric-light company is not relieved from liability for injuries by wires broken by a storm, unless it was one which could not reasonably have been anticipated.
6. Remarks by the court in the presence of the jury, in a colloquy with counsel as to the propriety of submitting a special finding, will not require reversal because they indicate the court's opinion upon the defense of contributory negligence, if the jury have been fully instructed on that question, and the remarks are not intended for their guidance, and do not prejudice defendant's case.

(November 12, 1901.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by **Beam, Ch. J.:**

This is an action by R. B. Boyd against the Portland General Electric Company to recover damages alleged to have been suffered by him on account of an injury to his minor son from coming in contact with a live electric-light wire. The defendant is a corporation engaged in supplying the city of Portland and its inhabitants with electric light, for which purpose it has put up poles along the streets, having cross arms near the top, upon which its wires are stretched. The day before the accident, and while a storm was prevailing, two of the wires on Magnolia street became crossed at a point some 125 feet west of Dakota street, and about 6 or 7 o'clock in the evening the smaller one burned in two and hung down in two loops east of the break; one of them nearly reaching the ground 2 or 3 feet west of the pole at the intersection of the streets, where it swung directly over a path used by residents of the neighborhood. The other end remained suspended from the next pole, some 150 feet west, and did not reach the ground. About the time, or soon after, the wire parted, the boy who was subsequently injured, a lad about eleven years of age, and an elder brother, passed the pole west of Dakota street, noticed the broken wire at that place, and knew it was dangerous, but did not know anything about the other wire hanging down east of that point at the intersection of the streets. About 8 o'clock the next morning, the plaintiff, who resides on Dakota street, some 200 feet south of its junction with Magnolia, sent his son on an errand which required him to travel along the path near the light pole at the corner of the street, over which the wire was suspended. A few minutes later the boy was discovered lying on the ground, immediately under the broken wire, in an insensible con-

dition, his right hand badly burned, while he was otherwise seriously, and perhaps permanently, injured. No one witnessed the accident, and the lad was unable to give any account of how it occurred, but says he passed out of the front gate, and ran north along Dakota street without looking up, after which he had no recollection of what occurred. It is admitted, however, that his injury was caused by contact with the broken wire. The negligence charged in the complaint is that the wire which parted and caused the injury was weak and defective, and not sufficiently attached or fastened to the pole, or properly stretched, or safely insulated, owing to which defects and weakness it broke and parted; that defendant could have known by proper diligence, and did know, at the time, or very soon after, the wire parted, and long before the injury occurred, that the wire was broken and swinging over and across the street, to the imminent danger of persons traveling thereon; that, disregarding its duty, it failed and neglected to remove or repair the broken wire, or to give any warning of danger, but wrongfully and negligently permitted it to remain in such condition until after the injuries complained of were received. The answer denies the negligence charged, and, for an affirmative defense, after alleging the contributory negligence of the plaintiff's son, avers that the wire which parted was of the best-known standard manufacture, and was placed upon the poles in a proper way; that a heavy storm prevailed during the afternoon of the 6th of December, the wind at one time reaching a velocity of 60 miles an hour, which the defendant believes forced the wire across a larger one on the cross arm to the north of it, so that the friction of the wires caused the insulation to wear away, permitting them to come in contact; that between 6 and 7 o'clock in the evening the smaller one burned through and parted, and fell in loops across the other as stated in the complaint; that, although defendant had the best-known appliances in use at the time for detecting or discovering the grounding of its wires, it had no knowledge of such parting until notified of the accident to plaintiff's son, when, upon examination, it ascertained that neither end of the broken wire had come in contact with the ground, so as to form a short circuit, and therefore the fact of the wire having parted could not be indicated by its appliances. The reply put in issue the new matter alleged in the answer; and, the trial resulting in a verdict and judgment in favor of the plaintiff, the defendant appeals.

Messrs. Dolph, Mallory, Simon, & Gearin, for appellant:

Proof of the happening of an accident is not sufficient to make out a prima facie case of negligence, except where some form of contractual relation exists between the plaintiff and defendant, as in the case of passenger and carrier, or some relation in its nature contractual.

2 Thomp. Neg. § 3, p. 1, 227, nota.

The negligence charged must be proved as a fact, and will not be presumed from the single fact that plaintiff's son was injured.

Walsh v. Oregon R. & Nav. Co. 10 Or. 250; *Coughtry v. Willamette Street R. Co.* 21 Or. 245, 27 Pac. 1031; *Nitroglycerine Case*, 15 Wall. 524, sub nom. *Parrott v. Wells*, 21 L. ed. 206; *Mitchell v. Chicago & G. T. R. Co.* 51 Mich. 236, 38 Am. Rep. 566, 16 N. W. 388; *Schultz v. Pacific R. Co.* 36 Mo. 14; *Buchelder v. Heagan*, 18 Me. 32; *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684; *Baker v. Fehr*, 97 Pa. 70.

In an action to recover damages for an injury caused by the negligence of another, the plaintiff must state in his complaint what the negligent act or omission was; and he is entitled to a verdict only upon evidence which proves the particular fact charged.

Woodward v. Oregon R. & Nav. Co. 18 Or. 289, 22 Pac. 1076; *Knahtla v. Oregon Short-Line & U. N. R. Co.* 21 Or. 136, 27 Pac. 91; *Scott v. Oregon R. & Nav. Co.* 14 Or. 228, 13 Pac. 98; *Neudecker v. Kohlberg*, 81 N. Y. 296; *Boardman v. Griffin*, 52 Ind. 101; *Ahern v. Oregon Teleph. & Tel. Co.* 24 Or. 276, 22 L. R. A. 635, 33 Pac. 403, 35 Pac. 549.

If the defendant's evidence overcomes the presumption of negligence, then the plaintiff can take nothing by the presumption, but must prove negligence, as if no presumption existed.

Snyder v. Wheeling Electrical Co. 43 W. Va. 661, 39 L. R. A. 499, 28 S. E. 733; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810, 19 S. E. 344; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499; *Thomp. Carr. of Pass.* § 9, p. 200; *Western U. Teleg. Co. v. State use of Nelson*, 82 Md. 293, 31 L. R. A. 572, 33 Atl. 763.

The care required is not that everything which human ingenuity can invent to prevent possible injury must be done, but, if that is done which such persons would ordinarily regard as proper and safe to do, the demands of the law are satisfied; and if, notwithstanding this, injury is sustained, it cannot be said to be the result of legal negligence.

Chicago, B. & Q. R. Co. v. Stumps, 55 Ill. 367; *Chicago v. Starr*, 42 Ill. 174, 89 Am. Dec. 422; *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744; *Bennett v. Ford*, 47 Ind. 264; *Beatty v. Central Iowa R. Co.* 58 Iowa, 242, 12 N. W. 332; *Sjogren v. Hall*, 53 Mich. 274, 18 N. W. 812; *Richards v. Rough*, 53 Mich. 212, 18 N. W. 785; *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649; *Fairbanks v. Kerr*, 70 Pa. 86, 10 Am. Rep. 664; *Baker v. Fehr*, 97 Pa. 72; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653; *Loftus v. Union Ferry Co.* 84 N. Y. 455, 38 Am. Rep. 533; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Crocheron v. North Shore Staten Island Ferry Co.* 56 N. Y. 656; *Cleveland v. New Jersey S. B. Co.* 68 N. Y. 306; *Burke v. Witherbee*, 98 N. 57 L. R. A.

Y. 562; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Morris v. New York C. & H. R. R. Co.* 106 N. Y. 678, 13 N. E. 455; *Code*, § 2035.

Messrs. Dufur & Menefee, for respondent:

When plaintiff had established the fact of ownership and control of the wire, and its dangerous condition in a public street, coupled with the accident, he had made out a complete prima facie case of negligence, and cast the burden upon defendant to show that the wire broke and remained in such condition until the accident, without its fault.

Haynes v. Raleigh Gas Co. 114 N. C. 203, 26 L. R. A. 810, 19 S. E. 344; *Western U. Teleg. Co. v. State use of Nelson*, 82 Md. 293, 31 L. R. A. 572, 33 Atl. 763; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499; *Mitchell v. Charleston Light & P. Co.* 45 S. C. 146, 31 L. R. A. 577, 22 S. E. 767; *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L. R. A. 596, 40 Pac. 108; *Trenton Pass. R. Co. v. Cooper*, 60 N. J. L. 219, 38 L. R. A. 637, 37 Atl. 730; *Willey v. Boston Electric Light Co.* 168 Mass. 40, 37 L. R. A. 723, 46 N. E. 395; *Snyder v. Wheeling Electrical Co.* 43 W. Va. 661, 39 L. R. A. 499, 28 S. E. 733; *Ahern v. Oregon Teleph. & Tel. Co.* 24 Or. 276, 22 L. R. A. 635, 33 Pac. 403, 35 Pac. 549.

Persons possessing or using dangerous things or agencies are bound to exercise more than ordinary care in their control of them.

Whittaker's Smith, Neg. p. 217; *City Electric Street R. Co. v. Conery*, 61 Ark. 381, 31 L. R. A. 570, 33 S. W. 426; *Mitchell v. Charleston Light & P. Co.* 45 S. C. 146, 31 L. R. A. 577, 22 S. E. 767.

Bean, Ch. J., delivered the opinion of the court:

The plaintiff gave evidence tending to show when the wire which caused the injury to his son fell and the circumstances surrounding the accident, but gave no direct evidence of the specific acts of negligence charged in the complaint. The court, however, instructed the jury, among other things, that "in cases of this kind the law raises a presumption of negligence from the mere fact that the wire broke and the accident happened, because of the high degree of care which is required on the part of the person or corporation conducting such business, and for reasons which I need not discuss here. What I mean by that is that if any evidence had been brought here that this wire was broken, and through the breaking of the wire this boy had been injured, and then nothing further had been introduced in the case,—no further evidence,—and the case was left there, it would be your duty to find for the plaintiff, provided you found, also, that he was not guilty of negligence on his part. That is what is called a prima facie case. Now, this may be rebutted by evidence on the part of the defendant, notwithstanding this pre-

sumption. If the defendant comes in and satisfies you that it did use ordinary care in building and maintaining and repairing this line, and that the accident occurred without fault on its part, then it would be your duty to find on that point for the defendant." The giving of this instruction is assigned as error. The general rule of law is unquestioned that, excepting in cases where the defendant is an insurer, a party who charges another with negligence must prove it. But there are instances in which proof of an accident and the manner of its occurrence is sufficient to make a prima facie case, and to cast the burden on the defendant to show that it occurred without fault on his part. As a general rule, where the thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of events would not happen if he had used proper care, it affords reasonable evidence, in the absence of a satisfactory explanation, that the accident arose from a want of care. *Esberg Cigar Co. v. Portland*, 34 Or. 282, 43 L. R. A. 435, 55 Pac. 961. This doctrine is held applicable in actions for injuries received from contact with a live electric wire in a public street. Electricity is a dangerous element, and those who make merchandise of it are legally bound to exercise that degree of care that will render its use reasonably safe; and, as the wires which convey it cannot safely be permitted within reach of travelers, a presumption arises, when they are found out of their proper place, that those having them in charge have been negligent. The courts quite universally hold that proof that a live wire was down in a street and injury resulted therefrom is prima facie evidence of negligence. 2 Jaggard, Torts, 864; Joyce, Electric Law, § 606; Keasbey, Electric Wires, 2d ed. § 271; *Western U. Teleg. Co. v. State use of Nelson*, 82 Md. 293, 31 L. R. A. 572, 33 Atl. 763; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810, 19 S. E. 344; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499; *Trenton Pass. R. Co. v. Cooper*, 60 N. J. L. 219, 38 L. R. A. 637, 37 Atl. 730; *Snyder v. Wheeling Electrical Co.* 43 W. Va. 661, 39 L. R. A. 499, 28 S. E. 733.

The defendant contends, however, that as the complaint in hand avers that the wire which caused the injury was weak and defective, and insufficiently stretched and fastened, the plaintiff was obliged to point out by his testimony some defects in the particulars alleged. But we are unable to concur in this view. The doctrine of *res ipsa loquitur*, alluded to, is a mere rule of evidence. 2 Thomp. Neg. 1227 *et seq.* It proceeds on the theory, as the term implies, that the happening of an accident under certain circumstances is of itself prima facie evidence of negligence, and, when it is evidence of the particular negligence charged in the complaint, the plaintiff is entitled to invoke the rule. Thus, in *Trenton Pass. R. Co. v. Cooper*, 60 N. J. L. 219, 38 L. R. A. 637, 37 Atl. 730, the negligence averred was

the insufficient bonding or fastening of the rails of a street railway, and it was insisted that the plaintiffs were obliged to point out and establish some particular defect or insufficiency as alleged. The court held, however, that the escaping of electricity from the rails was presumptive proof of the negligence alleged, thus bringing the case within the doctrine of *res ipsa loquitur*. In *Snyder v. Wheeling Electrical Co.* 43 W. Va. 661, 39 L. R. A. 499, 28 S. E. 733, the negligence charged was insufficient fastening, and, although the court held that no evidence of other acts of negligence was competent, it ruled that the mere fact that the wire fell created a prima facie presumption of negligence, sufficient to support the action unless rebutted by something appearing in the case. In *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499, the negligence charged was defendant's failure to properly construct its line and its omission to take the necessary precautions to prevent the wires from falling. It was held that the fact that the wire had become detached from its fastenings and hung down in a public alley, so as to endanger public travel, was prima facie evidence of negligence on the part of the defendant, and an instruction to that effect was properly given. In the case at bar, it probably would have been sufficient, if the plaintiff had specified in the complaint generally the act or omission which he alleges to have been the proximate cause of the injury, and averred that it was negligently done or omitted. But, since the wire which caused the injury would not, presumably, have parted and fallen down, in the ordinary course of events, unless it was either defective or improperly stretched or fastened, it is reasonable to presume that its position in the street was owing to one or all of these causes. It must be assumed that a suitable wire, properly put up, would not be a menace to travelers on the highway; otherwise, the operation of a light plant by wires supported by poles in the streets of a city would be *ipso facto* a nuisance, and an unauthorized interference with the rights of the public. If, therefore, the wires break and fall down, that fact in itself affords reasonable evidence of negligence, either in the use of defective wires or in the manner of putting them up, and calls upon the defendant to show that it was without fault. It is, of course, true that in an action of this character the plaintiff cannot allege negligence in one particular, and upon the trial prove and recover upon another. *Lieuallen v. Mosgrove*, 33 Or. 282, 286, 54 Pac. 200, 664; *Jones v. Portland*, 35 Or. 512, 58 Pac. 657. But we do not understand that the instruction complained of conflicts with this rule. It was confined to the inference or presumption to be drawn from the breaking of the wire and the happening of the accident, the proof of which was prima facie evidence that the wire was either weak and defective or improperly put up. The instruction, therefore, did not advise the jury that the plaintiff was entitled to recover on a ground of negli-

gence not charged. The cases already cited illustrate the application of the doctrine of *res ipsa loquitur* where specific acts of negligence are charged in the complaint.

It is argued, however, that, if proof of the accident was sufficient under the pleadings to make out a *prima facie* case in favor of the plaintiff, it was overcome by the testimony of the defendant. But the weight, value, and credibility of such testimony were for the jury, and the court could not properly have taken the case from them on the ground that the defendant had shown by its employees that the accident occurred without fault on its part. In a recent case in New York, where a trolley wire fell, injuring a traveler, it was held that the presumption of negligence on the part of the company, arising from the fall of the wire and the happening of the accident, was not overcome by the evidence of interested persons that the supports were the best obtainable, that the line was frequently inspected, and an automatic device called the "breaker system" was in use, which, if properly adjusted, would automatically cut off the current if the wire touched the ground; the credibility of the witnesses and the sufficiency of the device being questions for the jury. *O'Flaherty v. Nassau Electric R. Co.* 34 App. Div. 74, 54 N. Y. Supp. 96. In *Uggla v. West End Street R. Co.* 160 Mass. 351, 35 N. E. 1126, the plaintiff was struck by part of an iron ear used to clasp a trolley wire and keep it in place around the curve over the defendant's track. There was no evidence of the defendant's negligence, except that the iron ear broke with the strain and one part of it fell, striking the plaintiff on the head. The verdict in his favor, however, was sustained, notwithstanding the defendant had introduced evidence tending to show that the break was a clean one, bright in color and appearance; that the iron was sound all through, with no flaw or defect in it; that the whole apparatus was manufactured and put up by a manufacturer of the highest reputation; that the ear and guy constituted the best and strongest device known at the time for keeping trolley wires in place; that the defendant employed a competent corps of assistants, including foreman and superintendent, who inspected the whole line weekly, including the cars and every attachment; and that this particular part of the line had been inspected within a week prior to the accident.

It is next insisted that the court erred in instructing the jury that, "if the defendant had known of the breaking of the wire, it would have been its duty, under the high degree of care required of it under the circumstances, to have repaired it at the earliest possible moment, or at least as early as it could practically be done; but, if it did not know of the break,—and the evidence here, I believe, is undisputed that it did not,—the question for you to determine is whether, under the circumstances, it reasonably should have known, or should have provided means by which it would have known, of the breaking within that time, and within such

a time that it could reasonably have repaired the break before this accident occurred. It is for you to determine whether or not it was guilty of a want of that high degree of care required of it in not providing means to find out whether this line had broken within this time. If you should find that the company was negligent in this respect, then it would be responsible for the negligence, although it might not have been guilty of negligence in any other respect." The specific objection to this instruction is that there are no allegations in the complaint charging the defendant with negligence in failing to adopt necessary or proper means to ascertain whether the wire was broken; but, on the contrary, it is argued, the complaint alleges that defendant did know of the break very soon after it occurred, and did not exercise due care and diligence in replacing and taking care of it. The language of the complaint is that defendant, its officers, agents, and employees, by proper diligence could have known, and did know, very soon after the wire was broken, and long before the injuries complained of, that it was broken and hanging over the street, etc., and carelessly failed and neglected to remove or repair it, or to give any warning of danger, and wrongfully and negligently permitted the broken wire to remain in such dangerous condition until after the accident. It is not clear whether the pleader intended to charge negligence in not ascertaining that the wire had broken, or negligence in not taking care of a broken wire; but the construction which seems to have been put upon the pleadings by the defendant in its answer, and by the court and parties throughout the trial, is that it charged negligence in not exercising reasonable care and diligence in ascertaining that the wire was broken, and we are of the opinion that the court did not err in submitting that phase of the question to the jury. Again, it is objected that this instruction assumes there was no evidence that the defendant had provided means, or used reasonable care and caution in providing means, for acquiring speedy information of a break in the wires. We do not consider this a reasonable interpretation of the language used by the court. It manifestly intended to, and did, submit to the jury, as a question of fact, whether the means which defendant had of ascertaining when a wire parted were such as proper care and diligence would require.

It is next asserted that the court erred in instructing the jury that "the defendant would not be liable for an act beyond its control and which could not reasonably be foreseen. It would not be liable for an accident caused by some unusual act of nature, or what is called an 'act of God,' if this could not have been reasonably foreseen and expected. As, for instance, suppose a stroke of lightning had occurred there, and broken one of these wires and thrown it down, and through that, and before the defendant had reasonable time in which to repair the break, the accident had occurred;

that would have been something that could not reasonably have been foreseen, and for which the defendant could not be held liable. So, too, if this breaking, you should find, was caused by such an unusual storm, unprecedented storm, or any act of God that could not be expected, such unusual storm as could not reasonably have been foreseen, something that had not been known to happen before in that way, then the defendant could not be held liable. But an ordinary storm, such as we have every winter, or nearly every winter, and which on that account ought to be expected to occur in any winter, would not excuse the defendant; that is, the mere fact that the injury was occasioned by the storm. The breaking of the wire, however, might occur during the storm, or at any other time, and not be the fault of the defendant. I simply, in giving you that instruction, refer to the storm alone." It is argued that this instruction is erroneous because it tells the jury, in effect, that if a storm caused the wire to part, and it was such a storm as happens in this country every winter, or nearly every winter, it would not be a defense, although it may have been in fact an extraordinary or unusual storm. The rule is that if the poles and wires of an electric company are properly erected and maintained, and a storm of unusual and extraordinary severity, such as could not reasonably have been expected, causes a wire to fall, and it is not negligently permitted to remain an unreasonable time in such condition, the company will not be liable for an injury caused thereby; in other words, where the proximate cause of the injury is an external force, for which the company is not responsible, the question of liability will depend on whether the force was one that might reasonably have been anticipated. And this, it seems to us, is the rule laid down in the instruction complained of. It is true, certain statements made by the court in attempting to explain and elucidate the matter to the jury would, if taken from their context, seem to support the contention of counsel; but, when construed in its entirety, the instruction amounts to a statement that defendant would not be liable for the breaking of a wire caused by a storm of unusual and extraordinary se-

verity, which could not reasonably have been anticipated, and this is the law upon the subject: Joyce, *Electric Law*, § 450; Keasbey, *Electric Wires*, 2d ed. § 236; *Mitchell v. Charleston Light & P. Co.* 45 S. C. 146, 31 L. R. A. 577, 22 S. E. 767.

After the case had been argued, counsel for the defendant requested the court to submit to the jury two special findings, the nature and character of which are not shown by the record. The request was denied, but during its consideration a colloquy between the court and counsel for the defendant ensued, a part of which is contained in the record, in the course of which the court stated, in effect, that the plaintiff's son was only required to exercise ordinary care, and was not obliged to keep his eyes on the full width of the street, and look at every point for an electric-light wire, but had a right to assume that the street was free from such an obstruction, and to have his head down while traveling therein, unless he had reason to believe the wire was there. It is urged that this was error, because it indicated the opinion of the court upon the defense of contributory negligence pleaded in the answer. The question of contributory negligence was, of course, for the jury, and it was submitted to them under proper instruction. The statements of the court in reference to the propriety of submitting the special findings, although made in the presence of the jury, were not intended for their guidance, or as an announcement of the rule of law by which the question of contributory negligence should be determined, but were the reasons given for the court's denial of counsel's request, and, in view of the subsequent instructions, did not, in our opinion, prejudice the defendant's case with the jury.

Objection is also made to the refusal of the court to give certain instructions requested by the defendant on the subject of contributory negligence; but that phase of the question was fully covered by the general charge, and there was no error in such refusal.

Having thus disposed of the questions presented on this appeal, and finding no error in the record, *the judgment is affirmed.*

Rehearing denied.

NEW JERSEY COURT OF ERRORS AND APPEALS.

NEWARK ELECTRIC LIGHT & POWER COMPANY, *Plff. in Err.*,

v.

Thomas J. RUDDY.

(62 N. J. L. 505, 63 N. J. L. 357.)

*Proof that an electric-light wire, controlled by a private corporation, and

*Headnote by COLLINS, J.

NOTE.—As to presumption of negligence from injury caused by broken or fallen electric wire, see preceding case of *Boyd v. Portland Electric Co.* (Or.), and footnote thereto.

57 L. R. A.

normally suspended upon poles along a public street, was trailing broken on the sidewalk, affords a presumption of negligence in a suit against such corporation by a person injured through electric shock by contact with such wire. *Res ipsa loquitur.*

(June 19, 1899.)

ERROR to the Supreme Court to review a judgment affirming a judgment of the Circuit Court for Essex County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to

have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the supreme court, which was delivered by COLLINS, J., and was as follows:

The plaintiff, a child of eight years, picked up from the sidewalk of a public street the end of a broken wire that trailed from one of the poles on which it should have hung suspended, and sustained severe injury through electric shock. The wire was an electric-light wire, under the control of the defendant. This writ of error removes a judgment, on verdict, in favor of the plaintiff in a suit brought to recover damages because of alleged negligence in the premises, of the defendant. No explanatory or exculpatory evidence was offered in defense.

The counsel for the plaintiff in error very properly limited his argument to the question of whether or not the facts proved warranted the submission of the case to the jury on the point of defendant's negligence. That question, now presented by exceptions to the refusal of the court to nonsuit the plaintiff or to direct a verdict in favor of the defendant, was, I think, correctly decided by the trial judge. The defendant was, by law, permitted to suspend along a public street a wire so charged with electricity as to be dangerous to the public if it should break and fall upon the street. This privilege entailed upon it a very high degree of care to maintain the wire intact. It was permissible to presume a lack of exercise of such care when the proof showed the wire broken and trailing on the sidewalk under conditions that rendered possible serious injury to persons lawfully there. Unexplained, the presence on the highway of the charged and broken wire, and the fact of injury received therefrom, justified an inference of negligence in the defendant, in whose control and management it was. Such an inference has been judicially permitted even when the wire that broke received the electricity from a wire on which it fell. *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810, 19 S. E. 344. It appeared, indeed, that the wire was covered with an insulating substance, of which but a small portion at the broken end was gone, and, if the plaintiff had not chanced to touch this small exposed portion of the wire, he would have received no shock. Still, as it is plainly possible that any break of such a wire may remove the insulation sufficiently to lead to such a result, the defendant, if chargeable at all, must accept that consequence. It happened that the plaintiff was able to produce no witness who had noticed that the wire was down except within five or ten minutes before the plaintiff took it up, and it was argued that so short a space of time forbade any presumption of negligence in not removing it. This argument is beside the point. The plaintiff was not bound to prove when the wire came down. Its presence at the time and place of injury sufficed. Had it appeared affirmatively that the wire had but just fallen,

the presumption of negligence would have been simply narrowed to the breaking of the wire. Only in case it had appeared that the breaking was without negligence would the question of reasonably prompt removal have arisen.

We may assume that such a wire, of proper size and quality, skilfully set up and inspected with sufficient care and frequency, will not spontaneously break, and, on the other hand, that undue strain or improper use may weaken such a wire, and cause its fracture. There remains the possibility of disruption caused by the elements or outside interference. Here lay the stress of the defendant's argument. It was contended that the plaintiff was bound to eliminate every such cause by disproving its existence; but to this argument I cannot yield assent. It is impracticable to frame a rule of general application on a subject so concrete as that involved in a jury's right to say that a particular occurrence speaks in itself of negligence. It was well said by Mr. Justice Garrison in *Bahr v. Lombard*, 53 N. J. L. 233, 21 Atl. 190, and 23 Atl. 167, that "the quantum of proof which a plaintiff must give in order to draw from the defendant explanatory evidence must, with certain limits, be dependent upon the circumstances of each case." One text writer sentimentiously sums up the matter thus: "If the accident is connected with the defendant, the question whether the phrase, *res ipsa loquitur*, applies, or not, becomes a simple question of common sense." Smith, Neg. p. 248. The following statement is fairly satisfactory: "Where it is shown that the accident is such that its real cause may be the negligence of the defendant, and that, whether it is so or not, it is within the knowledge of the defendant, and not within the knowledge of the plaintiff in such cases the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant." Channell, B., in *Bridges v. North London R. Co.* L. R. 6 Q. B. 377, 391. The weakness of this statement is inherent in all attempts to formulate the rule. The circumstances to be proved are, as they must be, left indefinite. A plaintiff must, of course, present all evidence reasonably within his power. The case of *Bahr v. Lombard*, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167, is authority that, "when the plaintiff's case shows that he has not produced material evidence clearly within his reach, the mere proof by him of the occurrence of an accident by which he was injured does not raise a presumption of negligence which the defendant can be called upon to rebut." This is both reasonable and just; but to exact from a plaintiff such negative proof as will exclude all possible theories of accident consistent with defendant's care would be unreasonable, and would not accord with common sense.

In the brief of counsel, it is complained as follows: "No attempt was made to show that there had been no storm or other violence to account for the falling of the wire. From anything that appeared, a tree, a wall, a pole, a trolley wire, or some other object may have fallen upon it and broken it. The local circumstances were as much, at least, within the knowledge of the plaintiff as of the defendant. The accident happened at the door of the plaintiff, and he must have known and have been able to show whether or not there was any external cause for the breaking of the wire. He could at least have shown that it parted without any apparent reason other than its own weakness." This complaint assumes a duty in the plaintiff to prove what were not the circumstances of the case, instead of what they were, and puts on him a burden properly belonging to the defense. In *Sheridan v. Foley*, 58 N. J. L. 230, 33 Atl. 484, this court adjudged that a nonsuit was wrong, although the only proof for plaintiff was that a brick fell from among defendant's workmen—brick-layers, and hod-carriers—engaged in constructing a wall at a considerable height. By the argument now pressed upon us, the nonsuit should have been upheld, because the plaintiff failed to disprove a hurricane or seismic disturbance. In *Trenton Pass. R. Co. v. Bennett*, 60 N. J. L. 219, 38 L. R. A. 637, 37 Atl. 730, the only proof of negligence was the fact that a horse was shocked by electricity when he stepped upon the track of defendant's electric street railway. The court of errors and appeals sustained the submission of the case to the jury. In an almost exactly similar case an appellate division of the New York supreme court reached like result. *Clarke v. Nassau Electric R. Co.* 9 App. Div. 51, 41 N. Y. Supp. 78. In that case, as here, the defendant argued that, to sustain an inference of negligence, all other hypotheses must be excluded by the plaintiff's proof. It was suggested that the defendant's road might have been in perfect order, and that the accident might have been occasioned by the carelessness of third persons engaged in stringing telegraph or telephone or electric-light wires. Bartlett, J., thus met the argument: "The rule is one which relates merely to negligence prima facie, and it is available without excluding all other possibilities. . . . The doctrine of *res ipsa loquitur* simply calls upon the defendant, after proof of the accident, to give such evidence as will exonerate him, if any there be, and relieves the plaintiff from the burden of proving the nonexistence of an adequate explanation or excuse."

In the case before us, how could the plaintiff have shown that the wire "parted without any apparent reason other than its own weakness?" He had no control over, or power or opportunity to examine and test it. Proof that the fracture must have come from external violence was peculiarly within the province of defendant. It could have proved when and how the wire was put up; to what usage it had been subjected; how

often, how carefully, and how recently it had been inspected, and what its appearance after disruption indicated. In short, the defendant could have exonerated itself from the prima facie case made against it if exoneration had been possible. The plaintiff was not called on to conjecture and disprove possibilities of exoneration.

The judgment will be affirmed.

Mr. R. V. Lindabury, for plaintiff in error:

The mere presence, in a public street, of the broken end of an electric-light wire charged with a high current of electricity, nothing else appearing, does not speak the negligence of the company of whose plant it is a part.

Bahr v. Lombard, 53 N. J. L. 239, 21 Atl. 190, 23 Atl. 107; 1 Beven, Neg. p. 132; *Czech v. General Steam Nav. Co.* L. R. 3 C. P. 14; *Mullen v. St. John*, 57 N. Y. 587, 15 Am. Rep. 530; *Oosulich v. Standard Oil Co.* 122 N. Y. 129, 25 N. E. 259.

Plaintiff was not entitled, upon the mere proving of the accident, to call upon the defendant for an explanation, upon the ground that the defendant may have been negligent, and that whether it was so or not was exclusively within its own knowledge.

Mr. Samuel Kalisch, for defendant in error:

With the admitted fact that the plaintiff below was injured by a wire of the defendant company which it managed and controlled, and with the undisputed fact that the wire was lying on the sidewalk of a public street, in a broken condition, charged with electricity and dangerous to life and limb, a strong prima facie case of negligence and liability was established against the defendant company, which it was called upon to explain.

Bahr v. Lombard, 53 N. J. L. 237, 21 Atl. 190, 23 Atl. 107; *Excelsior Electric Co. v. Sweet*, 57 N. J. L. 228, 30 Atl. 553; *Suburban Electric Co. v. Nugent*, 58 N. J. L. 658, 32 L. R. A. 700, 34 Atl. 1069.

The leaving of an electric-light wire charged with electricity, by which the plaintiff below was injured, on a public sidewalk, which wire the defendant admitted was under its control and management, was wholly indefensible.

Western U. Teleg. Co. v. State use of Nelson, 82 Md. 293, 31 L. R. A. 572, 33 Atl. 703; *White v. Boston & A. R. Co.* 144 Mass. 404, 11 N. E. 552; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810, 19 S. E. 344; *Carpus v. London & B. R. Co.* 5 Q. B. 747; 1 Shearm. & Redf. Neg. 5th ed. § 59; *Volkmar v. Manhattan R. Co.* 134 N. Y. 419, 31 N. E. 870; *Clarke v. Nassau Electric R. Co.* 9 App. Div. 51, 41 N. Y. Supp. 78.

Plaintiff made out a prima facie case against the defendant, and was entitled to a verdict unless the defendant succeeded in rebutting the prima facie case.

Per Curiam:

The judgment of the Supreme Court is unanimously affirmed, for the reasons given by that court.

Irving D. BELLES, *Plff. in Err.*,
v.

William H. KELLNER *et al.*

(.....N. J.....)

*From the fact that a quiet, gentle horse was left standing untied in the public street, free from the presence of anything which might frighten or disturb him; the driver being within from 5 to 8 feet of the wagon to which the horse was hitched; it appearing that the driver had been accustomed to use the horse in that way for many years without an accident,—no inference can arise that the act is negligent.

(*Magie, Ch., and Hendrickson, Pitney, Adams, and Vroom, JJ., dissent.*)

(March 4, 1902.)

ERROR to the Supreme Court to review a judgment reversing a judgment of the Circuit Court for Essex County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. Samuel Kaliseh for plaintiff in error.

Messrs. Sherrerd DePue and Richard W. Lindabury, for defendants in error:

No negligence on the part of the defendants was shown.

Hayman v. Hewitt, Peake, N. P. Cas. pt. 2, p. 170; *Wasmer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 608; *Reed v. Southern Esp. Co.* 95 Ga. 108, 22 S. E. 133; *Griggs v. Fleckenstein*, 14 Minn. 81, Gil. 62, 100 Am. Dec. 199; 1 Beven, Neg. p. 656.

The case is analogous to those in which damages are sought for injuries caused by the vicious act of a domestic animal, where scienter must be proved.

Coa v. Burbridge, 13 C. B. N. S. 430; *Meaney v. Sampson*, 20 N. J. L. J. 183.

Van Syckel, J., delivered the opinion of the court:

This case was tried in the Essex circuit court, where a judgment was rendered for the plaintiff. The supreme court reversed that judgment, and the judgment of the supreme court is in this court for review.

The facts of the case are very concisely stated in the opinion of Mr. Justice Fort in the supreme court, as follows: "This was an action for damages, tried at the Essex circuit, brought by the plaintiff to recover for an injury alleged to have been occasioned by a horse of the defendants left standing in the public streets of the city of

Newark without being in charge of any person, and without being tied or otherwise secured. The plaintiff is a letter carrier, and was in the habit of passing upon his wheel three or four times daily the place where the accident happened. The defendants are retail merchants in the city of Newark, and their delivery wagons are accustomed to be backed to the curb line adjoining their property on Halsey street. The wagons are cut-under wagons, and the horses are turned so as to stand parallel with the sidewalk, and left untied while the wagons are being loaded. With these facts the plaintiff was perfectly familiar. It is claimed by the plaintiff that upon the day of his injury three of these delivery wagons were thus standing, with the horses hitched thereto, facing to the north, parallel with the east side of Halsey street. The plaintiff states that he was riding at a speed of about 6 miles an hour; that he had passed two of the wagons of the defendants, and was about to pass the third, when the horse attached to it, to quote his language, 'suddenly, without any warning at all, swerved around, knocking me on the right side, and lifted me from my wheel, and threw me so I landed on the asphalt pavement, on my left shoulder and head, with my heels in the air.'" The suit in the circuit court was brought to recover damages for this alleged injury.

It appeared by the evidence on the part of the defendants, which was uncontradicted, that the horse was quiet and gentle, and accustomed to being left untied while the driver was a short distance from him, engaged in his work; that the defendants had purchased this horse fourteen or fifteen years before, and had constantly used him in their business. During all that time it was the habit of the drivers not to tie or secure the horse in any way while leaving him to load the wagon or to deliver parcels, and during all that time he had never been known to run away, or to move from the place where he was left standing. The testimony on the part of the defendants also was that the driver of the horse was upon the sidewalk, about midway between the wagon and the elevator in defendant's store. That elevator was 10 or 15 feet from the wagon, and therefore the driver was distant from 5 to 7½ feet from the wagon. The place where the horse was standing was free from the presence of a locomotive or music passing at the time, or any unusual thing which could be supposed to frighten a gentle horse accustomed to be left in that condition in the street. All the horse did was to move around towards the center of the street, without moving the wagon from its position against the curbstone. To entitle the plaintiff to recover, he was required to show by a preponderance of evidence that the defendants were guilty of some negligent act which was the proximate cause of the injury to the plaintiff. In reviewing this case upon the alleged error in the trial court, we must assume that the testimony on the part of the defense is true; and there-

*Headnote by VAN SYCKEL, J.

NOTE.—As to collision between bicycle and other vehicle in street, see also *Peltier v. Bradley, D. & C. Co.* (Conn.) 32 L. R. A. 651; *Cook v. Fogarty* (Iowa) 39 L. R. A. 488; *Taylor v. Union Traction Co.* (Pa.) 47 L. R. A. 289, and note; and *Foote v. American Product Co.* (Pa.) 49 L. R. A. 764.

57 L. R. A.

fore the only question is whether the mere fact of leaving the horse untied, under the conditions stated, constituted actionable negligence.

The defendants' counsel requested the court to charge: "It is not negligence for the driver of a quiet, gentle horse to leave him untied and otherwise unattended on the side of a public highway while the driver is upon the sidewalk, loading goods in the wagon." The trial court refused so to charge, and to such refusal exception was taken, and error is assigned thereon. In dealing with this request to charge, it was the duty of the trial court to consider and apply it, and to instruct the jury upon it as applicable to the facts and circumstances of the case before them; assuming that the horse was kind and gentle, accustomed to such use, as before stated, and that the driver was near him, upon the sidewalk, nothing of an unusual character being present to alarm a quiet, gentle horse. The question is whether, under these circumstances, there is anything from which an inference can be drawn that a man of ordinary prudence could have reasonably believed that injury might result from his act. With what additional care he might have been charged if the horse had been left near a steam railroad track, where locomotives were passing, or in a place where fire engines or bands of music were approaching, is not a question in this case. It has been frequently held that leaving a horse untied and unattended in the street (that is, with no one near enough to control him by voice or otherwise), or to leave him in that condition in proximity to a steam railroad, or where the horse is not gentle, are circumstances from which negligence may be inferred. *Lynch v. Nurdin*, 1 Q. B. 422; *Rumsey v. Nelson*, 58 Vt. 590, 3 Atl. 484; *Drake v. Mount*, 33 N. J. L. 442; *Hoboken Land & Improvement Co. v. Lally*, 48 N. J. L. 601, 7 Atl. 426. The facts regarded as controlling in those cases are absent in the case before us. Here, in my judgment, there was nothing to lead a reasonably prudent man to believe that any greater care was necessary. The fact that the horse was left so that he could move a short distance before the driver could stop him did not constitute negligence. It would be difficult to tie a horse so that he could have no freedom of movement whatever. As the court of appeals said in *Wasmer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 608, there is no absolute rule of law that requires one who has a horse in a street to tie him or to hold him by the reins. It would doubtless be careless to leave a horse in a street, wholly unattended, without tying him to

57 L. R. A.

something; but it is common for persons doing business in streets with horses to leave them standing in their immediate presence, while they attend to business, and it is not unlawful for them to do so. In *Hayman v. Hewitt*, Peake, N. P. Cas. pt. 2, p. 170, Lord Kenyon said: "He was performing his duty while removing the goods into the house, and, if every person who suffered a cart to remain in the street while he took goods out of it was obliged to employ another to look after his horse, it would be impossible for the business of the metropolis to go on." A like view was taken in *Griega v. Fleckenstein*, 14 Minn. 81, Gil. 62, 100 Am. Dec. 199, where the court said: "The degree of care required of the plaintiff, or those in charge of his horse at the time of the injury, is that which would be exercised by a person of ordinary care and prudence under like circumstances. It cannot be said that the fact of leaving the horse unhitched is in itself negligence. Whether it is negligence to leave a horse unhitched must depend upon the disposition of the horse, whether he was under the observation and control of some person all the time, and many other circumstances, and is a question to be determined by the jury from the facts in each case." In the case under judgment there is nothing but the mere fact of leaving a gentle horse as he had been left for years under the observation and control of the driver. From that fact, under the conditions which must be conceded to exist in this case, no inference of negligence can arise. There are no circumstances to be submitted to a jury, under the situation to which the request to charge applies, from which a contrary inference can be drawn. The trial court should have charged: "It is not negligence for the driver of a quiet, gentle horse to leave him untied and otherwise unattended on the side of a public highway while the driver is upon the sidewalk, loading goods on the wagon." There was evidence which could have fully justified the jury in finding that the horse was quiet and gentle, and that the driver was upon the sidewalk, loading goods on the wagon, at the time of the alleged injury, and that the horse had been used for years in that way without an accident. The refusal of the trial court to charge as requested left the jury free to find a verdict against the defendants, although the jury was convinced that these facts were proven.

The judgment of the Supreme Court, reversing the judgment of the Trial Court, should be affirmed.

Magie, Ch., and Hendrickson, Pitney, Adams, and Vroom, JJ., dissent.

MASSACHUSETTS SUPREME JUDICIAL COURT.

WORCESTER & SUBURBAN STREET
RAILWAY COMPANY

v.

TRAVELERS' INSURANCE COMPANY.

(180 Mass. 263.)

A policy insuring a railroad company against loss from liability to persons who should accidentally "sustain personal injuries" on its road under circumstances which impose upon the insured a common-law or statutory liability for the injuries does not cover cases of instantaneous death without conscious suffering through injuries for which insured is responsible, where the statutes give a new right of action to the personal representatives in case of death, and not a right of action to deceased which survives.

(Morton and Barker, JJ., dissent.)

(January 3, 1902.)

REPORT by the Superior Court for Worcester County for the opinion of the Supreme Judicial Court after overruling a demurrer to the declaration in an action brought to recover from defendant under its insurance policy the amount which plaintiff had been compelled to pay for the negligent killing of a passenger on its cars. *Judgment for defendant.*

The facts are stated in the opinions.

Messrs. B. W. Potter and R. A. Stewart, for plaintiff:

The travelers mentioned in the plaintiff's declaration all died instantly and without conscious suffering, so it is clear that the railway company is not liable at common law for their deaths.

Carey v. Berkshire R. Co. 1 Cush. 475, 48 Am. Dec. 616; *Moran v. Hollings*, 125 Mass. 93; *Barrett v. Dolan*, 130 Mass. 366, 39 Am. Rep. 456.

It is equally clear that it is liable under the statutory provisions of Pub. Stat. chap. 112, § 212.

At the time the policies of insurance in question were executed and delivered the statutes creating liability in cases of instant death were in full force and effect.

The liability insured against in the policy in question is not only that which accrues to the party injured, but also that which accrues to his personal representative under the statute.

An action for conscious suffering is made to survive by statutory enactments, and likewise an action for instantaneous death is made to survive by statutory law; so that under the terms of this policy the defendant is as liable for instantaneous death as for conscious suffering.

M'Carthy v. Guild, 12 Met. 291; *Brewer v. Crosby*, 11 Gray, 29; *Com. v. Tewksbury*, 11 Met. 55; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Osgood v. Lynn & B. R. Co.* 130 Mass. 492; *Madden v. Springfield*, 131 Mass. 441; *Ricker v. American Loan & T. Co.* 140 Mass. 349, 5 N. E. 284; *Ames v. Union R. Co.* 117 Mass. 541, 19 Am. Rep. 426; *Binney v. Globe Nat. Bank*, 150 Mass. 574, 6 L. R. A. 379, 23 N. E. 380; *Billings v. State*, 107 Ind. 54, 57 Am. Rep. 75, 6 N. E. 914.

If there be any doubt or ambiguity about any provision of this policy, then it should receive a liberal construction in favor of the insured.

Dolliver v. St. Joseph F. & M. Ins. Co. 128 Mass. 315, 35 Am. Rep. 378; *Mandell v. Fidelity & C. Co.* 170 Mass. 173, 49 N. E. 110.

Messrs. Herbert Parker and Charles C. Milton for defendant.

Lathrop, J., delivered the opinion of the court:

By the terms of the policy the defendant insured the plaintiff "against loss from liability to every person, who may, during a period of twelve months" from a time named, "accidentally sustain bodily injuries while traveling on any railway of the insured, or while in the car or upon the railway bed or other property of the insured, under circumstances which shall impose upon the insured a common-law or statutory liability for such injuries." The question presented is whether the terms of the policy are broad enough to cover the case where a person who is a traveler on the plaintiff road dies instantly, and without conscious suffering, in consequence of an accident for which the plaintiff is responsible. The plaintiff contends that the terms are sufficiently broad. The defendant contends that the policy is satisfied by limiting the words used to cases of bodily injuries sustained, for which the plaintiff is liable, either at common law or by statute, to the person sustaining the injury, or to his executor or administrator, if the injured person survives the injury and subsequently dies. The diligence of counsel has furnished us with no case in which a policy in the terms of the one before us has been construed, and we are obliged to consider the case mainly upon general principles. It may be conceded that the policy is to receive a reasonable construction in view of the plaintiff's business (*Mandell v. Fidelity & C. Co.* 170 Mass. 173, 49 N. E. 110), but when we have said this we have not advanced very far, for it is obvious that the parties may not have intended that all the risks incurred by the

NOTE.—On the question of the distinction between causes of action for personal injuries and those for death resulting from such injuries, see note to *Louisville & N. R. Co. v. McElwain* (Ky.) 84 L. R. A. 788, on the question, *How many distinct causes of action arise from* 57 L. R. A.

injuries resulting in death. See also *Hill v. Pennsylvania R. Co.* (Pa.) 35 L. R. A. 196; *Sweetland v. Chicago & G. T. R. Co.* (Mich.) 43 L. R. A. 568; *Brown v. Chicago & N. W. R. Co.* (Wis.) 44 L. R. A. 579; and *Re Mayo* (S. C.) 54 L. R. A. 660.

plaintiff as a common carrier of passengers should be covered. Whatever was their actual intention, we are obliged to determine the intent from the natural meaning of the language used, viewed in the light of the attendant circumstances. It is plain that an accident insurance policy may insure a person against an injury caused by an accident, or against death resulting from an accident, or it may combine the two. All these forms are or have been in use. It cannot be said, therefore, that in the policy before us death is necessarily included. In this commonwealth there is no common-law liability for death. *Carey v. Berkshire R. Co.* 1 Cush. 475, 48 Am. Dec. 616; *Moran v. Hollings*, 125 Mass. 93. Nor is there any statute which gives a right of action for the death of a person to his executor or administrator as an asset of the estate. In all the statutes which have allowed an executor or administrator to bring an action on account of the killing of a person by the negligence of a corporation or its servants the action is for the benefit of the widow, children, or next of kin. Pub. Stat. chap. 112, § 212; Stat. 1886, chap. 140; Stat. 1887, chap. 270; Stat. 1898, chap. 565. An action for a personal injury which has accrued to a person in his lifetime survives since Stat. 1842, chap. 89; Pub. Stat. chap. 165, § 1. But there is nothing in the statutes above cited which recognizes any right of survivorship in case of death. The power to recover in such a case was first given by an indictment, and a fine was imposed for the benefit of the widow, etc., of the deceased. While an action of tort was afterwards allowed, the relief obtained was devoted to the same use, and not to the estate of the person killed. The difference between the right to recover for an injury and for a loss by death has been recognized in our decisions. Thus, under Stat. 1879, chap. 297, which gave, among other things, a right of action to a wife injured in her means of support by reason of the intoxication of her husband against a person causing the intoxication, it was held that no action lay for death caused by intoxication. *Barrett v. Dolan*, 130 Mass. 366, 39 Am. Rep. 456. Pub. Stat. chap. 52, § 17, gives a right of action not exceeding \$1,000 to the executor or administrator of a person killed by reason of a defect or want of repair in a highway, etc., for the use of the widow and children. Section 18 gives a right of action to a person who "receives or suffers bodily injury" under similar circumstances. These two actions are independent, and both may be maintained, if warranted by the evidence. Thus, in *Boyes v. Boston*, 155 Mass. 344, 349, 15 L. R. A. 365, 29 N. E. 633, it was said by Mr. Justice Knowlton: "The right to recover damages suffered in his lifetime by one who dies from an injury received on a highway survives to his administrator for the benefit of his estate, and the damages are estimated on the theory of making compensation. . . . The action by an administrator, under § 17, on account of his intestate's loss of life, is to recover a sum not exceed-

57 L. R. A.

ing \$1,000 for the benefit of the widow and children or of the next of kin of the deceased, to be estimated according to the degree of culpability of the defendant. Both actions, under the statute, may proceed at the same time, on independent grounds, and for different purposes." We are not aware of any legislation in this commonwealth giving a right of recovery for personal injuries which has been construed to give a right of action for death. Nor are we aware of any legislation giving the right of recovery for death in which the fact of bodily injury to the deceased is made an element in the computation of damages. The statutes generally give damages for death between certain fixed limits, according to the degree of culpability of the defendant. They give a new right of action to the executor or administrator, and not a right of action to the deceased, which goes to the executor or administrator by survival only. *Com. v. Boston & L. R. Corp.* 134 Mass. 211, 213; *Littlejohn v. Fitchburg R. Co.* 148 Mass. 478, 483, 2 L. R. A. 502, 20 N. E. 103; *Mulhall v. Fallon*, 176 Mass. 266, 268, 54 L. R. A. 934, 57 N. E. 386. By the terms of the policy the plaintiff is insured against loss from liability to every person who may accidentally sustain bodily injuries under circumstances which impose upon the insured a common-law or statutory liability for such injuries. The liability is to a person who sustains bodily injuries, and such person must have a right of action therefor, either at common law or by statute. The policy cannot include the case of death, for which the person never had a right of action.

According to the terms of the report, the order must be, in the opinion of a majority of the court:

Judgment for the defendant.

Morton, J., dissenting:

I regret that I am unable to agree with the majority of the court. The question is one of construction, and is whether, in the language of Lord Cairns in *Sackville-West v. Holmesdale*, L. R. 4 H. L. 543, 574, we shall servilely follow the literal sense of the words used, which I agree can be done, or whether we shall construe them liberally, and in a manner more in accord with the nature of the contract and the situation of the parties. It seems to me that the latter course should be followed. The contract is one of indemnity against loss from liability for personal injuries caused by accidents for which the plaintiff was responsible, and the precise question is whether the liability of the plaintiff, which is a street railway company, for damages for death caused by its negligence, comes fairly within the terms of the policy. At common law damages for death caused by the negligence of another person were not recoverable. But such damages are now recoverable by statute in this state and in other states in many cases, and in England generally; and it seems to me that that fact should be borne in mind in construing the policy before us. Pub. Stat. chap. 52, § 17; Pub. Stat. chap. 112, § 212; Stat. 1866, chap. 140; Stat. 1887,

chap. 270, § 2; Stat. 1898, chap. 565: § 9 & 10 Vict. chap. 93; 2 Sedgw. Damages, § 571. It is undoubtedly true that such damages do not constitute, generally speaking, assets of the estate of the deceased, and that the right of action is a new one. But it does not follow that the liability to loss on account of personal injuries which is insured against may not be fairly construed to include such damages. Parties well may be supposed to contract with reference to new conditions, though they use the old terms; and the old terms will be given a new content if they fairly admit of such a construction and such appears to have been the intention of the parties. The ground on which damages for death are allowed is that a person causing the death of another by his negligence should not be suffered to escape liability therefor. And whether the damages assessed are awarded according to the culpability of the defendant (as in the employer's liability act in this state), or according to the pecuniary loss sustained by the family of the deceased (as in the English act), they go in fact, though not in terms, to those to whom the estate of the deceased passes at his death. The fact, therefore, that such damages do not, strictly speaking, constitute assets of the estate of the deceased person, would not seem to be of vital consequence, if we look at substance, rather than form. There can be no doubt that it is and was well understood by street railway companies and by liability insurance companies that damages for death caused by the negligence of the railway companies are recoverable in actions against them therefor. It is obvious that there can be no good reason why a railway company should wish to protect itself against liability for damages when the injury did not result in death, and not against liability for damages for death. Of course, a contract is not to be construed according to the understanding of one party to it. But it is equally obvious, I think, that the matter would present itself in the same light to an insurance company. It seems to me, therefore, that the words in the policy, "against loss from liability to every person who may," etc., should be construed as meaning "liability in respect to every person who may," etc., and as having regard, not to the extent of recovery, or the nature of the remedy, but to the subject of the injury. The application, which is made a part of the policy, begins by saying that the railway company applies for a railway policy. The policy that was issued is entitled "Street Railway Liability Policy." Evidently a railway liability policy was and is a well-known form of insurance. Assuming, as we are bound to do, good faith on the part of the insurer and insured, it is difficult, it seems to me, to believe that, as business men, those in charge of railway and insurance companies could have intended or understood the insurance to have the partial character given to it by the majority of the court. The application goes on to provide that, "if the applicant shall fail to comply with the requirements of any law, by-law,

or ordinance respecting the safety of persons, the policy shall not cover injuries resulting from such failure." There is nothing here to show that death resulting from the failure spoken of was not one of the injuries contemplated. It would be an extraordinary construction to say that the safeguards provided for related to lesser injuries, but not to death. In the statements contained later in the application in regard to persons injured and suits against the road for damages, and apparently required of the plaintiff by the defendant, there is nothing which tends in the least to show that cases of death were in fact excluded or were intended to be excluded in considering the nature of the risk or the liability insured against. The application contains nothing, I think, which, fairly construed, excludes from or does not include in the insurance applied for the liability for damages for death. Neither is there anything in the policy, it seems to me, which requires a construction of the words describing the risk that will exclude liability for damages for death. Such a liability, as already observed, is a statutory one. But the policy expressly provides that the liability insured against shall include statutory as well as common-law liabilities. Amongst the conditions contained in the policy, and to which the insurance was subject, were the following: That the defendant's liability shall not exceed \$20,000 "for all injuries . . . consequent upon any one accident;" that "this policy shall not take effect unless the premium is paid previous to any accident under which claim is made;" that "this insurance does not cover claims upon which suit shall be commenced after six years from the date of the accident;" that in case of loss covered by other like insurance the company shall be liable only for its *pro rata* share, and shall be subrogated to the plaintiff's rights against any third person; and that immediate written notice shall be given of any accident, and of all claims made by injured persons, with all the information in plaintiff's possession relating to the accident, or any claim made on account thereof. These provisions, which contain the more important conditions, are, to say the least, as consistent with the view that damages for death are included in the risk as with the view that they are not. "Accidents," "injuries," "claims," and "losses" are spoken of without distinguishing between cases in which the accident or injury resulted in death and cases where it did not, or between claims which included damages for death and those which did not. Of course, it may be said that when the risk has once been defined all other provisions in the policy are to be construed as relating to the risk so defined. But the question in this case is, What was the risk that was insured against? and in answering that question the nature of the contract, the provisions contained in the application and policy, and the effect of the construction contended for on the one side and the other, are all, I think, to be taken into account.

The effect of the construction adopted by the majority of the court will be to limit the plaintiff's right of recovery in respect to statutory liabilities to cases where a right of action has been given by statute to persons injured, and passes by statute on their death to their executors or administrators. It will exclude a class of cases, equally important, to say the least, in which a right of action has been given to the executor or administrator or to the widow or next of kin to recover damages for the death of a person injured by the negligence of a railway company. Such a construction does not seem to me to be a reasonable one. It is said that bodily injuries do not include death. But, as already observed, the matter is one of construction. There is nothing in the words themselves to prevent them

from being so construed, & it is apparent that the parties so used them. Moreover, it is provided by the employer's liability act that, if the death is preceded by conscious suffering, or is not instantaneous, damages for the death may be recovered by the executor or administrator in the action for personal injuries. Stat. 1892, chap. 260, § 1. The use and construction of the words in the policy as including death, and the liability to loss for damages for death, is therefore warranted by the statute.

For these reasons it seems to me that the ruling was right, and that the judgment should be affirmed.

Mr. Justice **Barker** concurs in this opinion.

MICHIGAN SUPREME COURT.

Plum B. SCHELLENBERG, *Appt.*,

v.

DETROIT HEATING & LIGHTING COMPANY.

(.....Mich.....)

Heating apparatus bought by a man under contract reserving title in the seller, and permanently placed in a building owned by himself and his wife by entirety, does not become a fixture so as to prevent its removal for nonpayment of the purchase money, if removal will not materially injure it or the building, since there is no unity of title in it and the real estate.

(April 25, 1902.)

A PPEAL by complainant from a decree of the Circuit Court for Wayne County in favor of defendant in a suit to enjoin the execution of a writ of replevin. *Affirmed.*

The facts are stated in the opinion.

Mr. **Franklin L. Lord**, for appellant:

A wife is not entitled to the possession of property held by entireties with her husband.

Grosser v. Rochester, 60 Hun. 379, 15 N. Y. Supp. 62; *Hiles v. Fisher*, 30 L. R. A. 310, note, 144 N. Y. 306, 37 N. E. 337.

This is not a suit to settle the title to property. All the complainant asks is to be protected in the enjoyment of property, about the title to which there is no dispute.

The court will not, in cases of this kind, be governed by dollars and cents alone.

White v. Forbes, Walk. Ch. (Mich.) 112; *Fuller v. Grand Rapids*, 40 Mich. 395; *Backus v. Jeffrey*, 47 Mich. 127, 10 N. W. 138; *Huyck v. Bailey*, 100 Mich. 223, 58 N. W. 1002; *Mastenbrook v. Alger*, 110 Mich. 414, 68 N. W. 213.

NOTE.—For other cases in this series as to effect of agreement between vendor and vendee or chattels attached to building to prevent them from becoming fixtures, see *McFadden v. Allen* (N. Y.) 19 L. R. A. 446; *German Sav. & L.* 57 L. R. A.

Allegation of a unity of title in the freehold and in the things attached, at the time of their attachment, is not necessary.

Mr. **George W. Bates**, for appellee:

The heaters were purchased on a title contract by the complainant's husband and placed on property owned by the husband and wife as tenants by the entirety. Neither has an absolute inheritable interest, nor such a separate interest that he or she can sell, encumber, or devise, or which her heir could inherit. Both must concur, as implied in the legal condition of the unity of person upon which it rests.

Fisher v. Provin, 25 Mich. 347; *Manwaring v. Powell*, 40 Mich. 371; *Vinton v. Beamer*, 55 Mich. 559, 22 N. W. 40; *Speier v. Opfer*, 73 Mich. 35, 2 L. R. A. 345, 40 N. W. 909; *Re Lewis*, 85 Mich. 340, 48 N. W. 580; *Naylor v. Minock*, 96 Mich. 182, 55 N. W. 604; *Dickey v. Converse*, 117 Mich. 449, 76 N. W. 80; *Doane v. Feather*, 119 Mich. 691, 78 N. W. 884.

There was no unity of title in this property and the real estate, which must exist to make a chattel a fixture.

Adams v. Lee, 31 Mich. 440; *Robertson v. Corsett*, 39 Mich. 777; *Scudder v. Anderson*, 54 Mich. 122, 19 N. W. 775; *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362; *Lansing Iron & Engine Works v. Walker*, 91 Mich. 409, 51 N. W. 1061; *Lansing Iron & Engine Works v. Wilbur*, 111 Mich. 413, 69 N. W. 667.

The existence of the title contract negatives any intention to annex these boilers, and shows that it was expressly understood that they should remain personalty.

Crippen v. Morrison, 13 Mich. 23; *Robertson v. Corsett*, 39 Mich. 777.

No presumption would arise from the an-

Soc. v. Weber (Wash.) 38 L. R. A. 267; *Fuller-Warren Co. v. Harter* (Wis.) 53 L. R. A. 603; *Anderson v. Creamery Package Mfg. Co.* (Idaho) 56 L. R. A. 554; and cases in *note* to *Muir v. Jones* (Or.) 19 L. R. A. 441.

nexation, and the chattel must be assumed to be personality unless made realty by other circumstances.

Wheeler v. Bedell, 40 Mich. 693; *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *Gill v. DeArmant*, 90 Mich. 425, 51 N. W. 527; *Harris v. Hackley*, 127 Mich. 46, 86 N. W. 389.

Complainant cannot maintain this bill, for she has a full, complete, and adequate remedy at law for any injury which may be done to this property.

Barrows v. Doty, Harr. Ch. (Mich.) 1; *Bennett v. Nichols*, 12 Mich. 22; *Torrent v. Muskegon Boom. Co.* 22 Mich. 354; *Hagenbuch v. Howard*, 34 Mich. 1; *Smith v. Walker*, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783.

There are some things which the court will take judicial notice of, and determine for itself as to whether such things can be fixtures under any circumstances.

Scudder v. Anderson, 54 Mich. 122, 19 N. W. 775.

Long, J., delivered the opinion of the court:

The bill in this case was filed to enjoin the execution of a writ of replevin by which it was sought by the defendant to take and remove two steam boilers sold to Harry L. Schellenberg, the husband of complainant, on a title contract, and placed in the basements of two dwelling houses. These dwelling houses are owned by Harry L. Schellenberg and his wife as by an estate in entirety as husband and wife. It appears that the husband bought these boilers to put in the buildings for heating purposes, the defendant reserving the title to itself by the contract until the boilers were paid for. Payment being refused, replevin suit was brought for the two boilers against Schellenberg and his wife and the tenants in the buildings. On the trial of the replevin suits, the defendant in the present case had judgment against Schellenberg for the return of the property, the judgment not passing against the wife or the tenants. It is stated in the present bill that when these boilers were sold to Harry L. Schellenberg the defendant knew they were to be attached to the dwellings in a permanent way, and saw the plan of the construction of said buildings and of the heating apparatus to be placed therein; that the complainant believes the defendant will attempt to remove the boilers, and asks that it be enjoined from removing or attempting to remove the same. The defendant demurred to the bill on the grounds: (1) That it does not show jurisdiction in a court of chancery; (2) that complainant has not by said bill stated a case which entitles her to the relief prayed; (3) that the bill does not show on its face that the complainant has any such interest in the subject-matter of the suit as entitles her to file it; (4) that the question as to whether the boilers can be treated as fixtures is a matter not within the jurisdiction of a court of chancery, and whether they can be taken on execution in 57 L. R. A.

replevin is a matter which can only be determined in a court at law; (5) that it appears by the bill that the constable is a necessary party, as it appears he was proceeding to take the boilers under process in his hands and remove them from the buildings; (6) that it does not appear by the bill that the amount in controversy exceeds \$100. This demurrer was sustained in the court below, and the bill dismissed. Complainant appeals.

We think the court was not in error in sustaining this demurrer. The title of the real estate is in the husband and wife jointly, who hold it by the entirety. The boilers were purchased by the husband and placed in the buildings under contract, reserving title to the defendant company. The wife was not a party to this contract, and the boilers never became fixtures in the buildings. There was no unity of title in this property and the real estate. It does not matter that the bill alleges that the boilers became attached and became a part of the real estate. The statements in the bill are sufficient to show that they never attached to the real estate, and never became fixtures. In *Adams v. Lee*, 31 Mich. 440, the title to the real estate was in one Kaufman. Machinery was put into the building on the real estate. There was no unity of title and ownership of the land and the machinery. Referring to the want of unity of title as affecting the question of fixtures, it was said: "To constitute a fixture, there must not only be physical annexation in some form to the realty, but there must be unity of title, so that a conveyance of the realty would, of necessity, convey the fixture also. When the ownership of the land is in one person and of the thing affixed to it is in another, and in its nature is capable of severance without injury to the former, the latter cannot, in contemplation of law; become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal estate only. And the fact that the owner of the thing affixed to the freehold has also an undivided estate in the latter cannot render the former a fixture when the interests are different in extent. A thing cannot, as to an undivided interest therein, be real estate, and, as to another undivided interest, be personality. It must be the one thing or the other." See also, upon this question: *Robertson v. Corsett*, 39 Mich. 777; *Scudder v. Anderson*, 54 Mich. 122, 19 N. W. 775; *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362; *Lansing Iron & Engine Works v. Walker*, 91 Mich. 409, 51 N. W. 1061; *Lansing Iron & Engine Works v. Wilbur*, 111 Mich. 413, 69 N. W. 667.

It is also quite apparent by the statement in the bill that these boilers put in the basements for heating purposes could be detached from the buildings without material injury to the boilers or the buildings; but, in addition to this, they were sold to the husband, the defendant reserving title to itself. These circumstances show that it was the intention of the parties that the boilers

were to remain personalty, and not to become, by annexation, a part of the realty. *Robertson v. Corsett*, 39 Mich. 777. It was said in *Manwaring v. Jenison*, 61 Mich. 119, 27 N. W. 903: "The permanency of the attachment, and its character in law, do not depend so much upon the degree of physical force with which the thing is attached, or the manner and means of its attachment, as upon the motives and intention of the party in attaching it. If the intention is that the articles attached shall not by annexation become a part of the freehold, as a general rule they will not. The exception is where the subject or mode of annexation is such as that the attributes of personal property cannot be predicated of the thing in controversy; . . . as when the property cannot

be removed without practically destroying it, or when it or a part of it is essential to the support of that to which it is attached." The bill does not exhibit such a state of affairs.

We think no other question in this case need be discussed. A judgment for the return of the property has been awarded to the defendant. Simply because the complainant is an owner by the entirety of the real estate would give her no interest in the retention of the property placed thereon which would entitle her to defeat the defendant's possession.

The order sustaining the demurrer must be affirmed, with costs.

The other Justices concur.

MINNESOTA SUPREME COURT.

NORTHERN PACIFIC RAILWAY COMPANY, Appt.,

John OWENS et al., Respts.

(.....Minn.....)

- *1. Where a statute, either in direct terms or from its general tenor, imposes the duty upon a public officer to pay over moneys received and held by him in his official capacity, the obligation thus imposed is an absolute one; unless it is limited by the statute imposing the duty, or by the conditions of his official bond. In respect to such liability there is no distinction between public and private funds.
2. The defendant herein received in his official capacity, as clerk of the district court, money paid into court in condemnation proceedings, which he deposited, in his name as clerk, in a solvent bank which afterwards failed, whereby the money was lost without his fault. Held, that he and the sureties on his official bond are liable for such loss.

(*Lewis, J., dissents.*)

(May 9, 1902.)

A PPEAL by plaintiff from an order of the District Court for St. Louis County denying a new trial after verdict in favor of defendants in an action brought to recover money deposited with defendant Owens as clerk of court. *Reversed.*

The facts are stated in the opinion.

Messrs. J. L. Washburn and W. D. Bailey, for appellant:

The clerk's bond was given for the pur-

*Headnotes by START, Ch. J.

NOTE.—As to liability on official bond for loss by theft or bank failure, see also, in this series, *Wilson v. People use of Pueblo & A. Valley R. Co.* (Colo.) 22 L. R. A. 449, and note; *State use of Overton County v. Copeland* (Tenn.) 21 L. R. A. 844; *Fairchild v. Hedges* (Wash.) 57 L. R. A.

pose of securing such deposits as are made in condemnation proceedings.

It was the duty of the clerk by statute to "receive and pay," and it was therefore a breach of his bond if he failed to pay, since payment was one of his official duties to secure the performance of which the bond was given.

Pine Island Bd. of Edu. v. Jewell, 44 Minn. 427, 46 N. W. 914.

In every instance this court has held to the absolute liability rule, and the reasons upon which the decisions rest are applicable with full force to the present case.

Hennepin County v. Jones, 18 Minn. 199, Gil. 182; *McLeod County v. Gilbert*, 19 Minn. 214, Gil. 176; *Redwood County v. Tower*, 28 Minn. 45, 8 N. W. 907; *State v. Bobleter*, 83 Minn. 479, 86 N. W. 461.

In *Morgan v. Long*, 29 Iowa, 434, the court makes no distinction between public and private funds.

Wright v. Harris, 31 Iowa, 272; *Walters-Cates v. Wilkinson*, 92 Iowa, 129, 60 N. W. 514; *State use of Judge v. Gatzweiler*, 49 Mo. 17, 8 Am. Rep. 119; *State ex rel. The Township v. Powell*, 67 Mo. 395, 29 Am. Rep. 512; *Haven's v. Lathene*, 75 N. C. 505; *State ex rel. Cox v. Blair*, 76 N. C. 78; *Wilmington v. Nutt*, 78 N. C. 179; *Rountree v. Barnett*, 69 N. C. 76.

Mr. L. C. Harris, for respondent John Owens:

At common law, public officers were not insurers of the funds coming into their hands, but were only liable for the loss of such funds caused by their dishonesty or negligence.

York County v. Watson, 15 S. C. 1, 40 Am. Rep. 675; *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284; *United States v. Thomas*, 15 Wall. 337, 21 L. ed. 89.

31 L. R. A. 851; *Bush v. Johnson County* (Neb.) 32 L. R. A. 223; *Healdsburg v. Mulligan* (Cal.) 33 L. R. A. 461; *State v. Gramm* (Wyo.) 40 L. R. A. 690; and *Thomssen v. Hall County* (Neb.) ante, 303.

If our statutes impose no greater liability upon clerks of the district court than was imposed by the common law, then it cannot be held that the defendant in this case is liable to the plaintiff.

The courts are practically unanimous in holding that public officers are not liable for more than ordinary care, unless there is some language in the statute and the bond.

York County v. Watson, 15 S. C. 9, 40 Am. Rep. 675; *People ex rel. Nash v. Faulkner*, 107 N. Y. 477, 14 N. E. 415; *Wilson v. People use of Pueblo & A. Valley R. Co.* 19 Colo. 199, 22 L. R. A. 449, 34 Pac. 944.

Messrs. Davis, Hollister, & Hicks, for respondent Robert Owens:

United States v. Prescott, 3 How. 578, 11 L. ed. 734, has been overruled, and the doctrine therein announced, so far as it could have any possible application to the case at bar, overruled, by *United States v. Thomas*, 15 Wall. 337, 21 L. ed. 89.

State v. Gramm, 7 Wyo. 329, 40 L. R. A. 690, 52 Pac. 533; *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284; *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59; *Peck v. James*, 3 Head, 75; *State use of Overton County v. Copeland*, 96 Tenn. 296, 31 L. R. A. 844, 34 S. W. 427; *Healdsburg v. Mulligan*, 113 Cal. 205, 33 L. R. A. 461, 45 Pac. 337; *Livingston v. Woods*, 20 Mont. 91, 49 Pac. 437.

An officer is not an insurer, but he may make himself so when he enters into a solemn obligation by contract.

Boyden v. United States, 13 Wall. 17, 20 L. ed. 527.

The responsibility of absolute safe keeping, free from loss, is never applied or enforced, except when found to be specifically contracted for.

State use of Overton County v. Copeland, 96 Tenn. 296, 31 L. R. A. 844, 34 S. W. 427; *State v. Gramm*, 7 Wyo. 329, 40 L. R. A. 690, 52 Pac. 533; *Van Trees v. Territory*, 7 Okla. 353, 54 Pac. 495.

An officer is not liable for private funds lost without his fault.

People ex rel. Nash v. Faulkner, 107 N. Y. 477, 14 N. E. 415; *Fairchild v. Hedges*, 14 Wash. 117, 31 L. R. A. 851, 44 Pac. 125; *Wilson v. People use of Pueblo & A. Valley R. Co.* 19 Colo. 199, 22 L. R. A. 449, 34 Pac. 944; *Dirks v. Juel*, 59 Neb. 353, 80 N. W. 1045.

Mr. John G. Williams for respondent Adams.

Start, Ch. J., delivered the opinion of the court:

The material facts of this case necessary to be here stated are these: John Owens, hereafter designated as the "defendant," was clerk of the district court of the county of St. Louis for four years; his term ending January 2, 1899. Upon assuming the duties of the office, he gave a bond as principal, with his codefendants as sureties, conditioned for the faithful discharge of his official duties. There was paid to him by his predecessor \$2,789.75, which had been paid to the 57 L. R. A.

clerk of the court in certain pending condemnation proceedings, pursuant to the provisions of Gen. Stat. 1894, § 2649. He accepted the money in his official capacity, and deposited it in the Marine National Bank of Duluth, in his name as clerk of such court. He never obtained any order of the court designating the bank as a depository of such money, nor was any such order ever made. Subsequent to the making of this deposit, and before the court ordered its payment to the party entitled to it, the bank became insolvent, and went into the hands of a receiver in November, 1896. The receiver paid to the defendant 65½ per cent of the sum so deposited. The amount so paid he turned over to his successor in office, and no more. Such proceedings were thereafter had in the condemnation proceedings that on February 27, 1900, the court ordered \$2,000 of the sum originally paid to the defendant to be paid to the plaintiff; but the then clerk, having received only \$1,310 from the defendant, paid over only that amount, leaving \$690 unpaid. This balance the plaintiff duly demanded of the defendant, who refused to pay it. Thereupon this action, by leave of the court, was brought upon the defendant's official bond, to recover the balance of the fund which was lost by the failure of the bank. At the time the deposit was made the bank was solvent, and in making it, and permitting it to remain therein, the defendant acted in good faith, and with reasonable care and diligence. The trial court, as a conclusion of law from these facts, directed judgment for the defendants upon the merits. The plaintiff appealed from an order denying its motion for a new trial.

The sole question presented by the record for our decision is whether a clerk of the district court of this state, and the sureties upon his official bond, are liable for money, whether belonging to the public or to individuals, deposited with him in his official capacity, when it is lost without fault or negligence on his part. Or, in other words, is a clerk of the court absolutely liable for funds deposited with him in his official capacity? The liability of public officers at common law for funds deposited with them was substantially that of a bailee for hire, and they were not liable for the loss of such funds if it occurred without their fault. This, however, is not the measure of the liability of such officers and the sureties on their official bonds in this state. The question of the liability of public officers for funds deposited with them in their official capacity is one of first importance. The decisions of the courts of the country are not uniform upon the question. A majority of the courts which have passed upon the question hold, upon grounds of public policy, and upon a consideration of the provisions of the statute and the conditions of the official bond in each particular case, to the doctrine of the absolute liability of such officers for the loss of public money received by them in their official capacity. Other able courts, however, have followed the common-law rule. We find it unnecessary to enter

upon any general discussion of the question, for this court thirty years ago adopted the rule of absolute liability, and has ever since enforced it. The only doubtful questions in this case are whether, in view of the provisions of the statutes relating to the duties of the clerk of the district court, the rule applies to such officer, and, further, if so, whether it extends to private funds deposited with him in legal proceedings.

1. The first question is to be answered by a review of the decisions of this court upon the subject and the reasons therefor. The first case on this subject was *Hennepin County v. Jones*, 18 Minn. 199, Gil. 182. It was an action upon a county treasurer's official bond, conditioned that "he shall . . . safely keep and faithfully pay over according to law all moneys which come into his hands," which were the conditions provided for by statute. The defense was that the funds which the treasurer failed to pay over were stolen from the county safe without any fault on his part; but the court held this to be no defense, for the reason that the treasurer, by reason of the conditions of his bond and the provisions of the statute, was absolutely liable for all public money deposited with him. The court, however, discussed generally the question of the liability of public officers for money deposited with them in their official capacity, as affected by considerations of public policy, and by implication, at least, approved the doctrine of the absolute liability of public officers for public funds, based upon considerations of public policy, as laid down in the case of *United States v. Prescott*, 3 How. 578, 11 L. ed. 734. The next case was *McLeod County v. Gilbert*, 19 Minn. 214, Gil. 176, which was an action, not upon an official bond, but one to recover from the county treasurer certain taxes which he had collected, and failed to pay over or to account for. The defendant admitted the receipt of the money, and alleged as a defense that it was stolen from the county safe without any neglect or fault on his part. This plea the court, following the *Jones Case*, held to be no defense, for the reason that the same degree of responsibility enforced in that case rested upon a county treasurer, independent and outside of his liability upon his official bond. The statute then in force was to the effect that the treasurer shall pay over all moneys received by him, and account therefor according to law. The court stated that it had not referred to considerations of public policy, as affecting the responsibility which should be exacted from public officers for money held by them as such, for the reason that it was unnecessary to add anything to what was said on the point in the first case. The third case was *Redwood County v. Tower*, 28 Minn. 45, 8 N. W. 907, which was an action upon the defendant's official bond as county treasurer, conditioned, as provided by the statutes for the faithful execution of the duties of his office, and the safe-keeping and paying over according to law of all moneys which come into his hands. The alleged breach was that the defendant had failed to

pay over certain money belonging to the county. The answer alleged that the money was received on a day named too late to be deposited in the county depository, and was placed in the county safe, from which it was stolen without any fault of the defendant. The court held that the alleged facts had no tendency to relieve the treasurer from liability; citing the *Jones* and *Gilbert* cases, without comment. Next in order was *Pine Island Bd. of Edu. v. Jewell*, 44 Minn. 427, 46 N. W. 914, which was an action upon the official bond of the defendant, as treasurer of an independent school district, for money received by him, but never paid out by him, nor delivered to his successor in office. The defense was that the money was locked in an iron safe in his place of business, from which it was stolen by burglars without his fault. The statute then in force (Gen. Stat. 1878, chap. 36, § 107) relating to the bond and duties of such treasurer required him to execute a bond "conditioned for the faithful discharge of his duties as treasurer." It also declared that the treasurer should receive and pay out upon the order of the board all moneys belonging to the district, and pay to his successor in office, upon demand, all money in his hands belonging to the district. His bond, in addition to the condition required by the statute, also provided that he "shall, at the expiration of his term of office, pay over to his successor in office all moneys remaining in his hands as treasurer." The court held that the fact that the money was stolen from the defendant without his fault was not a defense to the action. The opinion, by Mr. Justice Dickinson, is an able one, and fully discusses the question upon principle and authority, and cites, not only the decisions of this court, but the leading cases in other jurisdictions. The conclusion reached was that "where the statute in direct terms, or from its general tenor, imposes the duty to pay over public moneys received and held as such, and no condition limiting that obligation is discoverable in the statute, the obligation thus imposed upon and assumed by the officer will be deemed to be absolute, and the plea that the money has been stolen or lost without his fault does not constitute a defense to an action for its recovery." This conclusion was rested, not only upon the terms of the statute and the conditions of the bond, but upon familiar considerations of public policy. The last case was *State v. Bobleter*, 83 Minn. 479, 86 N. W. 461, which was an action on the defendant's bond as state treasurer for money received in his official capacity, and not paid to his successor, because it had been lost by the failure of certain state depositories in which it was deposited. His bond was conditioned for the faithful discharge of the duties of his office, and the statute imposed upon him the duty of safely keeping the public money, and paying it out as directed by law. This court, approving *United States v. Prescott*, 3 How. 578, 11 L. ed. 734, expressly recognized and enforced the rule of the absolute liability of public officers for money in their

hands as such, for the reason that the statute (Gen. Stat. 1894, § 344, subd. 2) providing for state depositaries expressed the purpose not to impair such liability. The conclusion which we draw from this review of our own decisions is this: It is the settled law of this state that, where a statute, either in direct terms, or from its general tenor, imposes the duty upon a public officer to pay over moneys received and held by him in his official capacity, the obligation thus imposed is an absolute one, unless it is limited by the statute imposing the duty, or the conditions of his official bond.

This brings us to the question whether the rule applies to a clerk of the district court. Counsel for the defendant concedes that it was his official duty as clerk to receive the money in question, and turn it over to his successor, if it had not been lost without his fault. But it is insisted that, to make him an insurer of the fund, he must have contracted to be one, in effect, in his bond, or the statute under which the bond was given must have so provided, and that neither his bond nor the statute imposes upon him the liability of an insurer of the fund. The statutory condition of the bond of a clerk of the district court is precisely the same as in the bond of the state treasurer and that of the treasurer of an independent school district. The statutory condition in each case is that the officer "shall faithfully discharge his official duties." This does not imply any limitation of the liability imposed by law upon such treasurer or clerk for a failure to discharge any of his official duties. The question, then, is narrowed to the inquiry whether the statute relating to the duties of clerks of the district court, either in direct terms or from its general tenor, imposes upon them the duty to pay over money received by them in their official capacity. The statutory provisions as to the duties of such clerks touching the care and payment of money deposited with them are meager. We have no statute which specifically requires him to pay over such money on the order of the court, or, if no such order is made during his term, then to his successor in office. The clerk of the district court, however, unless a court depositary has been appointed, is, by the settled practice of the court, recognized by the statute as the official custodian of all moneys, whether public or private, paid into court, and bound to safely keep them, and pay them out on the order of the court, or deliver them to his successor. It is provided by Gen. Stat. 1894, § 856, that "every clerk of the district court, before entering on the duties of his office, shall execute a bond to the board of county commissioners, with two or more sureties, approved by said board, in the penal sum of \$1,000, conditioned for the faithful discharge of his official duties, and take and subscribe the oath required by law; which oath and bond shall be filed and recorded in the office of the register of deeds: provided, that the judge of the district court in any county may order all

moneys, paid into court to abide the result of any legal proceedings, to be deposited, until the further order of said court, in some duly incorporated bank or banks, to be designated by the court as such depositary; or said judge, on application of any person or corporation paying such money into court, may require said clerk to give an additional bond, with like effect as the bond provided for in this section, in such amount as said judge shall deem sufficient. That the clerk of said district court shall be entitled to receive a commission of 1 per cent on every dollar for receiving and paying over money which may be deposited with him, to wit: one half of such commission for receiving, and the other half for paying, the same. Said per cent to be paid by the party depositing the money." Gen. Stat. 1894, §§ 2649, 2650, provide that in condemnation proceedings the railroad company, if in doubt as to the party entitled to the damages, or any portion thereof, awarded for land taken for its railway, may, upon filing an affidavit to that effect with the clerk of the court in which the proceedings are pending, pay the amount thereof into court, and be released from further liability in the premises. And when the court finally determines to whom the fund belongs, it must be paid upon its order to them. Again, in actions for partition of real estate, if a sale is ordered of the premises, and there is any question as to whom any portion of the proceeds thereof belongs, the clerk of the court must receive, hold, and invest, subject to the order of the court, such portion for the use and benefit of the parties entitled thereto. Gen. Stat. 1894, § 5809. So, also, in an action where there are adverse claimants to money which the plaintiff seeks to recover from the defendant, he may pay the amount thereof to the clerk of the court. Laws 1895, chap. 329. A surety on a forfeited recognizance may pay the amount thereof to the clerk of the court, and be discharged from further liability. Gen. Stat. 1894, § 7158. And money accepted by a magistrate in lieu of a recognizance, where the defendant is held to bail to await the action of the grand jury, must, it would seem, be delivered to the clerk of the district court, as a substitute for a recognizance. Gen. Stat. 1894, §§ 7149, 7156. It is clear from the general tenor of these statutes that they impose upon the clerk of the district court the duty of receiving, keeping, and paying over on the order of the court, or to his successor in office, all money paid into court or to him. We therefore hold that the rule of absolute liability of public officers and the sureties on their official bonds for moneys received by them in their official capacity, as declared and enforced in this court in actions against state, county, and school-district treasurers, respectively, applies to clerks of the district court and the sureties on their official bonds.

2. Does this rule extend to private funds; that is, funds received by a public officer by virtue of his office, which are ultimately

to be paid by him to private parties? It is urged by counsel for one of the sureties in this case that the rule is limited to strictly public funds, and that, in any event, the liability of the officer in this case is only that of a bailee for hire. The cases of *People ex rel. Nash v. Faulkner*, 107 N. Y. 477, 14 N. E. 415; *Wilson v. People use of Pueblo & A. Valley R. Co.* 19 Colo. 199, 22 L. R. A. 449, 34 Pac. 944, and *Fairchild v. Hedges*, 14 Wash. 117, 31 L. R. A. 851, 44 Pac. 125, tend to support this contention. But, on the other hand, the cases of *Morgan v. Long*, 29 Iowa, 434; *Wright v. Harris*, 31 Iowa, 272, *Haven v. Lathene*, 75 N. C. 505, and *State use of Judge v. Gatzweiler*, 49 Mo. 17, 8 Am. Rep. 119, do not recognize the distinction claimed. The cases in this court which we have cited do not suggest any distinction between public and private funds. This is not specially significant, for the subject-matter of each of those cases was public money. Upon principle, we are unable to make any distinction between public and private funds in the hands of a public officer, as to his liability therefor. In both cases the funds are paid to the officer in obedience to the mandate of the statute, which makes no distinction between them, and imposes the same duty as to each. The same bond secures both in the same terms. Can it be true that a county can recover on such a bond the amount of a forfeited recognizance lost by the clerk without his fault, but that money received by him in his official capacity for a private party, and so lost, cannot be recovered by an action on the same bond? It is not the character of the fund, but the statute and considerations of public policy, which impose the liability upon the officer. The same considerations of public policy which require that public officers who receive public money be held to a strict measure of responsibility therefor apply just as forcibly to private funds officially received by them, for private property is just as sacred as public property. This is especially true of money paid to the clerk of the district court, as in this case, in condemnation proceedings. The money in such a case is not deposited by its owner. He is not consulted in the premises. On the contrary, his land is taken for a public purpose without his consent, and the money, which is a substitute therefor, is placed in the official custody of the clerk, to be paid to the owner whenever (it may be after years of litigation) the court decides that he is entitled to it. Surely a wise public policy demands in such a case, if it does in any case, that the official custodian of the money should be held to a strict measure of responsibility therefor. We hold, therefore, that a public officer is liable for the loss of private funds received and held by him in his official capacity whenever he would be liable for the loss of public funds under the same circumstances, for in respect to his liability for the loss of money in his official custody there is no distinction between public and private funds.

It follows that the order herein appealed
57 L. R. A.

from must be reversed, and the case remanded, with directions to the District Court to amend its conclusions of law to the effect that the plaintiff is entitled to recover from the defendants the amount claimed in its complaint, and cause judgment to be entered accordingly. So ordered.

Lewis, J., dissenting:

The decision of the majority is based upon the following principle: Where a statute either in direct terms or from its general tenor, imposes the duty upon a public officer to pay over moneys received and held by him in his official capacity, the obligation thus imposed is an absolute one, unless it is limited in the statute imposing the duty, or the conditions of his official bond. This proposition is taken from the opinion in *Pine Island Bd. of Edu. v. Jewell*, 44 Minn. 427, 46 N. W. 914, with the addition of the words "or the conditions of his official bond." As I understand the decision in the *Jewell Case*, the court had no intention of extending the liability of the officer and his sureties, unless the statutory provisions expressed obligations greater than those imposed by the common-law rule. This is evident from the authorities upon which the decision was based. The leading case was *United States v. Prescott*, 3 How. 678, 11 L. ed. 734, where the officer was the receiver of public moneys, and the condition of his bond was to well, truly, and faithfully keep safely the moneys placed in his hands. The court held that by the use of this language the officer had entered into an absolute contract to safely keep the moneys, and that considerations of public policy required the language used to be strictly construed against him, because he had voluntarily assumed the responsibility. This construction was followed in *United States v. Dashiell*, 4 Wall. 182, 18 L. ed. 319, and *Boyd v. United States*, 13 Wall. 17, 20 L. ed. 527. In *Hancock v. Hazard*, 12 Cush. 112, 59 Am. Dec. 171, the conditions of the bond were to faithfully collect, account for, and pay over, to which the reasoning of the *Prescott Case* was applied. Of the other cases cited, it may be said that in each instance either the statute or the bond specifically provided that the officer was bound to account for and pay over the moneys, upon proper warrants, or to his successor in office; and the courts, in applying the doctrine of the *Prescott Case*, expressly put it upon the ground that the common-law rule was abrogated by the terms of the statute, and that the officer had voluntarily accepted the conditions thus defined. The Minnesota cases cited in support of the decision in the *Jewell Case* were to the same effect. In *Hennepin County v. Jones*, 18 Minn. 199, Gil. 182, the statute and the bond both required the treasurer, during his term of office, to "safely keep" and faithfully "pay over," according to law, all moneys which came into his hands. In the language of Justice Berry, the rule is thus stated: "The very words used in bonds of this kind, viz., that the obligor shall 'safely keep' the moneys, seem to carry

the idea that the money is not his property, but the property of the body politic, for which it is required to be safely kept. But the fact that the moneys received in this case belong to the county in no way lessens the degree of responsibility of defendant, Jones; nor has such fact any tendency to show that his obligation is not absolute, to safely keep the moneys coming into his hands." This case is followed and approved in *McLeod County v. Gilbert*, 19 Minn. 214, Gil. 176, and *Redwood County v. Tower*, 28 Minn. 45, 8 N. W. 907, where the statutory provisions were to the same effect. The statute under consideration in the *Jewell Case* required the treasurer to execute a bond conditioned for the faithful discharge of his duty as treasurer, and declared that he should receive, and, upon order of the board, pay out, all moneys belonging to the district, and to pay over to his successor in office, upon demand, all moneys in his possession belonging to the district; and the bond followed the statute. It therefore becomes evident that in the *Jewell Case* the court did not intend to abrogate the common law where the statute did no more than to re-enact it. In the present case the duties imposed upon the clerk of court with reference to funds coming into his hands are no other or greater than those imposed by the common law, and the mere fact that an inference arises by the general tenor of the statute that he is to pay over such moneys to the proper parties does not change that rule. I have found no case, nor has one been presented, where the strict rule of absolute liability has been applied under a statute similar to the one now involved. In every instance the language corresponded to that already referred to in the cases above reviewed. The courts have given different reasons for coming to the same conclusions, and, as in New York, have distinguished between private and public funds; but nowhere, by any court, has the common-law rule been abrogated, in the absence of express provisions either in the statute or bond. In order to hold the officer under consideration absolutely liable, such obligation must rest upon one of two grounds: Either because the statutory provisions referred to abrogated the common-law rule, or that the common-law rule should be abrogated, regardless of the statute, upon considerations of public policy. I do not believe the language of our statute either directly or impliedly extends the common-law test of liability. And I am not prepared to fasten upon this class of officers the strict rule applied by the decision. That degree of responsibility is manifestly unreasonable and unjust when applied to officers whose possession of funds is merely incidental to their official duties, and, whether it shall be so applied, the legislature, not the court, should determine. I therefore dissent.

57 L. R. A.

Minnie BENEDICT, Admrx. of George Benedict, Deceased, Appt.,

v.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Respt.

(.....Minn.....)

1. While it is the absolute duty of a railway carrier of passengers to provide a safe and secure place for its patrons to ride within its cars, when such duty is performed the passenger has no right to voluntarily extend his person beyond the line of a moving car, or ride upon its platform; and if he does so, and injury follows, no recovery can be had therefor.
2. Where a carrier of passengers by steam permits its cars to be overcrowded, and requires its passengers to ride on the platforms, it cannot excuse itself for injuries from such cause; but if a passenger, while riding on the platform, negligently extends his person beyond the car line from curiosity, his act in that respect must be regarded as negligent.
3. A youth sixteen years of age, traveling alone, cannot be held, merely on account of his immature years, to have been incapable in law of exercising sufficient discretion and judgment to avoid incurring the risk of a voluntary exposure of his person beyond the sides of a moving train.
4. In the review of a complaint upon general demurrer,—*Held*, that certain facts and conditions set forth therein do not excuse the conduct of an injured party, or absolve him from contributory negligence, in protruding his head beyond the sides of a moving train on which he was a passenger.

(May 16, 1902.)

A PPEAL by plaintiff from an order of the District Court for Hennepin County sustaining a demurrer to a complaint filed to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed*.

The facts are stated in the opinion.

Mr. Thomas Cauty for appellant.

Mr. Albert E. Clarke, for respondent:

It is negligence *per se* for a passenger upon a railroad train to unnecessarily expose his person, or any part thereof, beyond the exterior line of a moving car; and the question whether he was negligent in so doing is not for the determination of the jury, but is a question of law for the court.

*Headnotes by LOVELL, J.

NOTE.—For other cases in this series as to negligence of passenger in standing on platform of railroad car, see *Mitchell v. Southern P. R. Co.* (Cal.) 11 L. R. A. 130, and *note*; *Cleveland, C. C. & St. L. R. Co. v. Moneyhun* (Ind.) 34 L. R. A. 141; *Watkins v. Birmingham R. & Electric Co.* (Ala.) 43 L. R. A. 207; and *Graham v. McNeill* (Wash.) 43 L. R. A. 300.

As to passenger's negligent exposure of person at car window, see *Richmond & D. R. Co. v. Scott* (Va.) 16 L. R. A. 91, and *note*; also *Clark v. Louisville & N. R. Co.* (Ky.) 36 L. R. A. 123.

As to duty of carrier permitting cars to become overcrowded, see *Lynn v. Southern P. Co.* (Cal.) 24 L. R. A. 710, and *note*.

Moore v. Edison Electric Illuminating Co. 43 La. Ann. 792, 9 So. 433; *Todd v. Old Colony & F. River R. Co.* 3 Allen, 18, 80 Am. Dec. 49, Affirmed in 7 Allen, 207, 83 Am. Dec. 679; *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. 294; *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 83, 92 Am. Dec. 336; *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 342, 17 Am. Rep. 568; *Richmond & D. R. Co. v. Scott*, 88 Va. 958, 16 L. R. A. 91, 14 S. E. 763; *Dun v. Seaboard & R. R. Co.* 78 Va. 645, 49 Am. Rep. 388; *Favre v. Louisville & N. R. Co.* 91 Ky. 541, 16 S. W. 370; *Louisville & N. R. Co. v. Sickings*, 5 Bush, 1, 96 Am. Dec. 320; *Georgia P. R. Co. v. Underwood*, 90 Ala. 49, 8 So. 116; *Carrico v. West Virginia C. & P. R. Co.* 35 W. Va. 389, 14 S. E. 12; *Clarke v. Louisville & N. R. Co.* 101 Ky. 34, 36 L. R. A. 123, 39 S. W. 840; *Beach*, Contrib. Neg. 2d ed. § 155; *Shelton v. Louisville & N. R. Co.* 19 Ky. L. Rep. 215, 39 S. W. 842.

It has repeatedly been held negligent to ride upon the platform without necessity.

Worthington v. Central Vermont R. Co. 64 Vt. 107, 15 L. R. A. 326, 23 Atl. 590; *Camden & A. R. Co. v. Hoosier*, 12 W. N. C. 1; *Chicago, St. P. M. & O. R. Co. v. Myers*, 25 C. C. A. 486, 49 U. S. App. 279, 80 Fed. 361.

If an infant is more than fourteen years old, incapacity must be affirmatively shown. The presumption is, an infant of that age is fully capable of exercising due care for his personal safety, and the question, in such case, is one of law, for the court.

Patterson, Railway Accident Law, p. 70. § 73; *Nagle v. Allegheny Valley R. Co.* 88 Pa. 39, 32 Am. Rep. 413; *Troist v. Winona & St. P. R. Co.* 39 Minn. 164, 39 N. W. 402; *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 776; *Tucker v. New York C. & H. R. R. Co.* 124 N. Y. 308, 26 N. E. 916; *Solomon v. Central Park, N. & E. River R. Co.* 1 Sweeny, 298; *Ludwig v. Pillsbury*, 35 Minn. 256, 28 N. W. 505.

Admitting that plaintiff had the right to be there, that would not excuse his act in leaning out.

Scheiber v. Chicago, St. P. M. & O. R. Co. 61 Minn. 499, 63 N. W. 1034.

Lovely, J., delivered the opinion of the court:

Plaintiff, as administratrix, seeks to recover for the death of her son, occurring through the alleged negligence of defendant, who demurs to the complaint upon the ground that it does not state a cause of action. The demurrer was sustained, from which order plaintiff appeals.

The essential facts in the complaint are as follows: During the summer season of 1901 defendant operated trains between Minneapolis and points on Lake Minnetonka. Defendant's passenger station is near the center of the city, and its tracks extend 4 miles westerly therefrom within the corporate limits. Two fifths of a mile west of the depot its railroad passes under a bridge on Lyndale avenue. It is claimed that the defendant negligently maintains its tracks so close to the 57 L. R. A.

iron posts which support this bridge that the sides of its cars pass within 10 inches of the same. At this time defendant was running suburban trains, and transporting passengers thereon between the city and Lake Minnetonka in each direction, not only for ordinary purposes, but upon the occasion of picnics and excursions, when the cars would be greatly "overcrowded, so that their doors and windows had to be open, and passengers were required to ride upon the platforms and steps at the end of the cars." That the yards of defendant for a mile west of the depot had switches and side tracks adjacent to its main tracks, and at various points within this distance such tracks were crossed by street bridges overhead, supported by iron posts erected in the yard at the sides of the tracks. That these bridges resemble each other, and look alike to passengers. That the depot is east of and very close to one of the bridges, so that when the trains arrive they must stop partly under it for passengers to alight. That the conductors and brakemen of the train announce the stations as the trains slow up and stop at various points under the bridges, "when the passengers frequently and usually lean out from the platforms of the cars, and look ahead to see if their train has arrived at its destination, which is their usual and customary habit" and known to defendant. On the 30th of June, 1901, plaintiff's intestate, a minor, of the age of sixteen years, was a passenger on one of these trains coming to the city from Lake Minnetonka. That this train was overcrowded with passengers returning from a picnic. That it was excessively hot. That the car was greatly overcrowded, and many drunken and disorderly persons were riding thereon, whereby intestate was compelled to stand upon the platform of his car. The train suddenly slowed up near the Lyndale avenue bridge, when he "with the consent of the defendant, and without any warning of the danger" (or knowledge of the bridge), "leaned out slightly, and looked ahead, to see if it was arriving or had arrived at its destination, when his head immediately came into collision with one of the iron posts referred to, and he received the injuries from which he died." The position of the defendant in support of the order of the trial court is that intestate, by extending his head beyond the line of the car while in motion, committed an act of negligence, which was the proximate cause of his injury, and therefore precludes recovery in this action.

The law undoubtedly enjoins upon the railway carrier of passengers extraordinary diligence. This rule is intended, for reasons of public policy, to secure their safe carriage, so far as human skill and foresight can accomplish that result. *Smith v. St. Paul City R. Co.* 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827. However, railways must construct and arrange their tracks and yards to attain practical purposes in the operation of their roads. They have been permitted, without restraint from police regulation, to build tracks with switches, when

necessary, in close proximity to each other. This course is unavoidable in city yards, where the right of eminent domain, in view of public as well as private interests, has restricted the appropriation of land for railroad uses. A common incident of city yards are overhead bridges, with posts to sustain them, as well as adjacent tracks upon which trains are continually passing so near to each other that a slight extension of the human body beyond the sides of a car is fraught with danger to life and limb. These conditions have always existed. They are customary, and to a large extent indispensable; hence the high degree of duty to patrons exacted of carriers of passengers has been generally regarded as fulfilled with reference to outside arrangements at such places where a safe and secure place has been provided within its cars for their occupation. Having done this, the carrier is not required, in maintaining adjoining structures, to guard against the anticipated carelessness of those who are in no danger so long as they remain in the place of safety which the carrier has furnished. The customary methods of constructing tracks, building bridges, and running trains in railroad yards renders any exposure of a person beyond the car line imminently hazardous; hence there must arise a presumption in behalf of the carrier, when injury arises from such exposure, that the conduct of its business in this respect is not negligent, and imposes upon the injured party the burden of showing that it was otherwise in any particular case. While, as a general rule, it may be said that railroads can arrange structures adjoining their tracks to accomplish practical ends, even though the maintenance of the same are dangerous to those who are themselves reckless, yet it cannot be said either that an unnecessary or useless act by the railroad in this regard would not be negligent as to an employee required to work in the yards, or even a passenger, whose person, through no fault of his own, as by extraneous force, impending danger, sudden emergency, or other unavoidable cause, would be exposed to danger.

Subject to the qualifications above stated, the courts have not been able to impose upon railway carriers burdens so unreasonable that they could not be fulfilled, nor have passengers been relieved from the exercise of restraint from the curiosity which prompts them to expose their persons to the imminent risk of collision with objects outside the cars. Car windows and doors are for the admission of light and air, not to enable passengers to pursue a course which general experience declares to be extremely hazardous. The proper use of platforms is to afford travelers a safe and convenient means of entrance and exit to and from the cars when not in motion. But it follows, in view of the conditions above stated, that the voluntary exposure of the body beyond the sides of a moving train, or the improper use of the platform when safety is assured within the car, must be regarded as reckless, and the almost inevitable disaster that fol-

lows remediless. These conclusions are supported by the great weight of authority in this country. Beach, *Contrib. Neg.* 2d ed. § 155; *Todd v. Old Colony & F. River R. Co.* 3 Allen, 18, 80 Am. Dec. 49, 7 Allen, 207, 83 Am. Dec. 679; *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. 294; *Indianapolis & O. R. Co. v. Rutherford*, 29 Ind. 83, 92 Am. Dec. 336; *Favre v. Louisville & N. R. Co.* 91 Ky. 541, 16 S. W. 370; *Georgia P. R. Co. v. Underwood*, 90 Ala. 49, 8 So. 116; *Moakler v. Willamette Valley R. Co.* 18 Or. 189, 6 L. R. A. 656, 22 Pac. 948; *Carrico v. West Virginia O. & P. R. Co.* 35 W. Va. 389, 14 S. E. 12; *Richmond & D. R. Co. v. Scott*, 88 Va. 958, 16 L. R. A. 91, 14 S. E. 763; *Scheiber v. Chicago, St. P. M. & O. R. Co.* 61 Minn. 499, 63 N. W. 1034. In a large measure the learned counsel for appellant concedes the rule as laid down in the cases cited. We quote from his thorough and exhaustive brief as follows: "I concede that, as a general rule, a passenger who stands on the platform, or protrudes his head out of the window or outside of the outer line of the car, on a rapidly moving train or an ordinary steam railroad, under ordinary conditions and circumstances, and is thereby injured, is guilty of contributory negligence as a matter of law." But it is urged that this complaint discloses exceptional circumstances, which takes this case out of the general rule. These exceptions are: The moderate speed of the train; its frequent stops; the misleading appearance of the overhead bridges, calculated to provoke inquiry; the knowledge by defendant of the habit of passengers to put their heads out of the windows of the cars at such places; the omission to give warnings forbidding this custom; the overcrowded condition of the cars, with the incidental necessity of passengers riding on platforms, invited and permitted by the defendant; as well as the immature age of the deceased,—which it is claimed relieve intestate from the imputation of recklessness. We are unable to give force to the view that the speed of the train is of significance, for it was moving with sufficient rapidity to make the exposure of any part of the body dangerous, as the unfortunate accident in this case demonstrates. The misleading appearance of the overhead bridges may have excited curiosity, but cannot justify a dangerous exposure, which was not necessary, particularly as defendant was required to announce the stations when reached, and this legal duty was admittedly performed; hence we cannot hold that curiosity alone can furnish an excuse for negligent self-exposure in such cases. The allegation of the custom of passengers to extend their heads beyond the sides of the car with the knowledge and consent of defendant, it is claimed, required warnings of the danger incurred thereby. These facts undoubtedly charged a reckless habit of the passengers thus exposing themselves. The general rule, as conceded by plaintiff's counsel, rests upon the ground that such conduct is so hazardous within the range of common experience that all travelers must and should

have knowledge thereof, and that dangers from such causes are so well known and anticipated that specific warning ought not to be required, and would be useless if given. These considerations have all been carefully weighed and answered in the evolution of the rule forbidding unnecessary exposure of their persons by travelers on railways in the cases cited above, and have not been considered sufficient to modify its force, so as to be the subject of innovation in this respect. The fact that the train on which intestate was a passenger was one among other suburban trains, and that such trains were habitually overcrowded by passengers who were permitted and required to ride on the platforms with the knowledge and consent of the defendant, may well have excused intestate in choosing the place he occupied when injured. If railway companies subject their trains to the same uses adopted on urban electric or trolley cars, and receive compensation for carrying passengers upon the platforms of the same, they cannot avoid responsibility for an injury arising merely from the occupation of such place by their patrons to which the injured party does not contribute. *Reem v. St. Paul City R. Co.* 77 Minn. 503, 80 N. W. 638, 778. Had intestate fallen from the train by reason of its being overcrowded, or had he been pushed therefrom by causes attributable to the dangerous course of conduct pursued by defendant in allowing passengers to ride on its platforms, we could not hold that intestate's conduct was negligent; but the complaint rests plaintiff's right to recover upon the expressed ground that the accident resulted from the action of intestate himself. It is alleged therein that at the inopportune moment he "then leaned out slightly and looked ahead as said train moved along, to see if it was arriving or had arrived at its destination." This averment repels the inference that the efficient cause of the accident was the overcrowding of the train; and, while his position on the platform may be excused by the course of defendant, it was the voluntary act of the unfortunate youth himself, wherein he exercised his own judgment, and took chances, which resulted in his death. Under the admissions of the plaintiff, her son's conduct can no more excuse him from negligence than in the case of a passenger within the car, who protrudes his head from a window and is struck by a passing car.

It remains to consider whether the immature age of intestate would, as a matter of law, demand a submission to a jury of the question of intestate's capacity to appreciate the risks incurred. The allegation in the complaint in this respect is that he "was

sixteen years of age." There are no facts alleged to show lack of intelligence, discretion, or ability ordinarily exercised by persons of that age. The rule of care imposed upon persons of immature years has been stated in a former decision of this court in the following language: "The law very properly holds that a child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence; but this principle cannot be applied as a rule of law to all children, without regard to their age or mental capacity. Children may be liable for their torts or punished for their crimes, and they may be guilty of negligence as well as adults. The law very humanely does not require the same degree of care on the part of a child as of a person of mature years, but he is responsible for the exercise of such care and vigilance as may reasonably be expected of one of his age and capacity, and the want of that degree of care is negligence." *Tuist v. Winona & St. P. R. Co.* 39 Minn. 164-168, 39 N. W. 402. See also *Ludwig v. Pillsbury*, 35 Minn. 256, 28 N. W. 505; *Powers v. Chicago, M. & St. P. R. Co.* 57 Minn. 332, 59 N. W. 307; *Tucker v. New York C. & H. R. R. Co.* 124 N. Y. 308, 26 N. E. 916; *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 776. The general rule that it is for the jury to determine the capacity of a minor to exercise discretion and judgment, and whether the failure to do so is contributory negligence, cannot reasonably be applied in cases where such persons are infants only in legal theory. An infant at fourteen years, under the policy of our law, has sufficient discretion to select a guardian (Gen. Stat. 1894, § 4535), and is capable of malice which would subject him to penal consequences for crime when above the age of twelve (Gen. Stat. 1894, § 301). It would seem to follow that the mere fact alone that the infant is above that age, though under twenty-one, would not presumptively absolve him from the consequence of contributory negligence. While an infant over twelve years might not have sufficient capacity to appreciate the risk of a dangerous situation, owing to peculiar individual characteristics affecting his capacity, yet we are unable to hold that a youth sixteen years of age, traveling alone on a railway train, is not, as a matter of law, endowed with sufficient intelligence and discretion to avoid the consequences of acts which the law considers culpably negligent. *Patterson, Railway Accident Law*, § 7; *Nagle v. Allegheny Valley R. Co.* 88 Pa. 35, 32 Am. Rep. 413; *Dietrich v. Baltimore & H. S. R. Co.* 58 Md. 347.

The order appealed from is affirmed.

MICHIGAN SUPREME COURT.

Herbert BOWEN, Admr., etc., of Angus D. Keith, Appt.,
v.

James B. W. LANSING et al.

(.....Mich.....)

The vendor's interest in a partially performed contract to purchase land of which the vendee has been put in possession passes to his personal representative upon his death, and is not subject to execution for the debts of his heir.

(December 21, 1901.)

A PPEAL by complainant from a decree of the Circuit Court for Wayne County in favor of defendants in a suit to remove

Norm.—Nature of interest of vendor or vendee in a land contract as real or personal property.

- I. Application of the doctrine of equitable conversion.
 - a. In general, 643.
 - b. Where judgment has been entered against one of the parties to the contract.
 1. Against the vendee, 644.
 2. Against the vendor, 645.
 - c. Where one of the parties to the contract subsequently dies, 646.
 - d. For purpose of determining who must bear losses and receive accretions, 647.
- II. Effect of provisions of contract, 647.
- III. The contract must be one which equity will specifically enforce, 648.
- IV. Time at which conversion takes place.
 - a. In general, 649.
 - b. Effect of vendee's failure to take possession, 650.
 - c. Optional contracts, 651.
- V. Reconversion, 652.
- VI. Application of doctrine in actions at law, 653.
- VII. Conclusion, 654.

I. Application of the doctrine of equitable conversion.

a. In general.

Acting under the rule that equity considers as done that which is agreed to be done, the cases harmoniously hold, subject to the limitations hereinafter noted, that the vendee under a contract for the sale of lands takes an equitable title, while the vendor holds the legal title in trust for the purchaser and as security for the purchase money due him. Hadley v. London Bank, 3 De G. J. & S. 63; Davie v. Beardsham, 1 Ch. Cas. 39; Greenhill v. Greenhill, 2 Vern. 679, Prec. in Ch. 320, Glib. Eq. Rep. 77; Purser v. Darby, 4 Kay & J. 41; Pollexfen v. Moore, 3 Atk. 272; Boone v. Chiles, 10 Pet. 177, 9 L. ed. 388; Lewis v. Hawkins, 23 Wall. 125, 23 L. ed. 113; Wimbley v. Montgomery Mut. Bldg. & L. Asso. 69 Ala. 575; Harris v. King, 16 Ark. 126; Gouldin v. Buckelew, 4 Cal. 107; Sparks v. Hess, 15 Cal. 186; Aaron v. Bayne, 28 Ga. 107; Home Mfg. Co. v. Gough, 2 Ill. App. 477; Vail v. Drexel, 9 Ill. App. 439; Sutherland v. Goodnow, 108 Ill. 528, 48 Am. Rep. 560; Jones v. Hollister, 51 57 L. R. A.

a cloud from the title of plaintiff's intestate, which was alleged to have been caused by the levying of an execution on an interest of which he died seised, as that of his heir at law. *Reversed.*

The facts are stated in the opinion.

Messrs. Bowen, Douglas, & Whiting, for appellant:

In equity, where a part of the purchase money has been paid, and the vendee has gone into possession, an equitable conversion takes place, by which the vendor becomes trustee of the land for the benefit of the vendee, and the vendee trustee of the money for the benefit of the vendor, and equitably the vendee is the owner of the land, the claim of the vendor being but an ordinary money debt secured by the contract.

Kan. 310, 32 Pac. 1115; Woodbury v. Gardner, 77 Me. 68; Cross v. Bean, 83 Me. 62, 21 Atl. 752; Fitzhugh v. Maxwell, 34 Mich. 138; Bell v. Flaherty, 45 Miss. 694; Jewett v. Black, 60 Neb. 173, 82 N. W. 375; Force v. Dutcher, 17 N. J. Eq. 165; Huffman v. Hummer, 17 N. J. Eq. 203; Haughwout v. Murphy, 22 N. J. Eq. 531; Lewis v. Smith, 9 N. Y. 510, 61 Am. Dec. 706; Young v. Guy, 87 N. Y. 462; Burank v. Babcock, 3 N. Y. S. R. 458; White v. Patterson, 139 Pa. 429, 21 Atl. 360; Poe v. Paxton, 26 W. Va. 607.

In *Dortch v. Benton*, 98 N. C. 190, 3 S. E. 638, it was held that the purchaser's interest was not personalty so as to entitle him to have it set apart as a personal-property exemption, but that it was realty, and he was entitled to a homestead therein.

And in *Wiseman v. Beckwith*, 90 Ind. 185, where the vendor's wife did not join in the contract, it was held that the purchaser had an equitable title subject to the wife's inchoate right of dower as fixed by the law then in force, which constituted a vested right, and could not be diminished by a subsequent statute increasing the right of dower to an estate in fee.

In *Russell's Appeal*, 15 Pa. 319, it was held that the purchaser's interest is not a mere chose in action, but an interest in land; and where he assigns the contract the assignment in effect constitutes a mortgage of his interest, and, unless recorded, will be postponed to the lien of judgments subsequently entered against him.

The purchaser's interest constitutes an interest in land within the meaning of the statute of frauds. *Dougherty v. Catlett*, 129 Ill. 438, 21 N. E. 932.

And he takes an equitable title within the meaning of a statute making equitable estates subject to dower. *Thompson v. Thompson*, 46 N. C. (1 Jones, L.) 430.

Where one agrees to convey land for a valuable consideration, which land he does not then own, but afterwards acquires, he holds it, when acquired, as a trustee for his vendee. *White v. Patterson*, 139 Pa. 429, 21 Atl. 360.

The purchaser in possession is the equitable owner, and is entitled to the rents, issues, and profits, and the vendor is not entitled to an injunction restraining him or his licensee from digging a raceway, unless the purchaser is in default, and the vendor's security is impaired thereby. *Baldwin v. Pool*, 74 Ill. 97.

A person in lawful possession of land under a contract to purchase may maintain trespass

Walker v. Casgrain, 101 Mich. 608, 60 N. W. 291.

Real estate descends to heirs, and personal estate to the personal representatives.

Wing v. McDowell, Walk. Ch. (Mich.) 181; *Compo v. Jackson Iron Co.* 49 Mich. 44, 12 N. W. 901; *House v. Deater*, 9 Mich. 246; *Baater v. Robinson*, 11 Mich. 522; *Gustin v. Union School Dist.* 94 Mich. 502, 54 N. W. 156; *Welsh v. Richards*, 41 Mich. 593, 2 N. W. 920.

The mere fact that the vendee was in possession under the land contract would have been sufficient notice.

Corey v. Smalley, 106 Mich. 260, 64 N. W. 13; *O'Brien v. Evans*, 107 Mich. 623, 65 N. W. 571.

An equitable estate is not subject to levy. *Gorham v. Arnold*, 22 Mich. 247; *Gorham v. Wing*, 10 Mich. 492.

for injuries thereto, even against the owner of the legal title, as the vendor's interest is merely a lien for the unpaid purchase money. *Smith v. Price*, 42 Ill. 399.

He has an equitable title which will enable him to maintain partition. *Longwell v. Bentley*, 23 Pa. 102.

In the following cases it was held that the vendor retains the legal title as security for the payment of the purchase money, and has the rights and equities of a mortgagee: *Moses Bros. v. Johnson*, 88 Ala. 517, 7 So. 146; *Lowery v. Peterson*, 75 Ala. 109; *Hutton v. Moore*, 26 Ark. 382; *Wakefield v. Johnson*, 26 Ark. 506; *Moore v. Anders*, 14 Ark. 628, 60 Am. Dec. 551; *McConnell v. Beattie*, 34 Ark. 113; *White v. Blakemore*, 8 Lea, 49; *Hendrix v. Barker*, 49 Neb. 369, 68 N. W. 531; *Haley v. Bennett*, 5 Port. (Ala.) 469.

And where the vendor assigns the note given for the purchase price he has no further interest in the property, as his assignment carries with it an equitable assignment of his lien on the land. *Jackson v. Snell*, 34 Ind. 241; *First Nat. Bank v. Edgar* (Neb.) 91 N. W. 404.

The vendor retains the legal title as security for the purchase money, his retention of the title operating as an equitable mortgage; and he cannot execute a valid mortgage on the land, though he can assign the debt due him. *Strickland v. Kirk*, 51 Miss. 795.

And in *Rose v. Watson*, 10 H. L. Cas. 672, 33 L. J. Ch. N. S. 385, it was held that the vendee is the owner, as against a mortgagee of the vendor, to the extent of the purchase money paid by him.

The vendor holds the legal title only as security for the payment of the purchase money, and he cannot convey a good title to one having notice of the existence of the contract. *Ellis v. Jeans*, 7 Cal. 415.

The vendee in possession under a land contract has the equitable title, and his possession is notice of his equity to one subsequently purchasing from the vendor. *Daniels v. Davison*, 17 Ves. Jr. 433, 16 Ves. Jr. 249.

The purchaser's title is sufficient to enable him to operate mines located on the property, and to dispose of the ore. *Woolsey v. Seely*, *Wright* (Ohio) 360.

And he may cut bark from trees, and, if the vendor attempts to sell it, he may recover it from the vendor's transferee. *Cochran v. Utter*, 15 N. Y. Week. Dig. 570.

The purchaser acquires an equitable title, and may execute a valid mortgage. *Smith v. Robinson*, 13 Ark. 533; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Ricker v. Moore*, 77 Me. 295; *Wing v. McDowell*, Walk. Ch. (Mich.) 57 L. R. A.

The personal representative of the vendor is generally the proper party to enforce specific performance.

22 Am. & Eng. Enc. Law, p. 1065, note 1; *Scott v. Davis*, 141 Mo. 213, 42 S. W. 714; *Warvelle, Vendors*, pp. 188, 189, 700; *Sugden, Vendors*, *177; *Pom. Spec. Perf. of Contracts*, § 494; *Evans v. Enloe*, 70 Wis. 348, 34 N. W. 918, 36 N. W. 22; *Lavender v. Abbott*, 30 Ark. 172.

Where there is a contract for the purchase of land, it descends in equity to the heirs of the vendee.

Champion v. Brown, 6 Johns. Ch. 400, 10 Am. Dec. 343; *Palmer v. Morrison*, 104 N. Y. 132, 10 N. E. 144; *Bender v. Luckenbach*, 162 Pa. 22, 29 Atl. 295, 296; *Sutter v. Ling*, 25 Pa. 466; *Miller v. Miller*, 25 N. J. Eq. 354; *Skinner v. Newberry*, 51 Ill. 203; *Lewis v. Smith*, 9 N. Y. 502, 61 Am.

175; *Gordon v. Collett*, 102 N. C. 532, 9 S. E. 486; *Roddy v. Elam*, 12 Rich. Eq. 343; *Skaggs v. Kelly* (Tenn. Ch. App.) 42 S. W. 275.

And in the following cases it was held that the purchaser's equitable title would enable him to execute a valid deed of the premises: *Neal v. Murphey*, 60 Ga. 388; *Higley v. Millard*, 45 Iowa, 586; *Jackson ex dem. New Loan Officers v. Bull*, 1 Johns. Cas. 81; *Weed v. Hall*, 101 Pa. 596; *Irvine v. Muse*, 10 Helsk. 477.

The vendee, under a land contract, takes the equitable title, and upon the payment of the purchase money may compel the vendor to convey, although he is at the time indebted to the vendor on another land contract. *Seaman v. Van Rensselaer*, 10 Barb. 81.

In *Crawford v. Bertholf*, 1 N. J. Eq. 458, it was held that where the vendee has been guilty of fraud, equity will not aid him by applying the doctrine of equitable relief, but will leave him to his remedy at law.

b. Where judgment has been entered against one of the parties to the contract.

1. Against the vendee.

In the jurisdictions where the common-law rule limiting the lien of judgments to legal estates has been abrogated by statute it has been uniformly held that the purchaser takes an equitable title which is subject to the lien of a judgment entered against him. *Ralston v. Field*, 32 Ga. 453; *Coombs v. Jordan*, 3 Bland, Ch. 284, 22 Am. Dec. 236; *Rand v. Garner*, 75 Iowa, 311, 39 N. W. 515; *Adams v. Harris*, 47 Miss. 144.

And his interest is real estate under a statute making the real estate of a judgment debtor subject to the lien of a judgment entered against him. *Van Camp v. Peerenboom*, 14 Wis. 66.

In Pennsylvania, where there is no court of chancery, the common-law courts have applied equitable principles in dealing with the question, and have held that a judgment against the purchaser is a lien on his equitable interest. *Richter v. Sellin*, 8 Serg. & R. 425; *Pugh v. Good*, 3 Watts & S. 56, 37 Am. Dec. 534; *Foster's Appeal*, 3 Pa. St. 79; *Catlin v. Robinson*, 2 Watts, 373.

In *Auwerter v. Mathiot*, 9 Serg. & R. 397, it was held that only the equitable interest of the purchaser is sold under an execution issued against him, and hence his judgment creditors are entitled to the surplus realized on the sale, even as against the vendor, who has not received all the purchase money.

The above case was followed in *Wilkinson v.*

Dec. 706; *Smith v. Gage*, 41 Barb. 60; *Potter v. Ellice*, 48 N. Y. 321; *Denham v. Cornell*, 67 N. Y. 556.

Messrs. Clark, Durfee, & Allor, with *Mr. John H. Patterson*, for appellees:

The vendor in a land contract has such a legal title to the land contracted to be conveyed as is subject to levy and sale on execution.

Comp. Laws, § 9225; *Doak v. Runyan*, 33 Mich. 75; Pom. Eq. Jur. §§ 368, 1261, 1262; 33 Cent. L. J. 107; *Patterson's Estate*, 25 Pa. 71; *Hardee v. McMichael*, 68 Ga. 678.

While it may be true that the vendee has such a title in the land as will descend to his heirs, it does not necessarily follow that the vendor has no such interest.

Pom. Eq. Jur. § 368.

The vendor holds the legal title subject

Burr, 10 Ga. 117, and it was held that the judgment creditors of the purchaser were entitled to the surplus arising on a sale of his interest under a judgment entered against him by the vendor for a part of the purchase price. In this case no part of the purchase price had been paid except that realized on the sale under the judgment, but the court said that the principle was the same as that in the *Auwerter Case*, 9 Serg. & R. 397, and as the sale was only the vendee's interest, his creditors were entitled to the proceeds.

The following decisions, which hold that the vendee's interest is not subject to the lien of a judgment entered against him, do not militate against the doctrine that the vendee takes an equitable title, as these cases recognize the soundness of the doctrine, but are based on the ground that an equitable interest in land is not subject to the lien of a judgment: *Doe ex dem. Cooper v. Cutshall*, Smith (Ind.) 128; *Gentry v. Allison*, 20 Ind. 481; *Evans v. Feeny*, 81 Ind. 532.

And in *Ellsworth v. Cuyler*, 9 Paige, 418, it was held, for the same reason, that the purchaser's interest can only be reached by a creditor's bill.

In *Bogert v. Perry*, 17 Johns. 351, it was held that the statute making trust lands liable to execution against the *cestui que trust* applies only when he has the whole beneficial interest, and hence will not apply to the interest of a purchaser under a land contract who has not paid all the purchase money, as until that time a portion of the beneficial interest is in the vendor.

A similar question was involved in *Modisett v. Johnson*, 2 Blackf. 431, where it was held that the statute making judgments a lien on certain equitable estates did not apply to the equitable estate passing to the vendee under a contract for the sale of land; and hence the common-law rule applied, and his equitable title was not subject to a judgment entered against him.

In *Sweezy v. Jones*, 65 Iowa, 272, 21 N. W. 603, the judgment creditor had but an option of purchase, and it was held that until he exercised the option he had no estate which could be subjected to the lien of a judgment.

2. Against the vendor.

In the following cases it was held that, the equitable title having passed to the vendee, a judgment against the vendor was not a lien on the property: *Taylor v. Lowenstein*, 50 Miss. 278; *Chisholm v. Andrews*, 57 Miss. 636; *Bell v. Flaherty*, 45 Miss. 694; *Moyer v. Hin-*
57 L. R. A.

to the right of the vendee to have conveyance upon complete performance.

Re Pulling, 97 Mich. 375, 56 N. W. 765.

Hooker, J., delivered the opinion of the court:

Angus Keith, an incompetent person, being possessed of certain land upon Gross Isle, contracted by an ordinary land contract, through his legally appointed guardian, the Union Trust Company, to convey it to Lulu D. Wormer. The purchase price was \$2,500, \$500 of which was paid at the time the contract was made. Before full payment, but after a part of the purchase money had been paid, and after the vendee had been put in possession under the contract (according to complainant's claim), Mr. Keith died, leaving as his sole heir his son, A. Douglas Keith. The complainant,

man, 13 N. Y. 180; *Moore v. Byers*, 65 N. C. 240; *Manley v. Hunt*, 1 Ohio, 257; *Minns v. Morse*, 15 Ohio, 568, 45 Am. Dec. 590; *Money v. Dorsey*, 7 Smedes & M. 15; *Merriman v. Polk*, 5 Helsk. 717.

And a judgment against the vendor is not a lien though a portion of the purchase money is paid after the entry of the judgment. *Hampson v. Edelen*, 2 Harr. & J. 64, 3 Am. Dec. 530.

In *Butler v. Brown*, 5 Ohio St. 211, the purchase money had not been paid, but the court held that the rule that the vendor becomes a trustee for the vendee and the land ceases to be subject to the lien of judgment subsequently entered against the vendor, should not be disturbed; saying that it had for more than thirty years been acted upon as a rule of title.

The vendor's interest in the unpaid purchase money can only be reached by garnishment or equitable proceedings. *Baldwin v. Thompson*, 15 Iowa, 504; *Woodward v. Dean*, 46 Iowa, 499.

In *Lane v. Ludlow*, 2 Paine, 591, Fed. Cas. No. 8,052, it was held that, while at law a judgment entered against the vendor is a lien on the land, equity will protect the purchaser's equitable interest; and that upon his paying the purchase money into court the judgment creditor will be restrained from selling the property under the judgment.

But in the following cases it was held that, although the equitable title had passed to the vendee, the vendor held the legal title as security for the payment of the purchase money, and his interest was subject to the lien of a judgment entered against him, and could be sold under execution; but that the purchaser at such sale would take the vendor's interest subject to the equities of the vendee: *Ware v. Jackson*, 19 Ga. 452; *Hardee v. McMichael*, 68 Ga. 678; *Bell v. McDuffie*, 71 Ga. 264; *Simpson v. Niles*, 1 Ind. 196; *Minneapolis & St. L. R. Co. v. Wilson*, 25 Minn. 382; *Wellis v. Baldwin*, 28 Minn. 408, 10 N. W. 427; *Coolbaugh v. Roemer*, 30 Minn. 424, 15 N. W. 869; *Berryhill v. Potter*, 42 Minn. 279, 44 N. W. 251; *Fillee v. Duncan*, 1 Neb. 134, 93 Am. Dec. 337; *Olander v. Tighe*, 43 Neb. 344, 61 N. W. 633; *Courtney v. Parker*, 16 Neb. 311, 20 N. W. 120; *Fasholt v. Reed*, 16 Serg. & R. 266; *M'Mullen v. Wenner*, 16 Serg. & R. 19, 16 Am. Dec. 543; *Stewart v. Coder*, 11 Pa. 90.

In *Lefferson v. Dallas*, 20 Ohio St. 68, where it was held that the judgment was a lien on the land to the extent of the purchase money remaining unpaid, the court distinguished the case from that of *Minns v. Morse*, 15 Ohio, 568, 45 Am. Dec. 590, *supra*, as in that case

Bowen, was appointed administrator of Keith's estate, which consisted of \$50 worth of household property and his interest in the lands contracted to Wormer. Claims aggregating \$400 or \$500 have been presented, and the administrator has no means with which to pay them, aside from the money due or to become due upon Wormer's contract, amounting to upwards of \$2,000. Angus Keith died on January 24, 1899, and on the 7th day of February, 1899, defendant Lansing, a judgment creditor of A. Douglas Keith, caused his codefendant, Stewart, a sheriff, to levy a writ of fieri facias in favor of Lansing upon the interest of said A. Douglas Keith in said premises, and to advertise the same for sale. This was about a month previous to complainant's appointment as administrator. After said levy the administrator filed this bill

to remove the cloud from the title caused by defendant's levy, alleging the foregoing facts, and that Wormer was ready to pay the purchase money when he could obtain a clear title to the premises, but refused payment until this cloud should be removed. Subsequently defendant Lansing purchased the premises at the sheriff's sale. Counsel seem to agree that the only question raised is whether the interest of Angus Keith in this land descended to A. Douglas Keith, so as to be subject to a levy. Complainant contends that it is personal property, and therefore belongs to the administrator, and that it was not subject to such levy. Defendant maintains that it is an interest in lands, which descended to the heir, by operation of law, upon the death of the ancestor, subject to the rights of creditors, and that it was susceptible to a levy for the

no part of the purchase money remained unpaid at the date of the judgment.

In *Adcock v. Patton*, 2 Baxt. 436, it was held that a judgment entered against a vendor giving a bond for title was a lien, unless the bond had been previously registered.

And in *Holman v. Creagmiles*, 14 Ind. 177, it was held that, since a judgment against the vendor is a lien to the extent of his interest, the vendee may pay it and deduct it from the purchase money.

From the above, it will be seen that the decisions involving the lien of a judgment against the vendor are not in harmony; but it will also be noticed that the conflict is not caused by any differences of judicial opinion as to the soundness of the doctrine that the vendee takes an equitable title to the property. They are all in accord as to the nature of the title and interests of the respective parties. The only point of difference between them is as to whether the substantial interest which remains in the vendor, and for the payment of which he holds the legal title as security, is subject to the lien of a judgment.

c. Where one of the parties to the contract subsequently dies.

The question frequently arises on the death of one of the parties to the contract, and in the following cases it was held that the vendor's interest constitutes personality, and is distributable among his next of kin: *Baden v. Pembroke*, 2 Vern. 215; *Mayer v. Gowland*, 2 Dick. 563; *Smith v. Hibbard*, 2 Dick. 730; *McKay v. Carrington*, 1 McLean, 50, Fed. Cas. No. 8,841; *Masterson v. Pullen*, 62 Ala. 145; *Muldrow v. Muldrow*, 2 Dana, 387; *Skinner v. Newberry*, 51 Ill. 203; *Gilmore v. Gilmore*, 60 Kan. 606, 57 Pac. 505; *Miller v. Miller*, 25 N. J. Eq. 354; *Re Everit*, 2 Edw. Ch. 597; *Swartwout v. Burr*, 1 Barb. 495; *Moore v. Burrows*, 34 Barb. 173; *Adams v. Green*, 34 Barb. 176; *Smith v. Gage*, 41 Barb. 60; *Thomson v. Smith*, 63 N. Y. 301; *Williams v. Haddock*, 145 N. Y. 144, 39 N. E. 825; *Simmons's Estate*, 140 Pa. 567, 21 Atl. 402; *Bender v. Luckenbach*, 162 Pa. 18, 29 Atl. 295, 296; *West Hickory Min. Asso. v. Reed*, 80 Pa. 38; *Sutter v. Ling*, 25 Pa. 406; *Foster v. Harris*, 10 Pa. 457; *Reynolds v. Brandon*, 3 Helak. 593; *Donohoo v. Lea*, 1 Swan, 119, 55 Am. Dec. 725.

In *Henson v. Ott*, 7 Ind. 512, it was held that the vendor's interest constitutes personality, and that upon his death it is distributable as such, and the statutes relating to the descent of real property do not apply.

The vendor's interest constitutes personality
57 L. R. A.

within the meaning of a statute giving a widow one third of her deceased husband's personal property. *Re Drenkle*, 3 Pa. St. 377.

After the owner of the land enters into a contract for its sale, she has no further title to the realty except to hold it as security for the payment of the purchase money, and her interest in it passes to her personal representatives, and not to the devisees named in a prior will. *Farrar v. Winterton*, 5 Beav. 1, 6 Jur. 204.

And the contract converts the vendor's interest into personality, operates as a revocation of a prior will, and the purchase money goes to the personal representatives. *Donohoo v. Lea*, 1 Swan, 119, 55 Am. Dec. 725.

That the vendor holds the legal title in trust is shown by the decision in *Lysaght v. Edwards*, L. R. 2 Ch. Div. 499, 45 L. J. Ch. N. S. 554, 24 Week. Rep. 778, 34 L. T. N. S. 787, where it was held that the vendor's interest passed under his will devising all the real estate vested in him as trustee.

In *Wall v. Bright*, 1 Jac. & W. 494, where it was held that the vendor's interest passed under a will disposing of his real and personal estate, the court said that the equitable title had passed to the purchaser, and that the vendor retained the legal title as trustee.

And in *Thirlie v. Vaughan*, 2 Week. Rep. 632, it was held that the vendor held the legal title as trustee for the purchaser, and that the language of his will was not sufficient to vest his beneficial estate in his devisee, but that the legal title descended to his heirs charged with the same trust.

So, in *Swartwout v. Burr*, 1 Barb. 495, it was held that the purchaser acquired an equitable title, and the heir of the vendor held the legal title in trust.

Conversely, it was held in the following cases that the vendee's interest constitutes realty, and descends to his heirs: *Alleyne v. Alleyne*, Mosely, 262; *Milner v. Mills*, Mosely, 123; *Langford v. Pitt*, 2 P. Wms. 632; *Potter v. Potter*, 1 Ves. Sr. 437; *Garnett v. Acton*, 28 Beav. 333; *Love v. Butler*, 129 Ala. 531, 30 So. 735; *Wise v. Walker* (Pa.) 8 Cent. Rep. 437, 10 Atl. 23; *Harney v. Donohoe*, 97 Mo. 141, 10 S. W. 191; *Griffith v. Beecher*, 10 Barb. 432; *Livingston v. Newkirk*, 3 Johns. Ch. 312; *Walton v. Walton*, 7 Johns. Ch. 258, 11 Am. Dec. 456; *Williams v. Kinney*, 43 Hun, 1, Affirmed in 118 N. Y. 679, 23 N. E. 1147; *Johnson v. Corbett*, 11 Paige, 265.

And the purchaser's heirs are not affected by the acts and contracts of his personal representatives in relation to it. *Stephenson v.*

debts of the heir, subject to such rights as creditors may have. When we shall have determined the character of the interest remaining in a vendor of land held by the vendee upon contract of purchase merely, we shall have gone far in ascertaining whether it is such as will descend to the heir as real estate, or go to the administrator as personalty. In the early case of *Wing v. McDowell*, Walk. Ch. (Mich.) 181, it was said: "At law a contract for the purchase of land gives the vendee no interest in the land; but the rule is otherwise in equity, which considers the vendor, as to the land, a trustee for the purchaser, and the vendee, as to the money, a trustee for the seller. In equity the land belongs to the vendee, and may be sold, devised, or encumbered by him, and on his death will descend to his heirs. *Seton v. Slade*, 7 Ves. Jr. 265, 274;

Paine v. Meller, 6 Ves. Jr. 353; *Champion v. Brown*, 6 Johns. Ch. 398, 10 Am. Dec. 343. It must be taken, however, subject to the rights of the vendor under the contract. And, McDowell having an equitable interest in the land under the contract, the mortgage from him to Simmons was an equitable mortgage of that equitable interest." This was emphasized by *Fitzhugh v. Maxwell*, 34 Mich. 138, where it was again said that the legal title remained in the vendor as a trust, and that his only equitable claim upon it was by way of security for his debt in the nature of a vendor's lien, which could only be made effective to divest the vendee's equitable title by a sale through proceedings to foreclose the vendor's lien. In *Walker v. Casgrain*, 101 Mich. 608, 60 N. W. 292, it was said: "While complainant holds the legal title, defendant Casgrain is

Yandle, 3 Hayw. (Tenn.) 109; Myrick v. Boyd, 3 Hayw. (Tenn.) 179.

d. For purpose of determining who must bear losses and receive accessions.

The question has also arisen where an unexpected change has taken place in the value of the property during the time elapsing between the execution of the contract and the delivery of the conveyance; in some cases the value of the property has been enhanced, in others, depreciated. And for the purpose of determining who is to bear the loss or receive the gain it has been necessary to determine the ownership of the property.

And in the following cases it was held that the equitable title is in the vendee, and he must stand the loss resulting from the destruction or injury of the property by fire: *Poole v. Adams*, 33 L. J. Ch. N. S. 639, 10 L. T. N. S. 287, 12 Week. Rep. 683; *Johnston v. Jones*, 12 B. Mon. 328; *Marks v. Tichenor*, 85 Ky. 536, 4 S. W. 225; *Snyder v. Murdock*, 51 Mo. 175; *Morgan v. Scott*, 26 Pa. 51; *Dunn v. Yakish*, 10 Okla. 388, 61 Pac. 926.

And hence he is not entitled to deduct from the purchase price the value of a building destroyed by fire after the making of the contract. *McKechnie v. Sterling*, 48 Barb. 330.

And in *Reed v. Lukens*, 44 Pa. 200, 84 Am. Dec. 425, it was held that the purchaser was entitled to the proceeds of a fire insurance policy collected by the vendor.

In *Stent v. Ballis*, 2 P. Wms. 217, *dicta* to the contrary can be found where the Master of the Rolls said: "If I should buy an house, and before such time as by the articles I am to pay for the same the house be burnt down by casualty of fire, I shall not in equity be bound to pay for the house."

There are cases where the question of loss resulting from fire arose in actions at law, and where the court held that it could not apply the equitable doctrine, and hence the loss must fall on the vendor. See *Thompson v. Gould*, 20 Pick. 134; *Powell v. Dayton*, S. & G. R. R. Co. 12 Or. 488, 8 Pac. 544, *infra*, VI.

In other cases, where it appeared from the contract of sale that the parties intended that the vendor should bear the loss, the vendee was relieved from liability. See *Combs v. Fisher*, 3 Bibb, 51; *Goddard v. Bebout*, 40 Ind. 115; *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65, *infra*, II.

As to time when equitable title vests so as to cast the loss on the vendee, see *Dunn v. Yakish*, 10 Okla. 388, 61 Pac. 926; *Marks v. Tichenor*, 85 Ky. 536, 4 S. W. 225; *Gould v. Murch*, 70 57 L. R. A.

Me. 288, 35 Am. Rep. 325; Lombard v. Chicago Sinal Congregation, 64 Ill. 477, *infra*, IV. a; *Johnston v. Jones*, 12 B. Mon. 328, *infra*, IV. b.

As to rights of parties under option of purchase where the option had not been exercised at time of fire, see *infra*, IV. c.

By reason of the vendee's equitable title he must stand the loss of rents and profits resulting from the tenant's quitting the premises, and he will not be relieved from the operation of this general rule by the fact that the tenant quitted the premises under a false construction of an agreement made between them. *Harford v. Purrier*, 1 Madd. 532.

In *White v. Nutts*, 1 P. Wms. 62, it was held that where one having an estate for two lives, in certain premises, articles to convey them, a purchaser takes an equitable title from the time of the sealing of the articles, and if between that time and the making of the conveyance, one of the lives ends, the loss must fall on the purchaser.

In *Hellreigel v. Manning*, 97 N. Y. 56, it was held that a party agreeing to sell and convey premises at a future day does not owe the vendee any duty to keep them in repair, or to guard against decay which is due to time and ordinary use.

In *Siter's Appeal*, 26 Pa. 180, the property had been sold under a judgment entered against the vendor prior to the execution of the contract, and after paying the amount of the judgment from the proceeds a surplus existed in excess of the amount due the vendor on the purchase price, and it was held that the purchaser was entitled to the excess.

II. Effect of provisions of contract.

The doctrine of equitable conversion will not be applied where it is apparent from the contract that such was not the intention of the parties. *Re Graves*, 15 Ir. Ch. Rep. 357; *Emuss v. Smith*, 2 De G. & S. 723.

And where the contract made no provision for the vendee's taking possession, and provided that, unless carried out at the time named, it should become null and void, and the vendee's possession was not under the contract, but under a prior lease existing between him and the vendor,—the court held that it was apparent that the parties did not intend that the contract should work an equitable conversion, but that the vendee's possession should be under the lease, which estate would continue until the performance of the contract of sale. *Bostwick v. Frankfield*, 74 N. Y. 207.

The loss resulting from the burning of a building must fall on the vendor where he cov-

the owner in equity. The claim of the vendor is but an ordinary money debt, secured by the contract." See also *Corey v. Smalley*, 106 Mich. 260, 64 N. W. 13; *O'Brien v. Evans*, 107 Mich. 623, 65 N. W. 571. Many authorities are cited by counsel for the complainant in support of their contention that a vendor's interest is not real estate, and does not pass to the heir, but is personalty, and goes to the administrator. The rule is so stated in 11 Am. & Eng. Enc. Law, 2d ed. p. 843, where the authorities are collected representing the states of Arkansas, Indiana, Massachusetts, New York, Pennsylvania, Illinois, and Wisconsin. See also *Warvelle, Vendors*, 189, and authorities cited; *Sugden, Vendors*, *177. In *Scott v. Davis*, 141 Mo. 213, 42 S. W. 717, the court quotes with approval from 22 Am. & Eng. Enc. Law, p. 1065, the following language, viz.: "The personal representative of the vendor is generally the proper party to enforce specific performance where the pur-

chase money is unpaid, after the death of the vendor, although, if a conveyance has to be made, the vendor's heirs or devisees may also be necessary parties,"—citing Pom. Spec. Perf. of Contracts, § 49; Fry, Spec. Perf. of Contracts, § 515; *Perry v. Roberts*, 23 Mo. 221; *Leeper v. Lyon*, 68 Mo. 216; *Butler v. Rockwell*, 14 Colo. 125, 23 Pac. 462; *Hill v. Proctor*, 10 W. Va. 59; *Angell v. Steere*, 16 R. I. 200, 14 Atl. 81; *Potter v. Ellice*, 48 N. Y. 323. As the foregoing authorities indicate that the vendor's title is only a trust coupled with an interest by way of security for a debt, which is personalty, so the following (cited by counsel) are in harmony in holding that the vendee is the *cestui que trust* as to the legal title, and that his interest is real property, and descends to his heirs (in equity), who are the proper ones to file a bill for specific performance. *Champion v. Brown*, 6 Johns. Ch. 400, 10 Am. Dec. 343; Pom. Spec. Perf. of Contracts, § 494; *Lavender v. Abbott*, 30

enanted in the contract to deliver the premises in the same condition in which they were at the time of the execution of the contract. *Combs v. Fisher*, 3 Bibb, 51; *Goddard v. Bebout*, 40 Ind. 115.

And such loss must fall on the vendor where it was apparent from the contract that the parties contemplated the transfer of the buildings as constituting an important and essential part of the transaction. *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65.

Where the contract provides that the purchase money shall be paid to the heirs of the vendor after his death his interest constitutes realty, and descends to his heirs. *Stevens v. Flannagan*, 131 Ind. 122, 30 N. E. 898.

As to provisions of contract showing intention to postpone the equitable conversion until the performance of conditions of sale, see *infra*, IV.

III. The contract must be one which equity will specifically enforce.

The contract will not operate as an equitable conversion unless it is one the specific performance of which can be enforced. *Atty. Gen. v. Day*, 1 Ves. Sr. 218; *Edwards v. West*, L. R. 7 Ch. Div. 858, 47 L. J. Ch. N. S. 463, 38 L. T. N. S. 481, 26 Week. Rep. 507; *Haynes v. Haynes*, 1 Drew & S. 426, 7 Jur. N. S. 595, 30 L. J. Ch. N. S. 578, 9 Week. Rep. 497, 4 L. T. N. S. 199; *Mills v. Harris*, 104 N. C. 626, 10 S. E. 704.

The same rule was laid down in the following cases, where the contract was so defective that it could not be enforced: *Rose v. Cunynghame*, 10 Ves. Jr. 554; *Blair v. Snodgrass*, *Sneed* (Ky.) 1.

And also in the following cases, where the vendor's title was defective: *Green v. Smith*, 1 Atk. 572; *Re Thomas*, L. R. 34 Ch. Div. 166, 56 L. J. Ch. N. S. 9, 55 L. T. N. S. 629.

A contract for the sale of lands does not work an equitable conversion so as to cast on the vendee the loss resulting from the burning of a building located on the premises, if the vendor's title is so defective that he cannot enforce a specific performance. *Mackey v. Bowles*, 98 Ga. 730, 25 S. E. 834; *Calhoun v. Belden*, 3 Bush, 675; *Christian v. Cabell*, 22 Gratt. 82.

Though the rule does not apply where the vendee has accepted the title. *Palne v. Melier*, 6 Ves. Jr. 349.

Where a contract could not have been specifically enforced against the vendee at the 57 L. R. A.

time of his death, his interest was not realty, and did not descend to his heirs. *Broome v. Monck*, 10 Ves. Jr. 597.

In *Frayne v. Taylor*, 10 Jur. N. S. 119, 33 L. J. Ch. N. S. 228, 12 Week. Rep. 287, where the owner of land, after entering into a verbal contract for its sale, died intestate, and his heir executed a conveyance to the purchaser, and rendered his account as administrator in which he included the proceeds of the sale as part of the personalty, the court held that while the contract, being one which could not have been specifically enforced, did not work a conversion; yet the conduct of the heir in performing the contract and treating the proceeds as personalty amounted to an adoption of the contract by him, and the proceeds must be regarded as personalty.

Where a contract to convey land is without consideration it does not work an equitable conversion of the land; as a contract to work such a conversion, must be one which equity would have enforced. *Wittingham v. Lightbipe*, 46 N. J. Eq. 429, 19 Atl. 611.

In *Shaw v. Wilkins*, 8 Humph. 647, 49 Am. Dec. 692, where the vendor was without title, and the purchaser had commenced an action against him to recover damages, it was held, on the death of the purchaser, that the action could be reviewed by his personal representatives, as the equitable title had not passed to the purchaser.

And in *Lunsford v. Jarrett*, 11 Lea, 192, it was held that the equitable title did not pass to the purchaser so as to deprive the vendor's widow of dower in the premises, where, subsequent to the vendor's death, the contract was rescinded on account of a defect in his title.

In *Kinney v. Hiccox*, 24 Neb. 167, 38 N. W. 816, where the contract was conditional that the vendor should remove certain encumbrances then existing against the property, the court held that until that was done he was not in a position to convey nor to enforce the contract; and if a portion of the property was destroyed by fire before such conditions had been complied with, the loss must fall on him.

To bring the rule into operation, the cause which renders the contract unenforceable must apply to the contract itself, and if it is enforceable at the time of the death of the vendor his interest descends to his next of kin, and not to his heirs at law, even though the purchaser may have subsequently, by his laches, lost his

Ark. 172; *Palmer v. Morrison*, 104 N. Y. 132, 10 N. E. 144; *Bender v. Luckenbach*, 162 Pa. 22, 29 Atl. 295, 296; *Sutter v. Ling*, 25 Pa. 466; *Miller v. Miller*, 25 N. J. Eq. 354; *Skinner v. Newberry*, 51 Ill. 203; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Smith v. Gage*, 41 Barb. 60; *Potter v. Ellice*, 48 N. Y. 323; *Denham v. Cornell*, 67 N. Y. 556; *Compo v. Jackson Iron Co.* 49 Mich. 44, 12 N. W. 901; *House v. Dexter*, 9 Mich. 246; *Baxter v. Robinson*, 11 Mich. 522; *Gustin v. Union School Dist.* 94 Mich. 502, 54 N. W. 156. It is clear that upon the death of the vendor the chose in action, with the security represented by the contract, became a part of the personal assets of the estate, and the interest of A. Douglas Keith therein was prospective merely, and contingent upon the course of administration. If the legal title descended to him, he held it merely by a tenure analogous to that of a "dry trustee," for such person as should become entitled to it by payment of the contract price, or by purchase upon fore-

closure of the lien; and he had no interest that could be acquired by sale on execution. *Battle v. Petway*, 27 N. C. (5 Ired. L.) 576, 44 Am. Dec. 59; *Boardman v. Willard*, 73 Iowa, 20, 34 N. W. 487; *Robinson v. Chapline*, 9 Iowa, 91; *Hollingsworth v. Trueblood*, 59 Ind. 542; *Cox v. Arnsmann*, 76 Ind. 210; *Bostick v. Keiser*, 4 J. J. Marsh. 597, 20 Am. Dec. 237; *Williams v. Fullerton*, 20 Vt. 346; *Townsend v. Barber*, 27 Vt. 417; *Rankin v. Barcroft*, 114 Ill. 441, 3 N. E. 97; *Campfield v. Johnson*, 5 N. J. Eq. 245. We are of the opinion that the execution debtor, A. Douglas Keith, had no interest in the land subject to sale on execution, and that the purchaser took no title by his purchase at such sale.

The decree of the Circuit Court will be reversed, and complainant may take a decree in accordance with the prayer of his bill, with costs of both courts.

The other Justices concur.

right to compel a specific performance. *Curre v. Bowyer*, 5 Beav. 8, note.

So, in *Keep v. Miller*, 42 N. J. Eq. 100, 6 Atl. 405, the court had refused to enforce a specific performance of the contract on the ground that the heirs of the vendor, by their laches, had delayed performance for such a time as to render it inequitable to compel the vendee to take the property, its value having fallen in the meantime. The widow then brought an action to have the property resold and the proceeds distributed as personality. The court held that, the contract having been valid and originally enforceable in equity against the vendee, it worked a conversion into personality, and as between the next of kin and the heirs at law the effect of such a conversion could not be defeated to the injury of the next of kin by the laches of the heir which rendered the contract unenforceable.

IV. Time at which conversion takes place.

a. In general.

The purchaser takes an equitable title at the time of the execution of the contract, and may make a valid deed at any time thereafter. *Jackson ex dem. New Loan Officers v. Bull*, 1 Johns. Cas. 81.

And in *Snyder v. Murdock*, 51 Mo. 175, *supra*, the vendee's title was held to date from the time of the execution of the bond for title.

Where a tenant by curtesy executed a contract to convey land, the fee of which was in his infant children, and the contract was subsequently confirmed by the children on their arriving at age, it was held that the vendee took an equitable title which related back to the time of the execution of the contract. *Hall v. Jones*, 21 Md. 439.

In *Richter v. Sellin*, 8 Serg. & R. 425, it was held that the purchaser takes an equitable title from the date of the execution of the contract, and a judgment entered against him subsequent to the making of the contract and prior to the delivery of the deed is a lien on the premises, his title not constituting after-acquired property within the Pennsylvania rule that a judgment is not a lien on after-acquired property.

In *Williams v. Haddock*, 145 N. Y. 144, 39 N. E. 825, where it was held that a contract for the sale of land worked an equitable conversion from the date of its execution, and the vendor's interest passed to his personal representative.

representatives on his death, although it contained conditions precedent to the execution of a deed of conveyance, and also contained a provision giving the vendor liberty to refuse to consummate the sale if the provisions precedent were not performed, the court distinguished the case from that of *Bostwick v. Frankfield*, 74 N. Y. 207, *supra*, by saying that that case showed beyond any doubt that the intention of the parties was that the contract should not work a conversion; and that it might be said in most contracts for the sale of real estate that the performance of some act on the part of the vendee is to precede the conveyance by the vendor, and hence such performance might be a condition precedent to such conveyance; that these contracts generally provided for the payment of purchase money or some portion thereof, and upon the payment of the money the vendor is then to make the conveyance. But that provisions of this nature, found in contracts for the sale of real estate, do not, prior to any default, alter this general rule in regard to the equitable conversion of the realty into personality, so far as to prevent the ordinary result flowing from such conversion; though the court said that after the happening of the default in the performance of conditions precedent a very different case is made.

The doctrine that the vendee takes an equitable title, the vendor holding the legal title in trust for the vendee from the date of the execution of the contract, is not affected by the fact that the contract prescribes a later date for the execution of the conveyance. *Atcherley v. Veron*, 10 Mod. 518.

This doctrine is also applied although the money is not paid at the time of the execution of the contract. *Hampson v. Edelen*, 2 Harr. & J. 64, 3 Am. Dec. 530; *Siter's Appeal*, 28 Pa. 180; *Wehn v. Fall*, 55 Neb. 547, 76 N. W. 13.

In *Siter's Appeal*, 28 Pa. 180, where it was held that the purchaser takes an equitable title, even though the purchase money has not been paid, the premises had been sold under a judgment entered against the vendor prior to the execution of the contract. The amount realized on the sale exceeded the purchase price, and it was held that the purchaser was entitled to the surplus.

In *Dunn v. Yakish*, 10 Okla. 388, 61 Pac. 926, the contract stated that the vendor "has this day sold and agreed to convey" to the purchaser

the land involved, but it provided that possession was not to be given or the deed executed until a later date. The court held that the equitable title passed to the purchaser at the time of the execution of the contract, and he must stand the loss resulting from fire.

And in *Marks v. Tichenor*, 85 Ky. 536, 4 S. W. 225, it was held that a provision in a contract for sale whereby the vendor agreed to paint the house and deliver possession at a designated day did not show an intention to postpone the vesting of the equitable title, and the vendee must stand the loss resulting from the destruction of the building by fire.

But in *Gould v. Murch*, 70 Me. 288, 35 Am. Rep. 325, where the vendor agreed to convey at a future date on payment of the purchase money, it was held that the equitable title did not pass until such future date, and the vendor must bear the loss resulting from fire.

In *Douglas County v. Union P. R. Co.* 5 Kan. 615, the question involved was whether the railroad company, having made a conditional purchase of land from the government and Indians, had acquired an equitable title so as to make it subject to taxation. The contract provided that the purchaser was not to receive a deed until the conditions were performed. One of the conditions was that the railroad company should construct 25 miles of its line within a stated period. The court held that the land was not taxable, as it was the evident intention of the vendor that the title should not pass until the conditions were performed, and that the construction of the road within the stated time was a substantial consideration for the sale, and that time was of the essence of the contract. The court also stated that a purchaser does not take an equitable title until the conditions have been so far performed that the land cannot be forfeited.

This latter statement of the court is not in accord with the weight of authority, and the case must be considered as limited in its effect to the peculiar conditions named in the contract.

And in *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477, where the contract contained a provision making it optional with the vendor, in case of a defect in the title, to return the earnest money and declare the agreement canceled, or to make the title good, and at the time of the destruction of a portion of the premises by fire legal objection had been made to the title, and the purchaser had not received notice of the vendor's election to complete the title,—the court held that the equitable title had not passed to the purchaser, and that the loss must fall on the vendor.

And in *Flower v. Cruikshank*, 77 Iowa, 110, 41 N. W. 587, where the owner of land entered into an agreement with his daughter and her husband by which they were to occupy and cultivate his farm during his life and support him from the proceeds thereof, and that, in consideration of such services, he was to give his daughter an undivided one-half interest in the place, the court held that the daughter did not take an equitable interest upon the making of the contract, but would be entitled to receive that interest only when she and her husband should have performed their undertakings under it.

And in *Walters v. Walters*, 132 Ill. 477, 23 N. E. 1120, where a father entered into a contract with his son by which the son was to have a home on the father's farm and support therefrom for himself and family during his father's life, and was to have the farm at the death of his father, in consideration of his staying on the farm and cultivating it, and supporting his father, and paying a stated sum to his 57 L. R. A.

brothers at his father's death, it was held on the death of the son prior to that of the father that he did not take an equitable title to the farm, as he had not performed his part of the contract.

And in *Smith v. Jones*, 21 Utah, 270, 60 Pac. 1104, the contract was for the sale of certain mining property, and it provided for a conveyance upon the payment of the purchase money, and contained a further provision that the purchasers, who are spoken of as the parties of the second part, should not sell their interest until the contract was fully satisfied. The purchasers never performed, and subsequently abandoned the contract. The court held that they would not take an equitable title until the purchase price was fully paid, and hence the vendor was entitled to a judgment quieting his title.

All of the above decisions which hold that the equitable title does not pass until the conditions named in the contract are fully performed rest upon the construction of the particular contract involved, and merely hold that the rule that the conversion takes place at the time of the execution of the contract shall not apply so as to overrule the apparent intention of the parties.

b. *Effect of vendee's failure to take possession.*

In *Johnston v. Jones*, 12 B. Mon. 328, where, under the terms of the contract, the vendor and vendee were to have joint possession until a specified date, the building was destroyed by fire during such joint possession, and it was held that the equitable title was in the purchaser, and he must bear the loss.

In *Marks v. Tichenor*, 85 Ky. 536, 4 S. W. 225, it was held that the equitable title passed to the vendee, although he had not taken possession, and that he must bear the loss resulting from fire.

And in *Rangler's Appeal*, 3 Pa. St. 377, it was held that where the vendor died at a date prior to that fixed by the contract for the vendee to take possession the vendor's interest constituted personality.

In *Harris v. King*, 16 Ark. 126, where it was held that the vendee took an equitable title, he had not been in possession.

The equitable title was vested in the vendee at the time of the execution of a contract where it authorized him to take possession immediately, although he did not at that time take possession, and did not pay the purchase money, which under the contract was payable on demand. *McKee v. Sterling*, 48 Barb. 330.

Under a contract reciting that "the vendor has this day sold to the vendee," the purchaser took an equitable title at the time of its execution, though by its terms possession was not to be given until a later date, and the purchase money was not to be paid until that time; and the loss resulting from the burning of a building between the time of the execution of the contract and the surrendering of possession to the purchaser falls on the purchaser. *Brewer v. Herbert*, 30 Md. 301, 98 Am. Dec. 582.

In *Marvel v. Ortlip*, 3 Del. Ch. 9, the contract did not authorize the purchaser to take possession, and, although the court held that, in the absence of a provision to that effect, the purchaser was not entitled to possession, it said that he took an equitable title.

But in *Phinix v. Guernsey*, 111 Ga. 346, 50 L. R. A. 680, 38 S. E. 790, it was held that the rule that the vendee takes an equitable title, and will stand the loss occurring from the burning of a building located on the land involved, did not apply where the vendee had not

gone into possession prior to the fire, and the vendors were not, prior to that occurrence, in a position where they could convey a good title to the vendee. The court, in deciding this case, did not pass separately on the two grounds of its decision, and it cannot be told how much weight they attached to the fact that the vendee had not taken possession, and therefore the case cannot be considered an authority against the proposition sustained by the preceding cases, as the inability of the vendor to convey a good title was sufficient to have prevented the equitable ownership from passing to the vendee. See *supra*, III.

c. Optional contracts.

Where the payment of the purchase money is optional, and the vendor agrees to convey if the purchase money is paid in a limited time, the contract constitutes an option of purchase, and an equitable title does not vest until the option is exercised, and it must be exercised within the limit fixed by the terms of the agreement, as time is of the essence of the contract. *Stembridge v. Stembridge*, 87 Ky. 91, 7 S. W. 611.

And where the owner of lands covenants with another that by making certain payments within a period named he may have an equal interest in the lands, and the latter does not agree to purchase and never makes a payment, he does not take an equitable title. *Richardson v. Hardwick*, 106 U. S. 252, 27 L. ed. 145, 1 Sup. Ct. Rep. 213.

An option to purchase real estate does not convert it into personality until the option has been exercised. *Ex parte Hardy*, 30 Beav. 206.

And until the lessee exercises the option of purchase contained in his lease, he has no equitable interest which can be reached by a judgment against him. *Bras v. Sheffield*, 49 Kan. 702, 31 Pac. 308.

In *Lawes v. Bennett*, 1 Cox, Ch. Cas. 167, it was held that where the lessee of land under a lease containing an option to purchase at any time during the term of the lease exercises such option after the death of the lessor, it works an equitable conversion which relates back to the date of the execution of the lease, and the lessor's interest goes to his next of kin, and not to his heirs at law.

This question again arose in *Townley v. Bedwell*, 14 Ves. Jr. 590, where the Lord Chancellor followed *Lawes v. Bennett*, 1 Cox, Ch. Cas. 167, *supra*, though he admitted that a great deal might be urged against it, but said that where there is a decision precisely in point it is better to follow it.

The *Lawes Case* was again followed in *Collingwood v. Row*, 28 L. J. Ch. N. S. 649, 3 Jur. N. S. 785, where precisely the same question arose. *Kindersley, V. C.*, saying that if the question were *res integra* he might entertain doubts upon the subject, but that, finding the question decided by so great a judge as Lord Kindersley, and his decision followed by Lord Eldon, in *Townley v. Bedwell*, 14 Ves. Jr. 590, *supra*, he was bound to follow it.

In *Weeding v. Weeding*, 1 Johns. & H. 424, where a testator, after making his will, executed a lease of a portion of the demised premises containing an option to purchase, which the lessee exercised after the testator's death, the court held that the case could not be distinguished from the *Lawes Case*, and followed it.

Lawes v. Bennett, 1 Cox, Ch. Cas. 167 was again followed in *Isaacs v. Reginald* [1894] 3 Ch. 506, where the lessor died intestate and the lease made the option to purchase exercisable only after the death of the vendor. The 57 L. R. A.

court, in referring to *Lawes v. Bennett*, said: "It may be open to question whether [it] . . . could not have been decided otherwise than it was, but the question, decided nearly a century ago, has stood the test of time, and stands as a landmark upon this subject."

In *Re Crofton*, 1 Ir. Eq. Rep. 204, where there had been a lease for lives renewable forever, and containing a covenant that if the lessee should at any time pay a stated sum he should hold the premises the remainder of the term free from any rent whatsoever, it was held that upon his exercising such option after the death of the lessor the sum paid by him would constitute personality, and go to the vendor's personal representatives.

The Master of the Rolls, in rendering this decision, followed the case of *Lawes v. Bennett*, 1 Cox, Ch. Cas. 167, without comment or discussion of the principle involved.

In *Re Graves*, 15 Ir. Ch. Rep. 357, *infra*, the court expressed a doubt as to the correctness of the decision in the above case, saying that no English case establishes such a proposition, and it distinguished the case from *Lawes v. Bennett*, 1 Cox, Ch. Cas. 167, and the cases following that one, upon the ground that the option in those cases was to be exercised within a few years, while the option in the *Crofton Case* might not be exercised for several centuries, and if exercised at that remote time the purchase money would, according to the decision, become part of the personal estate of a person dying several hundred years before the payment.

But in *Re Graves*, 15 Ir. Ch. Rep. 357, where the lease provided that the purchase money was to be paid to the person who should be the owner of the estate or the rent at the time of the option, the court for this reason distinguished the case from that of *Lawes v. Bennett*, 1 Cox, Ch. Cas. 167, and held that the lessor's interest—that is, the purchase money—passed to his heirs at law, he being dead. And it will be seen from this distinction that the case is not in conflict with *Lawes v. Bennett*, but the decision is placed on the construction of the instrument, as, of course, there can be no equitable conversion against the express direction of the vendor.

And in *Einuss v. Smith*, 2 De G. & S. 723, where, after the making of a lease, testator entered into a contract giving another an option to purchase part of the devised property, and subsequently republished his will, the court held that, considering the language of the will and the contract, coupled with the fact of the republication, the exercise of the option after the testator's death did not work an equitable conversion so as to deprive the devisee of the purchase moneys received on the sale of the land under the contract.

And where the lessee exercised, after the death of the lessor, an option to purchase contained in the lease, the court held that the devisee under a devise contained in the lessor's will, expressly devising to him the demised premises, was entitled to the purchase money due under the contract. The court placed this decision upon the express ground that the testator's will showed his intention, and that therefore the case was distinguishable from *Lawes v. Bennett*, 1 Cox, Ch. Cas. 167, of the soundness of which, the court said, it did not mean to suggest the slightest doubt. *Drant v. Vause*, 1 Younge & C. Ch. Cas. 580, 11 L. J. Ch. N. S. 170, 6 Jur. 313.

The doctrine laid down in these cases has been followed in this country in the case of *Newport Waterworks v. Sisson*, 18 R. I. 411, 28 Atl. 336, where it was held that the exercise of the option by the vendee after the death of

the vendor relates back to the date of the execution of the lease, and the vendor's interest does not pass under a devise of the land.

But in *Smith v. Loewenstein*, 50 Ohio St. 346, 34 N. E. 159, it was held that where the lessee exercises an option to purchase after the death of the lessor the conversion takes place at the time that the exercise of the option is declared, and does not relate back to the time of the execution of the lease, and the lessor's interest descends to his heirs, and not to his next of kin. In so holding the court declared that the doctrine of *Lawes v. Bennett*, 1 Cox, Ch. Cas. 167, did not rest upon a firm foundation, and that there were no adjudications by that court in which the doctrine of equitable conversion, as applied to optional contracts, was given a retrospective operation, and also distinguished the *Lawes* Case on the ground that the lease in that case was for but seven years, and therefore likely to be exercised during the life of the lessor; while in the case in hand the lease being given for ninety-nine years with a privilege of a perpetual renewal, and therefore rendering probable the exercise of the option at a time long subsequent to the death of the lessor, it could not be presumed that he intended that a conversion should relate back so as to defeat his heirs at law, who might already be in possession.

The case of *Re Adams*, L. R. 27 Ch. Div. 394, 54 L. J. Ch. N. S. 87, 51 L. T. N. S. 382, 32 Week. Rep. 883, differed from *Lawes v. Bennett*, 1 Cox, Ch. Cas. 167, *supra*, in that the lessee, instead of the lessor, died. And the court held that the exercise of the option by his administrator did not relate back so as to work an equitable conversion; the court saying that in the *Lawes* Case, the owner of the realty having created the option, the contract would, as between his heirs and personal representatives, have a retrospective action, and relate back to the time that he created the option. But, as regards the death of the vendee without exercising the option, his personal representatives could not subsequently exercise it and have such exercise relate back so as to change the character of his estate as it existed at the time of his death.

The same question was involved in the following cases, where it was likewise held that on the death of the lessee without exercising the option of purchase his interest under the contract constituted personality, and passed to his personal representatives: *Sutherland v. Parkins*, 75 Ill. 338; *Gustin v. Union School Dist.* 94 Mich. 502, 54 N. W. 156; *McCormick v. Stephany*, 57 N. J. Eq. 257, 41 Atl. 840.

That the exercise of the option does not relate back to the date of the execution of the contract, so as to operate as an equitable conversion from that date for all purposes, is shown by the case of *Townley v. Bedwell*, 14 Ves. Jr. 590, *supra*, where it was held that, although it worked an equitable conversion so that the lessor's interest was distributable among his next of kin, it did not deprive his heirs of the rents and profits accruing prior to the exercise of such option.

And so, in *Edwards v. West*, L. R. 7 Ch. Div. 858, 28 Week. Rep. 507, 38 L. T. N. S. 481, 47 L. J. Ch. N. S. 463, where there was a lease containing an option to purchase, and before the time for exercising the option the buildings demised were burned, after which the tenant exercised his option to purchase, and claimed the insurance money, the court held against his contention on the ground that the contract could not have been specifically enforced prior to the exercise of the option, and that consequently the equitable conversion could not relate back to a time prior to such exercise of 57 L. R. A.

the option. And the court, in referring to *Lawes v. Bennett*, 1 Cox, Ch. Cas. 167, *supra*, says, that that case had been criticized; and although the court would implicitly follow it in a case between the real and personal representatives of the person who granted the option, it did not feel at liberty to extend it to a case between the vendor and the purchaser.

In *Gilbert v. Port*, 28 Ohio St. 276, the same question arose, and the court there held that the lessee acquired an equitable title at the time he exercised his option, but that it did not relate back so as to entitle him to the insurance money.

But the contrary was held in *People's Street R. Co. v. Spencer*, 156 Pa. 85, 27 Atl. 113.

And in *Williams v. Lilley*, 67 Conn. 50, 37 L. R. A. 150, 34 Atl. 765, where a similar question arose, the court held that the vendee's title related back to the time of the execution of the lease, and entitled him to insurance money collected by the vendor. The court in so deciding said that the provisions of the lease were so exceptional and peculiar that the decision was largely based upon them, and should not be regarded as laying down general principles applicable to all contracts of option. The agreement involved demised to the lessee the upper floors of the building, with a grant to him of the right to purchase all of the premises, the sums paid by him by way of rent to be credited on the purchase price, he to pay all taxes and insurance and to operate the elevator and heat the entire building from the time of the execution of the lease. The provisions, the court said, made the lessee's relation to the premises as lessee subordinate and incidental to his broader relation as an inchoate or initiate purchaser thereof.

And in *Caldwell v. Frazier* (Kan.) 68 Pac. 1076, where the lessee exercised the option after a portion of the property had been destroyed by fire, it was held his title to the property dated from the time of the exercise of the option, and did not relate back to the date of the execution of the lease; and if he took the property he would have to take it in the condition in which it was at the time of his election to take, under the option, and he could not compel the vendor to restore the premises and convey them to him, or to convey them to him with an abatement in price equal in value to the lost improvements.

In *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526, it was held that where one in possession of land under a lease containing an option of purchase exercises the option it relates back to the date of the execution of the lease, as against an intervening purchaser from the vendor.

V. Reconversion.

Where time is of the essence of the contract the purchaser has no title after default. *Petersen v. Davis*, 63 Kan. 672, 66 Pac. 623.

The vendee under a land contract becomes the equitable owner of the land, although he did not pay or tender the purchase price until after the date named in the contract, unless time was of the essence of the contract. *King v. Ruckman*, 21 N. J. Eq. 599.

In *Davis v. Vass*, 47 W. Va. 811, 35 S. E. 826, where the vendee, who was in possession, had defaulted in paying the purchase price and the vendor had subsequently sold the land to the vendee's wife by contract, allowing her the amount that had already been paid by her husband on his contract, it was held that the husband, not having surrendered possession, held the equitable title to the land which was subject to a lien of a judgment which had been entered against him.

But in *Williams v. Haddock*, 145 N. Y. 144, 89 N. E. 825, where the court held that a land contract works a conversion from the date of its execution, although by reason of a condition precedent the legal conveyance was not to be made until the performance of the condition, the court said that a failure to perform the condition would work a reconversion from the date of the default.

And where a purchaser fails to perform the contract on his part, and it is forfeited, the vendor's interest again becomes realty, and his devisee takes it discharged from the equitable rights of the purchaser. *McCarty v. Myers*, 5 Hun, 83.

The vendee's equitable estate which he acquires by his entry under a contract of purchase is defeated by his refusal to comply with the terms of the contract, and he becomes a trespasser, and the vendor may maintain ejectment. *Whittier v. Stege*, 61 Cal. 238.

And in *Thorne v. Hammond*, 46 Cal. 532, where the defendant had been in default for more than two years, and had unqualifiedly refused to perform, it was held that he had lost his equitable title, and could not set up the contract as a defense to an action of ejectment.

Whether or not a purchaser's interest under a land contract constitutes realty so as to descend to his heirs must be determined from the situation of things at the time of his death, for nothing happening subsequently can alter the rights of his real and personal representatives. *Garnett v. Acton*, 28 Beav. 333.

Where the vendor's widow, who is entitled to his personality, surrenders the purchase-money notes to the purchaser in consideration of his transfer of the bond for title to her, she does not thereby work a reconversion so as to entitle the heirs to retain the realty, but she may compel them to convey to her. *Fuller v. Bradley*, 160 Ill. 51, 43 N. E. 732.

A similar question was involved in *Lelper's Appeal*, 85 Pa. 420, 78 Am. Dec. 347, where, after the death of the vendor, the purchaser made default and forfeited the property. It was held that the forfeiture did not work a reconversion, and that the property went to the vendor's personal representatives. This was on the ground that the personal representatives, being entitled to the purchase money, were also entitled to the realty forfeited in lieu of it.

And in *Tate v. Conner*, 17 N. C. (2 Dev. Eq.) 224, it was held that the rescission of the contract by the vendor after the death of the vendee did not work a reconversion so as to entitle the personal representatives of the vendee to recover the purchase money paid by him. The court said that the heir was entitled to the land, and if she could not get that she was entitled to the purchase money in lieu of it.

And in *Young v. Young*, 81 N. C. 91, it was also held that when the contract is rescinded after the death of the vendee the right of action to recover the purchase money paid goes to his heirs.

But in *Lauffer v. Ashley*, 6 Ky. L. Rep. 748, it was held by a divided court that where the vendor rescinds after the death of the vendee the cause of action to recover the purchase money paid by him is in the personal representatives.

And where, under the provisions of the contract, the vendor was authorized to declare it forfeited on the failure of the vendee to pay the purchase price within the stipulated time, and he dies in default, his interest is not realty. *Loddell v. Hayes*, 4 Allen, 187.

Where one holding land as trustee executed a contract of sale which provided that he might

rescind it on the default of the purchaser, a subsequent rescission by him operated as a reconversion of his estate, and the interest of the *cestui que trust*, who had died prior to the rescission, constituted realty. *Lelper v. Irvine*, 26 Pa. 54.

VI. Application of doctrine in actions at law.

Some unsuccessful attempts have been made to apply the doctrine in actions at law in states where the distinctions between law and equity had not at the time been abrogated.

In *Thompson v. Gould*, 20 Pick. 134, where the purchaser brought an action of assumpsit to recover from the vendor the sums paid by him on a contract for the purchase of land upon the ground that a portion of the premises had been destroyed by fire and the consideration had thereby failed, the court held that the plaintiff could recover, and that the loss resulting from the fire must fall on the vendor. In so holding the court said that a different doctrine had been adopted in equity, founded on the fiction that whatever is agreed to be done shall be considered as actually done, but that a court of law could not recognize such doctrine.

A similar question was involved in *Powell v. Dayton, S. & G. R. R. Co.* 12 Or. 488, 8 Pac. 544, where, after the destruction of a portion of the premises, the purchaser refused to perform, and the vendor brought an action at law against him to recover damages for breach of contract. The court held that it could not apply the doctrine of equitable conversion, but must hold that the title was in the vendor at the time of the destruction of the premises, and hence the purchaser was excused at law from performing.

And in *Tenelck v. Flagg*, 29 N. J. L. 25, it was held that the rule in equity that the vendor's interest constitutes personality and passes to his personal representatives will not be applied in courts of law.

In *Hall v. Bray*, 1 N. J. L. 212, it was held that a contract for the sale of land on which the purchase money is not paid during the life of the vendor does not amount, at law, to a revocation of the vendor's will by which the property is devised, though the court said that in equity, perhaps, the contract might be considered as an absolute disposition of the property.

And in *Wright v. Moore*, 21 Wend. 230, it was held that a court of law must act on the legal title only, and consequently the purchaser's equitable title is not a defense to an action of ejectment brought against him by the vendor on his failure to pay the purchase money.

The power of the court to apply the doctrine in actions at law does not seem to have ever been questioned in the jurisdictions where the distinctions between law and equity have been abolished, though, as will appear from the following statement of the cases, the doctrine has been actually applied in such actions.

In *Thompson v. Thompson*, 46 N. C. (1 Jones, L.) 430, *supra*, where it was held that the purchaser takes an equitable title, the question arose on a petition to have dower assigned to the widow of the purchaser.

Jones v. Hollister, 51 Kan. 310, 32 Pac. 1115, *supra*, where it was held that the vendee took an equitable title, was an action of ejectment.

In *Jewett v. Black*, 60 Neb. 173, 82 N. W. 375, *supra*, the action was one of ejectment by the vendor against the vendee, and the defendant set up the contract and asked for a decree enforcing specific performance. The court en-

tertained the defense, though it held against him on the ground of forfeiture.

In *Woodward v. Dean*, 46 Iowa, 499, *supra*, where it was held that a judgment against the vendor was not a lien on his interest, the question arose in garnishment proceedings.

And *Snyder v. Murdock*, 51 Mo. 175, *supra*, where it was held that the purchaser must bear the loss resulting from fire, was an action on the purchase-money notes.

Cochran v. Utter, 15 N. Y. Week. Dig. 570, *supra*, was an action by the vendee to recover bark which he had cut from trees on the premises and which the vendor had sold, and it was held that the title was in the vendee, and he could maintain the action.

In *Catlin v. Robinson*, 2 Watts, 373, *supra*, where it was held that a judgment against the vendee constitutes a lien on his interest, the court said: "These principles have been cast upon us by our want of a court of chancery, and consequent departure from a rule of the common law, by which a judgment and execution operate but upon legal estates."

And *West Hickory Min. Asso. v. Reed*, 80 Pa. 38, *supra*, where it was held that the vendor's interest constitutes personality and may be disposed of by his personal representatives, was an action of debt to recover purchase money.

In *Siter's Appeal*, 26 Pa. 180, *supra*, where it was held that the vendee took an equitable title and was entitled to the surplus realized on a sale under a judgment against the vendor, was a proceeding before an auditor to dispose of the surplus moneys.

Russell's Appeal, 15 Pa. 319, *supra*, was a similar proceeding, and there it was held that an assignment of the contract by the vendee constituted a mortgage of realty, and must be recorded as against subsequent judgment creditors of the vendee.

VII. Conclusion.

Under the familiar doctrine that equity considers as done that which was agreed to be done, a contract for the sale of land operates as an equitable conversion. The vendee takes an equitable title, and his interest under the contract becomes realty; in case of his death before the conveyance is made the title descends to his heirs; he is entitled to all benefits attaching to the property, and must bear all losses, unless the contract shows a contrary intention on the part of the parties; he may execute a valid mortgage or deed of the property; and is entitled to the usual benefits attaching to the ownership of property, subject, however, to the rights of the vendor, who holds

the legal title as security for the payment of the purchase money.

Conversely, the vendor's interest constitutes personality, and on his death is distributable as such. He holds the legal title as trustee for the purchaser and as security for the payment of the purchase money. He cannot give a valid deed or mortgage of the property to one having knowledge of the vendee's equities, though he may transfer his interest under the contract. The decisions are conflicting as to whether a judgment against him constitutes a lien on the property; some hold that it does not constitute a lien, while others hold that it constitutes a lien on his interest in the property which may be sold under the judgment.

The doctrine will not be applied where it is apparent from the contract that the parties intended that it should not operate as an equitable conversion.

Neither will it be applied where the contract is one the specific performance of which cannot be enforced.

The conversion takes place at the time of the execution of the contract, even though the purchaser does not take possession or pay the purchase price; though in some cases, where the decisions were based on the language of the particular contracts, it was held that the equitable title did not pass until the performance of certain conditions.

In cases of leases containing options of purchase it has been established by the English courts that where the lessee exercises the option of purchase after the death of the lessor it relates back to the date of the execution of the lease, and the vendor's interest constitutes personality and is distributable among his next of kin. This rule has been criticised both in this country and England, and the cases in this country are divided on the question.

However, the courts of both countries are united in limiting its operation, and hold that when the lessee dies the subsequent exercise of the option by his personal representatives does not relate back, and his interest goes to his next of kin.

The rule is established by the weight of authority that the failure of performance by the vendee within the stipulated time does not work a reconversion unless time is of the essence of the contract.

In some of the decisions arising in actions at law, the distinction between law and equity has been maintained, and the court has refused to apply the doctrine of equitable conversion. In other jurisdictions, where such distinctions have been abrogated, the doctrine has been applied in proceedings at law, though without having the power of the court to do so actually questioned and passed upon. C. W. P.

MISSOURI SUPREME COURT.

Re Arnot CARTER.

(166 Mo. 604.)

Merely exempting a witness in a criminal case from liability to have his testimony used against himself in case he is subsequently prosecuted for an offense to which it relates is not sufficient to prevent his claiming the protection of a consti-

tutional provision that no person shall be compelled to testify against himself in any criminal case, since the testimony so given may disclose facts upon which a successful prosecution against him may be founded.

(February 4, 1902.)

PETITION for a writ of habeas corpus to procure the discharge of petitioner from

NOTE.—As to statutory exemption from prosecution as a substitute for constitutional exemption from self-incriminating evidence, see *Re Buskett* (Mo.) 14 L. R. A. 407, and *note*; 57 L. R. A.

United States v. James (D. C. N. D. Ill.) 26 L. R. A. 418, and *note*; and *Ex parte Cohen* (Cal.) 26 L. R. A. 423.

the custody of the sheriff of Shannon County, to which he had been committed for contempt in refusing to answer questions propounded to him as a witness. *Petitioner discharged.*

The facts are stated in the opinion.

Mr. James Orchard, for petitioner:

The statute is in violation of § 23, art. 2, of the Constitution of Missouri, and of the 5th Amendment to the Constitution of the United States.

Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *State v. Quarles*, 13 Ark. 307; *State ex rel. Atty. Gen. v. Simmons Hardware Co.* 109 Mo. 118, 15 L. R. A. 676, 18 S. W. 1125; *Re Green*, 86 Mo. App. 216; *Ew parte Buskett*, 106 Mo. 602, 14 L. R. A. 407, 17 S. W. 753.

Sherwood, J., delivered the opinion of the court:

This proceeding has been instituted to test the validity of § 2206, Rev. Stat. 1899, which reads this way: "No person shall be incapacitated or excused from testifying touching any offense committed by another, against any of the provisions relating to gaming, by reason of his having betted or played at any of the prohibited games or gaming devices, but the testimony which may be given by such person shall in no case be used against him." It seems that a prosecution was begun against *W. R. Shuck et al.*, down in Shannon county, for playing "pitch" and "seven-up" for money and drinks. On the trial of that cause, petitioner was sworn as a witness, whereupon the following colloquy ensued between the prosecuting attorney and the witness:

Q. Are you acquainted with *W. R. Shuck*?

A. Yes, sir.

Q. I will ask you— He stands charged here with betting on a game of pitch, also on a game of seven-up, last July some time. I will ask you to state to the jury if you saw them along about that time playing?

A. I must refuse to testify in this case. I am afraid I would incriminate myself.

Q. I will ask you to state to this jury if you did not, some time within a year prior,—some time last July,—if they were not over here at this place, and you didn't see them playing pitch for the drinks?

A. As I told you before, I refuse to testify, on the same grounds.

Your Honor, I insist that the witness answer the questions.

The Court: Answer the question.

A. I refuse to answer the question, because it would lead to evidence which would incriminate myself, or lead to witnesses by whose testimony I would be convicted, and would humiliate and degrade me, and, if I should give evidence concerning the whole case, it would criminate me.

Upon such refusal the court fined the petitioner for contempt, and ordered him into the custody of the sheriff, in whose custody he now is.

57 L. R. A.

On behalf of his constitutional exemption from being required to answer such questions, petitioner contends that he did not have to answer them. The petitioner contends that his confinement is illegal, and in violation of § 23 of article 2 of the Constitution of the state of Missouri, which says "that no person shall be compelled to testify against himself in a criminal case," and that said imprisonment is in violation of that part of the 5th Amendment to the Constitution of the United States which says, "nor shall any person be compelled, in any criminal case, to be a witness against himself."

The rulings of various courts have not been uniform on the question here presented; one court, and perhaps more, holding to the extreme view that only in a criminal case wherein the person sought to be made a witness was also a party defendant in such case did the constitutional prohibition apply. Thus, in New York the Constitution declared that no person shall "be compelled, in any criminal case, to be a witness against himself." Const. art. 1, § 6. And the act there questioned provided that every person offending against the statute should "be a competent witness against any other person so offending," and might be compelled to give evidence before any magistrate or grand jury, or in any court, in the same manner as other persons, "but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying." Laws 1853, chap. 539, § 14. A similar provision was contained in chapter 446 of the Laws of 1857, in § 52. And upon this it was said: "The term 'criminal case,' used in the clause, must be allowed some meaning, and none can be conceived, other than a prosecution for a criminal offense. But it must be a prosecution against him, for what is forbidden is that he should be compelled to be a witness against himself. Now, if he be prosecuted criminally touching the matter about which he has testified upon the trial of another person, the statute makes it impossible that his testimony given on that occasion should be used by the prosecution on the trial. It cannot, therefore, be said that in such criminal case he has been made a witness against himself by force of any compulsion used towards him to procure in the other case testimony which cannot possibly be used in the criminal case against himself." And thereupon it was ruled that, as the witness Hackley was not a party defendant to the prosecution, he was compellable to testify before the grand jury. *People ex rel. Hackley v. Kelly*, 24 N. Y. 74.

In Massachusetts, however, the provision of the Constitution was that no subject shall be "compelled to accuse or furnish evidence against himself." Const. pt. 1, art. 12. The statute bearing on that subject provided: "No person who is called as a witness before the joint special committee on the state police, shall be excused from answering any question or from the production of any paper relating to any

corrupt practice or improper conduct of the state police, forming the subject of inquiry by such committee, on the ground that the answer to such question or the production of such paper may criminate or tend to criminate himself, or to disgrace him, or otherwise render him infamous, or on the ground of privilege; but the testimony of any witness examined before said committee upon the subject aforesaid or any statement made or paper produced by him upon such an examination, shall not be used as evidence against such witness in any civil or criminal proceeding in any court of justice." Stat. 1871, chap. 91. The witness Emery was brought before the joint special committee of the senate and house, and this interrogatory propounded to him: "Have you ever paid any money to any state constable, and do you know of any corrupt practice or improper conduct of the state police? If so, state fully what sums, and to whom you have thus paid money, and also what you know of such corrupt practice and improper conduct." To this he answered: "I decline to answer the . . . question, upon the grounds—First, that the answer thereto will accuse me of an indictable offense; second, that the answer thereto will furnish evidence against me by which I can be convicted of such an offense." For this refusal he was imprisoned. Being brought before Judge Wells on habeas corpus, the case was fully argued, and upon conference with the other judges of the supreme judicial court the opinion delivered by Judge Wells (*Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22) met with the unanimous concurrence of all the judges. In that opinion it is said in regard to the question propounded: "It is apparent that an affirmative answer to the question put to him might tend to show that he had been guilty of an offense, either against the laws relating to the keeping and sale of intoxicating liquors, or under the statute for punishing one who shall corruptly attempt to influence an executive officer by the gift or offer of a bribe (Gen. Stat. chap. 163, § 7)." Regarding the clause quoted from the bill of rights, the opinion says: "By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature instituted for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto in any manner, although not in the course of any pending prosecution. But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against himself as a confession of crime, or an admission of facts tending to prove the commission of an offense by himself, in any prosecution then pending or that might be brought against him therefor, such disclosure would be an accusation of him-

self, within the meaning of the constitutional provision. In the absence of regulation by statute, the protection against such self-accusation is secured by according to the guilty person, when called upon to answer as witness or otherwise, the privilege of then avowing the liability and claiming the exemption, instead of compelling him to answer, and then excluding his admissions so obtained, when afterwards offered in evidence against him. This breach of the constitutional exemption corresponds with the common-law maxim, *Nemo tenetur seipsum accusare*, the interpretation and application of which has always been in accordance with what has been just stated." Referring to the expression "or furnish evidence against himself," the opinion says that this clause must be equally extensive in its application, and "in its interpretation may be presumed to be intended to add something to the significance of that which precedes. Aside from this consideration, and upon the language of the proposition standing by itself, it is a reasonable construction to hold that it protects a person from being compelled to disclose the circumstances of his offense, the sources from which or the means by which evidence of its commission, or of his connection with it, may be obtained or made effectual for his conviction without using his answers as direct admissions against him. For all practical purposes, such disclosures would have the effect to furnish evidence against the party making them. They might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was perpetrated, or even the *corpus delicti* itself. Both the reason upon which the rule is founded, and the terms in which it is expressed, forbid that it should be limited to confessions of guilt, or statements which may be proved in subsequent prosecutions as admissions of facts sought to be established therein." Proceeding, then, to consider the effect of the statute of Massachusetts already quoted, the opinion says: "It follows from the considerations already named that, so far as this statute requires a witness, who may be called, to answer questions and produce papers which may tend to criminate himself, and attempts to take from him the constitutional privilege in respect thereto, it must be entirely ineffectual for that purpose, unless it also relieves him from all liabilities for protection against which the privilege is secured to him by the Constitution. The statute does undertake to secure him against certain of those liabilities, to wit, the use of any disclosures he may make as admissions or direct evidence against him in any civil or criminal proceeding." Further on, the opinion, recurring to the constitutional provision then under consideration, says: "No one can be required to forego an appeal to its protection, unless first secured from future liability, and exposure to be prejudiced, in any criminal proceeding against him, as fully and extensively as he would be secured by

availing himself of the privilege accorded by the Constitution. Under the interpretation already given, this cannot be accomplished so long as he remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate. It is not done, in direct terms, by the statute in question. It is not contended that the statute is capable of an interpretation which will give it that effect; and it is clear that it cannot, and was not intended to, so operate. Failing, then, to furnish to the persons to be examined an exemption equivalent to that contained in the Constitution, or to remove the whole liability against which its provisions were intended to protect them, it fails to deprive them of the right to appeal to the privilege therein secured to them. The result is that, in appealing to his privilege as an exemption from the obligation to answer the inquiries put to him, the petitioner was in the exercise of his constitutional right; and his refusal to answer upon that ground was not, and could not be considered as, disorderly conduct, or a contempt of the authority of the body before which he was called to answer. There being no legal ground to authorize the commitment upon which he is held, he must be discharged therefrom." *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22.

In Virginia the bill of rights of the Constitution of 1870 contained a provision that had existed in that bill of rights ever since June 12, 1776,—that no man can "be compelled to give evidence against himself." Const. art. 1, § 10. And upon this the court of appeals said that it was the purpose of the framers of that clause "to declare, as part of the organic law, that no man should anywhere, before any tribunal, in any proceeding, be compelled to give evidence tending to criminate himself, either in that or any other proceeding," and that the provision could not be confined "only to cases in which a man is called on to give evidence himself in a prosecution pending against him." And thereupon it was ruled that the witness could not be compelled to answer before the grand jury what he knew of a certain duel, because, as he stated, the answer to the question would tend to criminate him. The act of the general assembly thus brought in question made provision as follows: "Every person who may have been the bearer of such challenge or acceptance, or otherwise engaged or concerned in any duel, may be required, in any prosecution against any person but himself, for having fought, or aided or abetted in such duel, to testify as a witness in such prosecution; but any statement made by such person, as such witness, shall not be used against him in any prosecution against himself." Acts 1869-70, chap. 355. The court held that the effect of the statute was to invade the constitutional right of the citizen, and to deprive the witness of his constitutional right to refuse to give evidence tending to criminate himself, without

indemnity, and that the act was therefore, to that extent, unconstitutional and void. It held, further, that, before the constitutional privilege could be taken away by the legislature, there must be absolute indemnity provided; that nothing short of complete amnesty to the witness—an absolute wiping out of the offense as to him, so that he could no longer be prosecuted for it—would furnish that indemnity; that the statute in question did not furnish it, but only provided that the statement made by the witness should not be used against him in a prosecution against himself; that, without using one word of that statement, the attorney for the commonwealth might in many cases, and, in a case like that in hand, inevitably would, be led by the testimony of the witness to means and sources of information which might result in criminating the witness himself; and that this would be to deprive the witness of his privilege, without indemnity. And so the judgment of the hustings court, which ruled to the contrary, was reversed. *Cullen v. Com.* 24 Gratt. 624.

In New Hampshire the clause in the bill of rights is exactly like that of Massachusetts, above mentioned. And in the case of *State v. Nowell*, 58 N. H. 314, Nowell declined to answer about selling liquors as clerk, etc., when questioned by the grand jury, giving the usual reasons for his refusal. The statute in that case had this provision: "No clerk, servant, or agent of any person accused of a violation of this chapter, shall be excused from testifying against his principal, for the reason that he may thereby criminate himself; but no testimony so given by him shall, in any prosecution, be used as evidence, either directly or indirectly, against him, nor shall he be thereafter prosecuted for any offense so disclosed by him." Gen. Stat. chap. 99, § 20. The supreme court, having been moved for an attachment against the recalcitrant witness, said: "The common-law maxim (thus affirmed by the bill of rights) that no one shall be compelled to testify to his own criminality, has been understood to mean, not only that the subject shall not be compelled to disclose his guilt upon a trial of a criminal proceeding against himself, but also that he shall not be required to disclose, on the trial of issues between others, facts that can be used against him as admissions tending to prove his guilt of any crime or offense of which he may then or afterwards be charged, or the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained." But that court further held, in substance and effect, that inasmuch as the statute under review secured the witness against all liability to future prosecution as effectually as if he were wholly innocent, and relieved him from all liabilities on account of the matters which he was compelled to disclose, the witness therefore had, under the statute, all the protection that the common-law right,

adopted by the bill of rights in its common-law sense, gave him, and that, if prosecuted, a plea that he had disclosed the same offense on a lawful accusation against his principal would be a perfect answer to the prosecution against himself, and that consequently he was compellable to testify, and liable to attachment should he fail to do so.

In *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, the court considered the 5th Amendment to the Constitution of the United States, heretofore set forth in connection with and reference to § 860 of the Revised Statutes of the United States, which is the following: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture," and, speaking through Mr. Justice Blatchford ruled: That the meaning of the constitutional provision is not merely that a person shall not be compelled to be a witness against himself, but its object is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime. The protection afforded by § 860 is not coextensive with the constitutional provision. As the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed on constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have, as far as possible, the same interpretation. It is a reasonable construction of the constitutional provision that the witness is protected from being compelled to disclose the circumstances of his offense, or the sources from which or the means by which evidence of its commission, or of his connection with it, may be obtained or made effectual for his conviction without using his answers as direct admissions against him. No statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. And so the petitioner, who had refused to answer an incriminating question in the lower court, was held entitled to his discharge on habeas corpus; § 860, aforesaid, not being regarded as broad in its power of protection as the amendment before referred to, and 57 L. R. A.

therefore constitutionally invalid. And the ruling in *People ex rel. Hackley v. Kelly*, 24 N. Y. 74, that the words "criminal case" mean only a criminal prosecution against the witness himself, was disproved.

Chief Justice Marshall, when engaged in the trial of Aaron Burr (1 Burr's Trial, 244), on the question whether the witness was privileged not to accuse himself, gave utterance to similar views, saying: "If the question be of such description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would incriminate himself, the court can demand no other testimony of the fact. . . . According to their statement [the counsel for the United States], a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable, case, that a witness by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed or is attainable against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws." This ruling by the eminent chief justice was in 1807; the 5th Amendment, among others, having been ratified in 1791.

In the present instance § 2206 of our statutes, now under comment, must be regarded, under the authorities cited (except *Kelly's Case*, 24 N. Y. 74), and for the reasons therein given, as falling under the ban of § 23 of our bill of rights.

We therefore enter an order discharging the petitioner from custody.

All concur.

W. W. HENDERSON, *Appt.*

v.

C. William KOENIG *et al.*, *Respts.*

(.....Mo.....)

1. Where under the statutes a particular city is denominated "a territorial division of the state," treated as a county, and provided with a probate judge the same as other counties, he is a county officer within the meaning of constitutional provisions regulating the compensation of such officers.
2. The probate judge of one county cannot be given a salary and required to account for all fees received, while the judges of all other counties are permitted to retain the fees as their compensation, under a constitutional provision requiring the general assembly, by a law uniform in its operation, to provide for and regulate the fees of all county officers.
3. An amendment of a general law allowing fees to probate judges as compensation for their services, which declares that in all cities of a certain class such judges shall be compensated by a salary, violates a constitutional provision that the general assembly shall not indirectly enact a special or local law by the partial repeal of a general one.
4. A general law can be made applicable to the fixing of the compensation of probate judges throughout the state, so as to bring such legislation within the operation of a constitutional provision forbidding local or special legislation where a general law can be made applicable.

(May 2, 1902.)

APPEAL by plaintiff from a judgment of the St. Louis Circuit Court in favor of defendants in an action brought to enforce plaintiff's right to the fees of his office as judge of the probate court. *Reversed.*

The facts are stated in the opinion of division No. 2, which was delivered by SHERWOOD, J., and was as follows:

1. This case had its origin in these circumstances: Section 34, article 6, of the Constitution of 1875, declares that "the general assembly shall establish in every county a probate court, which shall be a court of record, and consist of one judge who shall be elected," etc.; which section concludes with this proviso: "That until the general assembly shall provide by law for a uniform system of probate courts, the jurisdiction of probate courts heretofore established shall remain as now provided by law." Section 35, *Id.*, still continues the thought of the uniformity of the organization of such courts. In 1877 the legislature (Laws of that year, p. 229), pursuant

For another case in this series as to changing compensation of officers by providing salary in lieu of fees, see *Northern Counties Invest. Trust v. Sears* (Or.) 85 L. R. A. 188.

For constitutional prohibition against changing salary during term of office as affecting fees, see *Gobrecht v. Cincinnati* (Ohio) 23 L. R. A. 609, and *note*.

For a case in this series discussing validity of special statute as to fees of officers, see *Henderson v. State ex rel. Stout* (Ind.) 24 L. R. A. 469.

57 L. R. A.

to the behests of the Constitution as contained in the above sections, established in every county in this state a probate court, and gave such courts uniformity of organization. Section 1 of the act just cited (which was approved April 9, 1877) provides that "a probate court, which shall be a court of record, and consist of one judge, is hereby established in the city of St. Louis, and in every county in this state;" thus treating the city of St. Louis as one of the counties of this state. The concluding section of the act repeals all inconsistent acts, and § 13 of the act provides that "the judge of probate shall receive such fees for his services as now are, or may hereafter be, allowed by law for probate business." The Constitution of 1875 went into effect, according to its terms, on the 30th day of November of that year. The scheme and charter affair took effect on the 22d day of October, 1876, and the legislative session of 1877 was the first held after the Constitution was adopted, and the first after the scheme and charter materialized; and consequently the act of 1877 aforesaid must be regarded as a contemporaneous construction of the meaning of § 34 for otherwise the city of St. Louis, unless treated as one of the counties of this state, would have been left without the pale and purview of § 34, and would not have been entitled to any probate court at all; but this would have balked the provisions of §§ 34 and 35, *supra*, by preventing the establishment of "a uniform system of probate courts." It was not known, of course, at the time the Constitution was framed, whether the scheme and charter would be adopted or not, but it would seem that a modicum of provision would have enabled the framers of the Constitution to have briefly provided for the contingency of the scheme and charter's adoption. But, as there was no provision, so there was no provision. Since the enactment referred to, and other similar ones, the city of St. Louis has been denominated "a territorial division of the state," and treated as a county. *State ex rel. Monahan v. Walton*, 69 Mo., *loc. cit.* 559, and subsequent cases. And in the rules laid down for construction of our statutes it is declared that "wherever the word 'county' is used in any law, general in its character to the whole state, the same shall include the city of St. Louis," etc. 1 Rev. Stat. 1899, §§ 41, 60. This has been the law since 1879. In the Revised Statutes of 1879, § 1186 is but a fac simile of § 13 of the law of 1877, quoted above, as to fees for the services of the probate judge. The same section continued the same when it became § 3407 in the revision of 1889. Rev. Stat. 1889, § 3407. But the legislature passed a statute approved March 20, 1897 (Laws of that year, p. 82), which is as follows:

An Act to Repeal Section 3407 of the Revised Statutes of 1889, and to Enact in Lieu Thereof a New Section, to be Known as Section 3407, Revised Statutes of 1889.
Sec. 1. That section 3407 of the Revised

Statutes of 1889 be and the same is hereby repealed and the following new section enacted in lieu thereof, to read as follows:

"Sec. 3407. [The judge of probate shall receive such fees for his services as are now or may hereafter be allowed by law for probate business.] Provided, that in all cities which now have or may hereafter have a population of three hundred thousand inhabitants or more, the judge of probate shall receive such compensation as now is or may hereafter be provided by law to be paid to judges of the circuit courts in such cities out of the city treasury. Provided further, that this act shall not apply to any judge now in office."

This section is now § 1764, Rev. Stat. 1899, and the bracketed words show the section as originally enacted.

Simultaneously with the passage of section 3407, last aforesaid, a statute, approved also on March 20th (Laws 1897, pp. 82, 83), was enacted, which reads thus:

An Act Providing for the Election of an Officer to be Known as Probate Clerk in Cities Now Having or Which may Hereafter Have a Population of Three Hundred Thousand Inhabitants and Over, Defining His Qualifications and Duties, and Providing for the Collection of Probate Fees and Their Payment into the Treasury of Such Cities, and Authorizing the Municipal Assembly of Such Cities to Provide by Ordinance for the Payment of Such Clerks, and Their Deputies and Assistants, and the Orderly Transaction of Business.

Sec. 1. In all cities having or which may hereafter have a population of three hundred thousand inhabitants and over, there shall be elected at the general election in the year 1898, and every four years thereafter, an officer, to be known as the probate clerk, whose official term shall commence on the first day of January next after election. Said officer shall, before entering upon the discharge of his duties, make and subscribe an oath before the city register of such cities that he will support the Constitution of the United States and of the state of Missouri, and that he will faithfully discharge all the duties of the office of probate clerk; and shall also execute a bond to the city within which he shall be elected, in the penal sum of ten thousand dollars, with two or more solvent sureties, to be approved by the judge of probate of such cities, conditioned for the faithful performance of the duties of the probate clerk, the collection and accounting for all fees allowed the probate judge or probate court of the city within which he shall have been elected, which oath and bond shall be filed in the office of the city register of such cities. The city or any person injured may maintain suit on said bond in like manner as suit may now be maintained on other office bonds.

Sec. 2. In addition to the duty now required by law of the clerk of the probate

court in such cities, it shall be the duty of such clerks to tax and collect all fees and taxable costs allowed by law to the probate judge and probate court and pay the same weekly into the treasury of such cities.

Sec. 4 (3). The municipal assembly in such cities is hereby authorized and empowered to provide by ordinance for the orderly transaction of business between such clerks and the treasurer of such cities, and for the payment of such clerks, deputies, and assistants.

Sec. 3 (4). All acts and parts of acts inconsistent with this act are hereby repealed.

The defendant C. William Koenig is the probate clerk of the city of St. Louis, elected under the act which has just been quoted. The plaintiff was elected judge of the probate court of the city of St. Louis in November, 1898, for a term of four years from the 1st day of January, 1899. He duly qualified and entered upon the discharge of his duties, and since January 1, 1899, has been the incumbent of that office. This suit was instituted in the circuit court of the city of St. Louis to test the constitutionality of the act of the legislature approved March 20, 1897, taking from the judge of said court the fees allowed to probate judges under the general statutes, and requiring the same to be paid into the city treasury, and giving said judge a salary in lieu thereof.

The petition charges that defendant Koenig is collecting the fees allowed by the General Statutes to probate judges, and is about to pay the same to the treasurer of the city of St. Louis, under the acts above set out, which plaintiff alleges are unconstitutional and void. The prayer is that defendant be enjoined from paying such fees into the city treasury, and be required to account to the plaintiff for and pay the same over to him. Each of the defendants filed a separate demurrer to the petition, based on the ground that it stated no facts, etc. The trial court held that the statutes were valid, sustained the demurrers, and entered final judgment for defendants. From that judgment plaintiff has appealed.

Section 33 of article 6 of the Constitution of 1875 provides that "the judges of the supreme, appellate, and circuit courts, and of all other courts of record receiving a salary, shall, at stated times, receive such compensation for their services as is or may be prescribed by law; but it shall not be increased or diminished during the period for which they were elected." Section 12 of article 9 of that instrument commands that "the general assembly shall, by a law uniform in its operation, provide for and regulate the fees of all county officers, and for this purpose may classify the counties by population." And § 8 of article 14 of the same declares that "the compensation or fees of no state, county, or municipal officer shall be increased during his term of office." Placing these various sections of the Constitution thus in juxtaposition, we find that the salary of the judges of the supreme, appellate, and circuit courts, and of all oth-

er courts of record receiving a salary, can neither be increased nor diminished during their terms of office, and that the legislature is commanded to enact a law uniform in its operation, whereby is provided for and regulated the fees of all county officers; and to this end that body is to classify the counties by population. And, further, that neither compensation nor fees of a state, county, or municipal officer can be increased during his term of office. These sections, thus placed in contiguous contrast, draw a clear line of demarcation between those judicial officers who receive a salary for their compensation and those who, for similar services, receive fees. "Salary" is defined to be "a periodical allowance made as compensation to a person for his official or professional services or for his regular work." Stand. Dict. Salary is regarded as a per annum compensation. Bouvier, Law Dict. And to the like effect, see an exhaustive review of the subject in *People ex rel. Van Valkenburg v. Myers*, 25 Abb. N. C. 368, 11 N. Y. Supp. 217. The sections prohibit either increase or diminution in salary during duration of the judicial term of office; but where such office is a nonsalaried one, but compensated by fees, they only permit diminution of such fees. Upon this status of constitutional regulations arises this question: Is the judge of probate a county officer? That a sheriff is a county officer has twice been determined by this court. *State ex rel. Holmes v. Dillon*, 90 Mo. 229, 2 S. W. 417; *State ex rel. Bender v. Spencer*, 91 Mo. 206, 3 S. W. 410. In the former case it was said and ruled that the words "state officer," as used in the Constitution, were intended only to refer to such officers whose official duties and functions are coextensive with the boundaries of the state, and were never intended to include such officers as sheriffs, coroners, county justices, etc., whose functions are confined to their respective counties, and are commonly known as and called county officers; and that the Constitution recognizes a clear distinction between state, county, and township officers. And it has elsewhere been determined that the judge of a county court is a county officer. *Moore v. State*, 5 Sneed, 510; *Saffron v. Ericson*, 3 Coldw. 1. Besides, if the scheme and charter business had never been carried, the probate court would indubitably have remained a county office, and located in a county; and the mere fact that, after the Constitution was adopted, the scheme and charter was also adopted, did not in the least tend to alter the nature, vary the functions, or change the jurisdiction of the probate court then and theretofore located in the city of St. Louis. It still remained a county office, and its judge a county officer. This was evidently the contemporaneous construction placed upon the sections of the Constitution heretofore cited and quoted by the legislature which met in 1877, the first session after the Constitution and the scheme and charter had been adopted. They obeyed the Constitution by establishing a probate court in every county in the state and in the city

of St. Louis, and gave that court the commanded uniformity of organization; and in the concluding section of the act they paved the way for obeying § 12 of article 9 of the Constitution by enacting that "the judge of probate shall receive such fees for his services as now are, or may hereafter be, allowed by law for probate business." At the revising session of 1879 the legislature more fully obeyed § 12 of article 9 of the Constitution by regulating the fees of probate judges, county judges, clerks of circuit courts, county clerks, common pleas courts, sheriffs, coroners, etc., and proceeded to classify by population the different counties of this state, and to regulate the amount of fees such clerks of courts of record should retain; but these were the only county officers the amounts of whose fees as allowed to be retained were thus specified and regulated according to population. Rev. Stat. 1879, §§ 5595 *et seq.* The law thus enacted has continued in force in substance ever since. Rev. Stat. 1889, §§ 4980 *et seq.*; Rev. Stat. 1899, §§ 3236 *et seq.* As just seen, however, the various counties were not classified as to population as to the fees the various judges of probate were allowed to retain. If the judge of probate is to be regarded as a county officer,—and of this there would seem to be no room for doubt,—then the legislature's only proper course of procedure in regard to the fees of judges of probate was that marked out by § 12 of article 9 of the Constitution, by enacting "a law uniform in its operation," and thus "provide for and regulate" the fees of the judges of probate "and for this purpose classify the counties by population."

The Constitution has pointed out the precise and specific method by which county officers are to be paid, which is by fees; and if the legislature desires to classify counties by population, and thus proportion the amounts of fees the various judges of probate may retain according to such ratio, then this must be done by appropriate legislative enactment. It cannot be done by making one or more judges of probate salaried officers, and compel them to account for the fees they may receive, and leave the other judges of probate throughout the whole state unhampered by any such conditions; for this would not be "a law uniform in its operation," and therefore not a compliance with § 12 of article 9. In construing constitutions, the maxim, *Expressio unius est exclusio alterius*, is equally as applicable as to statutory construction. Indeed, the maxim cited seems to be more rigidly applied and enforced when construing constitutions than when construing statutes, and this because the constitution framers are supposed more carefully to measure their words than ordinary legislators. Treating of this subject, Thompson, Ch. J., said: "The expression of one thing in the Constitution is necessarily the exclusion of things not expressed. This I regard as especially true of constitutional provisions declaratory in their nature. The remark of Lord Bacon, that, as exceptions strengthen

the force of a general law, so enumeration weakens as to things not enumerated,' expresses a principle of common law applicable to the Constitution, which is always to be understood in its plain, untechnical sense. *Com. v. Clark*, 7 Watts & S. 127; *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272.. On the same topic Judge Cooley observes: "If directions are given respecting the times or modes of proceeding in which a power shall be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end; especially when, as has been already said, it is but fair to presume that the people in their Constitution have expressed themselves in careful and measured terms corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication." Cooley, *Const. Lim.* 6th ed. pp. 78, 79, 93, 94. Discussing the same subject, Denio, Ch. J., says with his accustomed force: "But the affirmative prescriptions and the general arrangements of the Constitution are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the lawmaking authority as strong as though a negative was expressed in each instance." *People ex rel. Wood v. Draper*, 15 N. Y. 544. See, to the same point, *Citizens' Nat. Bank v. Graham*, 147 Mo., *loc. cit.* 257, 48 S. W. 910; *State v. Hill*, 147 Mo. 63, 47 S. W. 798; *Ex parte Arnold*, 128 Mo. 256, 33 L. R. A. 386, 30 S. W. 768, 1036. For this reason all that portion of § 3407 aforesaid, contained in the proviso, must be held repugnant to § 12 of article 9 of the Constitution, and this ruling, of course, also brings under the ban of the Constitution the act passed on the same day providing for the election of a probate clerk in cities, etc.

2. The next question which propounds itself upon the record is whether the act of March 20, 1897, which takes from the judge of the probate court of the city of St. Louis such fees as are allowed all over the state to probate judges under the general statutes, and causes such fees to be paid into the city treasury, and provides for paying such judge out of the city treasury a salary in lieu thereof, violates that portion of § 53 of article 4 of the Constitution which declares: "Nor shall the general assembly indirectly enact such special or local law by the partial repeal of a general law." This paragraph or clause of § 53, art. 4, is the concluding one of that section, which begins by forbidding the general assembly from passing any local or special law respecting

a variety of subjects, enumerating them, and finally adds to its prohibitions a clause (which immediately precedes the one under present consideration) by declaring: "In all other cases where a general law can be made applicable, no local or special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined, without regard to any legislative assertion on that subject." Under the comprehensive provisions last above quoted, no local or special law can be enacted where a general law can be made applicable; and, as if fearful of some legislative subterfuge which should evade these wholesome prohibitions, the framers of the Constitution gave additional emphasis and energy to their prohibitive idea by ordaining that paragraph which forms the basis of the present inquiry: "Nor shall the general assembly indirectly enact such special or local law by the partial repeal of a general law." Does the act in question do this? Section 3407, as it originally stood in the revision of 1889, provided that "the judge of probate shall receive such fees for his services as now are or may hereafter be allowed by law for probate business." This law, as it thus and then stood, applied to every judge of probate in the state of Missouri. And if the legislature then, without repealing in terms the statute just quoted, had enacted into a law the proviso § 1764 now contains, no one, it seems, could doubt that such additional enactment would have amounted to the partial repeal of a general law, and the consequent enactment of a special or local law; because, in such cases, the partial repugnancy would accomplish the partial repeal. *Potter's Dwarrr. Stat.* 113, 155, and cases cited; *Sutherland, Stat. Constr.* §§ 137, 138, and cases cited. But the case is in no wise altered by reason of the fact that such repeal was in reality accomplished by the pretended and formal amendment by enacting as a part and parcel of § 1764 the proviso aforesaid, which declares the old law intact save in the city of St. Louis, and save in regard to the then incumbent of the office of judge of probate in that city. If such legislation as this can be sustained, then there is neither force nor efficacy in the constitutional prohibition which forbids that the legislature "indirectly enact such special or local law by the partial repeal of a general law." The act in question is local as to the city of St. Louis, and special as to the incumbent of the office of judge of probate. An elaborate and exhaustive discussion of the subject of local or special laws is had by Corliss, Ch. J., of North Dakota, in *Edmonds v. Herbrandson*, reported in 2 N. D. 270, 14 L. R. A., *loc. cit.* 729, 730, 50 N. W. 970. After citing, quoting from, and discussing numerous authorities, the chief justice quotes from *Davis v. Clark*, 106 Pa. 384, where the court said: "It was not then a general act applicable to every part of the commonwealth. It did apply to a great number of counties, but there is no dividing line between a local

and a general statute. It must be one or the other. If it apply to the whole state, it is general. If to a part only, it is local. As a legal principle, it is as effectually local when it applies to sixty-five counties out of the sixty-seven as if it applied to one county only. The exclusion of a single county from the operation of the act makes it local." Having made this quotation, and citing to the same effect *State, Haines, Prosecutor, v. Mullica Twp.* 51 N. J. L. 412, 17 Atl. 941, the learned judge proceeds: "The case of *People ex rel. Clauson v. Newburg & S. Pl. Road Co.* 86 N. Y. 1, is cited as holding a contrary doctrine. We do not so construe that decision. But we would have no hesitation in declaring that doctrine unsound if it adjudged an act to be not special, so far as the constitutional inhibition against special legislation is concerned, because it related to all except two counties in the state, where there was no reason for classification. If an act is not special because it relates to all except a single county in a state, without any reason for the classification, then the legislature can accomplish indirectly what is beyond their power to bring about by direct steps. Whenever it is desired to introduce a new rule as to a single county, a general law can be passed establishing that rule in all the counties, and then another law can be enacted re-establishing the old rule in all counties except the one singled out to be governed by the new rule. The first law would be clearly general, and under what it is claimed is the New York doctrine the second act could not be assailed as special legislation. This would, indeed, be an ingenious mode of neutralizing the constitutional prohibition against special legislation. We would not give it our sanction, however it might be buttressed by authority." The legislature in the case at bar would seem to have pursued substantially the same course as that just above indicated. They first pass a general law, which declares that "the judge of probate shall receive such fees for his services as now are or may hereafter be allowed by law for probate business." Then after that law had been in operation for twenty years it occurred to the legislature to repeal that section and immediately re-enact it, coupled with a proviso that makes that general law applicable to every probate court in the state, except in the city of St. Louis; the only city in the state that can, under the Constitution, have a probate court. It is true that as to mere form this act is not the partial repeal of a general law; but, in reality, that it is such partial repeal, who can doubt? In such cases courts will look at the true drift, meaning, and purpose of the litigated act, and will not permit themselves to be misled or deceived by subterfuging schemes and diaphanous disguises. *Dunne v. Kansas City Cable R. Co.* 131 Mo. loc. cit. 5, 32 S. W. 641. The mere form an act is made to assume will not determine its constitutional character. That will be determined by its operation. *State ex rel. Harris v. Herrmann*, 75 Mo. 340; *State v.*

Julow, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781. And before concluding this paragraph it is well enough to cite some additional instances apropos previous remarks and citations. Thus, in California, it has been ruled that a statute of that state relating only to one county therein was a special law. *Earle v. San Francisco Bd. of Edu.* 55 Cal. 489. In *People ex rel. Lee v. Chautauqua County*, 43 N. Y. 10, 21, it is said: "It must be held, then, from the authorities, also, that an act is local, within the meaning of the Constitution, which in its subjects relates but to a portion of the people of the state, or to their property; and may not, either in its subject, operation, or immediate and necessary results, affect the people of the state, or their property, in general." And in Ohio it has been decided that "the amount of compensation to be attached to a local office is a question in its nature local." *Cricket v. State*, 18 Ohio St. 22; *State ex rel. Atty. Gen. v. First Judicial Dist. C. P. Ct. Judges*, 21 Ohio St. 11. In Illinois it has been held that "a statute which, by its terms, can have application to but one county in the state, although purporting to be a general law applicable to all counties having a certain population, is special legislation." *Devine v. Cook County*, 84 Ill. 590. And a ruling has been made that "a law is local when, instead of relating to and being binding upon all persons, corporations, or institutions to which it may be applicable, within the entire territorial jurisdiction of the lawmaking power, it is limited in its operation to certain districts of such territory, or to certain individual persons or corporations." *Kerrigan v. Force*, 68 N. Y. 381. And an act relating to the fees of a sheriff of a single county has been ruled a local act. *Gaskin v. Meek*, 42 N. Y. 186. And where a statute fixes the compensation of an officer in a particular locality upon a basis entirely different from that of all other persons filling like offices in the state, it is held not a general law, but comes within the constitutional prohibition against special legislation. *Gibbs v. Morgan*, 39 N. J. Eq. 126; *Com. v. McMichael*, 8 Pa. Dist. R. 157. It should, therefore, be ruled that the act in question is invalid because it is the partial repeal of a general law, and local as well as special.

3. The next proposition requiring discussion is that involved in that prohibitory provision of the Constitution heretofore quoted that "in all other cases where a general law can be made applicable no local or special law shall be enacted, and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined, without regard to any legislative assertion on that subject." Section 53, art. 4, Const. In this instance could a general law have been made applicable? The Constitution makes the determination of this question a judicial one. But counsel for defendant city admit that a general law could have been made applicable. The admission, however, is wholly superfluous, since it is very

plain that such a law could have been made applicable; and the best of evidence of this fact is furnished by the general law already quoted, which stood on our statute books for twenty years, relating to every probate judge in the state. *State ex rel. Keenan v. Milwaukee County*, 25 Wis. 339; *State ex rel. Peck v. Riordan*, 24 Wis. 484; *State ex rel. Walsh v. Dousman*, 28 Wis. 541. This court has constantly upheld the prohibition of the Constitution now under consideration, and, obeying its behests, has condemned as local or special all legislation where a general law could have been made applicable. *State v. Granneman*, 132 Mo. loc. cit. 331, 33 S. W. 784; *State v. Gritzner*, 134 Mo. loc. cit. 529, 36 S. W. 39; *State v. Walsh*, 136 Mo. loc. cit. 407, 35 L. R. A. 231, 37 S. W. 1112; *State v. Hill*, 147 Mo. loc. cit. 67, 47 S. W. 798.

4. But the assertion is made that cases have been decided by this court where local or special legislation—that is to say, legislation applicable alone to the city of St. Louis or alone to Kansas City—has been held valid. This is true, but in the decisions in none of those cases was there any expression or ruling which impinged in the slightest degree on the constitutional prohibition against a local or special law being enacted where a general law could have been made applicable. On the contrary, either distinct, or else implied, recognition is constantly given to the idea that, owing to the circumstances and exigencies of the particular case, a general law could not have been made applicable, or else it could not have been made applicable by reason of the fact that the legislation questioned was the result of direct obedience to some specific command of the Constitution. This statement will be found to embrace all the cases decided on this subject. The various decisions on this matter have been very well collated, summarized, and analyzed in the brief of counsel, to which we refer. In this case, however, there is no command of the Constitution requiring the general assembly to regulate respecting the compensation to be awarded the judge of probate of the city of St. Louis. Nor is there any exigency requiring such legislation, and confining its operation, as does the act in question, to the city of St. Louis alone. There are cases where this court has said an act would have been valid applied to St. Louis by name, but this court has never said this of an act where a general law could have been made applicable, but only in cases where it could not. The various commands of the Constitution do not clash with each other. A local or special law can be passed by the legislature, but this cannot be done if the same object can be attained by a general law; and as to whether this can be done is always a judicial question, in investigating which legislative assertion goes for nothing. In other words, and stating the point more briefly, the power to enact a local or special law is altogether exceptional and conditional. If the condition exists, to wit, the inability to make a general law applicable, then the

power exists to enact a local or special law. The condition is the basis of the power; absent the condition, absent the power.

The premisses considered, we hold the petition sufficient, and accordingly reverse the judgment, and remand the cause, with directions to the lower court to proceed in conformity with the views herein expressed. All concur.

Measre. W. M. Williams, Morton Jourdan, and Adiel Sherwood, for appellant:

The act of March 20, 1897, offends the organic law in this, that it is a "local law" "indirectly" enacted "by the partial repeal of a general law."

Mo. Const. § 53, art. 4; *State v. Buchardt*, 144 Mo. 84, 46 S. W. 150; *Cooley*, Const. Lim. 6th ed. 482; *State v. Hill*, 147 Mo. 63, 47 S. W. 798; *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *Lewis v. Webb*, 3 Me. 326; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Calder v. Bull*, 3 Dall. 388, 1 L. ed. 649; *Piquet*, *Appellant*, 5 Pick. 65; *Durham v. Lewiston*, 4 Me. 140; *Budd v. State*, 3 Humph. 483, 39 Am. Dec. 189; *Officer v. Young*, 5 Yerg. 320, 26 Am. Dec. 268; *Vanzant v. Waddel*, 2 Yerg. 200; *Daly v. State*, 13 Lea, 231; *Woodard v. Brien*, 14 Lea, 523; *Hatcher v. State*, 12 Lea, 368.

Will this court permit a plain constitutional provision to be disregarded by a mere mumble of words showing a form of repeal, and then the re-enactment of the law pretendedly repealed with an exception which shows the real purpose of the performance?

Dunne v. Kansas City Cable R. Co. 131 Mo. 5, 32 S. W. 641; *State ex rel. Harris v. Herrmann*, 75 Mo. 340; *State ex rel. Atty. Gen. v. Miller*, 100 Mo. 451, 13 S. W. 677; *State ex inf. Mytton v. Borden*, 164 Mo. 221, 64 S. W. 172.

The act of March 20, 1897, violates § 53, art. 4, Mo. Constitution, in this, that it is a law local with respect to the city of St. Louis, and special with respect to the judge of probate in said city.

Statutes which are restricted in their application to one or more counties or cities, with no provision by which those subsequently attaining the specified number of inhabitants might enjoy the benefits or powers conferred by the act, have been held to fall under the prohibition.

Dunne v. Kansas City Cable R. Co. 131 Mo. 5, 32 S. W. 641; *State ex rel. Reform School v. Jackson County Ct.* 89 Mo. 237, 1 S. W. 307; *Rutherford v. Heddens*, 82 Mo. 388; *State ex rel. Harris v. Herrmann*, 75 Mo. 340; *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 221; *State ex rel. Richards v. Hammer*, 42 N. J. L. 435; *State ex rel. West v. Des Moines*, 96 Iowa, 521, 31 L. R. A. 186, 65 N. W. 818; *State ex rel. Atty. Gen. v. Somers Point*, 52 N. J. L. 32, 6 L. R. A. 57, 18 Atl. 694; *Sewickley School Dist. v. Osborne School Dist.* 6 Pa. Dist. R. 211; *Sutton v. State*, 96 Tenn. 696, 33 L. R. A. 589, 36 S. W. 697; *State v. Hinman*, 65 N. H. 103, 18 Atl. 194; *State v. Pennoyer*, 65 N. H. 113, 5 L. R. A. 709, 18 Atl. 878; *State ex rel. Ran-*

dolph v. Wood, 49 N. J. L. 85, 7 Atl. 286; *Brown v. Haywood*, 4 Heisk 357; *Knopf v. People ex rel. Chicago*, 185 Ill. 20, 57 N. E. 22; *People ex rel. Denoon v. Martin*, 178 Ill. 622, 53 N. E. 309; *State ex inf. Mytton v. Borden*, 164 Mo. 221, 64 S. W. 172; *State ex rel. Atty. Gen. v. Covington*, 29 Ohio St. 102; *Devine v. Cook County*, 84 Ill. 590; *State ex rel. Atty. Gen. v. First Judicial Dist. C. P. Ct. Judges*, 21 Ohio St. 11.

It cannot be doubted that "the amount of compensation to be attached to a local office is a question in its nature local."

Crickel v. State, 18 Ohio St. 22; *State ex rel. Atty. Gen. v. First Judicial Dist. C. P. Ct. Judges*, 21 Ohio St. 11.

An act which by its terms can apply to but one county in the state, although purporting to be a general law applicable to all counties having a certain population, is special legislation.

Devine v. Cook County, 84 Ill. 590; *Nance v. Anderson County*, 60 S. C. 501, 39 S. E. 5.

A law which purports by its terms to be made for the entire state, but which then proceeds by exceptions and provisos to withdraw from its operation all but one or a few persons of a special class of persons, or all but one of a few cities and counties, is in reality a private or local law, and the courts will so declare.

State ex rel. Harris v. Herrmann, 75 Mo. 340; *State, Red Star Line S.S. Co., Prosecutors, v. Jersey City*, 45 N. J. L. 247; *Belleville & I. R. Co. v. Gregory*, 15 Ill. 20, 58 Am. Dec. 589; *Coutieri v. New Brunswick*, 44 N. J. L. 58; *Woodard v. Brien*, 14 Lea, 520; *Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800.

An act relating to the fees of a sheriff of a single county is clearly a local act.

Gaskin v. Meek, 42 N. Y. 186; *Morrison v. Bachert*, 112 Pa. 322, 5 Atl. 739.

A statute made applicable to the city of St. Louis by name may be valid.

There must be some reason growing out of the nature of the regulation, for putting the city of St. Louis in a class by itself. Special acts regulating the practice and proceeding in certain courts in said city and elsewhere, where the same matter could be governed by general laws, have been held invalid.

State v. Kring, 74 Mo. 612; *State v. Buchardt*, 144 Mo. 83, 46 S. W. 150; *State v. Hill*, 147 Mo. 63, 47 S. W. 798; *State v. Thomas*, 138 Mo. 95, 39 S. W. 481; *Ashbrook v. Schaub*, 160 Mo. 107, 60 S. W. 1085; *Campbell's Appeal*, 132 Pa. 257, 7 L. R. A. 193; *Edmonds v. Herbrandson*, 2 N. D. 270, 14 L. R. A. 725, 50 N. W. 970; *Ayars's Appeal*, 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 356; *King v. State*, 87 Tenn. 304, 3 L. R. A. 210, 10 S. W. 509.

To justify such legislation the distinguishing features must be such as to call for and demand a separate rule of statute law.

State ex rel. Atty. Gen. v. Miller, 100 Mo. 451, 13 S. W. 677; *Jersey City Bd. of Edu. v. Lewis* (N. J. Err. & App.) 50 Atl. 346; *Wagner v. Milwaukee County*, 112 Wis. 601, 57 L. R. A.

88 N. W. 577; *State ex inf. Mytton v. Borden*, 164 Mo. 221, 64 S. W. 172.

A statute fixing the compensation of an officer in a particular locality upon a basis entirely different from that of all other persons filling like offices in the state is not a general law, and comes within the constitutional prohibition against special legislation.

Gibbs v. Morgan, 39 N. J. Eq. 126; *Com. v. McMichael*, 8 Pa. Dist. R. 157.

A general law could have been made applicable in this instance, and the best proof thereof is that for twenty years we have had a general law, which the legislature, by the act of March 20, 1897, have attempted by indirection to partially repeal.

State v. Granneman, 132 Mo. 326, 33 S. W. 784; *Durkee v. Janesville*, 28 Wis. 467, 9 Am. Rep. 500; *Shreveport v. Levy*, 26 La. Ann. 671, 21 Am. Rep. 553; *State v. Gritner*, 134 Mo. 512, 36 S. W. 39; *State v. Walsh*, 136 Mo. 400, 35 L. R. A. 231, 37 S. W. 1112; *State v. Higgins*, 51 S. C. 51, 38 L. R. A. 561, 28 S. E. 15; *Conlin v. San Francisco City & County*, 114 Cal. 404, 33 L. R. A. 752, 46 Pac. 279; *State v. Thomas*, 138 Mo. 95, 39 S. W. 481.

A general law having been once enacted, there can no longer be any question whether a general law can be made applicable; and this is true in cases where the determination of the matter is not vested exclusively in the courts as by our Constitution.

State ex rel. Keenan v. Milwaukee County, 25 Wis. 339; *State ex rel. Peck v. Rordan*, 24 Wis. 484; *State ex rel. Walsh v. Dousman*, 28 Wis. 541.

The judge of probate is a county officer within the meaning of the Missouri Constitution, and said Constitution requires a uniform rule in laws regulating fees.

Ex parte Arnold, 128 Mo. 256, 33 L. R. A. 386, 30 S. W. 768, 1036; *State ex rel. St. Louis v. Seibert*, 123 Mo. 424, 24 S. W. 750, 27 S. W. 624; *Heidelberg v. St. Francois County*, 100 Mo. 74, 12 S. W. 914; *Sutherland*, Stat. Constr. §§ 325-328; *Bishop*, Statutory Crimes, 2d ed. § 249; *Barker v. People*, 20 Johns. 457; *Hyde v. State*, 52 Miss. 665; *State ex rel. Ewing v. Francis*, 88 Mo. 557.

This act is one "regulating the affairs of counties, cities," etc., in violation of the second prohibition contained in § 53, art. 4, Mo. Const.

Morrison v. Bachert, 112 Pa. 322, 5 Atl. 739; *Perkins v. Philadelphia*, 156 Pa. 554, 27 Atl. 356; *State ex rel. Harris v. Herrmann*, 75 Mo. 340; *Re Ruan Street*, 132 Pa. 257, 7 L. R. A. 193, 19 Atl. 219; *Scowden's Appeal*, 96 Pa. 422; *Davis v. Clark*, 106 Pa. 377; *McCarthy v. Com. ex rel. Griffiths*, 110 Pa. 246, 2 Atl. 423; *Scranton v. Silkman*, 113 Pa. 191, 6 Atl. 146; *Ayars's Appeal*, 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 356; *York School Dist.'s Appeal*, 169 Pa. 70, 32 Atl. 92; *Com. ex rel. Fertig v. Patton*, 88 Pa. 258; *Philadelphia v. Westminster Cemetery Co.* 162 Pa. 105, 29 Atl. 349; *Weinman v. Wilkinsburg & E. L. Pass. R. Co.* 118 Pa. 192, 12 Atl. 288; *McCarthy v.*

Com. ex rel. Griffiths, 110 Pa. 243, 2 Atl. 423; *Scranton School Dist.'s Appeal*, 113 Pa. 176, 6 Atl. 158.

Messrs. B. Schnurmacher and Charles Claffin Allen, for respondent city:

An act of the legislature must appear to be unconstitutional beyond a reasonable doubt before the courts will pronounce it invalid on that ground. Every presumption is in favor of its validity.

State ex rel. Hawes v. Mason, 153 Mo. 23, 54 S. W. 524; *State ex rel. Fath v. Henderson*, 160 Mo. 190, 60 S. W. 1093; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L. R. A. 280, 45 S. W. 245; *State ex rel. Donham v. Yancy*, 123 Mo. 391, 27 S. W. 380; *Ewing v. Hoblitzelle*, 85 Mo. 64.

The act in question, which limits and fixes the compensation of a probate judge in cities of 300,000 inhabitants and over, is not unconstitutional, but is a valid enactment.

State ex rel. Hawes v. Mason, 153 Mo. 23, 54 S. W. 524; *Kansas City v. Stegmiller*, 151 Mo. 189, 52 S. W. 723; *Spaulding v. Brady*, 128 Mo. 653, 31 S. W. 103; *Kenefick v. St. Louis*, 127 Mo. 1, 29 S. W. 838; *State ex rel. Manning v. Higgins*, 125 Mo. 364, 28

S. W. 638; *State ex rel. Donham v. Yancy*, 123 Mo. 391, 27 S. W. 380; *Ewing v. Hoblitzelle*, 85 Mo. 64; *State ex rel. Lionberger v. Tolle*, 71 Mo. 645; *State ex rel. Monahan v. Walton*, 69 Mo. 556; *State ex rel. Berry v. Shields*, 4 Mo. App. 259; *Conner v. New York*, 5 N. Y. 285.

Mr. Charles W. Bates, also for respondents:

Legislation which carries out an express provision of the Constitution, or is authorized by it, cannot be obnoxious to the constitutional prohibition against local and special legislation.

Spaulding v. Brady, 128 Mo. 653, 31 S. W. 103; *Kenefick v. St. Louis*, 127 Mo. 1, 29 S. W. 838.

Sherwood, J.:

The foregoing opinion, heretofore delivered in division No. 2, is hereby adopted as the opinion of the court in banc.

Burgess, Ch. J., and Robinson, Brace, Marshall, and Gantt, JJ., concur. Valliant, J., absent.

VERMONT SUPREME COURT.

STATE of Vermont
v.

F. D. CADIGAN.

(78 Vt. 245.)

1. A statute requiring partnerships organized under the laws of other states to furnish bonds before doing business in the state will not be construed as applicable to individual nonresidents in determining its constitutionality.
2. The mere organization of a partnership under the laws of another state is not sufficient to justify the imposition of conditions upon its doing business within the state not required of local partnerships.
3. A statute imposing a penalty on agents transacting business within the state for foreign partnerships which have not complied with conditions not required of local partnerships discriminates against such agents in favor of those of local firms so as to be void under the Federal Constitution and those provisions of a state Constitution protecting equal rights and privileges.

(May 17, 1901.)

EXCEPTIONS by defendant to rulings of the Windsor County Court in a proceeding against him for violation of the statutes against acting as agent for an unlicensed foreign partnership which resulted in his conviction. *Sustained.*

The facts are stated in the opinion.

NOTE.—As to infringement of the constitutional immunities and privileges of citizens, see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.)* 14 L. R. A. 579. 57 L. R. A.

Messrs. Dillingham, Huse, & Howland, for defendant:

The law violated discriminates against nonresidents.

No law, whether accidentally or designedly phrased, can accomplish by indirection the violation of a constitutional prohibition. "The court will look at the substance of the legislation, irrespective of its form or pretense."

Guthrie's 14th Amendment, p. 48; *Smyth v. Ames*, 109 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *State v. Duckworth (Idaho)* 39 L. R. A. 365, 51 Pac. 456.

The law violated deprives citizens of other states of the privileges and immunities of citizens in Vermont.

Hamilton in *Federalist*, Nos. 7, 22, 142; Von Holst, *Constitutional History of U. S.*; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Cooley, Const. Lim. p. 397*; *Coryfield v. Coryell*, 4 Wash. C. C. 380, Fed. Cas. No. 3,230.

The purpose of § 2, art. 4, U. S. Const., was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449; *Sprague v. Fletcher*, 69 Vt. 69, 37 L. R. A. 840, 37 Atl. 239; *Bliss's Petition*, 63 N. H. 135; *State v. Lancaster*, 63 N. H. 267; *State ex rel. Hoadley v. Insur-*

ance Comrs. 37 Fla. 564, 33 L. R. A. 288, 20 So. 772.

The extent of the discrimination is not important, and the only question is, Does it exist?

State ex rel. Hoadley v. Insurance Comrs. 37 Fla. 564, 33 L. R. A. 288, 20 So. 772; Guthrie's 14th Amendment, p. 39; *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693.

The police power cannot be invoked to support the law in question, because: (1) It is not within the scope of the police powers; (2) the police power cannot be exercised in violation of the Constitution.

Thorpe v. Rutland & B. R. Co. 27 Vt. 149, 62 Am. Dec. 625; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285.

Mr. Charles O. Tarbell, for the State: To violate the Constitution the burden must be substantial, and such as, in its effect, materially adds to the price of the article sold.

State v. Hoyt, 71 Vt. 59, 42 Atl. 973; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972; *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Hunt v. Fay*, 7 Vt. 170.

Stafford, J., delivered the opinion of the court:

Cadigan is informed against for acting as agent of a partnership organized under the laws of the state of New York, in selling certain municipal bonds here, without said partnership having complied with the statute of this state requiring firms organized under the laws of other states to procure a license from the inspector of finance, to file a bond with him, and to submit to his examination, before conducting such business here. The case was heard below on demurrer to the information, which was held sufficient. The decision depends upon the constitutionality of sections of chapter 175 of the Vermont Statutes, entitled "Loan and Investment Companies," which may be summarized as follows: The 1st section declares that every corporation organized under the laws of this state for the purpose of selling its own choses in action, or of selling, guaranteeing, or negotiating those of other persons or corporations, as investments or as a business, shall be under the supervision of the inspector of finance. Vt. Stat. § 4132. Then follow sections under the division title "Foreign Corporations," but in all these, when the word "corporation" is used, it is supplemented by the words "company or firm;" the phrase, in full, being, "such corporation, company, or firm organized under the laws of another state." No person, it is declared, shall act in this state as agent or representative of such corporation, company, or firm, or sell, offer for sale, or negotiate choses in action owned, issued, negotiated, or guaranteed by it, unless such corporation, company, or firm has filed with the inspector of finance a bond to the state for such an amount as he requires, not more than \$10,000 and not less than \$500, with such sureties or security as

he may approve, conditioned for the making of such returns as may be required, and the payment of all taxes that may be assessed against it, and in all things to comply with the laws of this state, and has submitted itself and its financial condition to an examination by the inspector in such manner as to enable him to make a report thereof, as specified in this chapter, "in case of like corporations in this state." Vt. Stat. § 4133. The inspector is required to notify the state's attorney of violations of this chapter, and such are made punishable by a fine of not less than \$50, nor more than \$1,000. Vt. Stat. § 4134. When it appears to the inspector that such corporation, company, or firm is conducting its affairs in a safe and authorized manner, and has filed the required bond, he shall issue to it a license good until the 1st day of the next January; and, within thirty days of the date of its license, it shall file in his office its certificate stating the names and addresses of all who are to act as its agents in this state, which certificate shall be amended by it in case of any change. Vt. Stat. § 4135. Before it can do business here, it must make the inspector its attorney, upon whom process may be served. Vt. Stat. § 4136. It shall file semiannual reports, under penalty of having its license revoked. Vt. Stat. § 4138. If it conducts its business in an unsafe or unauthorized manner, the inspector shall direct it to desist, and to at once provide for the safety and security of all such business transactions. Vt. Stat. § 4139. If it fails to comply with such order, or to report when requested, or if it appears to the inspector that it is unsafe or inexpedient for it to continue business, he shall revoke its license. Vt. Stat. § 4140. All services and expenses under this chapter shall be approved by the state auditor, and paid by the licensees upon an equitable apportionment to be made by the inspector. Vt. Stat. § 4142.

The respondent, by demurring, admits that he did the thing prohibited by the statute, for no question is raised as to the form or sufficiency of the information, except as hereinafter stated; but he says it was no offense, because he was acting as agent for citizens of New York, who, as such, were entitled to all the privileges and immunities of citizens of Vermont; that citizens of Vermont might lawfully do, by themselves or agent, all that he did in behalf of his principals; consequently it was lawful for him to do the same. The statute is thus challenged as in contravention of U. S. Const. art. 4, § 2: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." It is not claimed that the citizenship of the respondent is of any materiality, under the statute, but that the citizenship of his principals is material; that the statute is aimed at firms whose members are residents of other states; and that it requires of such firms what it does not require of resident firms. It will be observed that the statute

itself says nothing about citizenship or residence. The test is whether the firm was "organized under the laws of another state." It is alleged that the respondent's firm was organized under the laws of New York, but its members may all be citizens of Vermont. On the other hand, if a firm is organized under the laws of Vermont, it is exempt from these requirements, even though all of its members resided in New York. So, looking at the letter only, there is no distinction between citizens of Vermont and citizens of other states. But the respondent, while taking note of this literal reading, says that the law should be tested by its intent and effect, both of which, he thinks, show clearly that it does discriminate against nonresidents. In the first place, he says, the mere fact that a common-law partnership,—and the respondent's firm is not alleged to be anything more,—was organized in some other state, instead of in Vermont, could afford no rational basis for a distinction. It would be no protection for citizens of this state that citizens of other states came here, upon our soil, merely to make their contract of partnership, and then returned to their own states. Nor would the people of Vermont be deprived of any protection by the fact that residents of this state, doing business here, had entered into their partnership under the laws of New York. So, he says, we must look deeper to find the real intent, and that it is made plain by three special provisions of the chapter itself: (1) The requirement that a bond shall be given to secure the payment of taxes, indicating that the members are not within reach, like residents; (2) the requirement that such firms make report as required of "like corporations in this state;" and (3) the condition that they appoint the inspector of finance their attorney, upon whom process may be served,—a thing unnecessary in the case of residents. Moreover, it is said, while there might be such cases as those just now supposed,—citizens of Vermont organizing firms in some other state, and *vice versa*,—they would be very exceptional, and, in the great majority of instances, firms organized under the laws of Vermont would be composed of residents of Vermont, while firms organized under the laws of other states would be composed of residents of such other states. There is some force in these contentions, and, indeed, it is freely conceded by the state's attorney that the act was intended to, and does, operate against nonresidents, really discriminating against firms whose members are not residents of Vermont; and such discrimination is defended as a fair exercise of the police power. Thus, we see, the respondent treats the statute as discriminating against nonresidents, in order to find a basis for his contention that it contravenes the Federal Constitution in the respect referred to; and the state treats it as discriminating against nonresidents, in order to find a basis for its contention that it is a police regulation for the protection of the people of Vermont

against strangers. But we are unable to adopt this construction. The statute itself takes no account of residence. In the very case before us the respondent's principals may be residents of Vermont. The respondent's neighbor, engaged in the same business, may be acting for a firm organized under the laws of this state, every one of whose members may be a resident and citizen of some other state. The test of the respondent's action is whether his principals formed their partnership under the laws of Vermont. If they did, his act was lawful. If they did not, it was unlawful. To the argument that the legislature intended to exclude firms whose members were nonresidents, it is a sufficient answer that, if that is what the legislature meant, that is what the legislature should have said.

The question then arises whether the test laid down is a valid one. Does the bare fact that the partnership was formed under the laws of this state, rather than of some other, afford a rational basis for distinction in determining the lawfulness of its agent's act in doing business for it here? Is the fact that it is organized here any protection to the people of this state? Does the fact that it was organized elsewhere lessen their protection? It is difficult to see how. The laws of Vermont make no requirement of firms organized here to transact this kind of business. The provisions upon that subject relate only to corporations. The agent of a firm organized under the laws of Vermont might lawfully do all that the respondent did. The agent of individuals residing in Vermont, or anywhere else, might lawfully do all that he did. But if such individuals had agreed to act as partners, instead of separately, and made that contract in some other jurisdiction, their agent could not act for them here without committing a crime. The formation of the partnership would not relieve them from individual liability to creditors, nor make the firm a distinct legal entity, like a corporation; yet it would make it a crime for the agent to do for them jointly what he might lawfully have done for them severally. How can it be held either that the statute is invalid as denying to nonresidents the privilege accorded to residents, as the respondent claims, or that it is valid as a police regulation against nonresidents for the protection of the people of Vermont, as the state claims, when, for anything that is alleged in this information, or anything that need be alleged or proved under the statute, all the parties concerned may be residents of Vermont? But suppose them to be resident here; can Vermont thus discriminate between her own people, denying to a class the privilege of transacting business upon such a ground as this? Not if the ground of classification is purely arbitrary and irrational. No state shall "deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const.

Amendment 14, § 1. To deprive one of the right to labor and transact business is to deprive him of his liberty, and also of his property. To hedge the privilege about with conditions and exactions for one class which do not exist for others is to deny to the former the equal protection of the laws; and when the classification is based upon a distinction wholly fanciful or arbitrary, having no possible reasonable connection with any proper purpose to be served by the enactment, it is unconstitutional and void. The equal protection of the laws means "the protection of equal laws." *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064. Our own bill of rights, in its 1st article, declares "that all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are, enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety;" and in its 4th article, that "every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character . . . conformably to the laws;" and in its 7th article, that the "government is, or ought to be, instituted for the common benefit, protection, and security of the people, . . . and not for the particular emolument or advantage of any single man,

family, or set of men, who are a part only of that community." These are the fundamental principles, not of our state, only, but of Anglo-Saxon government itself, enlarging upon the axiom that when the facts are the same the law is the same, and inspired by the ideal of justice, that the law is no respecter of persons. The law touching classification for purposes of taxation, and what may furnish a reasonable basis therefor, was carefully examined by this court in *State v. Hoyt*, 71 Vt. 59, 42 Atl. 973; and the rule there recognized, which is none the less applicable here, will be found to determine the question before us.

The result is that chapter 175 of the Vermont Statutes discriminates between agents of firms organized under the laws of this state and agents of firms organized under the laws of other states, making the act of the latter unlawful, while the act of the former in the same circumstances would be lawful, and therein contravenes the 1st clause of the 14th Amendment of the Federal Constitution, as well as various provisions of our own bill of rights, securing to all the equal protection of the laws, and must therefore be held, to that extent, unconstitutional and void.

Judgment reversed; demurrer sustained; information adjudged insufficient and quashed; the respondent discharged and let go without day.

GEORGIA SUPREME COURT.

J. B. WRIGHT, *Plff. in Err.*,
v.

J. E. DU BIGNON.
(114 Ga. 765.)

- *1. It is a general rule of law in force in this state that, in the absence of a contract giving him the right so to do, the tenant cannot lawfully remove fixtures annexed to the freehold, which he has placed on leased land. The exception to this rule exists only in the case of trade fixtures. (a) Section 3120 of the Civil Code is construed to refer to trade fixtures. (b) The fixtures sought to be removed in the present case were not trade fixtures.
2. Domestic or ornamental fixtures which a tenant has attached to a dwelling house or the grounds on which the same is located to promote his domestic comfort, and which may be easily severed, and made equally useful to him in another house, may be removed by him during his term. *After* as to such as are substantial additions to the house, or which, if taken away, would be injurious to the freehold.
3. A servant's room, metallic gutters attached to the roof of a house, water pipes laid under the ground by a tenant on

*Headnotes by LITTLE, J.

leased premises become, when constructed and attached, a part of the freehold, and cannot be lawfully disavowed from the land by the tenant against the will of the landlord, even though at the time of their erection the tenant intended to remove them at the expiration of his term.

4. The charge of the trial judge, to which exceptions were taken, as well as the verdict which was rendered, not being in accord with the principles of law announced above, a new trial should have been granted.

(February 7, 1902.)

ERROR to the Superior Court for Glynn County to review a judgment in favor of defendant in an action brought to restrain the removal of certain fixtures. *Reversed*.

The facts are stated in the opinion.

Messrs. Owens Johnson and D. W. Krauss, for plaintiff in error:

The servant's house, the rainwater gutters, and the water piping were permanent fixtures and immovable.

McCall v. Walter, 71 Ga. 290; 2 Taylor, Land. & T. 8th ed. § 547.

Where permanent annexation to the freehold is intended, an article lawfully an-

NOTE.—As to right of tenant to remove fixtures on leased premises, see also, in this series, *Collamore v. Gillis* (Mass.) 5 L. R. A. 150, and *note*; *Friedlander v. Hewitt* (Neb.) 9 L. R. A. 700, and *note*; *Sanitary Dist. v. Cook* (Ill.) 39 L. R. A. 369; and *Bass v. Metropolitan West* 37 L. R. A.

Side Elev. R. Co. (C. C. App. 7th C.) 39 L. R. A. 711.

As to what are fixtures as between landlord and tenant, see cases in *note* to *Overman v. Sasser* (N. C.) 10 L. R. A. on page 723.

nexed becomes a fixture and part of the realty, whether its removal would injure the freehold or not.

8 Am. & Eng. Enc. Law, p. 44; *Morrison v. Berry*, 42 Mich. 389, 36 Am. Rep. 446, 4 N. W. 731; *Tiedeman*, Real Prop. § 6; *Stockwell v. Campbell*, 39 Conn. 362, 12 Am. Rep. 393; *Stockwell v. Marks*, 17 Me. 455, 35 Am. Dec. 266.

Section 3120 of the Code was made up from the headnote in the case of *Youngblood v. Eubank*, 68 Ga. 630. The court, in deciding it, did not consider that it was making any new law.

Carr v. Georgia R. Co. 74 Ga. 73; *Charleston & W. C. R. Co. v. Hughes*, 105 Ga. 23, 30 S. E. 972.

Mr. W. E. Kay, for defendant in error: The ancient rule that restricted the rights of the tenant as to removal of improvements made upon leased premises has been much mitigated, and the harshness of the same practically destroyed.

Wall v. Hinds, 4 Gray, 256, 64 Am. Dec. 64; 13 Am. & Eng. Enc. Law, 2d ed. pp. 639, 647; *Tyler*, Fixtures, ed. 1877, p. 153.

Distinction is always to be drawn between those things which are placed by the owner of the freehold with the intention of permanently remaining, and those things that are temporarily placed by a tenant.

Youngblood v. Eubank, 68 Ga. 630; *McCall v. Walter*, 71 Ga. 287; *Carr v. Georgia R. Co.* 74 Ga. 74; *Cunningham v. Cureton*, 96 Ga. 493, 23 S. E. 420; *Bagley v. Columbus Southern R. Co.* 98 Ga. 626, 34 L. R. A. 286, 25 S. E. 638.

Even if the fixtures are of a character not ordinarily removable by the tenant, yet this is always subject to special agreement between the parties, and a contract allowing the removal will be the law of that particular case.

Tyler, Fixtures, p. 455; 13 Am. & Eng. Enc. Law, 2d ed. p. 655.

Little, J., delivered the opinion of the court:

James B. Wright filed an equitable proceeding in the superior court of Glynn county against John E. Du Bignon, in which he sought to restrain the defendant from removing certain fixtures placed by him on a lot of land which was owned by the plaintiff. It was alleged that the fixtures which the defendant sought to remove were permanent, and such as were attached to the freehold. The defendant, in his answer, admitted that it was his purpose to remove the fixtures, and insisted that he had a right to do so, because he had rented the lot from the plaintiff for a term of years, and the fixtures were in the nature of conveniences to the house which he proposed to occupy as a dwelling for himself and family, and they had been erected by him with the intention of removing them at the expiration of his term, and plaintiff had consented that he should remove them at that time. The case was submitted to a jury, and, while the evidence was in some respects directly conflicting, that of the plaintiff tended to show that he was the owner of the land,

and rented it to the defendant for a term of three years; that the defendant desired to have certain improvements done on the house, to which the plaintiff agreed, and gave him a check for \$100; that, in addition to certain repairs placed on the interior of the house, the defendant erected a servant's room, attached to the main body of the dwelling, attached to the roof certain galvanized iron gutters as receptacles for rain water, laid under the ground iron pipes for the purpose of conducting water and maintaining a fountain, made a cement walk, and other improvements; that there was no agreement, expressed or implied, between the defendant and himself, that these fixtures should be removed by defendant at the expiration of his term of lease, and that their removal would be an injury to the freehold. On the contrary, the evidence for the defendant tended to show, in relation to the improvements and fixtures which were constructed, that the plaintiff sent defendant a check for \$100 to have certain repairs made and work done in the interior of the house, but declined, on defendant's application, to put up a servant's room in the yard, and defendant then told the plaintiff that, if he would not build the servant's house, as he (defendant) was compelled to have one, he would do so himself, which he did; that the repairs on the inside of the house cost very much more than the \$100 furnished by plaintiff; that he paid on the erection and furnishing of this servant's room more than \$100; that he paid \$18 to have gutters put to the house, and something like \$75 for putting in a fountain and cement walk, and for plumbing, water spigots, etc. These payments were met from defendant's funds, and the work was necessary for his comfort and convenience in occupying the house. He caused these improvements to be made with the intention of removing them at the expiration of his lease, and in having the work done he had directed it to be constructed with this end in view. Defendant also admitted that, in addition to the removal of the servant's house, etc., which he alleged could be done without injury to the property, it was his purpose to remove the flowers which the lady members of his family had planted and cared for. There was much evidence introduced by the respective parties, but the above brief outline is, in view of the application of the legal principle which we think controls the case, sufficient for the purposes of this decision. The jury returned a verdict for the defendant, giving him the privilege of removing from the premises the servant's house, the gutters, and the water pipes, and requiring him to deposit the sum of \$50 with the court to cover the expense of repairs necessary to put the house in as good condition as it was before; and a decree was entered accordingly.

The plaintiff submitted a motion for a new trial on a number of grounds. Inasmuch, however, as the sole question involved in the case relates to the right of a tenant to remove from a dwelling house fixtures of the character indicated which he had placed

thereon, and for which he had paid with the intention of removing them, it is unnecessary to consider and pass upon the grounds of the motion *seriatim*, but we will address ourselves to a consideration of the question of the right of the tenant so to remove. It will be noted, from the statement of the case made above, that the answer of the defendant sets up, among other alleged facts, that the plaintiff had agreed with him that he should have the right to remove the improvements or fixtures at the termination of his lease. We have diligently searched the brief of evidence to ascertain whether this averment in the petition was supported by the evidence of any witness who testified in the case; for, if that fact had been established, it would have materially altered the disposition of the case under well-defined rules of law. Our examination, however, fails to disclose the existence of any such evidence in the record, and the only question which we have to consider is the legal right of a tenant to remove fixtures of the character indicated in this case from the rented premises, in the absence of a contract allowing him so to do. No point is made that the removal contemplated by the defendant was out of time, as the existing status in that respect was preserved between the parties by a written agreement.

1. By Civil Code, § 3049, it is declared that "anything intended to remain permanently in its place, though not actually attached to the land, such as a rail fence, is a part of the realty and passes with it." Section 3119 of the same Code declares that the tenant "cannot cut or destroy growing trees, remove permanent fixtures, or otherwise injure the property." In defining "realty" the Civil Code (§ 3045) declares that real estate includes all lands and the buildings thereon, and all things permanently attached to either. So it is unnecessary to go beyond the terms of our statute law to ascertain what are fixtures, or to find an authority declaring that they are a part of the land, and may not be removed by a tenant. Our Code is in entire harmony with the common law on this subject, one of the rules of which is, "Fixtures annexed to the freehold are prima facie the property of the owner of the soil." It is, however, insisted on the part of the defendant in error that the ancient rule, which restricted the right of a tenant as to the removal of improvements in the nature of fixtures made on the leased premises, has been mitigated, and its harshness practically destroyed; that the law is now being more liberally interpreted in favor of the rights of the tenant to remove improvements and fixtures made by him for his own convenience than it formerly was. To support these propositions, and as authority for his contention that the defendant had the right to remove the fixtures which are the subject-matter of the case in hand, counsel cites Civil Code, § 3120, which declares: "A tenant during the term or a continuance thereof, or while he is in possession under the landlord, may remove fixtures erected by him. After the term and possession are

ended, they are regarded as abandoned to the use of the landlord, and become the latter's property." Apparently there is a conflict between the rule of law laid down in this section and that which is found in § 3119, above quoted. If we take the words of § 3120 literally, they seem to support the contention made by the defendant. However, the conflict is more apparent than real. The section last cited is not an enactment of our legislature, nor is it the rule of the common law as it stands stated, but it was codified from a decision of this court in the case of *Youngblood v. Eubank*, 68 Ga. 630. This does not make it any the less the law. But under the rule of construction, which is not only fair and reasonable, but which has been uniformly followed by this court, we are at liberty, in order to ascertain the meaning of the section, to refer to the case from which it was codified, and interpret it in the light of the decision there rendered. *Calhoun v. Little*, 106 Ga. 336, 43 L. R. A. 630, 32 S. E. 86. It may be remarked, however, that, while the words contained in this section were taken from the first headnote in *Youngblood v. Eubank*, 68 Ga. 630, it will be found on examination that the headnote was prepared by the reporter, and not by the court, and that the principle announced in the headnote is not supported by the decision which was rendered. The facts upon which that decision was predicated show that the fixtures which were sought to be removed were temporary shanties, shelters, pens, stock lots, etc., which had been placed on the leased premises by a tenant who was engaged in the sawmill business, and the structures had been erected for his use and convenience in such business; and the entire decision deals with a class of fixtures known as "trade fixtures," and does not undertake to explain the law relating to any other kind of fixtures. Mr. Justice Speer, in the course of the opinion there rendered by him, uses this language: "The custom set up by the evidence is in accord with the common-law rule as to the rights of tenants to remove fixtures made or erected by them." He then quotes the rule of the common law, above set out, that "fixtures annexed to the freehold are prima facie the property of the owner of the soil." After stating this proposition, he further says: "In aid of the tenant, however, and in favor of trade, an exception is ingrafted upon that rule, enabling him to sever the fixtures made by him, and so regain his property in them." The point in the case just cited was really not the right of the tenant to remove fixtures, but the time in which he might remove trade fixtures, and the opinion as a whole was directed to this point, and the extracts quoted above are the only authority for the statement contained in the headnote, which is embodied in Civil Code, § 3120. Being so, it is clear, beyond question, that the fixtures which it was ruled might be removed by a tenant were only those which come under the definition of trade fixtures. So that, in interpreting this section of the Code, we have no difficulty in arriving at the conclusion that the

section must be construed to refer only to trade fixtures. So interpreting it, it is in entire harmony with other sections of the Code first above quoted. Not only so, but we are also in entire harmony with the great current of adjudicated cases, as well as the conclusions of all modern text writers on this subject. Chief Justice Holt once ruled that trade fixtures might be removed by the tenant during his term, not by virtue of any special custom, but by the common law in favor of trade and to encourage industry. Mr. Taylor, in his treatise on Landlord and Tenant (vol. 2, § 545), says: "As regards trade fixtures, it may be stated, in general terms, that a tenant may take away whatever he erects for the purpose of carrying on trade, whether it be machinery or buildings, even though affixed to the soil or freehold." To the same effect, see Ewell, *Fixtures*, 84, 89, 91. Under the principle above stated it has been ruled that a tenant who was a soap-boiler, and who, for the convenience of his trade, put up vats and copper tables upon the demised premises, might remove them during his term. Similar adjudications have been made as to a baker's oven; salt pans; carding machines; steam engines and boilers; cider mills; furnaces; ice houses; platform scales; copper stills; counters or counting rooms nailed to the floor; heavy machinery, such as a trip hammer, forge blower, or the like. And there can now be no doubt that the ancient rule in relation to fixtures has been so modified as to trade fixtures that a tenant may remove such from the leased premises during his term. For a very full discussion of the doctrine of trade fixtures, see the opinion of Mr. Justice Cobb in the case of *Charleston & W. O. R. Co. v. Hughes*, 105 Ga. 23, 24, 30 S. E. 972. The defendant, however, can gain nothing under this view of the law, because the fixtures which he sought to remove were permanent in character, and it was not claimed that they came under the definition of trade fixtures.

2. Nor do we think that the fixtures which the defendant claimed the right to remove come in that class known as "domestic or ornamental fixtures," and which, under certain circumstances, a tenant has the right to remove during his term. Mr. Taylor, in his work above cited (§ 547), says: "Domestic fixtures are all such articles as a tenant attaches to a dwelling house in order to render his occupation more comfortable or convenient, and may be separated from it without doing substantial injury,—such as furnaces, stoves, cupboards, and shelves, bells, bell pulls, gas fixtures, etc.; or things merely ornamental,—as painted wainscots, pier and chimney glasses, although attached to the walls with screws, marble chimney pieces, grates, beds nailed to the walls, window blinds, and curtains. All these articles, whether useful or ornamental, are, in a manner, necessary to the tenant's domestic comfort; and, being easily severed from the house, are capable of being equally useful to him in any other house he may occupy, and therefore he may remove

them. But things which he attaches to the house in a more permanent manner, in order to complete it, such as hearthstones, doors and windows, closets, presses, locks and keys, he cannot take away, because such things are peculiarly adapted to the house in which they are fixed, and, if taken away, are injurious to the freehold. All substantial additions made to the house also become a part of the freehold, and are immovable, such as conservatories, green-houses, hothouses, pig sties, stables, wash houses, and other outhouses. Neither can the tenant remove shrubbery,—flowers planted by him in the garden." The propositions thus enunciated are well supported by adjudicated cases from courts of high repute, and are in line with text writers upon this subject. Thus we see that such fixtures as are attached to the realty in a permanent manner so as to become substantial additions, although erected by the tenant, and for his convenience, attach to and become a part of the realty, and cannot be removed by him as domestic fixtures. It is, however, claimed that at the time of the erection of the fixtures which the defendant in error asserted a right to remove he intended to remove them at the expiration of his term, and that, having been erected with such intention, his right to remove them is preserved. This proposition is not a sound one. The right to remove such fixtures is denied him by the law; and, no matter what his intention might have been at the time he erected them, such intention, in the absence of a contract with the owner of the land, would not avail to give him the right of removal. Mr. Ewell, in his work above cited, on page 41, says: "In order to give effect to the intention of a party not to make an erection a permanent accession to the realty, the person making the improvement must have the right to determine whether or not the erection shall become a part of the realty; and if, as between himself and the owner of the soil, he has no right to erect the same as property separate and distinct from the freehold, an intention to do so, no matter how clearly manifested, is of no avail." It would therefore seem that the intention which the law considers is not the secret intention of the party who erects the fixture, but, except in the case of trade fixtures, the intention is indicated by the nature of the fixtures erected. Therefore, while we find abundant evidence that the defendant intended to remove these fixtures at the expiration of his lease, we do not find that this intention was communicated and assented to by the owner of the land; and because the fixtures erected became a part of the realty, and are not embraced in the class known as trade fixtures, the uncommunicated intention to remove them would not give him a right to do so without the authority of the owner.

For the reasons above stated, the trial judge erred in overruling the motion for a new trial.

Judgment reversed.

All the Justices concur.

TENNESSEE SUPREME COURT.

Marvin LOWERY, Appt.,

v.

Henry CATE et al.

(.....Tenn.....)

Negligence of an infant in performance of his contract to thresh grain, which results in the destruction of the grain and the shed covering it by fire set by sparks from the engine, will not render him liable for the loss, since the gravamen of the action is not a tort independent of the contract, but is an injury which can be made out only by proving the contract, and showing negligence in its performance.

(November 2, 1901.)

NOTE.—*Liability of an infant for torts.*I. *General liability of an infant for torts*, 673.II. *Tort in inducing a contract*, 675.a. *By fraudulent representations*, 675.b. *By false warranty*, 680.III. *Tort in the performance of a contract*.a. *Contract of bailment*.1. *Damage to property by negligence*, 680.2. *Damage to property by wilful act*, 681.3. *Refusal to deliver property*, 683.b. *Contracts other than bailment*.1. *By negligence*, 683.2. *By other acts*, 683.IV. *Other torts arising from contracts*, 683.V. *Estoppel of an infant, by his fraud*, 684.a. *When estopped to plead infancy in an action on contract*, 684.b. *When estopped to reassert title, or to demand a second payment*, 685.c. *When compelled in equity to make satisfaction for his fraud*, 687.VI. *Liability of an infant as trustee or officer*, 688.VII. *Summary*, 688.I. *General liability of an infant for torts.*

The unquestioned general rule is that an infant is liable, in the same manner as an adult, for a tort not connected with or arising out of a contract. Cooley, *Torts*, 2d ed. § 123; Tyler, *Infancy & Coverture*, 2d ed. § 123; Vasne v. Smith, 6 Cranch, 226, 3 L. ed. 207; Stearns v. Wallace, 59 N. H. 595; Bullock v. Babcock, 3 Wend. 391; Wiley v. Heard, 1 Tex. App. Civ. Cas. (White & W.) § 1202, p. 686; *Re Wolf*, 9 Kulp, 523; Dial v. Wood, 9 Baxt. 297; Hanks v. Deal, 3 McCord, L. 257; O'Leary v. Brooks Elevator Co. 7 N. D. 554, 41 L. R. A. 677, 75 N. W. 919; Wilbur v. Jones, 21 N. B. 4.

This general liability is without regard to the age of the infant, according to many cases. In a case in the Year Books (1456) 35 Hen. VI., 11 b. it was held that an infant of four years was liable in trespass for the putting out of an eye; and the age of the child is important simply as bearing upon the question of the unavoidability of the accident. "Where infants are the actors, that might probably be considered an unavoidable accident which would not be so considered where the actors are adults; but such a distinction, if it exists, does not apply to this case." Bullock v. Babcock, 3 Wend. 391, where a boy of twelve shot his schoolmate in the eye with an arrow.

57 L. R. A.

A PPEAL by defendant from a judgment of the Circuit Court for Polk County in favor of plaintiffs in an action brought to recover the value of certain grain and buildings destroyed through defendant's alleged negligence. *Reversed*.

The facts are stated in the opinion.

Messrs. N. G. Allen, Traynor & Smith, B. B. C. Witt, John C. Ramsey, and John S. Shamblin for appellant.

Messrs. Mayfield, Son, & Aiken, R. M. Copeland, and J. L. Smith for appellees.

McAlister, J., delivered the opinion of the court:

The plaintiffs below recovered a verdict

And in *Neal v. Gillett*, 23 Conn. 437, where the injury was caused by the throwing of a ball near the head of plaintiff's horse, by the defendants, boys of thirteen and sixteen, the court said: "Persons of the . . . [age of thirteen or more] must be considered, in the absence of proof to the contrary, as emancipated from childish instincts, and bound to exercise their rights with ordinary care."

So, in *O'Brien v. Loomis*, 43 Mo. App. 29, it was assumed that a boy of ten years was liable for negligent shooting; and in *Huchting v. Engel*, 17 Wis. 230, 84 Am. Dec. 741, a boy under seven; and in *McGee v. Willing*, 31 Phila. Leg. Int. 37, a boy of less than six years,—were held liable, the former in trespass, and the latter for assault with a hammer, blinding his nurse.

The express command of the parent of an infant is no defense in an action of tort. So, in *School Dist. No. 1 v. Bragdon*, 23 N. H. 507, in form a curiously artificial case, one of trespass *qu. cl. fr.*, where the defendants, small boys, were sued for "breaking into" a school in the wrong district, the gravamen of the action being, of course, fraud, it was held that the command of their father was no defense. The court added: "Infants are liable in cases arising *ex delicto*, whether founded on positive wrongs, as trespass or assault, or constructive tort, or frauds." To the same effect are *Humphrey v. Douglass*, 10 Vt. 71, 33 Am. Dec. 177, where a boy turned the plaintiff's horses into the highway by his father's directions; *Scott v. Watson*, 46 Me. 362, 74 Am. Dec. 457, a case of a boy carrying off plaintiff's hay; and *Kilpatrick v. Hall*, 67 Me. 543, also a case of trespass.

In *Drane v. Pawley* (1886) 8 Ky. L. Rep. 530, it was held that in the case of a girl of thirteen, sued for slander, the influence or duress of parents was not a defense, as to words not spoken in their presence.

Exemplary damages are not ordinarily recoverable against an infant,—at any rate in the case of infants who are not of sufficient age and discretion to be criminally responsible.

So, it is said in *Huchting v. Engel*, 17 Wis. 231, 84 Am. Dec. 741: "If damages by way of punishment were demanded, undoubtedly his extreme youth [six years], and consequent want of discretion, would be a good answer."

And in *O'Brien v. Loomis*, 43 Mo. App. 29, it was said: "We know of no case where such damages have been allowed in the case of an injury by a child only ten years of age."

The cases in assault and battery are: *Year Book*, 35 Hen. VI. 11b, *supra*; *Bullock v. Bab-*

and judgment for the sum of \$310 against the defendant, Lowery, for the value of wheat and other property alleged to have been destroyed through his negligence. It appears from the proof that the defendant, Lowery, was the owner of an engine and thresher, and entered into a contract with plaintiffs to thresh their wheat for every twentieth bushel. The contract was made by J. G. Cate for himself and other parties in interest, with the defendant, Lowery. The wheat was stored in a large shed on Cate's farm, the portion of each of the parties being packed in separate tiers. The defendant, Lowery, with his employees, arrived with the thresher early in the morning, and began threshing the wheat. They continued threshing until about 1 o'clock in the afternoon, when the wheat caught fire from the sparks emitted from the engine,

and both the wheat and oats stored in the shed, together with the shed, were totally destroyed. There is proof tending to show the value of the wheat was \$730; the oats, \$75; and the shed, \$125. Separate suits were brought by the parties in interest against the defendant before a justice of the peace of Polk county. In the circuit court, by consent of parties, these causes were heard together, and verdict rendered in favor of the plaintiffs for sums aggregating \$310. There is proof tending to show that the defendant proceeded to thresh the wheat without any spark arrester on his engine, and that, on the day preceding, defendant had set fire to the wheat of one Howard while threshing it. There is also proof tending to show that the engine and thresher were set in such position and at such an angle that the wind blew

cock, 3 Wend. 391, where a boy put out his schoolmate's eye with an arrow; Peterson v. Haftner, 59 Ind. 130, 26 Am. Rep. 81, where a boy injured another's eye with lime; Vincent v. Warner, 12 Kulp, 46; Watson v. Wrightsman, 26 Ind. App. 437, 59 N. E. 1064; McGee v. Willing, 31 Phila. Leg. Int. 37; Sikes v. Johnson, 16 Mass. 389. In the last case the assault was not committed by the infant defendant himself, and the fact that he procured another (not his agent) to do the act was no defense.

As to tort by an agent, *vide* Smith v. Kron, 96 N. C. 392, 2 S. E. 533, and Burns v. Smith (1902; Ind. App.) 64 N. E. 94, *infra*, IV.

And ejectment may be maintained against an infant. McCoon v. Smith, 3 Hill, 147.

In Marshall v. Wing, 50 Me. 62, it was held that the action was maintainable against an infant for disselsin, that being a tort.

So, in Veigand v. Malatesta, 6 Coldw. 362, and in McClure v. McClure, 74 Ind. 108, infancy was no defense to an action for damages from forcible detainer.

The rule is the same in the concurrent remedy by writ of entry, although that is a real action, and not one in tort. Beckley v. Newcomb, 24 N. H. 359.

There are three cases holding infancy to be no defense in libel or slander: in libel: Fears v. Riley, 148 Mo. 49, 49 S. W. 836 (*semble*); in slander: Defries v. Davis, 1 Bing. N. C. 692; Drane v. Pawley, 8 Ky. L. Rep. 530.

In the case of an action for malicious prosecution there would seem from the two cases of this kind to be some doubt (resulting merely from the legal disability of an infant to prosecute an action), as to his liability.

In Burnham v. Seaverns, 101 Mass. 360, 100 Am. Dec. 123, it was held that an infant was not liable for a malicious prosecution brought without his knowledge by his *prochein ami*, although he had assented to it when he heard of it. But in Sterling v. Adams, 3 Day, 411, which was brought, on a statute, for damages from a vexatious (civil) suit, the court did not find it necessary to decide whether an infant was liable for bringing a vexatious suit, since the infant in question became of age before the return day of the writ, and afterwards knowingly prosecuted the suit; and judgment for the defendant was reversed.

The cases holding an infant liable for his negligence are: Conklin v. Thompson, 29 Barb. 218, in which a boy exploded a firecracker under the plaintiff's horse, causing it to die of fright; Baker v. Morris, 33 Kan. 580, 7 Pac. 267, against a boy for killing the plaintiff's mare; Edwards v. Crume, 13 Kan. 348,

an action against the father of a boy who set fire to the prairie, and so destroyed the plaintiff's property, the court saying that the son alone was liable; Smith v. Davenport, 45 Kan. 423, 11 L. R. A. 429, 25 Pac. 851, where a father was sued, with the same result, for the negligence of his son in riding down the plaintiff on the highway; Stringer v. Frost, 116 Ind. 477, 2 L. R. A. 614, 19 N. E. 831, where an infant was held liable for the same thing; Morgan v. Cox, 22 Mo. 373, 66 Am. Dec. 623, where a boy negligently shot the plaintiff's cow; Conway v. Reed, 66 Mo. 346, 27 Am. Rep. 354, against a boy for carelessly shooting a playmate; O'Brien v. Loomis, 43 Mo. App. 29, in which a boy was held liable for shooting a servant with a toy rifle.

But in Robbins v. Mount (1867) 33 How. Pr. 24, it was held that infants, owners of a building, were not liable for damages caused by the overflow of a sink in it, since no personal negligence of their own was shown, and they were incapable in law, from their inability to make a valid contract, of appointing servants or agents for whose negligence they could be held responsible, and therefore the doctrine of *respondet superior* did not apply.

In 1900, however, it was held, in the same state, that the infant owners of land, a wall on which was negligently allowed to fall, were liable for the damages thereby done to a neighbor's property, without regard to any question of negligence in themselves; and the fact that their guardians managed the property was no defense. McCabe v. O'Connor, 4 App. Div. 354, 38 N. Y. Supp. 572, Affirmed in 162 N. Y. 600, 57 N. E. 1116.

The cases holding an infant liable for seduction are: Fry v. Leslie, 87 Va. 269, 12 S. E. 671; Straughan v. Smith, 19 Ont. Rep. 558; Becker v. Mason, 93 Mich. 336, 53 N. W. 361; Lee v. Hefley, 21 Ind. 99.

The cases in trespass are: Wilson v. Gerard, 59 Ill. 51, where a father was held not liable for the trespass of his children; and in Tift v. Tift, 4 Denio, 175, and Chandler v. Deaton, 37 Tex. 406, where fathers were sued for the trespasses of their children (in the former case setting a dog on a neighbor's swine, and in the latter, shooting another's mules), although it was held that the father was not liable, it was said that the son would be; School Dist. No. 1 v. Bragdon, 23 N. H. 509; Huchting v. Engel, 17 Wis. 231, 84 Am. Dec. 741; Scott v. Watson, 46 Me. 362, 74 Am. Dec. 457; Kilpatrick v. Hall, 67 Me. 543; Humphrey v. Douglass, 10 Vt. 71, 33 Am. Dec.

the sparks directly towards the shed. It is also shown that the wind was not blowing very hard in the morning, but during the day its velocity greatly increased, and plaintiff, seeing there was danger of the wheat catching fire, warned defendant's engineer, but the engineer said there was no danger; that he would turn on an exhaust valve and stop the sparks. Plaintiff admits he saw there was no spark arrester on the engine, but says he thought that was all right. Plaintiff states that when the work was commenced he called his men to set the engine square, but defendant said the angle set was all right. It was 74 feet from the point the fire caught to the engine. It would have been 20 feet further if a square set had been made. Plaintiff states on cross-examination that he did not stop them from making the angle set, nor did he stop them

from running when he saw the danger, for the reason that the engineer told him there was no danger, and that he could stop the sparks by turning on the exhaust valve. There is no proof indicating any wilfulness on the part of defendant or his employees in setting fire to the shed, but the case presented by plaintiff is one of negligence in the operation of the engine and thresher. At the time the contract was made and the wheat destroyed the defendant, Lowery, was a minor, eighteen years of age. Plaintiff Cate testified that he said to defendant when he commenced the work that he seemed rather young to be running a thresher. Defendant replied that he did not know much about it, but had men with him as employees who did understand it. On the trial below the defendant pleaded his infancy in bar of the action. Plaintiff's

177; *Eady v. Elsdon*, 70 L. J. K. B. 701, [1901] 2 K. B. 480, 84 L. T. 615, 49 Week. Rep. 595, where a boy set fire to the plaintiff's house.

A case in trover is *Green v. Sperry*, 16 Vt. 390, 42 Am. Dec. 519, where a boy was sued for a watch converted by him.

And where money was tortiously taken, it was held, in *Elwell v. Martin*, 32 Vt. 217, that it could be recovered from an infant in addition to, as for money had and received, on the ground that a wrongdoer who acknowledges his liability in tort cannot be heard to object that the plaintiff has brought against him a milder remedy than an action *ex contractu*. (Compare *Bristow v. Eastman* [1794] 1 Esp. 172, *Peake N. P. Cas.* pt. 1, p. 223, *infra* § 11 b, 2.)

The same principle was held in *Shaw v. Cook*, 58 Me. 254, 4 Am. Rep. 290; and *Wireman v. Mueller*, 20 W. N. C. 10, is a similar case upon the same facts.

And in proceedings quasi criminal, but not taking more of the nature of a tort, infancy is no defense.

So, it was held in *Winslow v. Anderson*, 94 Mass. 376, that an infant might be sued *ex delicto* for a penalty for neglect of militia duty.

And in *Chandler v. Com.* 4 Met. (Ky.) 66, it was held that in bastardy proceedings, which, under the statute, were not criminal but civil, infancy was no defense.

And a Massachusetts case—*McCall v. Parker*, 13 Met. 372, 46 Am. Dec. 735—is to the same effect.

The rule that infancy is no defense in actions of this sort is now so well settled that no attempt is usually made to defend on that ground. As instances of this kind, where infants failed to set up the defense of infancy, see *Vosburg v. Putney*, 80 Wis. 523, 14 L. R. A. 226, 50 N. W. 403; *Markley v. Whitman*, 95 Mich. 238, 20 L. R. A. 55, 54 N. W. 763.

II. Tort in inducing a contract.

Between cases of pure tort (for which an infant is always liable), and cases of ordinary contract (for which, as a general rule, an infant is not liable except in the case of purchase of necessities), there are very many cases which have characteristics of both classes, and apparently involve both conflicting rules, resulting in uncertainty and confusion. This class is treated in the remainder of the note.

a. By fraudulent representations.

The English rule is that an infant is not 57 L. R. A.

liable in tort for deceit in representing himself to be of age, or making other false statements, with the intention thereby to induce, and actually inducing, another person to contract with him. This was on the ground, originally, that an infant was liable only for torts which are *ex delicto*, and that misrepresentations made with the intent to induce a contract are a part of the contract, for which an infant cannot be made liable. The earliest case was *Grove v. Nevill*, decided in 1604, and reported in 1 Keble, 778. The whole report is as follows: "In an action upon the case in nature of deceit on sale by the defendant of goods as his own, whereas in truth they were another's, the defendant pleads nonage at the time of the sale; to which the plaintiff demurred. . . . *Sed curia contra*, this being no actual tort, or anything *ex delicto*, but only *ex contractu*, which is voidable by plea; but it's a tort by construction of law. Windham doubted."

This was followed the next year by the famous and leading case of *Johnson v. Pye*, reported in three places: *Sid.* pt. 1, p. 258, 1 Keble 913, 1 Lev. 169. *Siderfin* says: The defendant affirms to the plaintiff that he was of full age, on which the plaintiff lends him the money. And he takes his security (a mortgage), when in truth he was only twenty and a half. Then he avoids his security. And a difference was taken between torts and contracts of infants, for though infants will not be bound for contracts, yet they will be bound for torts. But though infants will be bound for actual torts, as trespass, etc., which are *vi et contra pacem* yet they will not be bound by those which sound in deceit, for if they should be, all the infants in England would be ruined. And according to Keble, Keeling, J., said: "Such torts that must punish an infant must be *vi et armis*, or notoriously against the public; but here the plaintiff's own credulity hath betrayed him." And Windham, J., said: "The commands of an infant are void; and for such he shall never be attainted a dis-sessor; much less shall he be punished for a bare affirmation. . . . Also by this means all the pleas of infancy would be taken away, for such affirmations are in every contract." In *Levinz* it is said that the court cited *Grove v. Nevill*, "where, in a case against an infant for selling a false jewel, affirming it to be a true one, 'twas adjudged the action did not lie; to which 'twas answered, that this is a trespass on the case, and an infant is chargeable for trespasses, though not for contracts." The whole case is dubious, because in *Levinz* it is said that the case was "adjourned," in Keble,

counsel demurred to the plea on the ground that the action was founded upon tort, and not upon contract, and an infant is liable in law for his torts. The court sustained the demurrer, and the plea was stricken from the file. Counsel for defendant also submitted a supplemental request asking the court to charge that if the loss resulted from a negligent performance of the contract, and there was no wilful or intentional wrong, defendant would not be liable. This request was refused. The action of the court on the plea and refusal to charge as requested is made the basis of the third assignment of error, and raises the determinative question in the case.

We are of opinion the court was in error in sustaining the demurrer. The principle is well settled that an infant is liable in an action *ex delicto* for all injuries to persons

or property committed by him. *Dial v. Wood*, 9 Baxt. 296; *Beasley v. State*, 2 Yerg. 481; *Weigand v. Malatesta*, 6 Coldw. 367. But, while an infant is liable for his torts, he is not liable for the tortious consequences of his breaches of contract; and, though the action may be in form as for a tort, yet, if the subject of it be based on contract, the suit will be attended with all the incidents of an action *ex contractu*. 16 Am. & Eng. Enc. Law, 2d ed. p. 309. Again, the mere fact that the cause of action grows out of or is connected with contract will not in every case shield the infant from liability. If the tort is subsequent to or independent of the contract, and not a mere breach of it, but is a distinct, wilful, and positive wrong in itself, then, notwithstanding the contract, the infant is liable. This principle is illustrated in the

nil capiat per villam, and in *Siderfin* the final disposition is not stated; and Chief Baron Comyns ignores the case altogether in his Digest (*Action on the case for a deceit*, A [10]), where he declares: "If a man affirm himself of full age, when he is an infant, and thereby procure money to be lent to him upon mortgage," he is liable for deceit; and he cites a case, undecided as to this question,—*Chetwin v. Venner*, in Sid. pt. 1, p. 183,—a few pages before the report of *Johnson v. Pye*. But in spite of this, and of the fact that for almost two hundred years there was no reported case decided in consonance with it, *Johnson v. Pye* has been stolidly followed again and again in England as the highest authority, and it is now firmly established in that country as law, that an infant is not liable at law for his deceit in inducing a contract.

In *Price v. Hewett* (1852) 8 Exch. 146, 17 Jur. 4, *Johnson v. Pye* was cited and approved by the court, although not upon the main point of the case. Two years later, in a case of fraud in a *feme covert* in representing herself as unmarried, and so inducing the plaintiff to lend money on her note (*Liverpool Adelphi Loan Assn. v. Fairhurst* (1854) 9 Exch. 422, 2 C. L. Rep. 512, 23 L. J. Exch. N. S. 163, 18 Jur. 191), *Johnson v. Pye* was expressly held to be an authority by analogy, for "when the fraud is directly connected with the contract, . . . and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible." *Wright v. Leonard*, 11 C. B. N. S. 258, 30 L. J. C. P. N. S. 365, 8 Jur. N. S. 415, 4 L. T. N. S. 110, 9 Week. Rep. 944, was on the same point, and *Erie, Ch. J.*, made the plausible suggestion that the representation as to age or coverture "is in substance a warranty of a debt, and so a contract."

As a result of these decisions denying the liability of an infant in tort for fraud connected with his contract, there were two distinct and unsuccessful attempts to evade the doctrine of *Johnson v. Pye*.

Bartlett v. Wells (1862) 1 Best & S. 836, 31 L. J. Q. B. N. S. 57, 8 Jur. N. S. 762, 5 L. T. N. S. 607, 10 Week. Rep. 229, was an action brought on a contract for goods sold and delivered; the plea was infancy; and, under the common law procedure act of 1854, allowing an "equitable replication," the plaintiff replied that the defendant, with knowledge of his true age, falsely and fraudulently represented that he was of full age, whereby the plaintiff was induced to supply the goods. This was demurred to, and the replication was held bad, as a departure from the declaration. And this case 57 L. R. A.

was followed by *DeRoo v. Foster*, 12 C. B. N. S. 272, in the same year, and *Bateman v. Kingston*, Ir. L. R. 6 C. L. 328, on exactly the same point.

But in *Miller v. Blankley* (1878) 38 L. T. N. S. 527, the plaintiff relied on the judicature act of 1873, providing that, in case of conflict between the rules of equity and common law in reference to the same matter, the former should prevail. This action was also in contract, for the price of materials, and although it was acknowledged, as *Beasley, J.*, said in the argument in *Bartlett v. Wells*, p. 838, that the rule in equity was that "an infant who obtains a loan on a representation which he knows to be false, that he was of age, is estopped from pleading his infancy," yet the court held infancy to be a good plea, simply following *Bartlett v. Wells*.

In the meantime, in this country there was a successful attempt to break away from a doctrine which, as suggested in 8 Yale L. J. p. 237, by making an infant, on the ground that he is not liable for his contracts, irresponsible for a fraud by which he has induced another to contract with him, violates that fundamental principle of contracts which renders void any agreement procured by fraud. The earliest American case is *Badger v. Phinney* (1819) 15 Mass. 359, 8 Am. Dec. 105. In this case, where the plaintiff had sold goods to the defendant on credit, upon his falsely representing himself as of age, the court held, the infant having rescinded the sale on the ground of his infancy, that the seller might replevy the goods; and *Putnam, J.*, said: "The basis of this contract has failed, from the fault, if not the fraud, of the infant; and on that ground the property may be considered as never having passed from, or as having reverted in, the plaintiff."

And in *Fitts v. Hall* (1838) 9 N. H. 441, the superior court of New Hampshire expressly repudiated the doctrine of *Johnson v. Pye*. Here the plaintiff sold hats to the defendant, who represented himself of age, and the plaintiff took his note, and this not being paid at maturity, the seller sued upon it, and was nonsuited on a plea of infancy. He then brought his action for deceit. The court held the infant liable, in a decision which has been much attacked and defended in this country. *Parker, Ch. J.*, said: "The representation in *Johnson v. Pye*, and in the present case, that the defendant was of full age, was not part of the contract, nor did it grow out of the contract, or in any way result from it. It is not any part of its terms, nor was it the considera-

use of hired horses. If an infant hires a horse to be moderately driven or ridden, and the infant, from lack of experience, rides or drives the horse immoderately, or injures him by unskilful management, it is a mere breach of contract, and the plea of infancy is a complete defense to an action therefor. But if the infant wilfully and intentionally injures the animal, or uses him for a different purpose from that for which he was hired, or drives him elsewhere or beyond the place contemplated in the contract, it is a conversion of the animal, which terminates the contract, and renders the infant liable in trover for its value. 16 Am. & Eng. Enc. Law, 2d ed. p. 309. "The defense of infancy cannot be pleaded in actions for wrongs independent of contract, but it may be pleaded in all cases where the cause of action is substantially founded

on a contract, though the declaration might be framed in form of tort instead of a contract. So that the plaintiff cannot indirectly make the defendant liable on a contract made during infancy by merely changing the form of the declaration." 1 Keener, Contr. p. 513. Mr. Cooley, in his work on Torts (p. 106), says: However, there is an exception to the rule. The distinction is this: If the wrong grows out of contract relations, and the real injury consists in the nonperformance of a contract into which the party wronged has entered with an infant, the law will not permit the adult to enforce the contract indirectly, by counting on the infant's neglect to perform it, or omission of duty under it as a tort. The reason is obvious. To permit this to be done would deprive the infant of that shield of protection which in

tion upon which the contract was founded. No contract was made about defendant's age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an action of assumpsit. The matter arises purely *ex delicto*. The fraud was intended to induce, and did induce, the plaintiff to make a contract for the sale of the hats, but that by no means makes it part and parcel of the contract. It was antecedent to the contract; and if an infant is liable for a positive wrong connected with a contract, but arising after the contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract. It has been said that all the infants in England might be ruined, if infants were bound by acts that sound in deceit. But this cannot be a reason why the action should not be maintained for fraudulent wrongs done, for the same reason would seem to apply equally well in cases of slander, trover, and trespass."

Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146, decided by the same court in the following year, although apparently inconsistent with Fitts v. Hall, is based on an entirely different ground. This was a case of assumpsit on notes given by an infant, who represented himself to be of age. The plaintiff maintained that the defendant, by his false representations, was estopped to set up infancy; but the court said that Fitts v. Hall did not lead to such a result, and that this action could not be maintained because the measure of damages, in case of recovery on the notes, would not be proper, since the amount promised might be greater than the actual damages sustained. This decision, of course, left the plaintiff to sue over again for his damages, in an action sounding in tort.

The rule in New York was first stated in 1843, in the case of Wallace v. Morse, 5 Hill, 391. The defendant, fraudulently representing himself to be of age, and with the intention not to pay, colluded with others to induce the plaintiff to sell him goods on credit. The court said (Cowen, J.): "The only question of moment is, whether an infant be chargeable by an action for tort in obtaining goods fraudulently, with an intention not to pay for them. We think he is, both on principle and authority."

Yet in 1851, Sandford, J., in Brown v. McCune, 5 Sandf. 224, a case in a lower court, although Wallace v. Morse was cited for the plaintiff, said: "We believe the law remains 57 L. R. A.

as it was laid down in Johnson v. Pye." Brown v. McCune was an action for the price of goods sold and delivered, where the plaintiff unsuccessfully maintained that the defendant, by his falsely affirming himself of age, should be estopped to set up his fraud as a defense (see *infra*, V. a), so that the remark was wholly *obiter*.

This doubt was removed, however, and the true rule was definitely laid down, in 1863, in Eckstein v. Frank, 1 Daly, 335, an action in the nature of trover, for the value of goods obtained by an infant through his fraudulent representation that he was of age. The opinion says: "The doctrine of Johnson v. Pie, 1 Lev. 169, 1 Keble, 905, 913, 8id. pt. 1, p. 258, though recognized in a comparatively recent English case (Price v. Hewett, 8 Exch. 146, 17 Jur. 4), and though believed to be the law by Justice Sandford, in Brown v. McCune, 5 Sandf. 224, had been eight years before distinctly repudiated by the supreme court of this state upon full consideration, in Wallace v. Morse, 5 Hill, 392, and it has also been considered and repudiated in a great number of cases in other states [citing New Hampshire, Massachusetts, Vermont, United States Supreme Court, Texas, South Carolina, and Maine cases]. It is therefore to be regarded as overruled in this country by an overwhelming weight of authority. . . . When an infant obtains property by falsely representing himself to be of full age, an action of tort may be maintained against him, either to recover it back or to recover damages, upon the ground that he obtained possession of it wrongfully." And in Schunemann v. Paradise, 46 How. Pr. 426, where an infant was arrested, on civil process, for his fraud in inducing a contract, this last decision was expressly followed.

Yet, when, in New York, a seller of goods on credit sues an infant in contract for the price of goods, although alleging fraud in the infant which induced the plaintiff to give credit, he cannot recover. So the court says, in Studwell v. Shapter (1873) 54 N. Y. 249: "They do not seek in this action to recover damages resulting from such representations [as to the infant's responsibility and business], on the ground of their falsity, but to enforce the agreements or contracts of purchase made by the defendant. . . . Viewing this action as one founded on contract, and not based on fraud in disaffirmance of it, I am of opinion that the judgment appealed from should be reversed."

And Kobbe v. Price (1878) 14 Hun, 55, decided on the authority of Studwell v. Shapter, went on the ground "that fraudulent represen-

matters of contracts the law has wisely placed before him. If suit should be brought against an infant for the immoderate use of, and want of care of, a horse which has been bailed to him, infancy is a good defense; the gravamen being a breach of contract of bailment. So, infancy is a defense to an action by a shipowner against his supercargo for a breach of his instructions regarding the sale of the cargo, whereby the same was lost or destroyed. Parsons, Contr. p. 316, says: "An infant is protected against his contracts, but not against his frauds or other torts. . . . If such tort or fraud consists in the breach

of his contract, then he is not liable therefor in an action sounding in tort, because this would make him liable for his contract merely by a change in the form of action, which the law does not permit." In the case of *Fitts v. Hall*, 9 N. H. 441, the court says that no liability growing out of a contract can be asserted against an infant. The test of an action against an infant is whether a liability can be made out without taking notice of the contract. Now, applying the test laid down in the cases cited, it will be observed that the tort which is the foundation of the present action was committed in the performance of a con-

tations made by an infant to induce another to enter into a contract with him would not give validity to the contract itself." This last case was on a note.

Heath v. Mahoney (1876) 7 Hun, 100, was a case where an infant deposited with the plaintiffs, brokers, \$500 cash upon a margin, and two bonds belonging to his mother, which he asserted were his. The stock bought fell, wiping out the margin, and was sold by the brokers in accordance with the contract; and the bonds were recovered from them in an action by the mother. In an action for the amount of the loss, the defendant pleading infancy, and, a recovery being had for the amount of the difference between the buying and selling prices of the stock, it was held upon appeal: "The recovery is much beyond any proper measure of damages in the case, and cannot be upheld, for two reasons: First, that no recovery can be worked out through an enforcement of the contract made by the defendant, or any part of it, because it is invalid for any and every purpose, and, second, that the recovery exceeds any damage which can be said to be the direct legal consequences of the alleged fraud." On the last point the decision is in accord with *Burley v. Russell*, 10 N. H. 184, 34 Am. Dec. 146.

In *Radley v. Kenedy* (1891) 37 N. Y. S. R. 612, 14 N. Y. Supp. 268, an infant who had contracted to buy real estate of the defendant sued to rescind the agreement and recover \$500 paid on account, and it was held that there could be no recovery on the defendant's counterclaim of damages, from debts incurred by the defendant to his broker and lawyer, and resulting from the infant's fraudulent concealment of his minority. The court said it was "an effort to recover indirectly for a breach of a contract which is not obligatory on the plaintiff. . . . It seems that 'if the substantive ground of the claim rest in contract, an infant cannot be rendered liable by changing the form of the action to one in tort, when he would not be liable on the contract itself.' 2 Kent, Com. 241."

Gaunt v. Taylor (1891) 39 N. Y. S. R. 757, 15 N. Y. Supp. 589, is a clear case. The defendant bought goods of the plaintiff, paying part cash, and falsely representing that he kept a store and was doing a good business, but signed the name of his sister, for whom he was acting as agent, to the contract of sale, the plaintiff thinking the name was his. On a plea of infancy, it was held that the defendant was liable in damages for the fraud, even without the plaintiff rescinding the contract by offering to return the money paid. The agreement was plainly void; the defendant intended to blind his sister, and the plaintiff intended that the defendant should be bound.

Somewhat similar is the case of *Ashlock v. Vivell* (1888) 29 Ill. App. 888. A horse was

sold to an infant, who concealed his minority and gave a note, but intended never to pay; and in trover for the horse it was held that an infant who obtains goods by pretending to purchase, but intending never to pay, is not a purchaser, and is liable in tort. The court said: "If an infant vendee obtains possession of goods through the pretense of a purchase, but intending at the time not to pay for them, there is, in fact, no contract executed between himself and his vendor. Their minds never meet. The transfer of possession as made by the vendor is based upon a supposed contract of sale, while such possession is received by the vendee fraudulently and tortiously."

In *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 53, 9 N. E. 420, an infant, by fraudulently representing himself to be of age, induced the plaintiff to deliver to him a buggy and harness on a year's credit, and to take his note. The infant repudiated his contract, and in an action for the value of the property, the court held that "Where the infant does fraudulently and falsely represent he is of full age, he is liable in an action *ex delicto* for the injury resulting from his tort. . . . The test, and the only satisfactory test, is supplied by the answer to the question: Can the infant be held liable without directly or indirectly enforcing his promise? There is no enforcement of a promise where an infant who has been guilty of a positive fraud is made to answer for the actual loss his wrong has caused to one who has dealt with him in good faith and has exercised due diligence." And in this case it was held that the action could be brought where the contract was repudiated, although the time to perform it had not yet expired.

In *Massachusetts, Badger v. Phinney* (1819) 15 Mass. 359, 8 Am. Dec. 105, was followed in 1854, by *Walker v. Davis*, 1 Gray, 506. Here, a young man got the plaintiff drunk, and by representing to him that he was able to contract for himself, prevailed upon the plaintiff, who knew that he was under age, to give his cow for the infant's note. It was decided that, although the infant had prevailed in an action on the note, he was still liable in an action of trover, and, although he had sold the cow before the demand, the original act was a conversion.

But *Slayton v. Barry* (1900) 175 Mass. 513, 49 L. R. A. 560, 56 N. E. 574, seems to be an unfortunate reversion to the old rule, and against the weight of authority in this country, as well as inconsistent with the spirit of the earlier Massachusetts cases which the opinion attempts to distinguish. The defendant obtained goods by falsely representing himself to be of age, and the plaintiff declared in deceit and trover; but the court held that neither was maintainable. The opinion of Morton, J., says: "The rule is stated in 2 Kent, Com. 241, as follows: 'The fraudulent act, to

tract, and not a wilful or intentional wrong done independent of and outside of the contract. The claim of plaintiffs is that defendant was guilty of negligence in failing to have reasonably safe and suitable machinery, in that it had no spark arrester, and that defendant and his employees were negligent in the locating of the engine and thresher at an angle and in such proximity to the wheat shed. The gravamen of the action is that this negligence constituted a breach of the contract, and furnished ground of liability. Plaintiffs are bound, in making out this case, to show the contract; and the ground of liability is the negligent per-

formance of that contract, whereby injury has resulted. There is no claim of wilful injury. Plaintiff must have known at the time this contract was made that defendant was an infant under twenty-one years, since he admits he told defendant that he (defendant) seemed to be rather young to run a thresher. He cannot now complain that his contract was in law a voidable one, and that it imposed no liability upon the defendant for its negligent performance.

For the error in sustaining the demurrer to the plea and in refusing the supplemental request, *the judgment is reversed* and the cause remanded.

charge him . . . must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover, or case, by a change in the form of action.' In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract, and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract which he was induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that, pursuant to that contract, there was a sale and delivery of the goods in question. . . . In Walker v. Davis there was no completed contract, and title did not pass. . . . Badger v. Phinney was an action of replevin, and it was held that the property had not passed, or, if it had, that it had reverted in the plaintiff in consequence of the defendant's fraud. The plaintiff maintained his action independently of the contract."

Gilson v. Spear (1865) 38 Vt. 311, 88 Am. Dec. 659, cited and approved as an authority for the decision in Slayton v. Barry, does not support it. That case was an action for deceit in the sale of a horse; the infant defendant, though refusing to warrant, falsely affirmed the horse to be sound. In such a case it is undisputed that the representation is a part of the contract, so that infancy is a good defense. (See, however, Word v. Vance, 1 Nott & M'C. 197, 9 Am. Dec. 683, *infra*, II. b.) But the decision that an infant is not liable for a false statement as to the subject-matter of the contract does not support the contention of Slayton v. Barry.

Doran v. Smith (1877) 49 Vt. 353, simply follows the principle laid down in Gilson v. Spear, 38 Vt. 311, 88 Am. Dec. 659. In this case the infant defendant had sold a pin to the plaintiff as his own. It was reclaimed by the real owner from the plaintiff, who brought his action for the deceit, and the court held the plea of infancy good.

But Nash v. Jewett (1889) 61 Vt. 501, 4 L. R. A. 561, 18 Atl. 47, also cited as an authority in Slayton v. Barry, is no authority for that decision. The plaintiff sold the defendant goods, and took his note, relying upon his statement that he was of age. The declaration stated these facts, but omitted to allege the damage in that the defendant had refused to keep his contract. The court reviews the Vermont authorities, none of which is exactly in point, and after distinguishing Fitts v. Hall (1838) 9 N. H. 441, the facts of which were the same as in Slayton v. Barry, on the ground that in that case the infant had avoided the contract before suit, decided that infancy was a defense.

In Illinois, in 1865, in Davidson v. Young, 57 L. R. A.

38 Ill. 145, it was held (*obiter*): "If he [an infant] were to falsely allege himself to be of age, for the purpose of inducing another person to purchase and take a deed of his lands, he would be liable to respond in damages for any injury which might result to the purchaser in consequence of the deceit."

And Mathews v. Cowan, 59 Ill. 341, decided that an infant who, pretending to make immediate payment for goods, gives a bad check, is liable *ex delicto* for fraud, since the contract was void, and title never passed. "The transaction, as here complained of, was not really a contract, but we must regard it as a mere tort." This was followed by Ashlock v. Vivell (1888) 29 Ill. App. 388.

So, in Nolan v. Jones (1880) 53 Iowa, 387, 5 N. W. 572, where an infant in an exchange of horses with the plaintiff represented that his horse was sound, knowing that it had glanders, the plaintiff brought replevin for his own horse, alleging simply that the defendant had obtained his horse by fraud, and that he himself still owned it, and ignoring the contract of exchange; and the court held that evidence of the fraud of the infant defendant was competent to show that the pretended contract, set up in the answer, was void for fraud. The court, however, added, entirely *obiter*, that, "as a minor cannot make himself liable upon his contracts of sale, no action for damages for deceit or fraud in a sale can be maintained against him."

In Pennsylvania it seems to be the law that an infant, although not liable for his contract, is yet liable in an action on the case for damages, if guilty of fraud. Hughes v. Gallans (1874) 10 Phila. 618.

And one who sells goods on credit to an infant who pretends to be of age may disaffirm the sale on learning of the fraud, and replevy the goods, even from a third person. Neff v. Landis, 110 Pa. 204, 1 Atl. 177.

And in Mississippi it has been said, *obiter*, that if one was induced by the affirmation of an infant to believe that he was of age, and so to enter into a contract with him, and the infant sought to entrap him into a contract which the infant intended to repudiate to the other's loss, the infant would be liable for his fraud. Yeager v. Knight (1883) 60 Miss. 730.

But in Maryland the opposite rule seems to obtain,—at least, unless the infant, when he made his contract, intended to repudiate it. In Monumental Bldg. Assn. No. 2 v. Herman (1870) 33 Md. 128, it is said: "Where he affirms himself to be of age, and borrows money, and gives his obligation for it, and avoids it by reason of his nonage, no action lies against him for the deceit, because, though liable for actual torts or trespass, etc., which are *ex delicto*, yet he is not bound for the action sounding in deceit."

In Louisiana, under the rule of the Spanish

law, an infant seems to be treated like an adult, in regard to fraudulent torts. Compare *Slidell, J., in Christian v. Welch* (1852) 7 La. Ann. 533: "Where there is fraud, the minor stands on no better footing than one of full age."

And in *Victoria (Campbell v. Ridgely, 18 Vict. L. Rep. 701)*, where an infant by fraudulently representing himself to be of age, has induced another person to enter into a contract with him, under which materials are supplied and work done, the infant is liable in an action, not only for the return of the materials in his possession, but also for an account, and to recover the value of the materials which are no longer in his possession.

In four of the states of the Union statutes have been passed (of which that of Iowa is the original) providing, in identical language, that an infant cannot disaffirm his contract "in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe him [the minor] capable of contracting." Iowa Code, § 3190; Kan. Gen. Stat. § 4184; Utah, Rev. Stat. § 1543; Wash. Gen. Stat. § 4582.

Cases under these statutes are: *Oswald v. Broderick* (1855) 1 Iowa, 382; *Prouty v. Edgar* (1858) 6 Iowa, 353; *Beller v. Marchant* (1870) 30 Iowa, 350 (holding that an infant who would otherwise be liable on his contract, under the statute, is not bound if his infancy was known to the other party); *Jaques v. Sax* (1874) 39 Iowa, 367; *Dillon v. Burnham* (1890) 43 Kan. 77, 22 Pac. 1016.

And under the civil law (1 Domat, pt. 1, bk. 4, title 6, Sec. 2, § 2378), "If a minor has given out that he is of age, and by producing a false certificate of the registry of his christening, or by some other way, has made people believe that he is a major, he cannot be relieved against those acts into which he shall have engaged anyone by this surprise. Thus, a minor having borrowed money by such means, although he has made no good use of it, yet his obligation will nevertheless have the same effect as that of a major," if the creditor has just reason to believe that the minor was of age.

And by the Spanish law (law 6, title 19, Partidas 6th), if an infant represents himself to be of age, and from his appearance seems to be so, any contract entered into with him will be valid, "for the law protects those who are defrauded, and not those who commit fraud."

(For cases in which it was sought to hold an infant in an action in contract, on the ground that he was estopped by his fraudulent representations from setting up his infancy, see *infra*, V. a.)

b. By false warranty.

The general rule is that an infant is not liable in either tort or contract for a false warranty in the sale of goods. The only case to the contrary is *Word v. Vance* (1818) 1 Nott & M'C. 197, 9 Am. Dec. 683, where, in case for deceit in falsely warranting a horse, the court said: "This is an action, as well in form as substance, *ex delicto*, and when such is the cause of action, even where the form is *ex contractu*, the defense of infancy will not avail."

Elsewhere the cases are uniform on this point. In *Howlett v. Haswell* (1814) 4 Campb. 118, and *Green v. Greenbank* (1816) 2 Marsh. 485,—the former in assumpsit and the latter in case,—infancy was a defense, both being cases of warranty of a horse. In *Green v. Greenbank, Glibbs, Lord Ch. J.*, held: "Where the substantial ground of action rests on promises, the plaintiff cannot, by changing the form of action, render a person liable who would

not have been liable on his promise. This is a case in which the assumpsit is clearly the foundation of the action; for it is, in fact, an undertaking that the horse was sound."

So, *Brown v. Dunham* (1791) 1 Root, 272, shows the Connecticut rule to be the same, the court holding, in an action on the case for fraud in the sale of a horse, that the infant, being incapable of making a contract, could not be guilty of fraud in contracting. Compare *Geer v. Hovy, 1 Root, 179*, in chancery, the petitioner alleging, in vain, that he was "without remedy at law" (*infra*, V. c.).

And *Prescott v. Norris, 32 N. H. 101*, and *West v. Moore, 14 Vt. 449, 39 Am. Dec. 235*, upon the same facts, are to the same effect; but in *Morrill v. Aden, 19 Vt. 505*, where an infant had falsely warranted his horse, and after reaching his majority sued on the notes given for it, it was held that infancy was no defense to the defendant's set-off for the breach of warranty, for, although infancy would be a good defense to an action on a false warranty, here the infant, by suing on the notes, had affirmed his contract, and his infancy would not avail him.

In *New York*, however, in *Hewitt v. Warren, 10 Hun, 560*, which was for breach of warranty in the sale of a horse, the court, instead of holding squarely that infancy was a good defense, since the warranty, although fraudulent, was a part of the contract, decided that the action was not maintainable, since the plaintiff upon discovering the fraud had not disaffirmed the contract, by returning or offering to return the horse, "and thus put the infant in the position of a mere wrongdoer, unjustly keeping what he had fraudulently obtained." And the court adds: "It would seem that the infant would then be liable in damages for tort."

For cases of fraud of an infant, not amounting to warranty, as to the subject-matter of a contract, see *Grove v. Nevill, 1 Keble, 773*; *Gilson v. Spear, 38 Vt. 811, 88 Am. Dec. 659*; *Doran v. Smith, 49 Vt. 353*; and *Nolan v. Jones, 53 Iowa, 387, 5 N. W. 572,—supra, II. a.*

III. Tort in the performance of a contract.

a. Contract of bailment.

1. Damage to property by negligence.

It may be stated as the law that an infant is not liable for injury to property bailed to him, occasioned simply by his ignorance or negligence. The difficulty is to determine whether injury in any case is of this kind, or is caused by the wilful or deliberate act of the infant (such as to put the case in the class treated in III. a, 2, *infra*), in which case the authorities are conflicting as to his liability.

The earliest case is *Crosse v. Andros* (1598) Rolle, Abr. 2. The goods in question were constructively in the possession of the innkeeper as bailee, and he would therefore be liable for them by the customs of inns. The report is: If an inn comes to an infant, and he keeps it, and his guests are robbed, yet no action lies against the infant. Agreed.

And the leading case (always contrasted with *Burnard v. Haggis, 14 C. B. N. S. 45, 32 L. J. C. P. N. S. 189, 9 Jur. N. S. 1825, 8 L. T. N. S. 820, 11 Week. Rep. 644, infra, III. a, 2*), is *Jennings v. Rundall* (1799) 8 T. R. 335. The declaration, in form trespass, stated the delivery of a mare by the plaintiff to the defendant, an infant, and that the defendant "wrongfully, injuriously, and maliciously" used the mare so immoderately and excessively that she was greatly injured. The court held that "the words 'wrongfully, injuriously, and ma-

liciously' . . . cannot vary the case. . . . The plea of infancy is a good bar to this action on the ground that the act done in this case is the foundation of an action of assumpsit. And the reason of the distinction taken in the case in *Siderfin* [*Johnson v. Pye*] is, that the plaintiff shall not, by changing the form of the action, vary the liability of the infant."

In America the cases are in accord where the act of the infant is merely negligent or injudicious. It was held in *South Carolina*, in 1820 (*Hard v. Templeton*, MSS., Dec. 1820), "that an infant is not liable for the value of a horse let to him, although the horse may have been killed by injudicious driving." See also *Young v. Muhling* (1900) 48 App. Div. 617, 63 N. Y. Supp. 181, *infra*, III. a, 2.

In *Philleo v. Sanford* (1856) 17 Tex. 281, 67 Am. Dec. 654, where the defendants were sued on a contract as common carriers, for damage to goods by wetting, the defense of infancy of Sanford was sustained without discussion.

Eaton v. Hill (1870) 50 N. H. 235, 9 Am. Rep. 189, was an action on the case for carelessly and immoderately driving the plaintiff's horse so that it died. The plea of infancy was sustained on the ground that the defendant had not been guilty of "a positive, wilful, and tortious act," which, the court said, would make him responsible for the damage, even although it was part of the contract, express or implied, that the property should be safely returned. *Bellows, Ch. J.*, said: "When . . . the infant wholly departs from his character as bailee, and by some positive act wilfully destroys or injures the thing bailed, the act is in its nature essentially a tort, the same as if there had been no bailment."

2. Damage to property by wilful act.

Furnes v. Smith (1835) Rolle, Abr. 530, is the earliest case on this head. This was a case in admiralty, but the opinion says that the rule at the common law applies. The report says: If an infant, being master of a ship at St. Christopher's over the sea, by contract with another take upon him to carry certain goods from St. Christopher's to England, and there deliver them, but after does not deliver them according to the agreement, but wastes and consumes them,—he can be sued for the goods in the admiralty court, although he be an infant, for this suit is but in the nature of a detinue, or trover and conversion at the common law.

Vasse v. Smith (1810) 6 Cranch, 226, 3 L. ed. 207, upon much the same facts, is the leading American case. The plaintiff employed the defendant, an infant, as supercargo, to take 70 barrels of flour from Alexandria and sell them in Norfolk. The declaration was in two counts: First, for breach of instructions, in that the defendant, by his negligence, had suffered the property to be embezzled, lost, or destroyed; the second count was in trover. The court held that infancy was a good defense to the first count, but not to the second. Chief Justice Marshall said as to the first count, that it stated a case of contract, and exhibited no feature of such a tort as will charge an infant. But as to the count in trover he said: "This court is of opinion that infancy is no complete bar to an action of trover, although the goods converted be in his possession in virtue of a previous contract. The conversion is still in its nature a tort; it is not an act of omission, but of commission, and it is within that class of offenses for which infancy cannot afford protection."

And *Peigne v. Sutcliffe* (1827) 4 McCord L. 57 L. R. A.

387, 17 Am. Dec. 756, an action on the case on similar facts, where the defendant engaged to carry goods to Africa, sold them, and converted the proceeds, was based expressly on *Vasse v. Smith*, and the "St. Christopher Case" (*Furnes v. Smith*), and held the defendant liable.

There is an Ohio case,—*Denning v. Nelson*, 1 Ohio Dec. Reprint, 503,—also holding that an infant who sells property bailed to him is liable for the tort.

All the other decided cases of wilful, positive tort of an infant in connection with property bailed to him are cases of hiring horses or vehicles.

Schenk v. Strong (1818) 4 N. J. L. 87, is the first American case, and is typical in facts, although contrary to the weight of authority. The plaintiff "lent" his "riding chair" to the defendants, infants, to go a certain journey and use it with moderation and care; and in his declaration, in case, he alleged that the defendants went a different journey, and wilfully and carelessly broke the chair. The decision, holding the plea of infancy a good defense, makes the bald distinction between contracts and torts of *et armis*, always accompanied by a breach of the peace, saying, "they violated the promise in every particular; that is the substance of the thing."

Campbell v. Stakes (1828) 2 Wend. 137, 19 Am. Dec. 561, the leading American case to the opposite effect, is based upon the ground of a constructive disaffirmance, by the infant, of the contract of bailment, by his wilful act in violation of it. This action was in trespass for the death of a mare by the defendant's hard and cruel usage. The court says expressly that case would not lie, since in that form of action the plaintiff would have to affirm the contract, for which infancy is a defense. "But if the infant does any wilful and positive act, which amounts to an election on his part to disaffirm the contract, the owner is entitled to the immediate possession. If he wilfully and intentionally injures the animal, an action of trespass lies against him for the tort."

And *Fish v. Ferris* (1855) 5 Duer, 49, 8 E. D. Smith, 567, follows this doctrine of constructive disaffirmance. The defendant drove a horse, hired to go to Flushing, to Jamaica, and it died. "The contract of hiring," the court says, "was voidable at his [the infant's] election, and a wilful departure from it was an election to avoid it. From the moment an infant becomes a trespasser, his plea of infancy falls him."

So, in *Moore v. Eastman* (1874) 1 Hun, 578, the jury found, in accordance with the charge, "a positive and wilful act, amounting to a disaffirmance of the contract of bailment," producing a proper result although there was little evidence to that effect.

In *Young v. Muhling* (1900) 48 App. Div. 617, 63 N. Y. Supp. 181, a horse was let to the infant defendant to go "direct to Haverstraw." He did not go by the shortest route, but it was a very hot day and the horse died as a result of the driving. On the defendant's appeal from a verdict, the court held that there was not enough evidence to find intentional injury on the defendant's part, in accordance with the principle of *Campbell v. Stakes*.

The rule in Massachusetts was settled in 1826 in *Homer v. Thwing*, 3 Pick. 492. This was in trover for a horse hired by an infant to go to Brookline, and driven to Cambridge and injured. The court said that "the driving of the horse beyond the place to which the defendant had permission to go was a conversion, and trover is the proper remedy."

In *Green v. Sperry*, 16 Vt. 390, 42 Am. Dec.

519, it was said: "Where property is bailed to a minor, and he uses the property for a different purpose from that for which it is bailed, the bailment is thereby determined, and the minor is liable in trover."

But in *Towne v. Wiley* (1851) 23 Vt. 355, 56 Am. Dec. 85, *Homer v. Thwing* was expressly followed. There a horse was hired by an infant for a specific trip; the infant came back by a circuitous way, doubling the distance, and left the horse out all night, so that it died; and the owner brought trover. The court (Redfield, J.) said: "So long as the defendant kept within the terms of the bailment, his infancy was a protection to him, whether he neglected to take proper care of the horse, or to drive him moderately. But when he departs from the object of the bailment, it amounts to a conversion of the property, and he is liable as much as if he had taken the horse in the first instance without permission."

And *Ray v. Tubbs* (1878), 50 Vt. 688, 28 Am. Rep. 519, reasserts the same rule. In this case an infant gave a note in satisfaction of his tort in overdriving a horse, but when sued on his note he pleaded infancy. It was held, however, that infancy was no defense, on the ground that the note was given for a necessary (*Bradley v. Pratt*, 23 Vt. 378); and the court saw no reason why he should not be held liable in an action upon the note, as he would be if the action were brought upon the cause of action which formed the consideration for the note.

Hanks v. Deal, 8 McCord, L. 257, was also a case on a note given in settlement of an award for a tort committed by an infant, but the court decided that the note was voidable; at all events, in the absence of proof that it was for a necessary, or beneficial to the infant.

In *Whelden v. Chappel*, 8 R. I. 230, trover was brought for a horse and buggy, hired to go to a certain place, and driven to a more distant place. On a plea of infancy it was held that without proof of conversion the plaintiff must fail. There was no denial of title to, or exclusion of dominion of, the plaintiff, and no misuse. It was necessary to show that the bailment had been determined.

But in a later Rhode Island case (*Freemen v. Boland* [1882] 14 R. I. 39, 51 Am. Rep. 840), on the same facts, the plaintiff was successful. The court said: "The question here is whether an infant, or minor, who hires a horse and buggy to drive to a particular place, and who, having got them under the hiring, drives beyond the place or in another direction, is liable in trover for the conversion. We think he is. There are cases in which infancy has been held to be a good defense to an action *ex delicto* for tort committed under contract or in making it. But that is not this case. The act here complained of was committed, not under the contract, but by abandoning it; the bailment being thus determined."

And in Nebraska the same rule obtains. An infant hired a horse and buggy to go to one place, and drove to entirely different places many times further, with five passengers. The buggy was upset and broken, and the horse injured and overdriven. Infancy was no defense. *Churchill v. White* (1899) 58 Neb. 22, 78 N. W. 369.

There are two Pennsylvania cases, however, which, with *Schenk v. Strong* (1818) 4 N. J. L. 87, are against the weight of authority. The first is *Penrose v. Curren*, 3 Rawle, 351, 24 Am. Dec. 356. The declaration was in case, and alleged a bailment to drive the plaintiff's horse to German town; that the defendant went to Chester and other places unknown, and by hard and cruel treatment killed the horse. The 57 L. R. A.

plea of infancy was held good. *Homer v. Thwing*, 3 Pick. 492, was expressly disapproved, and the court said: "The foundation of the action is contract, and, disguise it as you may, it is an attempt to convert a suit, originally in contract, into a constructive tort so as to charge the infant."

On almost the same facts, in *Wilt v. Welsh* (1837) 6 Watts, 9, the same result was reached, and *Campbell v. Stakes* (1828) 2 Wend. 137, 19 Am. Dec. 561, was disapproved. The opinion says: "The ground of the New York case (*Campbell v. Stakes*) is that a positive breach of the contract is a disaffirmance which works a dissolution of it, and reduces the infant to a level with an adult who is chargeable with a conversion for any act which subverts the nature of the bailment. . . . Why should we employ any juggle to tear from an infant the defenses with which the law has covered his weakness?"

The English rule is in accordance with the weight of authority in this country. *Burnard v. Haggis* (1863) 14 C. B. N. S. 45, 32 L. J. C. P. N. S. 189, 9 Jur. N. S. 1825, 8 L. T. N. S. 320, 11 Week. Rep. 644. An infant hired a mare for a ride on the road, and was expressly told that she was not fit for jumping. The mare was put at a fence, fell on a stake, and was killed. Judgment was for the plaintiff. *Byles, J.*, said that this was an act of tort, just as distinct from the contract as if the defendant had run a knife into the mare.

And in *Walley v. Holt* (1876) 35 L. T. N. S. 631, a case of an agreement to go to a certain place and back with one other person, carrying three other persons a greater distance, driving furiously, and ill treatment of the horse, the whole subject was carefully treated, and *Jenings v. Rundall* (*supra*, III. a. 1) was contrasted with *Burnard v. Haggis*. Chief Baron Kelly said: "The question in this case is not whether . . . the contract . . . has been broken, . . . but whether or not it appears that something in the nature of a wrong has been done by the defendant, independently of and beyond the contract, for which an action on the case will lie. . . . Where . . . something has been done beyond the contract, which amounts to a tort, then infancy is no defense. The question has recently been very well treated by Mr. Pollock in his excellent work 'Principles of Contract,' where, at pages 52, 53, . . . he says that 'the rule that an infant cannot be sued for a wrong when the cause of action is in substance *ex contractu*, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract, is decidedly laid down in *Jennings v. Rundall*, where it was sought to recover damages from an infant for overdriving a hired mare. But if an infant's wrongful act, though concerned with the subject-matter of the contract, and such that but for the contract there would have been no opportunity of committing it, is, nevertheless, independent of the contract in the sense of not being an act of the kind contemplated by it, or being an act expressly forbidden by it, then the infant is liable . . . and the learned author then refers to . . . *Burnard v. Haggis*, as establishing the distinction. In that case the horse was used in a manner positively forbidden by the contract, and it was held to be a trespass and an independent tort, for which the infant defendant was liable; and so, in the present case, the overdriving and flogging, and all that was done by the defendant, by which the plaintiff's mare was injured, was *ultra* the contract altogether, and constituted a separate and independent tort on his part, to which . . . the plea of infancy is no defense."

3. Refusal to deliver property.

On this point the cases are uniform that the infant is liable in trover, replevin, or detinue for the return of the goods.

In *Manby v. Scott* (1663) Sid. pt. 1, p. 129, a case of trover, it was said, however: If one deliver goods to an infant on a contract, knowing him to be an infant, the infant will not be charged in trover and conversion for them, for by this way all the infants in England would be ruined. But if delivery of the goods be to the infant, not knowing him to be an infant, it will be otherwise.

But in *Mills v. Graham* (1804) 1 Bos. & P. N. R. 140, in detinue for skins delivered to an infant to be worked upon and finished, the plaintiff was successful, and Mansfield, Ch. J., added that "trover might have been brought for the conversion."

In *Green v. Sperry* (1844) 16 Vt. 390, 42 Am. Dec. 519, trover was maintained against a boy for a watch lent to him by the plaintiff's wife.

In *Bennett v. McLaughlin*, 18 Ill. App. 349, replevin was brought for a sewing machine delivered to the defendant on a conditional sale. The defendant undertook, on reaching her majority, to rescind the contract and keep the machine, and refused to pay the instalments. But the court said: "Her right to avoid the contract cannot be questioned, but it is a privilege secured to her by the law for her own protection, and she is not permitted to use it as a sword to injure others; she cannot retain the property purchased, after arriving at her majority, and at the same time repudiate the contract under which she received it; and if she does repudiate the contract under such circumstances, the title remains in the vendor, and he is entitled to the immediate possession of the property."

Wheeler & W. Mfg. Co. v. Jacobs, 2 Misc. 236, 21 N. Y. Supp. 1006, was on the same facts, and infancy was no defense; the court holding that where an infant pleads his minority in order to escape payment of the purchase price, the seller may rescind the sale and replevy the goods.

And *Robinson v. Berry* (1899) 93 Me. 320, 45 Atl. 84, reaches the same result.

b. Contracts other than bailment.

1. By negligence.

There seems to be no case exactly in point with the principal case, *LOWERY v. CATE*, where an infant, who contracted to do work on another person's property, was sued in tort for the damages resulting from his negligence in performing the contract. On full consideration of the cases, however, it will be seen that there can be no question as to the correctness of the decision in *LOWERY v. CATE*.

2. By other acts.

Bristow v. Eastman (1794) 1 Esp. 172, Peake N. P. Cas. pt. 1, p. 223, was a case of embezzlement by an infant servant of funds in his hands. The employer brought assumpsit for money had and received. Lord Kenyon said that infancy was no defense to the action. Infants were liable to acts *ex delicto*, though not *ex contractu*; and, though the present action was in its form an action of the latter description, yet it was of the former in point of substance. If the plaintiff had brought an action of trover, or an action grounded on the fraud, unquestionably infancy would have been no defense; and, as the object of the present action was precisely the

same, that his opinion was, that the same rule of law should apply, and that infancy was no bar.

Re Seager, 60 L. T. N. S. 665, a recent case (1889), follows this case; here, however, the action was brought *ex delicto*.

These cases were of conversion of money in the hands of an infant by virtue of a contract, and such are to be carefully distinguished from the breach of a contract to sell and account for the proceeds.

Of the latter class is *Munger v. Hess* (1858) 28 Barb. 75. The complaint stated a contract, by which the defendant was to vend for the plaintiff certain goods, account for those sold, and return those unsold. The plaintiff demanded the return of the goods, and the defendant refused. But there was no allegation of a conversion, and the court held that the plea of infancy was a good defense, although the plaintiff maintained, on the authority of *Bristow v. Eastman*, that infancy was no defense if the substance of the action were *ex delicto*, though the form were *ex contractu*. But there was no conversion here.

Of the same class is a recent Maine case, *Caswell v. Parker* (1901) 96 Me. 89, 51 Atl. 238, where an infant was intrusted with a quantity of shoes to be sold upon commission, and those unsold were to be returned to the plaintiff with the proceeds of those sold. The plaintiff complained in trover that the infant defendant, contrary to instructions, sold upon credit, and failed to account for the proceeds. But it was held that the substance of the complaint was a breach of contract, and the plaintiff could not deprive the infant of his defense of infancy by suing in tort.

Somewhat similar is *Root v. Stevenson*, 24 Ind. 115. This was trover for \$1,300, in the hands of an infant as firm profits, which he had agreed to turn over. The decision was that infancy is a good defense, because it was not a bailment (as in *Towne v. Wiley*, 23 Vt. 355, 56 Am. Dec. 85) to deliver over specific things, as coins and bills, and the action of the infant was merely a nonfeasance, for which infancy is a protection.

But where an infant takes money as a stakeholder, and refuses to pay it over to one of the betters on demand, he is liable, in trover, for the specific bills. *Lewis v. Littlefield*, 15 Me. 238.

Catts v. Phalen (1844) 2 How. 376, 11 L. ed. 306, was an action brought on the analogy of *Bristow v. Eastman*, in assumpsit, for \$12,500, money had and received. The defendant was employed by the plaintiffs to manage a lottery wheel, and colluded with another to defraud them by a spurious drawing. The defendant's infancy was no defense.

In *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 420, the plaintiff in leasing a farm to the defendant, an infant, expressly reserved a full lien on all the crops of that year as security for the payment of the rent, and upon the defendant's disposing of the crops brought trover for them. Infancy was held to be no defense, the court saying: "His conversion of this property was a tortious act. His liability . . . does not arise from any breach of contract, but for an unlawful appropriation to his own use of the plaintiff's property."

IV. Other torts arising from contracts.

Ejectment may be maintained for disseisin, that being a tort, against an infant, although he claims under a mortgage. *Marshall v. Wing*, 50 Me. 62; *McCoon v. Smith*, 3 Hill, 147.

So, an action is maintainable against an in-

fant for damages for the wrongful withholding of land. *McClure v. McClure*, 74 Ind. 108.

Infancy is no defense to an action for seduction (*Fry v. Leslie*, 87 Va. 269, 12 S. E. 671; *Straughan v. Smith*, 19 Ont. Rep. 558), even though induced by a promise of marriage. *Becker v. Mason*, 93 Mich. 336, 53 N. W. 361; *Lee v. Hefley*, 21 Ind. 99.

This rule, it will be seen, is the exact converse of, and consistent with, the rule that infancy is a good defense to an action for breach of promise of marriage, which, in treatment, is rather a tort than a breach of contract (*Holt v. Ward*, *Clarencieux*, 2 *Strange*, 987; *Hunt v. Peake*, 5 Cow. 475, 15 Am. Dec. 475; *Willard v. Stone*, 7 Cow. 22, 17 Am. Dec. 496; *Morris v. Graves*, 2 Ind. 354; *Hamilton v. Lomax*, 28 Barb. 615; *Warwick v. Cooper*, 5 Sneed, 659; *Cannon v. Alsbury*, 1 A. K. Marsh. 76, 10 Am. Dec. 709; *McConkey v. Barnes*, 42 Ill. App. 511; *Evans v. Terry*, 1 Brev. 80; *Pool v. Pratt*, 1 D. Chp. [Vt.] 252; *Smith v. Jamieson*, 17 Ont. Rep. 626; *Rush v. Wick*, 31 Ohio St. 521, 27 Am. Rep. 523; *Felbel v. Oberaky*, 13 Abb. Pr. N. S. 402, note; *Frost v. Vought*, 87 Mich. 65); although the promise was the means of effecting seduction. *Cohen v. Weinberg*, N. Y. Daily Reg. April 11, 1884; *Leichtweis v. Treakow*, 21 Hun, 487.

But in *Evans v. Terry* (1802) 1 Brev. 80, the action being in assumpsit, the court added that "they were of opinion that the plaintiff might maintain an action in another form, founded on the deceit practised on her by the defendant."

Stromberg v. Rubenstein (1897) 19 Misc. 647, 44 N. Y. Supp. 405, decides that infancy is a good defense to an action of replevin for an engagement ring, after the engagement to marry had been broken by the defendant.

In *Oliver v. McClellan*, 21 Ala. 675, *McClellan* had lent his horse to *Hall*, who exchanged it for another with *Oliver*, an infant, saying that the exchange was subject to the ratification of *McClellan*. Upon *Oliver* refusing to deliver the horse, *McClellan* brought detinue, and infancy was held to be no defense; the court saying that "an infant may be sued for his torts, and this, irrespective of the form of action which the law prescribes for the redress of the wrong done."

Where an infant married woman was sued for personal injuries to the plaintiff resulting from the negligence of her husband, who was acting as her agent in cutting timber on her land, it was held that she was not liable, since she was legally incompetent to enter into a binding contract of agency with another so as to make her liable for his torts. *Burns v. Smith* (1902; Ind. App.) 64 N. E. 94.

But it seems that in North Carolina an infant is liable for the torts committed by his agent in the necessary business of his agency, under the maxim, *Qui facit per alium facit per se*. *Smith v. Kron* (1887) 96 N. C. 392, 2 S. E. 533. (Compare *Sikes v. Johnson*, 16 Mass. 359; *Robbins v. Mount*, 38 How. Pr. 34; and *McCabe v. O'Connor*, 4 App. Div. 364, 38 N. Y. Supp. 572,—*supra*, l.)

An infant who rescinds, before his majority, the sale of his goods, and regains possession of them, is not liable in trespass therefor. *Shipman v. Horton*, 17 Conn. 484.

V. Estoppel of an infant by his fraud.

Under the head of estoppel this note covers only cases where it was sought to be maintained that an infant was estopped by his tortious acts, amounting to deceit, at the time of the execution of a contract; and it does not cover cases of mere acquiescence in the contract.

tract, nor admissions, nor cases of fraud or admissions by others than the infant (as by guardians) for his benefit.

a. When estoppel to plead infancy in an action on contract.

The authorities are divided, and no general American rule can be stated. But while there are some cases in which it is said that an infant cannot be bound by anything that he may do before his majority, either by way of contract or estoppel (*Silms v. Everhardt*, 102 U. S. 300, 26 L. ed. 87; *Wieland v. Koblick*, 110 Ill. 16, 51 Am. Rep. 678; *Corey v. Burton*, 32 Mich. 32; *Lackman v. Wood*, 25 Cal. 147; *Alvey v. Reed*, 115 Ind. 149, 17 N. E. 265; *Carpenter v. Carpenter*, 45 Ind. 142 [although, as the last case says, the infant's false representation may furnish ground of an action against him for the tort]); and while the weight of authority in this country seems to be to the effect that an infant is not estopped by his false representations from using his infancy as a shield against the contracts induced by his fraud,—yet the authorities to the contrary are respectable in number.

The decisions in the older states are generally of the first kind.

So, in New York, *Conroe v. Birdsall* (1799) 1 Johns. Cas. 127, 1 Am. Dec. 105, is the earliest authority. The defendant, upon being asked by the plaintiff's agent, at the time of the execution of the bond on which the action was brought, whether he was of age, replied that he was. The plaintiff contended that the infant ought not to be allowed to set up his own fraud, but it was held that infancy was a defense. The court said: "No decision can be found which carries the doctrine of fraud, or its effects in relation to infants at common law, to this extent. . . . The cases cited were in equity."

And *Brown v. McCune* (1851) 5 Sandf. 224 (*supra*, II. a), also an action on contract, went upon the ground that estoppel would simply have the effect of rendering the infant's contracts valid. The court said: "We are not aware that any case has gone the length of holding a party estopped by anything he has said or done while he was under age. . . . If he were thereby estopped from denying his majority, the contract would, of course, be adjudged valid and obligatory upon him. A contrary doctrine would overturn the whole law relative to the contracts of infants." *Ackley v. Dygert*, 33 Barb. 176, 193, *semble*, is in accord.

And it was reasserted in *Studwell v. Shapter*, 54 N. Y. 249 (*supra*, II. a), that fraudulent representation would not give validity to a contract otherwise invalid.

But in New York *Building Loan Bkg. Co. v. Fisher* (1897) 23 App. Div. 363, 48 N. Y. Supp. 152, a case in equity (mortgage foreclosure), the usual equitable rule in such cases was disregarded, and again infancy was held to be a good defense.

Carolina Interstate Bldg. & L. Asso. v. Black, 119 N. C. 323, 25 S. E. 975, a case of an infant married woman, is exactly in accord. (Compare *Pemberton Bldg. & L. Asso. v. Adams*, 53 N. J. Eq. 258, 81 Atl. 280, and the English cases, *infra*, V. b.)

In New Hampshire (*Burley v. Russell*, 10 N. H. 184, 34 Am. Dec. 146) it is the law that an infant is not estopped, by his fraud as to his age, from setting up his infancy, in assumpsit, to avoid his contract.

And in Vermont the rule is the same. In *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678, where an infant, by means of represent-

ing himself of age, bought a wagon, paying part, the seller retaining a lien for the rest, and on default the wagon was sold by the vendor, it was held that the infant was not estopped to avoid his contract and sue for the money paid. The court said: "The false representations . . . do not make the contract any more binding than it otherwise would be." *Carpenter v. Carpenter*, 45 Ind. 142, is an almost identical case.

And in an action to establish a lien on a building for materials it was held that an infant cannot make himself liable on his contracts by simply holding himself out as an adult. *Price v. Jennings*, 62 Ind. 111.

The Pennsylvania rule seems to be the same. *Keen v. Coleman*, 89 Pa. 299, 80 Am. Dec. 524, was an action on a bond executed by a married woman representing herself as a widow. The court said: "As in the case of infancy, it is not a case of privilege, but of legal incapacity to contract, that stands in the way of the plaintiff's recovery on this bond. The wrong done cannot make the contract good by way of estoppel. . . . If a legal incapacity can be removed by a fraudulent representation of capacity, then the legal capacity would have only a moral bond or force, which is absurd."

This was followed by *Ledger Loan & Bldg. Assn. v. Cook*, 6 W. N. C. 428, an action on a mortgage. It appeared that one of the mortgagors was a married infant, although she had made affidavit at the time of the execution of the mortgage that she was of full age, and the court held that judgment must be in her favor. And *Neff v. Landis* (1885) 110 Pa. 204, 1 Atl. 177, *supra*, II. a, is by implication to the same effect.

And in Massachusetts, in *Merriam v. Cunningham*, 11 Cnsh. 40, an action on contract for the keep of horses of the infant defendant, who represented himself to be of full age, Bigelow, J., said: "The fraud of the defendant, if ever so clearly shown, does not restore validity to his promise, or, in any way, enhance its obligation."

But in *Baker v. Stone* (1884) 186 Mass. 405, where an infant borrowed money on a mortgage without disclosing her minority, from one who, she knew, believed her to be of age, the court, while holding that she was not estopped from avoiding the mortgage, expressly said that the facts did not present the question as to estoppel of an infant who has induced one to accept a deed by fraudulent misrepresentations that he was of age.

Burdett v. Williams, 30 Fed. 697, decides that an infant's fraud as to his age, on signing shipping articles, does not estop him from rescinding his contract and suing on *quantum meruit*.

In Minnesota the rule is the same. *Conrad v. Lane*, 26 Minn. 389, 37 Am. Rep. 412, 4 N. W. 693, was an action for goods sold to an infant on credit. He was not estopped from pleading his infancy by his fraud as to his age.

In accord are *Folds v. Allardt*, 35 Minn. 488, 29 N. W. 201, and *Alt v. Graff*, 65 Minn. 191, 68 N. W. 9, mortgage foreclosure cases.

But the rule seems to be *contra* in New Jersey (as to mortgage foreclosure), Texas, and Victoria, Australia.

In *Pemberton Bldg. & L. Assn. v. Adams*, 58 N. J. Eq. 258, 31 Atl. 280, an action on a mortgage, the defendant having secured the loan by fraud as to his age, the court said: "The law will not, under such circumstances, allow a fraud-doer to protect himself under the plea of infancy." This was on the authority of *Hayes v. Parker*, 41 N. J. Eq. 630, 7 Atl. 511, *infra*, V. b.

In *Harselm v. Cohen* (Tex. Civ. App.) 25 S. 57 L. R. A.

W. 977, the father of an infant carried on a business of his own under the name of his daughter, the defendant, who was aware of the fraud. The daughter, sued on an account, pleaded infancy, and it was held that it was the law in Texas that a minor could be held to contracts secured by his fraudulent representations; and an earlier case, apparently supporting this decision, is *Carpenter v. Pridgen*, 40 Tex. 32. Of the same general class is *Campbell v. Ridgely*, 13 Vict. L. Rep. 701, *supra*, II. a, with regard to the question of estoppel.

In *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176, it is held that, in order that an infant may be estopped from setting up infancy to an action on a contract (for legal services in this case), by his representing that he was of age, the representation must have been fraudulently made, and believed, relied upon, and acted upon by the other party.

In England an attempt to apply the doctrine of estoppel to evade the rule that an infant is not responsible for his fraud in inducing a contract was unsuccessfully made in *Miller v. Blankley* (1878) 38 L. T. N. S. 527, *supra*, II. a.

But in an earlier case, in bankruptcy,—*Es parte Unity Joint Stock Mut. Bkg. Assn.* (1858) 3 DeG. & J. 63, 27 L. J. Bankr. N. S. 83, 4 Jur. N. S. 1257,—it was decided that an infant who had obtained a loan by fraudulently representing himself to be of age made himself liable in equity for the amount; the equitable rule applying in bankruptcy proceedings.

Where, however, an infant represented that he was of age, to the agent of the other party to a marriage settlement who was herself present and knew his real age, the contract was not binding upon him in equity when he became of age. *Nelson v. Stocker* (1859) 4 DeG. & J. 458, 28 L. J. Ch. N. S. 760, 5 Jur. N. S. 751.

(For the English rule in equity, generally, see *infra*, V. b.)

b. When estopped to reassert title, or to demand a second payment.

In England, owing partly, no doubt, to the effects of the hard rule of *Johnson v. Pye*, Sid. pt. 1, p. 258, 1 Lev. 169, 1 Keble, 905 (*supra*, II. a), courts of equity have gone much further than in this country to prevent an infant of years of discretion from taking advantage of his own fraud to the damage of innocent persons, although in courts of law he is always protected from estoppel by his fraudulent representations, contrary to the rule in many American jurisdictions.

This tendency is first shown in *Clare v. Bedford*, 13 Vin. Abr. 536. An infant clerk of an attorney, on whose land he held a mortgage, engrossed a mortgage deed of the same land to a third person, and the claim of the second mortgagee was preferred to that of the infant.

And *Hanning v. Ferrers* (1712) 1 Eq. Cas. Abr. 356, is a stronger case. An infant remainderman, although not privy to the making by the life tenant of a long lease to one who believed the lessor to have the fee, where he allowed the lessee to spend much money on the land, was not allowed to profit by his fraud.

But *Savage v. Foster* (1723) 9 Mod. 35, a similar case on the facts, except that the fraud was committed by a married woman, settled the equitable rule, the court saying that it was an apparent fraud not to give notice of title to the intended purchaser, and in such case infancy or coverture would be no excuse.

Zouch v. Parsons, 3 Burr. 1794, 1 W. Bl. 575, deciding that an infant mortgagee cannot avoid his reconveyance made upon payment be-

cause he is compellable by law to make it, is an important case on account of Lord Mansfield's much-quoted maxim: "The privilege of infants is a shield, and not a sword. It shall protect them from fraud and oppression, but shall not be turned into an offensive weapon to assist fraud and oppression."

So, in *Beckett v. Cordley*, 1 Bro. Ch. 352, 358, where an infant executed a discharge of her interest, and later reclaimed it, but no fraud on her part was made out, it was said: "If there was a fraud of which the infant was consant, she would be bound as much as an adult."

And in *Cory v. Gertcken*, 2 Madd. 40, where an infant persuaded his trustee to make a payment to him, the concealment of his infancy was held to be a fraud, and precluded him from calling for a repayment.

Overton v. Banister, 3 Hare, 503, 9 Jur. 906, was on similar facts, and it was held that payment by the trustee operated as a discharge for the amount, although the general release by the infant was no bar.

And in *Wright v. Snowe* (1848) 2 DeG. & S. 321, it was even held that an infant representing that he is of age, who executes a release, on which the other party acts, cannot impeach its validity, whether the other knows his real age or not.

And in *Inman v. Inman* (1873) L. R. 15 Eq. 260, 21 Week. Rep. 433, where an infant, with the sworn statement that he was of age, executed a charge on a fund, and upon reaching his majority executed a mortgage upon the same fund to one without notice of the former charge, it was held, upon an application by the later encumbrancer for funds of the infant in the hands of the court, that the second charge was a valid disaffirmance of the first, and, the infant not himself seeking to take advantage of his fraud, it would not avail the first lender against the second.

The American cases are conflicting, but the great weight of authority is in accord with the English cases.

The opinion in *Hayes v. Parker* (1886) 41 N. J. Eq. 630, 7 Atl. 511, states the general rule very clearly. Here an infant, by representing himself of age, secured a settlement with his guardian, and executed a discharge, but was not permitted to compel his guardian to account. The court says: "At law, . . . he [an infant] is incapable of fraudulent acts which will estop him from interposing the shield of infancy. . . . In equity, however, this rigid rule has its exceptions. Equity will regard the circumstances surrounding the transaction,—the appearance of the minor, his intelligence, the character of his representations, the advantage he has gained by the fraudulent representations, and the disadvantage to which the person deceived has been put by him,—in determining whether he should be permitted to invoke successfully the plea of infancy."

New York is in accord with this rule. *Spencer v. Carr* (1871) 45 N. Y. 406, 6 Am. Rep. 112, while not actually an authority to this effect, was expressly followed, as to the implication contained in it, in *Blakeslee v. Sincepaugh* (1893) 71 Hun, 412, 24 N. Y. Supp. 947. The former held that an infant who signed her mother's name, at her request, to a deed of the daughter's land, was not estopped, in the absence of proof of intentional fraud on the infant's part, from asserting her title. In *Blakeslee v. Sincepaugh* the infant stated to the purchaser of land of which he was actually the owner that he had no title, and it was held that he was estopped to sue in ejectment, 57 L. R. A.

ing "an infant of sufficient age to appreciate his rights and duties."

Johnson v. Clark, 23 Misc. 346, 51 N. Y. Supp. 238, where an infant, representing himself of age, gave jewelry for poker chips, and was held not estopped to reclaim it, went on the ground of the special rule as to gambling contracts.

An infant who conveys land, falsely representing himself of age, cannot have his deed set aside on the ground of infancy (*Schmitheimer v. Eiseman* [1870] 7 Bush, 298 [see however, *Wilson v. Wilson*, 20 Ky. L. Rep. 1971, 50 S. W. 260, *infra*]; *Ryan v. Growney* [1894] 125 Mo. 474, 28 S. W. 189, 755; *Williamson v. Jones* [1897] 48 W. Va. 562, 38 L. R. A. 694, 27 S. E. 410; and *Kilgore v. Jordan* [1856] 17 Tex. 341, *semble*); but in *Vogelsang v. Null*, 67 Tex. 463, 8 S. W. 451, an infant who was asked, under the same facts as in the last case, as to her age, and did not answer, another answering for her, was not estopped.

A case similar to the last in facts, but with a contrary result, is *Adams v. Fite*, 3 Bart. 70. An infant sold his land, concealing his minority, but without active misrepresentation, and the grantee had good reason to believe that he was of age. The court held the infant estopped on these facts, combined with the acquiescence of the grantor for twenty years after attaining his majority.

In *Ferguson v. Bobo*, 54 Miss. 121, an infant, with knowledge of her rights, conveyed land to her father to enable him to borrow, and the father later conveyed to the mortgagee. She was estopped to set up her legal title. But in *Brantley v. Wolf* (1882) 60 Miss. 420, an infant who had sold land without mentioning his age was not estopped.

And mere receipt of the consideration, and apparent acquiescence by the infant in the unauthorized sale of land by a trustee, will not estop him. *Wille v. Brooks*, 45 Miss. 542.

In *Goodman v. Winter*, 64 Ala. 410, 437, 38 Am. Rep. 18, where an infant remainderman was held estopped from repudiation of a sale of land by the life tenant, the infant having received his share of the consideration, it is said that no infant, lunatic, or married woman can be permitted to receive, hold, and enjoy the proceeds of a sale of property, whether the sale is by an order of a court irregular and void, or by the wrongful act of an individual, without being estopped from a repudiation of the sale.

In *Montgomery v. Gordon*, 51 Ala. 377, 380, a case not involving fraud by an infant, it is said that an infant is incapable of being affected by an estoppel *in pais*, of which fraud is not an element; and the infant was not precluded from recovery.

And in *Gillespie v. Nabors*, 59 Ala. 441, 31 Am. Rep. 20, a case holding that an infant cannot be estopped by his guardian's unauthorized act in selling his land, it was said that infants, as a rule, can do no act which will amount to an estoppel *in pais*.

In Ontario it has been held (*Bennetto v. Holden*, 21 Grant, Ch. [U. C.] 222) that where an infant conveying land represented herself as of age, and after majority conveyed to others who had knowledge of the earlier grant, she was bound by her misrepresentations.

In South Carolina there are four cases under this head, in each of which an infant's slaves had been sold by his father.

Hall v. Timmons, 2 Rich. Eq. 120, was a bill in equity for the specific delivery of a slave. The infant was fifteen years old at the time of the sale, and did not object to it. The case went off on another point, but the court said

that if the infant knew his rights he would be estopped.

In *Norris v. Walt*, 2 Rich. L. 148, 44 Am. Dec. 283, which was trover for a slave, the infant had not stated his title at the time of the sale. He was not estopped to reclaim his property.

And in *Norris v. Vance*, 3 Rich. L. 164, the infant, with his father, signed the bill of sale, saying he was of age. In trover for the slave, it was held that he was not precluded by his fraud.

But in *Barham v. Turbeville*, 1 Swan, 437, 57 Am. Dec. 782, where the infants said that the father's title was good, and denied their own, the court held them estopped, and said: "In cases of actual fraud the principle of estoppel should apply at law as well as in equity, to protect the title of an innocent purchaser."

... This rule ... applies to infants as well as to adults."

Irwin v. Morell, Dudley (Ga.) 72, is a similar case, where the infant allowed her father to mortgage her slave without objection. In trover brought by the infant upon reaching her majority, the court said that infancy was no protection, provided the minor had arrived at those years of discretion when a fraudulent intent could be reasonably imputed to him. *Strain v. Wright*, 7 Ga. 568, is to the same effect.

But in *Dillard v. Dillard*, 8 Humph. 41, where a girl merely did not object to the sale of her slave, she was allowed to recover him, the court holding that her rights were not affected unless she did some act by which bidders were induced to purchase.

In Louisiana, it seems, an infant is precluded as much as an adult. "It is an error to suppose that the law can sanction the perpetration of frauds by minors; the truth and reality of bona fide transactions are as binding upon them as upon majors." *Guidry v. Davis*, 6 La. Ann. 90.

But in several states it is held that in such circumstances an infant cannot be estopped to assert title.

In Ohio an infant who fraudulently represents himself to be of age is not estopped to disaffirm the sale of his land, after majority. *Mills v. Rodgers*, 3 West. Law Month. 262.

In Illinois three cases (*Davidson v. Young*, 38 Ill. 145; *Kane County v. Herrington*, 50 Ill. 232; and *Dorlague v. Cress*, 71 Ill. 380) decided that simple silence or consent of an infant would not estop him to set up his title; and in *Wieland v. Koblick* (1884) 110 Ill. 16, 51 Am. Rep. 676, it was decided that an infant was not estopped by a false statement in her deed that she was of age, the court holding that the doctrine of estoppel was inapplicable to infants. And with this, *Sims v. Everhardt*, 102 U. S. 800, 28 L. ed. 87, and *Lackman v. Wood*, 25 Cal. 147, are in accord.

In *Watson v. Billings*, 38 Ark. 278, 281, 42 Am. Rep. 1, where an infant married woman executed a release of dower, making a representation to the officer taking the acknowledgment that she was of age, but it was not proved that the statement was known to the releasee, upon her bringing her bill in equity to establish her dower, the court said, in upholding the bill, that infants cannot by fraud denude themselves of the protection thrown around them by the policy of the law.

A Pennsylvania case, *Stoolfoos v. Jenkins*, 12 Serg. & R. 403, decided that an infant who executed a release of her land (without representing herself of age) is not estopped to disaffirm on attaining her majority. But the court says that the case does not present the question "whether there may not be cases of 57 L. R. A.

such gross and palpable fraud, committed by an infant arrived at an age of discretion, as would render it proper to punish him by the loss of his land."

And in *Williams v. Baker*, 71 Pa. 476, an infant was held not estopped to reassert in ejectment title to land sold by her, by the fact that the certificate of acknowledgment contained the words "the said [plaintiff] being of full age, and by me duly examined, etc."

So where a girl of seventeen years executed a deed containing a recital to the effect that the grantor was of full age, but intended no fraud, she was not estopped to disaffirm the conveyance, even against creditors of her grantee, who had acquired liens. *Wilson v. Wilson*, 20 Ky. L. Rep. 1971, 50 S. W. 260.

Where an infant married woman conveyed land to one who believed her to be of full age, and who later improved the land with the grantor's knowledge, she was held not to be guilty of such fraud as to estop her from setting up title to the land, although she had enjoyed the consideration received, and although the grantee had conveyed to an innocent purchaser in the meantime. *Buchanan v. Hubbard*, 96 Ind. 1.

Rundle v. Spencer, 67 Mich. 189, 34 N. W. 548, was a bill to stay proceedings in ejectment brought by one who had sold the land in question when under age. The court expressly avoided putting the decision on the ground of estoppel, and decreed a stay, on the equities of the case, saying that, as a general rule, the doctrine of estoppel should not be predicated upon the acts and conduct of an infant. This was plainly to evade overruling the general rule laid down by *Cooley, J.*, in *Corey v. Burton*, 32 Mich. 32 (*supra*, V. a.), to the effect that estoppel does not apply to infants.

And it is said in *Harmon v. Smith*, 38 Fed. 482, that the doctrine of estoppel does not apply to minors, "unless their conduct is intentional and fraudulent."

c. When compelled in equity to make satisfaction for his fraud.

In England, courts of equity have exercised their powers with greater freedom than in this country in compelling fraudulent minors to make restitution.

In *Watts v. Creswell*, 2 Eq. Cas. Abr. 515, Lord Cowper said: "If an infant is old and cunning enough to contrive and carry on a fraud, . . . he ought to make satisfaction for it." Here an infant remainderman, who conducted negotiations to mortgage the land for the benefit of his father, the life tenant, the latter making an affidavit of title in fee in himself, was compelled to account.

And in *Evroy v. Nicholas* (1733) 2 Eq. Cas. Abr. 488, an infant, who approved of a long lease by his guardian and witnessed the lease, was compelled, upon avoiding it on reaching his majority, to make a new lease, or refund the consideration, at his election.

So, in *Clarke v. Cobby* (1789) 2 Cox, Ch. Cas. 173, a woman made notes, and later married an infant, who gave a bond and received the notes in exchange. In an action on the bond the defendant pleaded his infancy, and upon the plaintiff filing a bill in equity for relief the court compelled the defendant to give up the notes in exchange for his bond, on the principle that "an infant shall not take advantage of his own fraud."

But where an infant, without representation as to his age, contracted with one who supposed him to be of age, he was not charged, in equity, on his contract. *Stikeman v. Dawson*, 1 DeG. & S. 90, 16 L. J. Ch. N. S. 295, 11 Jur. 214, 4 Railway Cas. 585.

And in a recent case where an infant induced the plaintiff to lease him a house, by representations that he was of age, he was ordered to give up possession, and the lease was declared void; but the infant was not charged for use and occupation. *Lempriere v. Lange*, L. R. 12 Ch. 675, 41 L. T. N. S. 378, 27 Week. Rep. 879.

There are two American cases of this class. In *Geer v. Hovy* (1790) 1 Root, 179, the petition alleged that the defendant pretended that he was of full age, and the plaintiff exchanged horses with him, and the defendant "cheated him, and he is without remedy at law." But the court held: "A minor is no more liable in equity, than law, for fraud in a contract, for, if he is incapable of making, he is incapable of committing a fraud in, a contract; besides, this would defeat the law made for the protection of minors, if, although they would not be liable upon their contracts, yet, by using deceit in them, they should be made liable."

In Georgia, however, where an infant bought a negro, paying part and for the balance giving a note which he later disaffirmed, the seller brought a bill in equity, and the court decreed the sale of the negro, to reimburse the infant and to pay the balance to the vendor; on the ground that the remedy of the vendor at law was inadequate and difficult. *Strain v. Wright* (1849) 7 Ga. 508.

VI. Liability of an infant as trustee or officer.

In *Smally v. Smally* (1700) 1 Eq. Cas. Abr. 6, it is said (*obiter*): "An infant may be executor, and shall be charged because the law enables him. So, he may be charged in trover, because a tort, but not on contract."

So, in *Loop v. Loop*, 1 Vt. 177, it is said: "A breach of this trust [of executor] can never be covered by infancy;" and the court decided that the infant executor was properly held to an account as if he had been an adult.

But in England the rule seems now to be different: and an infant executor who never proved the will, but received assets of the estate and paid them over to his mother, who was entitled to the use of the property for life, was, on account of his infancy, held not to be under any liability to account for them. *Stott v. Meanock*, 31 L. J. Ch. N. S. 746, 10 Week. Rep. 605.

This decision was based expressly upon *Hindmarsh v. Southgate*, 3 Russ. Ch. 324. This was a case of an administrator, but the principle was said, in *Stott v. Meanock*, to be the same.

And *Russell's Case* (1478) 5 Coke, 27a, is (*obiter*) to the same effect, the court saying that a release by an infant executor would not bar him, because if it should be a bar it would be a *devastavit*.

And an infant administrator was said, in *Whitmore v. Weld*, 1 Vern. 326, 2 Ch. Rep. 383, 8 Ch. Cas. 167, to be unable to commit a *devastavit*.

In *Carow v. Mowatt*, 2 Edw. Ch. 57, it was held that where an infant was, by inadvertence, appointed administrator, he could not be made to account for his receipts during infancy.

Saum v. Coffelt, 79 Va. 510, is in accord on this point; and so is *Young v. Purvis*, 11 Ont. Rep. 597.

But, it seems, an infant constable levying on property is liable in trespass. *Green v. Burke*, 23 Wend. 490, at p. 504.

McConnell v. Kennedy, 29 S. C. 180, 7 S. E. 76, however, holds that an infant specially deputized to execute a warrant can make a lawful arrest, although ineligible to the office of constable. 57 L. R. A.

VII. Summary.

An infant is liable for his torts which are not connected with, and do not arise out of, his contracts. This liability is the rule without regard to the age of the infant, and without regard to whether he acted at the command of another, except in case of actual duress; but an infant who has not reached years of discretion is not liable to exemplary or punitive damages. (*Supra*, I.)

As to torts committed by an infant for the purpose of inducing another person to contract with him, there is conflict. In England he is not responsible for his misrepresentations as to things (his age, for instance), other than the subject-matter of the contract itself, by which misrepresentations he induced a contract, because it is said that (a) to make him liable for his deceit would be to enforce the contract, for which he is not liable by the policy of the law; and that (b) the deception practised is part of the contract itself.

But in this country the overwhelming weight of authority is contrary to the English rule, cases in only two states (Massachusetts and Maryland) having held that an infant is not liable in deceit for such misrepresentations. And it is apparently always possible to replevy goods delivered on credit to an infant and still in his possession, when he has obtained the possession by deceit. And in four states all uncertainty as to liability, where the infant falsely represents himself to be of age, has been removed by statute. (*Supra*, II. a.)

But where the infant's representations are in regard to the subject-matter of the contract, as, for instance, warranty of goods sold by him, they constitute part of the contract, for which he cannot be made liable. (*Supra*, II. b.)

In regard to injuries done by an infant to property bailed to him, if the damages are occasioned simply through his ignorance or negligence, he is not responsible. (*Supra*, III. a. 1.) But where the wrong is deliberate or intentional, he is responsible in trover or trespass, even if the wrongful act were expressly provided against in the contract of bailment. But in two states (Pennsylvania and New Jersey) he is held not responsible, on the ground that to make him liable would indirectly enforce the contract. (*Supra*, III. a. 2.)

And he is always liable for refusal to deliver goods in his possession as bailee. (*Supra*, III. a. 3.)

In the case of contracts other than bailments, the rule is the same, in regard to negligent, as distinguished from wilful, acts. (*Supra*, III. b. 1, 2.)

And in cases of torts more remotely connected with contracts an infant is generally liable. (*Supra*, IV.)

As to estoppel of an infant, there are two classes of cases: First, where, in an action upon a contract induced by his fraudulent misrepresentations that he was of age, he sets up his infancy as a defense; and, second, where he has given a deed of property, or executed a release for money due him, and later seeks to recover the property, or compel a second payment, upon the pretense that he has elected to avoid his deed or contract of sale, or release, upon reaching his majority. As to the first class he is not estopped, except in a few jurisdictions, and never in an action strictly at law, upon the contract. This is upon the ground that estoppel would have the effect simply of validating the contract, against the policy of the law. (*Supra*, V. a.)

But as to the second class, he is generally estopped in this country (although some few

cases hold that the doctrine of estoppel does not apply at all to infants), and always in England. (*Supra*, V. b.)

In England, also, such a fraudulent infant can be compelled in equity to account, or to make specific restitution, where he has obtained property or a loan by fraud; but in this country the powers of courts of equity have not been

exercised so widely in this direction. (*Supra*, V. c.)

An infant trustee cannot be made to account for assets received by him when under age; but an infant who occupies an office for which he is legally ineligible may be liable in tort for his official acts. (*Supra*, VI.)

L. B. B.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

GUARANTY TRUST COMPANY OF NEW YORK, *Plff. in Err.*,

v.

Frederick GROTRIAN, Jr., et al.

(114 Fed. 433.)

Money paid by the drawee upon a draft drawn against "indorsed bills of lading" which are in fact fictitious, and accepted "against" such bills in ignorance of the fraud, may be recovered back from the payee.

(February 4, 1902.)

ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of plaintiffs in an action brought to recover back money alleged to have been paid by mistake upon an acceptance. *Affirmed*.

The facts are stated in the opinion.

Argued before Wallace and Lacombe, Circuit Judges, and Townsend, District Judge.

Mr. Edward Percy Hamlin, with Messrs. Davies, Stone, & Auerbach, for plaintiff in error:

Plaintiff in error did not warrant the bill of lading to be genuine, and in the absence of any knowledge of a forgery, or of any representation which it knew to be false, cannot be held liable for the damage resulting therefrom to the defendants in error.

In cases of ambiguity the language of the acceptance must be construed most strongly against the acceptors.

4 Am. & Eng. Enc. Law, 2d ed. p. 225; Meyer v. Decroix, 65 L. T. N. S. 653; Cowan v. Hallack, 9 Colo. 572, 13 Pac. 700.

The practical construction of the contract by the parties themselves may be resorted to for the purpose of aiding in its interpretation.

New York v. New York Refrigerating Constr. Co. 8 Misc. 61, 28 N. Y. Supp. 614; Easton v. Pickersgill, 55 N. Y. 310; Parks v. Jacob Dold Packing Co. 6 Misc. 570, 27 N. Y. Supp. 289.

The condition of the acceptance having been discharged by the delivery of the bills of lading, there is no mistake and no ground of recovery.

It is the duty of the drawee, and not of

the indorsee, to pass upon the genuineness of the bills of lading.

Robinson v. Reynolds, 2 Q. B. 196; Thiedemann v. Goldschmidt, 1 De G. F. & J. 4; Woods v. Thiedemann, 1 Hurlst. & C. 478; Leather v. Simpson, L. R. 11 Eq. 398; Ulster Bank v. Synnott, Ir. Rep. 5 Eq. 595; Goetz v. Bank of Kansas City, 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318; Hoffman v. National City Bank, 12 Wall. 181, 20 L. ed. 366; Craig v. Sibbett, 15 Pa. 238; Young v. Lehman, 63 Ala. 519.

The defendants in error are not entitled to recover as for money paid under a mistake.

Hoffman v. National City Bank, 12 Wall. 181, 20 L. ed. 366.

By payment before maturity and before the arrival of the Buffalo, the defendants in error waived any possible recourse they might have had against the plaintiff in error on the theory of an acceptance conditional upon the existence and arrival of the flaxseed in port.

Beinhauer v. Gleason, 15 N. Y. S. R. 227; Mansfield v. Cheslyn, 2 L. J. K. B. 85; Rorabacher v. Lee, 16 Mich. 189; Holbrook v. Wilson, 4 Bosw. 64; Swanek v. Nichols, 20 Ind. 198; Evansville, I. & C. S. L. R. Co. v. Dunn, 17 Ind. 603.

Messrs. Dill, Bomeisler, & Baldwin, for defendants in error:

Money paid under a mistake of fact can be recovered.

United States v. Barlow, 132 U. S. 271, 33 L. ed. 346, 10 Sup. Ct. Rep. 77; Kelly v. Solari, 9 Mees. & W. 54; White v. Continental Nat. Bank, 64 N. Y. 319, 21 Am. Rep. 612.

Grotrian & Co., upon presentation of the bill of exchange, did not give an absolute acceptance, but they did give a conditional acceptance, which resulted in a new contract between the holder and the acceptor.

It is the right of the holder of a bill of exchange to insist upon an absolute, unconditional acceptance, and he may decline a conditional one, and protest.

Shackelford v. Hooker, 54 Miss. 716; Dan. Neg. Inst. ¶ 508; Green v. Raymond Bros. 9 Neb. 298, 2 N. W. 881; Lamon v. French, 25 Wis. 37; Crowell v. Plant, 53 Mo. 145.

This was a conditional acceptance.

Smith v. Vertue, 30 L. J. C. P. N. S. 59.

The delivery of what purported to be a bill of lading did not satisfy a condition which demanded the delivery of a bill of lading. A forged bill of lading is not a bill

NOTE.—The effect of the acceptance of a draft accompanied by bill of lading as creating an obligation for the performance of the contract for the sale of the goods included in the bill of lading is considered in a note to Finch v. Gregg (N. C.) 49 L. R. A. 679.

57 L. R. A.

of lading, any more than counterfeit money is real money, or a forged check a good check.

Conard v. Atlantic Ins. Co. 1 Pet. 445, 7 L. ed. 214.

After the acceptance by Grottrian & Co. the Guaranty Trust Company could only have recovered upon the draft by proving the performance of the condition.

Shackelford v. Hooker, 54 Miss. 716; *Read v. Wilkinson*, 2 Wash. C. C. 514, Fed. Cas. No. 11,811; *Taylor v. Newman*, 77 Mo. 257; *Cummings v. Hummer*, 61 Ill. App. 393; *Williams v. Gallyon*, 107 Ala. 439, 18 So. 102; *Newhall v. Clark*, 3 Cush. 376, 50 Am. Dec. 741; *Tiedeman*, Com. Paper, ¶ 180; *First Nat. Bank v. Bensley*, 9 Biss. 378, 2 Fed. 614.

The fact of payment did not alter the rights of the parties.

National Bank of Commerce v. National Mechanics' Bkg. Asso. 55 N. Y. 213, 14 Am. Rep. 232; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 75, 17 Am. Rep. 305; *Bank of Commerce v. Union Bank*, 3 N. Y. 234.

Townsend, District Judge, delivered the opinion of the court:

John Glen, of New York city, drew a draft upon Grottrian & Co., plaintiffs, in these words:

Frederick B. Grottrian & Company, New York. 1911
Exchange for £1,518. 8. 7 stg.

11 Nov., 1898.

Sixty days after sight of this first (second unpaid) pay to my order in London fifteen hundred and eighteen pounds 8. 7 sterling, value received, and charge the same to account of 8,417.50 bush. flax seed.

John Glen.

To F. B. Grottrian & Co., Hull.

To this draft he attached forged duplicate bills of lading for the flaxseed mentioned in the draft, and on the same day he cashed the draft with defendant. The defendant, ten days later, presented to the plaintiffs for acceptance the draft accompanied by the forged bills of lading and an insurance policy. The plaintiffs accepted the draft in these words:

Hull, 21st Nov., 1898.

Accepted, payable at Lloyd's Bank, Ltd., London, against indorsed bills of lading for 8,417 bushels of flaxseed per Buffalo S. S. at New York & Certificate of Insurance \$8,500.

Fred. B. Grottrian & Co.

Due 22d Jan., 1899.

There was no representation as to the genuineness of the bill of lading. At the time of the presentation of the draft for acceptance the steamship Buffalo had not arrived at Hull, England, but was in transit. A few days before her arrival the plaintiffs, in order to procure possession of the goods immediately upon arrival, took up the draft, and paid to the defendant, Glen's as-
57 L. R. A.

signee, \$7,319.29. Plaintiffs, at the time of said acceptance and payment, believed the bills of lading to be genuine, and that the flaxseed was on the steamship. There was no such flaxseed on the steamship, and immediately upon discovering the fraud, plaintiffs notified the defendant, and have since duly tendered to defendant the draft, bills of lading, and insurance policy, and have demanded repayment of the \$7,319.29. Defendant insists that the acceptance of the draft bound the plaintiffs absolutely without regard to the genuineness of the bills of lading, and that, whether or not defendant could have recovered judgment against plaintiffs if payment of the draft had been refused, the money paid by them cannot be recovered back. It is not disputed that the unconditional acceptance of a draft accompanied by a paper purporting to be a bill of lading, but fictitious, binds the acceptor in ordinary cases, as between him and the payee, where both parties are ignorant of the fraud, even though the payee has cashed the draft for the drawer before presenting it for acceptance to the drawee. In the case at bar, however, plaintiffs rely on the direction in the draft to charge the amount to account of the flaxseed, and the acceptance "against indorsed bills of lading." The defendant insists that by "bills of lading" in the acceptance is to be understood the papers in the form of a bill of lading accompanying the draft, and that, even if the plaintiffs had delayed payment of the draft until its maturity, whereby the fraud would have been discovered before payment, defendant could nevertheless have sued and recovered judgment; and this preliminary question is of vital importance. No case precisely in point has been cited. In *Smith v. Vertue*, 30 L. J. C. P. N. S. 59, it was said that an acceptance substantially like that of the plaintiffs was conditional, and that the bill of lading must be delivered to enable payee to recover; but no question of genuineness was involved, and the statement is *obiter*. The principal cases on this subject in the United States courts are *Hoffman v. National City Bank*, 12 Wall. 181, 20 L. ed. 366; *Goetz v. Bank of Kansas City*, 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318. In *Hoffman v. National City Bank*, bills of exchange accompanied by forged bills of lading were discounted by a bank, and subsequently accepted by the drawees. The drawers of the bills had been accustomed to ship flour to the plaintiffs, who, at the request of the drawers, and on their representations that the flour mentioned in the bills of lading had been shipped to their firm for sale, promised to accept them, and did accept them on presentation. The acceptors paid the bills, and, on learning of the forgery of the bills of lading, tendered the same, with the bills of exchange, to the bank, and, repayment being refused, brought suit. The court refers to the argument that the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached to the same, and says: "It is not perceived

that the concession, if made, would benefit the plaintiffs, as the bill of exchange are in the usual form, and contain no reference whatever to the bills of lading; and it is not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine." And again: "Beyond doubt the bills of lading gave some credit to the bills of exchange beyond what was credited by the pecuniary standing of the parties to the same; but it is clear that they are not a part of those instruments, nor are they referred to, either in the body of the bills or in the acceptance, and they cannot be regarded in any more favorable light for the plaintiffs than as collateral security accompanying the bills of exchange."

In *Goetz v. Bank of Kansas City*—a similar case—the court cites with approval the doctrine in *Hoffman v. National City Bank* that, supposing the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached, that fact would not benefit them, as the bills of exchange were in the usual form, and contained no reference whatever to the bills of lading. In most of the cases of acceptance of drafts accompanied by forged bills of lading, cited by defendant, there were special circumstances influencing the equities between the parties, as that the acceptor was the regular correspondent of the drawer, and had been accustomed to accept such drafts from him, or had authorized the making or discounting of the drafts, and in all of said cases the acceptance was unconditional. In the present case, no facts are alleged which establish an equity in favor of the payee against the acceptor. Defendant might have refused to receive any acceptance other than an absolute one. In fact, Glen had given it a written assignment of the draft, in which it was particularly stated that it might exercise this option. The request to pay was conditioned upon the delivery of the flaxseed, and plaintiff's acceptance of the draft was conditioned upon the delivery of the indorsed bills of lading for it. The payment of the draft before the arrival of the steamer does not justify a construction of the entirely intelligible words "indorsed bills of lading," as importing "documents purporting to be indorsed bills of lading," or as importing documents in the form of bills of lading attached to this draft.

It is contended that the equities are equal, and therefore that the party having the money should retain it. This would have been the case if the acceptance had been unconditional. Defendant first paid the money and received the forged documents. But, under their conditional acceptance, plaintiff had a right to genuine documents and to rely on the genuineness

of those delivered upon the discharge of their obligation. The precedents cited by defendant of waiver of condition by payment without performance of the condition are cases where the party paying knew at the time of payment that the condition had not been performed. Here both parties supposed that it was performed, and no such waiver can be inferred. There was no relinquishment of any right, for the parties were ignorant of the facts. A waiver is an intentional relinquishment of a known right. Transfer of valid bills of lading would have been equivalent to delivery of the flaxseed.

Finally, defendant contends that this is a case where a pledgee had given an order to a third party to receive the security upon payment of the debt, and that the party paying cannot recover back the money from the pledgee on the ground that the security was found to be valueless; and cites *Ketchum v. Stevens*, 19 N. Y. 499; *Baker v. Arnot*, 67 N. Y. 448; and *Aiken v. Short*, 37 Eng. L. & Eq. 592. In each of these cases the court held that under the particular circumstances the plaintiff paid the debt as the agent of the original debtor, and that the transaction was, in effect, a redelivery of the security to the original pledgee, and a subsequent transfer by him to the plaintiff. But in the present case the plaintiffs qualified their acceptance so as to make it dependent upon the shipment of the flaxseed and the genuineness of the bill therefor. They paid the money, not on the original contract of the drawer, but upon the new contract created by their conditional acceptance, and the assent thereto of defendant. In *Aiken v. Short*, cited at length in *Ketchum v. Stevens*, which is relied on in *Baker v. Arnot*, Baron Bramwell said: "It seems to me that the right to recover money paid under a mistake of fact must have reference to a belief of the existence of a fact which, if true, would have given the person receiving a right against the person paying the money."

The case at bar falls within this rule. The acceptance herein was conditioned upon receipt of bills of lading, which, however, were forged, and therefore nullities, unless some intervening right should arise,—as by estoppel, agency, or otherwise. It is true, the payment was prematurely made, but no intervening rights or liabilities were acquired or imposed. Defendant had no rights under the forged papers, and, if he had any, they would not have been prejudiced. *Munger v. Shannon*, 61 N. Y. 251; *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. The judgment is affirmed.

Petition for writ of certiorari denied by Supreme Court of United States May 5, 1902.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

NEW HAMPSHIRE FIRE INSURANCE
COMPANY of Manchester *et al.*, *Appts.*,
v.

NATIONAL LIFE INSURANCE COM-
PANY.

(50 C. C. A. 188, 112 Fed. 199.)

1. An insurer which receives an assignment of the mortgagee's claims against the mortgagor upon paying him the amount due by it under its policy on the mortgaged property cannot, in an accounting of all sums received from the various policies on the property by the mortgagee, who is seeking to enforce his mortgage for an unpaid balance, insist that he should be charged with the portion of the sum received under another policy which he is charged to have wrongfully permitted to go to the mortgagor, where the amount kept by him out of such payment was more than the share of the mortgage indebtedness chargeable to that policy.
2. A provision in one of several insurance policies on mortgaged property, that, in case the insurer is compelled to make payment to the mortgagee when it is under no liability to the mortgagor, it shall be subrogated to the mortgagee's security, does not make the insurer a surety for the mortgage debt, so as to entitle it to challenge settlements made, while it was contesting its liability on its own policy, by the mortgagee with other insurers, or charge him with sums which he might have received, but failed to receive, from such policies.
3. One of several insurers of mortgaged property, who pays the amount due on its policy to the mortgagee, and becomes subrogated to his security, cannot charge, in satisfaction of the mortgagee's demands against the security, a sum allowed by a court of competent jurisdiction to the mortgagor's attorney out of recovery on other policies, either on the ground that the mortgagor had parted with his interest so as not to be entitled to an allowance for attorneys' fees, since that question was settled by the order, or on the ground that the mortgagee was at fault in not appealing from the order, where the insurer's interest had attached before the order was passed, and it failed to object to the allowance, or to indemnify the mortgagee against the expense of appealing.

(November 11, 1901.)

APPEAL by defendants from a decree of the Circuit Court of the United States for the District of Nebraska in favor of complainant in a proceeding to establish a mortgage lien. *Affirmed.*

NOTE.—As to subrogation of insurer to mortgagee's rights where the insurance covers only part of the mortgage debt, see also, in this series, *Phenix Ins. Co. v. First Nat. Bank (Va.)* 2 L. R. A. 667.

On the general subject of subrogation of insurer against party causing loss of property, see *Insurance Co. of N. A. v. Easton (Tex.)* 3 L. R. A. 424, and cases in note on page 426; 57 L. R. A.

Statement by **Thayer**, Circuit Judge:

The appeal in this case arises out of the following facts: Conrad Bohn and William G. Bohn, in September, 1888, executed a mortgage in favor of the National Life Insurance Company, the appellee, whereby they conveyed certain property, with improvements thereon, which were situated in Douglas county, Nebraska, to secure the payment of their notes to the amount of \$25,000. The Bohns agreed to keep the improvements on the mortgaged property insured to the amount of \$25,000 for the security of the mortgagee, and in pursuance of that agreement took out policies for the following amounts in the following companies: In the North British & Mercantile Insurance Company, \$1,500; in the Norwich Union Fire Insurance Company, \$3,500; in the Syndicate Insurance Company of Minneapolis, Minnesota, one of the appellants, \$5,000; in the New Hampshire Fire Insurance Company of Manchester, New Hampshire, one of the appellants, \$2,500; in the Glens Falls Insurance Company of New York, \$7,500; and in the Hanover Fire Insurance Company and in the Citizens' Fire Insurance Company, \$5,000. On March 12, 1891, the improvements on the mortgaged property were destroyed by fire, the mortgagee having up to that time made payments on the mortgage indebtedness to the amount of \$4,657. On November 17, 1892, the Glens Falls Insurance Company settled its policy by paying the sum of \$7,700, of which amount \$7,035 was paid to the National Life Insurance Company, and credited on the mortgage debt, while the residue, amounting to about \$666, was paid to the Bohns; they claiming to have an insurable interest in the property which was covered by that policy. On July 14, 1891, the Bohns instituted suits against all of the aforesaid companies to recover the amount alleged to be due on their respective policies in the district court of Douglas county, Nebraska; and on December 21, 1891, the National Life Insurance Company, as mortgagee, also brought suits against said companies on the same policies, claiming the sums due thereon in its own right as mortgagee. The actions against the Syndicate Insurance Company and against the New Hampshire Fire Insurance Company were subsequently removed to the Federal court for the district of Nebraska and were there tried, resulting in judgments against the last-named companies. The other actions remained in the state court, and were there tried, resulting eventually in judgments

Phenix Ins. Co. v. Pennsylvania Co. (Ind.) 20 L. R. A. 405; *St. Louis, A. & T. R. Co. v. Fire Asso. of Philadelphia (Ark.)* 28 L. R. A. 83; and *Anderson v. Miller (Tenn.)* 31 L. R. A. 604.

As to loss of right of action against insurer by destroying right of subrogation, see *Packham v. German F. Ins. Co. (Md.)* 50 L. R. A. 828.

against the several insurance companies. All of the judgments so recovered against the several insurance companies have heretofore been paid. On April 20, 1895, when the New Hampshire Fire Insurance Company and the Syndicate Insurance Company paid the judgments that had been recovered against them, respectively, the National Life Insurance Company, to whom the payments were made, assigned to the New Hampshire Fire Insurance Company one tenth, and to the Syndicate Insurance Company two tenths, of its interest in the Bohn mortgage as that interest existed at the date of the fire. Omitting the recitals, the material part of these assignments—both of them being alike, except as to names, the amount of money received, and the interest assigned—was as follows:

"Now, therefore, in consideration of twenty-seven hundred seventy-one and 51-100 dollars, this day paid to the National Life Insurance Company of Montpelier, Vermont, mortgagee under said mortgage clause, by the said New Hampshire Fire Insurance Company, the receipt whereof is hereby acknowledged, said sum being in full settlement of said company's liability to said mortgagee by reason of said loss and damage under the said policy, said National Life Insurance Company, mortgagee, does hereby assign, set over, transfer, and subrogate to the said New Hampshire Fire Insurance Company one tenth of all the right, title, claim, and interest which said National Life Insurance Company had in said mortgage or trust deed above described at the time of said fire, and in and to the note or notes therein described; and it is agreed that all interest which hereafter accrues upon said mortgage to the extent of the proportion aforesaid shall inure and be paid to said insurance company, and that no release of any kind for any amount of said notes or mortgage, or any part thereof, shall be made by said trustee or mortgagee until said company shall have received therefrom the sum paid said mortgagee as aforesaid, with the interest thereon at the same rate as provided in and by said notes from the date thereof until paid, subject only to the rights of the said mortgagee to the balance of its claim to be first paid from such security."

In July, 1891, the National Life Insurance Company brought an action to foreclose the aforesaid mortgage, but the proceedings in that case, after the filing of the bill, were stayed until the termination of the litigation in the various suits which were brought as aforesaid to collect the insurance. After the latter litigation was ended, and the judgments against the various insurers had been collected, the National Life Insurance Company on May 2, 1898, filed an amended and supplemental bill in the foreclosure case, wherein it prayed that an account might be taken of the moneys which it had collected from the various insurance companies which had risks on the mortgaged property, that the sum still due to it on the mortgage debt

might be ascertained, and that the mortgaged premises be sold to satisfy the balance of the debt which was ascertained to be due. The New Hampshire Fire Insurance Company and the Syndicate Insurance Company, which had at that time changed its name and become the Minnesota Fire Insurance Company, each filed an answer to the supplemental bill and also a cross bill. By these pleadings they alleged, in substance, that nothing was due to the National Life Insurance Company on account of the mortgage indebtedness; that out of the moneys realized from the insurance policies it had either made or suffered improper payments to be made to the Bohns and to certain attorneys who had prosecuted the insurance suits; that, if the National Life Insurance Company was denied credit for these improper outlays, it would be found that it had received payment in full of the mortgage debt; and that by virtue of the assignments aforesaid a considerable sum of money would be found to be due to them, for which they, rather than the National Life Insurance Company, were entitled to a lien on the mortgaged property and to have the same sold for their benefit. A trial was had upon these issues, which resulted in a finding by the trial court that the sum of \$2,721.28 was still due on the mortgage to the National Life Insurance Company, and that it was entitled to the greater part of the credits which it claimed. The New Hampshire Fire Insurance Company and the Minnesota Fire Insurance Company have appealed from this decree.

Argued before *Sanborn and Thayer*, Circuit Judges, and *Adams*, District Judge.

Mr. A. S. Churchill for appellants.
Messrs. Frank H. Gaines, James E. Kelby, and John A. Storey for appellee.

Thayer, Circuit Judge, delivered the opinion of the court:

The first claim made by the appellants is that, out of the sum of \$7,700 which was paid by the Glens Falls Insurance Company to settle its share of the loss that was occasioned by the destruction of the improvements on the mortgaged property, \$666.55 was improperly paid to the Bohns, the mortgagors, which should have been retained by the National Life Insurance Company, the appellee, and that, because it suffered this sum to be paid to the Bohns, it should be treated as money received by itself and credited as a payment on the mortgage indebtedness in the accounting between it and the appellants. The circumstances attending the settlement with the Glens Falls Insurance Company were as follows: That company was sued upon its policy by the National Life Insurance Company, along with the other fire companies, on July 14, 1891; but in November, 1892, it professed a willingness to settle its policy for the sum of \$7,400, provided the mortgagors, as well as the mortgagee, released their claim under the policy. The mortgagors, as it seems, claimed the sum of \$666.55 as due

to them under the policy in addition to what was due to the mortgagee, and would not execute a release unless that amount was paid to them, whereupon it was arranged that they should receive the sum demanded, and it was accordingly paid. At this time the appellants were defending the actions which had been brought against them by the National Life Insurance Company, and were denying any liability on their respective policies, and they did not pay the sums due thereon until April 20, 1895, after judgments had been recovered. Besides, it appears that the Glens Falls Insurance Company carried only three tenths of the total insurance on the mortgaged property, and all of the policies, as we understand the record, contained the usual provision that the several insurers should respectively contribute to the payment of any loss which might be sustained in the proportion that their several policies bore to the total amount of the insurance. By virtue of this provision the Glens Falls Company was liable to the mortgagee for only three tenths of the sum due on the mortgage at the time of the fire, and, as the sum so due was about \$21,201.36, it would seem that the sum which was actually paid to the National Life Insurance Company on November 17, 1892, by the Glens Falls Company, to wit, the sum of \$7,035, was a little more than the mortgagee was equitably entitled to demand of the Glens Falls Company at that time on account of its interest as mortgagee. This fact, that the mortgagee received as large a sum from the Glens Falls Company as it was equitably bound to pay on account of the mortgagee's interest in the insured property, is sufficient in itself to show that there is no substantial foundation for the claim now made by the appellants that the sum of money which was paid to the Bohns should be charged to the National Life Insurance Company, and treated as a payment made to it on the mortgage indebtedness in an accounting between the mortgagee and the appellants.

But that contention cannot be sustained for another reason. The theory of the appellants is that, because their respective policies contained in the mortgage clause a provision to the effect that, whenever either company paid to the mortgagee any sum for a loss under its policy and claimed that it was under no liability to the mortgagors, it should at once be subrogated to the rights of the mortgagee under any securities held by it "on the property in question" for the payment of the mortgage debt, this provision in effect made them sureties for the payment of the mortgage debt, and armed them with all the rights of sureties. They further claim that, if the mortgagee held policies issued by other companies covering the mortgaged property, it could not make a settlement with the other insurers without obtaining the consent of the appellants, or, at least, that if it did make such a settlement, and accepted less than it was legally entitled to recover, it did so at its peril, 57 L. R. A.

and that the appellants, as sureties, are privileged to challenge the settlement, and insist that the mortgagee be charged with the sum it ought to have received, and to do so at any remote period, when they found it convenient or necessary to settle their own policies. We are of opinion that this is an erroneous view. The provision found in the mortgage clause did not make the appellants sureties for the payment of the mortgage indebtedness, and did not purport to place them in that relation. As above stated, it provided, in substance, that when they paid the mortgagee any sum for a loss under the policy, and claimed that they were not liable to the mortgagors, then, and not before, they should be subrogated to the rights of the party to whom payment was made as respects all securities held by such party on the "property in question" to secure the payment of the debt. This doubtless gave to the appellants the right to pay their proportion of the loss to the mortgagee, and claim subrogation as respects the mortgage existing on the property; but it did not give them the right to contest the payment of their own policies, denying all liability thereon, and at the same time insist that the mortgagee should not make a settlement with their insurers, for less than the face of their policies, without their consent. If the appellants desired to avail themselves of the right of subrogation which was reserved to them by the mortgage clause, and to acquire an interest in the mortgage, so as to be able to dictate or control settlements with other insurers, they should first have paid their respective losses. Until they did pay their own losses, the mortgagee was entitled to make any settlement with the other insurers which it deemed fair and just without consulting the wishes of the appellants. In the case of *Royal Ins. Co. v. Stinson*, 103 U. S. 25, 28, 26 L. ed. 473, it was said: "Where a creditor effects insurance on property mortgaged or pledged to him as security for the payment of his debt, the insurers do not become sureties of the debt, nor do they acquire all the rights of such sureties. . . . A surety of the debt might complain if the creditor should surrender to the debtor collateral securities; but an insurer of the property for the benefit of the mortgagee would have no just ground of complaint. True, after a loss has occurred and the insurance has been paid, sufficient to discharge the debt, the insurers may be entitled to be subrogated to the rights of the creditor against the debtor, and to any collateral securities which the creditor may then hold and which are primarily liable for the debt before the insurers. But even then we do not think that the creditor is bound to take any active steps to realize the fruits of a collateral or to keep it from expiring, unless the insurance be first paid and notice be given to him of a desire on the part of the insurers to be subrogated to his rights, with a tender of indemnity against expenses."

These views are strictly applicable to the

case at bar, and establish the proposition that the appellants, notwithstanding the provision in the mortgage clause, did not occupy the attitude of sureties with respect to the mortgage indebtedness, and that the right of subrogation did not arise until they had paid the losses incurred under their respective policies, which losses were not paid until long after the Glens Falls policy was settled. For these reasons we concur in the view, which was expressed by the lower court, that, as respects the Glens Falls insurance, the sum paid to the mortgagors ought not to be regarded as a sum paid to the mortgagee and charged against it as a payment in its accounting with the appellants.

The next proposition contended for by the appellants is that, in the accounting between themselves and the National Life Insurance Company, the latter company should be charged with the sum of \$1,127, which sum, as it is claimed, was erroneously paid to Byron G. Burbank, an attorney at law, out of the moneys collected from the various insurance companies on their policies. This payment to Burbank was made under the following circumstances: Burbank was the attorney of record for William G. and Conrad Bohn, the mortgagors, in all of the insurance suits, both those which were tried in the Federal court and those that remained in and were tried in the state court. On or about February 15, 1894, Burbank filed a claim for an attorney's lien on the sums due under the policies for services rendered in enforcing the collection of the same. Such a claim was filed in three of the actions that were pending in the state court. In one of the cases an allowance was made in his favor in the sum of \$420, in another in the sum of \$600, and in another in the sum of \$107. No opposition appears to have been made by anyone to the allowance of these several demands for legal services rendered for and in behalf of the Bohns, although a notice of the claim which was filed in one of the cases appears to have been served by Burbank upon the attorney who now represents the appellants. The several claims as made by Burbank were allowed by orders of court duly entered of record in the several cases in which the claims were preferred, one on October 22, 1896, and the other on January 9, 1897.

The contention of the appellants with respect to the sum paid to Burbank may be stated as follows: That the Bohns had no interest in the policies upon which they caused suits to be instituted by Burbank, because they had sold and conveyed the insured property prior to the fire; that by reason of such conveyance they had no right to an allowance for counsel fees out of the moneys recovered on the policies; that the National Life Insurance Company should have resisted the claim; and that, as it did not do so, it should now be charged with the sum erroneously paid to Burbank. We have not been able to concur in this view of the law for the following reasons:

The allowances were made in the several cases pending in the state court, and it appears to have been held by the state court that the Bohns did have an insurable interest in the property covered by the policies, and that they were entitled to maintain actions on the same and to recover for their own benefit whatever was due thereon in excess of the amount of the mortgage indebtedness. *Hanover F. Ins. Co. v. Bohn*, 48 Neb. 743, 750, 751, 67 N. W. 774, 777. The suits that were brought by the Bohns and those that were brought by the National Life Insurance Company were consolidated for trial in the state court, so that in that court the mortgagors and the mortgagee were treated as joint plaintiffs; and while the amount which each plaintiff was entitled to recover was not formally stated in the several judgments, yet when the court allowed the claims of Burbank for services rendered for and in behalf of the Bohns, and directed them to be paid out of the sums recovered, that was in effect an adjudication that the mortgagors were at least entitled to so much of the sums recovered as were awarded to their attorney. As this was an adjudication of a question which was properly before the state court for determination, the ruling made thereon must be accepted as conclusive. The state court adjudged, in effect, that the sum which it ordered to be paid to Burbank was not due to the National Life Insurance Company, but to the mortgagors; and, even if it should be conceded that this ruling was erroneous, yet such concession would afford no sufficient reason for charging the National Life Insurance Company with a sum of money which was not paid to it, and which it was not allowed to recover.

Nor are we able to decide that the National Life Insurance Company should be charged with the sum of money in question because it did not appeal from the orders making the allowances in favor of Burbank. These orders were made after the appellants had paid their own policies and had become subrogated to an interest in the mortgage by a formal assignment of an interest amounting to three tenths. It was their duty to appear and object to the allowances if they deemed them erroneous, and the fact that they did not so appear, or request the National Life Insurance Company to appear, and object thereto, and that they did not tender to the latter company any indemnity against the costs and expenses which would be incurred by taking such appeal, effectually prevents them at this time from making any objections to the allowances within the doctrine heretofore quoted from *Royal Ins. Co. v. Stinson*, 103 U. S. 25, 28, 26 L. ed. 473, 477.

Another objection was made by the appellants in the trial court, and is renewed here, to a payment in the sum of \$2,500, which the National Life Insurance Company made to its attorneys for long and laborious services rendered by them in prosecuting the numerous suits to final judgments. The trial court sustained this exception to the

extent of reducing the credit claimed to the sum of \$800, which latter amount it considered a reasonable allowance for services that had been rendered in behalf of the National Life Insurance Company in collecting the amount due from the Gleps Falls Insurance Company. We perceive no reason whatever why the National Life Insurance Company should not be allowed credit in its accounting with the appellants for this latter sum, and we think it most probable that the appellants would have had no just ground for complaint if a greater credit had been allowed. However, as the appellee took no exception to the action of the lower court, and has not appealed, we are not called upon to decide whether an error to its prejudice was committed.

No other questions are presented by the record which in our judgment deserve special notice, and the decrees below is accordingly affirmed.

COLD BLAST TRANSPORTATION COMPANY, Plff. in Err.,
v.

KANSAS CITY BOLT & NUT COMPANY.

(114 Fed. 77.)

- *1. A contract for the future delivery of personal property is void for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise, with reasonable certainty.
2. An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles required by his business during this time, from the party who makes the offer.
3. But an accepted offer to sell or deliver articles at specified prices during a limited time, in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration and void, because the acceptor is not bound to want, desire, or take any.
4. Accepted orders for goods under such void contracts constitute sales of the goods thus ordered, on the terms of the contracts; but they do not validate the agreements as to articles which the one refuses to purchase, or the other refuses to sell or deliver, under the void contracts, because neither party is bound to take or deliver

*Headnotes by SANBORN, Circuit Judge.

NOTE.—As to validity of contract for purchase of indefinite quantity, see *Wells v. Alexandre* (N. Y.) 15 L. R. A. 218, and *note*; *Minnesota Lumber Co. v. Whitebreast Coal Co.* (Ill.) 31 L. R. A. 529; *Hayes v. O'Brien* (Ill.) 23 L. R. A. 555; *Hoffman v. Maffoli* (Wis.) 47 L. R. A. 427; and *Hickey v. O'Brien* (Mich.) 49 L. R. A. 594.
57 L. R. A.

any amount or quantity of these articles thereunder.

5. The intention of parties cannot be imported into a contract where its terms are plain and unambiguous, and they do not express it.
6. A verified account must be taken as true, against a denial and an offset pleaded in an unverified answer under Kan. Gen. Stat. 1897, chap. 95, § 198.

(March 10, 1902.)

ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment in favor of plaintiff in an action brought to recover the contract price of certain articles sold and delivered by plaintiff to defendant. *Affirmed.*

Statement by **Sanborn**, Circuit Judge:

This writ of error challenges a judgment on the pleadings in favor of the defendant in error, who was the plaintiff in the court below. For convenience, the plaintiff in error will be called the "defendant," and the defendant in error the "plaintiff," in this statement, and in the opinion which follows it. The plaintiff's petition stated a cause of action upon a verified account for \$5,573.43. The defendant in its answer denied the averments of the petition, and pleaded a counterclaim for \$5,341.94 damages for the failure of the plaintiff to deliver to the defendant after June 1, 1899, certain manufactured articles which it ordered and needed, and which the defendant alleged that the plaintiff was bound to deliver under an alleged written contract, which it averred was made and broken in this way: On October 27, 1898, the plaintiff sent to the defendant this letter:

Kansas City, Mo., Oct. 27, '98.

C. S. Ullman, Esq., Purchasing Agent Cold Blast Transportation Co., S. & S. Packing Co.

Dear Sir:—

We offer to deliver at your works, during six months from November 1st, 1898, the following materials at the prices stated:

Bar iron, \$1.20 flat delivered by car, \$1.25 by wagon.

Soft steel bars, \$1.25 car load, \$1.30 by wagon.

Machine bolts, 80 and 10% discount.

U. S. Std. sq. nuts, \$6.50 off.

" hex. " 7.40 off.

70 % off extras for tapping.

—and will make in part payment No. 1 wrought scrap at \$8.50 net ton, or arch bars and transoms at \$10.50 net ton, or wrought iron car axles at \$12.50 net ton, delivered your works; the quantity of scrap to be taken not to exceed the weight of materials sold to you. Yours truly,

R. C. Howes, Sec'y.

With option of renewal for 6 months from June 1st, 1899.

The K. C. Bolt & Nut Co.,

R. C. Howes, Sec'y.

On receipt of the proposition contained in

this letter the defendant accepted it; and between November 1, 1898, and June 1, 1899, it ordered, the plaintiff delivered, and the defendant paid for, nuts, bolts, and bars of the character specified in the letter, under the terms and at the prices there stated. Before June 1, 1899, the defendant notified the plaintiff that it exercised its option to renew the contract evidenced by the letter and acceptance. Between June 1, 1899, and December 1, 1899, the defendant ordered of the plaintiff nuts, bolts, and bars of the character described in the letter, which it needed in its business, which the plaintiff refused to deliver, and which the defendant was forced to purchase of others at prices which, in the aggregate, exceeded those specified in the alleged contract between the parties by \$5,341.94. In addition to the counterclaim, which has been stated, the defendant pleaded an offset of \$2,727.18, founded on the alleged fact that the plaintiff had charged that amount in excess of the prices specified in the alleged contract for nuts, bolts, and bars which it had furnished to the defendant on its orders between June 1, 1899, and December 1, 1899. The answer of the defendant was not verified. There was a reply to it. But upon this review of a judgment upon the pleadings against the defendant the averments of the reply became immaterial because the allegations of the answer stand admitted, and those of the reply which assert new matter are denied. The only question for consideration is whether the answer stated any legal defense, counterclaim, or offset to the cause of action pleaded by the plaintiff.

Argued before *Caldwell, Sanborn, and Thayer*, Circuit Judges.

Messrs. N. H. Loomis, R. W. Blair, and O. L. Miller, for plaintiff in error:

The party making a promise is bound to nothing until the promisee within a reasonable time engages to do, or else does or begins to do, the things which are the condition of the first promise. But after an engagement on the part of the promisee which is sufficient to bind him, then the promisor is bound also, because there is now a promise for a promise, with entire mutuality of obligation. So, if the promisee begins to do the thing in a way which binds him to complete it, here, also, is a mutuality of obligation; but if, without any promise whatever, the promisee does the thing required, then the promisor is bound on another ground. The thing done is itself a sufficient and a complete consideration.

1 *Parsons*, Contr. 451; *Cherry v. Smith*, 3 *Humph.* 19, 39 *Am. Dec.* 150; *Minnesota Lumber Co. v. Whitebreast Coal Co.* 160 *Ill.* 85, 31 *L. R. A.* 529, 43 *N. E.* 774; *Wells v. Alexandre*, 130 *N. Y.* 642, 15 *L. R. A.* 218, 29 *N. E.* 142.

Contracts should be upheld if possible, rather than declared void; and the court will take into consideration all the circumstances surrounding the parties, and give effect to their manifest intention when it can do so without violating the language

actually used; and, when it can be done without contradicting the terms of a contract, the obligations intended by the parties will be implied; and this is especially true where the parties have in large part performed the contract, as in the case at bar, according to such intention of the parties as interpreted by them.

Bishop, Contr. Enlarged ed. § 380; *Collins v. Lavelle*, 44 *Vt.* 230; *French v. Pearce*, 8 *Conn.* 439, 21 *Am. Dec.* 680; *Chicago v. Sheldon*, 9 *Wall.* 50-54, 19 *L. ed.* 594-596; *Hamm v. San Francisco*, 9 *Sawy.* 31, 17 *Fed.* 119.

See, as bearing upon indefiniteness of quantity or amount in such contracts,—

Sterling Wrench Co. v. Amstutz, 50 *Ohio St.* 484, 34 *N. E.* 794; *Walsh v. Myers*, 92 *Wis.* 397, 66 *N. W.* 250; *Parker v. Pettit*, 43 *N. J. L.* 512; *Hitchcock v. Galveston*, 3 *Woods*, 287, *Fed. Cas. No.* 6,534.

It would violate no terms of the written contract counted upon by defendant, to imply that the agreement was for the purchase and sale of all the materials needed by defendant in its business for the times mentioned in the writing.

Parker v. Pettit, 43 *N. J. L.* 512; *Hamm v. San Francisco*, 9 *Sawy.* 31, 17 *Fed.* 119; *Messer v. Oestreich*, 52 *Wis.* 684, 10 *N. W.* 6; *Enterprise Carriage Mfg. Co. v. Crusan*, 63 *Kan.* 411, 65 *Pac.* 647.

Where the parties to a contract have given it a particular construction, such construction will generally be adopted by the courts.

Central Trust Co. v. Wabash, St. L. & P. R. Co. 34 *Fed.* 254; *Paige v. Banks*, 13 *Wall.* 608, 20 *L. ed.* 709; *Stark v. Starr*, 94 *U. S.* 477, 24 *L. ed.* 276; *Heath v. West*, 68 *Ind.* 548.

And they may by their acts put an interpretation upon a contract at variance even with its plain terms, and be bound by their interpretation.

Reisner v. Ooley, 80 *Ind.* 580; *Reading v. Gray*, 5 *Jones & S.* 79; *Clark v. Nunn*, 25 *Gratt.* 287; *Cooper v. Lansing Wheel Co.* 94 *Mich.* 272, 54 *N. W.* 39; *Robson v. Mississippi River Logging Co.* 61 *Fed.* 893, 16 *C. C. A.* 400, 32 *U. S. App.* 520, 69 *Fed.* 773; *McCartney v. Glassford*, 1 *Wash.* 579, 20 *Pac.* 423; *Chicago & A. R. Co. v. Derkes*, 103 *Ind.* 520, 3 *N. E.* 239; *Holland v. Rea*, 48 *Mich.* 218, 12 *N. W.* 167; *Thomas v. Wiggers*, 41 *Ill.* 470; *Chesapeake & O. Canal Co. v. Hill*, 15 *Wall.* 94, 21 *L. ed.* 64.

Messrs. W. Littlefield and Alford & Clingman, for defendant in error:

Such a proposition as the one contained in the letter referred to as exhibit A does not constitute any contract binding upon the party making the offer. Unless both parties are bound so that an action could be maintained by either against the other for a breach, neither will be bound.

Bishop, Contr. Enlarged ed. § 78; 7 *Am. & Eng. Enc. Law*, 2d ed. p. 138; *Campbell v. Lambert*, 36 *La. Ann.* 35, 51 *Am. Rep.* 1; *Houston & T. C. R. Co. v. Mitchell*, 38 *Tex.* 85; *Ashcroft v. Butterworth*, 136 *Mass.* 511; *Drake v. Vorse*, 52 *Iowa*, 417, 3 *N. W.*

465; *Trayer v. Burchard*, 99 Mass. 508; *Hoffman v. Maffioli*, 104 Wis. 630, 47 L. R. A. 427, 80 N. W. 1032; *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240; *Neuklin v. Prevo*, 90 Ill. App. 515; *Chicago & A. R. Co. v. Jones*, 53 Ill. App. 431; *Clark, Contr.* 166; *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 540, 34 U. S. App. 60, 68 Fed. 791.

The neglect or refusal of the defendant to order goods under this letter would give no right of action to the plaintiff. In other words, there was no mutuality of promise for the sale of a definite or ascertainable quantity of the material.

Crane v. C. Crane & Co. 45 C. C. A. 96, 105 Fed. 869; *Bailey v. Austrian*, 19 Minn. 535, Gil. 465; *Moulton v. Kershaw*, 59 Wis. 316, 48 Am. Rep. 516, 18 N. W. 172; *Swaine v. Maryott*, 28 N. J. Eq. 589.

A promise is not a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement.

Stiles v. McClellan, 6 Colo. 89; *Bailey v. Austrian*, 19 Minn. 535, Gil. 465; *Townsend v. Fisher*, 2 Hilt. 47; *Livingston v. Rogers*, 1 Cai. 583; *Tucker v. Woods*, 12 Johns. 190, 7 Am. Dec. 305; *Keep v. Goodrich*, 12 Johns. 397; *Macedon & B. Pl. Road Co. v. Snediker*, 18 Barb. 317.

A promise made by one party without a corresponding obligation by the other party is void.

Corbitt v. Salem Gaslight Co. 6 Or. 405, 25 Am. Rep. 541; *Woolsey v. Ryan*, 59 Kan. 601, 54 Pac. 664; *Utica & S. R. Co. v. Brinkerhoff*, 21 Wend. 139, 34 Am. Dec. 220; *Missouri, K. & T. R. Co. v. Bagley*, 60 Kan. 424, 56 Pac. 759; *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 540, 34 U. S. App. 60, 68 Fed. 791; *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240; *Rafolovits v. American Tobacco Co.* 73 Hun. 87, 25 N. Y. Supp. 1036; *Hoffman v. Maffioli*, 104 Wis. 630, 47 L. R. A. 427, 80 N. W. 1032; *Davis v. Lumberman's Min. Co.* 93 Mich. 491, 24 L. R. A. 357, 53 N. W. 625; *Teipel v. Meyer*, 106 Wis. 41, 81 N. W. 982; *Crane v. C. Crane & Co.* 45 C. C. A. 96, 105 Fed. 872; *American Refrigerator Transit Co. v. Chilton*, 94 Ill. App. 6.

Sanborn, Circuit Judge, delivered the opinion of the court:

The main question in this case is whether or not the answer states a legal counterclaim. The basis of this counterclaim is that the plaintiff failed to deliver nuts, bolts, and bars between June 1, 1899, and December 1, 1899, under the alleged renewal of the so-called contract of October 27, 1898. This supposed contract consisted of a written offer to deliver manufactured articles in unnamed quantities at certain specific prices at any time between October 27, 1898, and June 1, 1899, and the acceptance of that offer, without more. The answer contains no averment that either the plaintiff or the defendant paid any consideration or performed any act to induce the contract, except the remitting of the offer 57 L. R. A.

by the plaintiff, and the sending of its acceptance by the defendant. There was, therefore, in the inception of this alleged agreement no consideration for the promise of either of the parties to it, except the promise of the other. Neither the letter nor the acceptance names any quantity or amount of the articles specified that is to be delivered or received under it. The plaintiff does not agree to deliver, nor does the defendant contract to receive or pay for, any quantity or amount whatever of the articles named in the writings. A promise is a good consideration for a promise. But no promise constitutes such a consideration which is not obligatory upon the party promising. It must bind the promisor, so that the promisee may maintain an action for its breach, or it is without legal effect and void. A promise to furnish, deliver, or receive specified articles at certain prices, without any agreement to order or to accept any amounts or quantities of the articles, is without binding force or effect, because neither party is thereby bound to deliver or to accept any quantity or amount whatever. Such promises are void, because they lack one of the essential elements of an agreement,—certainty in the thing to be done. Contracts for the future supply during a limited time of articles which shall be required or needed or consumed by an established business, or used in the operation of certain steamships or other machinery, are no exceptions to this principle, because they fall under the rule, *Id certum est quod certum reddi potest*. But an accepted promise to furnish goods, merchandise, or other property, at certain prices, during a limited time, in such quantities as the acceptor shall require or want in his business, is without consideration and void, because the acceptor is not bound thereby to require or take any articles whatever under the supposed agreement. The line of demarcation between valid and invalid contracts here runs between the requirements of machinery, or of an established business, and the wants, desires, or requirements of the tentative vendee; and that because the former are either reasonably certain, or may be made so by evidence, while the latter are conditioned by the will of the tentative vendee alone, and are both uncertain and capable of infinite variation.

It is, however, contended that even if this alleged contract was void in its inception, it became valid and binding upon the parties when the defendant ordered, and the plaintiff delivered and received payment for, a large quantity of the manufactured articles at the prices and in accordance with the terms of the letter of October 27, 1898. But the fatal defect in the alleged contract was that the plaintiff was not bound to deliver, nor the defendant to take and pay for, any specific quantity of the offered articles. As to all undelivered articles, that defect still inheres in the agreement. The plaintiff is not bound to deliver, nor the defendant to take and pay for any articles that have not been delivered, because there

is no specification in the alleged contract of the amount or quantity which the one is to deliver and the other to receive. The orders for these articles which have been filled by their delivery specified the amounts so delivered, and thus effected contracts for their sale. But these orders and deliveries have in no way remedied the fatal defect of the offer and acceptance regarding those articles which the defendant has ordered, and the plaintiff has refused to deliver. The defendant never agreed to order or to pay for any quantity of these undelivered articles. If it had refused to order and take them, no action could have been maintained for its failure, because no court could have determined what amount it was required to take. Nor can an action be better maintained against the plaintiff for its failure to deliver the articles which the defendant has ordered, because the offer contains no measure of the quantity which the plaintiff was to deliver, and consequently no agreement on its part to deliver any whatever. As the contract was void in its inception, and has continued to be void as to all undelivered goods, the notice of its renewal which was delivered by the defendant was futile, since the renewal of a void contract but continues its invalidity.

It is said that the intention of the parties was to make an agreement that the plaintiff should sell and deliver, and the defendant should buy, all the articles of the character specified in the offer which should be needed or required by its business between October 27, 1898, and June 1, 1899; that the purpose of the construction and interpretation of contracts is to ascertain the intention of the parties; and that this contract should be interpreted to effect this intent. The answer is that, while ambiguous terms and doubtful stipulations may be interpreted to carry out the intention of the parties when they fairly evidence it, their secret intention cannot be imported into contracts whose terms and meaning are plain and unambiguous, and do not express it. It is only the intention of the parties which the contract itself expresses that the courts may enforce. In the case at bar the offer of the plaintiff is nothing but a price list. The acceptance of the defendant contains no agreement to buy any of the articles specified in the list, and there is no ambiguity in the terms, or doubt in the meaning, of the writings in issue. To give effect to the intention of the parties which the defendant now alleges would be to ascribe to them a purpose, and to make and enforce for them a contract, which their writings neither express nor suggest; and this is beyond the province of the courts. *Missouri, K. & T. R. Co. v. Bagley*, 60 Kan. 424, 431, 56 Pac. 759; *Woolsey v. Ryan*, 59 Kan. 601, 54 Pac. 664; *Davie v. Lumberman's Min. Co.* 93 Mich. 491, 24 L. R. A. 357, 53 N. W. 625; *Vogel v. Pekoc*, 157 Ill. 339, 30 L. R. A. 491, 42 N. E. 386; *Campbell v. Lambert*, 36 La. Ann. 35, 51 Am. Rep. 1; *Dayton, W. Valley & X. Turnp. Co. v. Coy*, 57 L. R. A.

13 Ohio St. 84; *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 869.

The rules applicable to contracts of this class may be thus briefly stated: A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty. An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer. *Wells v. Alexandre*, 130 N. Y. 642, 15 L. R. A. 218, 29 N. E. 142; *Minnesota Lumber Co. v. Whitebreast Coal Co.* 160 Ill. 85, 31 L. R. A. 529, 43 N. E. 774; *Parker v. Pettit*, 43 N. J. L. 512. But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration and void, because the acceptor is not bound to want, desire, or take any of the articles mentioned. *Bailey v. Austrian*, 19 Minn. 535, Gil. 465; *Tarboe v. Gotsian*, 20 Minn. 139, Gil. 122; *Missouri, K. & T. R. Co. v. Bagley*, 60 Kan. 424, 433, 56 Pac. 759; *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 540, 34 U. S. App. 60, 68 Fed. 791; *Crane v. C. Crane & Co.* 45 C. C. A. 96, 105 Fed. 869. Accepted orders for goods under such void contracts constitute sales of the goods thus ordered at the prices named in the contracts, but they do not validate the agreements as to articles which the one refuses to purchase, or the other refuses to sell or deliver, under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder. *Crane v. C. Crane & Co.* 45 C. C. A. 96, 105 Fed. 869; *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 540, 34 U. S. App. 60, 68 Fed. 791; *Campbell v. Lambert*, 36 La. Ann. 35, 51 Am. Rep. 1; *Houston & T. O. R. Co. v. Mitchell*, 38 Tex. 85, 95; *Ashcroft v. Buttermoorth*, 136 Mass. 511, 514; *Drake v. Vorse*, 52 Iowa, 417, 3 N. W. 465; *Thayer v. Burchard*, 99 Mass. 508, 520; *Hoffman v. Maffioli*, 104 Wis. 630, 47 L. R. A. 427, 80 N. W. 1032, 1035; *Chicago & A. R. Co. v. Jones*, 53 Ill. App. 431, 437; *Rafolovits v. American Tobacco Co.* 73 Hun, 87, 25 N. Y. Supp. 1036.

Tested by these rules, the accepted offer of October 27, 1898, was void in its inception for want of consideration and mutuality. No quantity of nuts, bolts, or bars was named in the offer or in the acceptance. The defendant was not bound to order, to receive, or to pay for any of the articles named in the offer; and there was there-

fore no consideration for the offer itself, and no mutuality in the supposed agreement. The orders which were made and filled prior to June 1, 1899, constituted valid contracts for the purchase and sale of the goods so ordered at the prices named in the offer. But they effected no agreement on the part of the defendant to order, or on the part of the plaintiff to deliver, any other goods under the offer, because the amount of goods whose delivery was contemplated was still unnamed. The defendant was not legally bound to order, to receive, or to take any articles which it had not ordered, so that there was still no consideration and no mutuality in the contract as to any articles which the defendant had not ordered, or which the plaintiff had not delivered. The refusal of the plaintiff to honor the orders of the defendant was therefore no breach of any valid contract, and formed no legal cause of action for the counterclaim.

It is specified as error that the court refused to permit the defendant to amend its answer at the trial so as to allege that it orally, and by the written contract, agreed to purchase all of the goods of the kinds mentioned in the offer of October 27, 1898, "that it might use or desire to use during the times mentioned in the contract," but no argument is presented in support of this specification, and no plausible reason for its assignment is suggested. If the amendment had been allowed, the alleged contract would still have been void, because, under the agreement stated in the amendment, the defendant would not have been bound to desire to use, or to use, any of the articles mentioned in the price list, and there would still have been no mutuality in the contract. Moreover, the granting of the motion was discretionary with the court below, and it was made so late that it would have been no abuse of discretion to have denied it if the amendment had been material. It was properly denied because the amendment was immaterial, because if it had been allowed the answer would not have stated facts sufficient to constitute a legal counterclaim, and because its allowance was discretionary, and there was no abuse of that discretion.

In addition to the counterclaim which has been considered, the answer contained a denial of the allegations of the complaint, and an offset against the plaintiff's claim for the sum of \$2,727.18, which the defendant alleged the plaintiff had charged it in excess of the prices specified in the offer of October 27, 1898, for goods delivered subsequent to June 1, 1899. But the statutes of Kansas provide that, "in all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." Kan. Gen. Stat. 1897, chap. 95, § 108.

57 L. R. A.

The correctness of the account set forth in the plaintiff's petition was verified by affidavit. The denial in the answer and the offset which it pleads challenge the correctness of this account. But the answer was not verified. Consequently, under the express provisions of the statute which has been quoted, the verified account must be taken as true, and neither the denial nor the offset can be considered under the pleadings.

The judgment below was right, and it is affirmed.

Cassandra PURPLE, *Piff. in Err.*,
v.
UNION PACIFIC RAILROAD COMPANY.

(114 Fed. 123.)

- *1. One who, knowing that a conductor has no authority to grant free transportation, enters and rides upon his train, with the deliberate intention not to pay his fare, under an agreement, or under a tacit understanding, with the conductor that he shall ride free, commits a fraud upon the railroad company, and is not a passenger, but is a mere trespasser, to whom the only duty of the company is to abstain from wilful or reckless injury.
2. One who enters and rides upon a car or train which he knows, or by the exercise of reasonable diligence would know, is prohibited from carrying passengers, is a trespasser, and not a passenger; and the only duty of the railroad company toward him is to abstain from wanton or reckless injury to him.
3. In the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that one riding for his own convenience on a freight train, an engine, a hand car, or any other carriage of a common carrier not designed for the transportation of passengers, is unlawfully there, and is a trespasser.
4. One about to board a train, who has knowledge of facts which would put a person of ordinary prudence and diligence upon inquiry to ascertain whether or not the train is permitted to carry passengers, is charged with a knowledge of all the facts which a reasonably diligent inquiry would discover.
5. It is not error to refuse to instruct the jury that a defendant is guilty of gross negligence, as distinguished from ordinary negligence on the one hand, and wilful or reckless negligence on the other, because there is no such legal degree of negligence as "gross" negligence. The word "gross" in this connection is a mere epithet used to characterize one of the two legal classes of negligence mentioned.
6. The statement of facts in a bill of

*Headnotes by SANBORN, Circuit Judge.

NOTE.—As to rights of person riding on freight train, see also, in this series, *Ohio Valley R. Co. v. Watson* (Ky.) 19 L. R. A. 310, and note; *Farber v. Missouri P. R. Co.* (Mo.) 20 L. R. A. 350; *Atchison, T. & S. F. R. Co. v. Headland* (Colo.) 20 L. R. A. 822; *Bogges v. Chesapeake & O. R. Co.* (W. Va., 23 L. R. A. 777; and *Woolsey v. Chicago, B. & Q. R. Co.* (Neb.) 25 L. R. A. 79.

exceptions is conclusive in an appellate court, unless it is excepted to and the exceptions are recorded in the bill when it is settled.

(March 10, 1902.)

ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by Sanborn, Circuit Judge:

On the 9th of January, 1900, Cassandra Purple, who is the widow of Harry G. Purple, brought an action against the Union Pacific Railroad Company for negligence causing his death. She alleged that on October 18, 1899, between Laramie and Cheyenne, in the state of Wyoming, he was a passenger upon a train of the railroad company, and was killed through the negligence of the latter by another train which ran into the rear of that upon which Purple was riding. The railroad company denied these allegations, and averred that Purple was riding upon an extra freight train, which was prohibited from carrying passengers, that he knew that this train was not authorized to carry passengers, and that he was riding without pass or other free transportation, with the intention of paying no fare. The issues presented by these pleadings were submitted to a jury, which returned a verdict for the defendant, and a writ of error has been sued out to reverse the judgment founded upon this verdict. The case is presented upon a bill of exceptions, which contains but a portion of the evidence. It discloses these facts: The train upon which Purple was riding was an extra freight train running east from Laramie to Cheyenne. It was prohibited from carrying passengers by the rules of the company, but those rules permitted regular freight trains to take passengers. At Sherman, on its way from Laramie to Cheyenne, it became a section of passenger train No. 6. The sectionizing of a train is the act of the train despatcher. It is an act of temporary application, and may be discontinued at any suitable point. Its sole purpose is to give certain track rights that a train does not possess before the order is issued. The order at Sherman which made this train a section of regular passenger No. 6 directed a freight train ahead of this one, this train, regular passenger No. 6, another passenger train, and another freight train to run as sections 1, 2, 3, 4, and 5 of the regular passenger No. 6. These sections were running in this way when the accident occurred. The evidence of the defendant tended to show that an extra freight train did not lose its distinctive character as such by being made a section of a passenger train, but that it still remained an extra freight train. One of the rules of the company was that, where "freight trains on which passengers are allowed to be carried are run in sections, 57 L. R. A.

the last section of the train only" will be permitted to carry passengers, and another was that "conductors will collect fare from all persons traveling without a ticket or pass, and will be allowed no discretion in the matter."

Harry G. Purple was an employee on the Union Pacific Railroad from 1884 until 1893, and a part of the time was a conductor. The rules for the operation of this road in force at the time of his death were the same as those in force when he was employed upon the road, and at that time he was thoroughly familiar with them. The train upon which Purple rode left Laramie at 8.15 P. M. on October 15, 1899. Its conductor was an old friend and acquaintance of Purple. The train consisted of 27 or 28 freight cars and a caboose. Purple had been visiting at Laramie for two or three days, and he had in his pocket on this day a time card which disclosed the fact that this train which he boarded was not a regular freight train, and therefore was not entitled to carry passengers. He was in the train despatcher's office before the departure of the train, and that despatcher could have informed him that this was not a regular freight train. The evidence of the defendant tended to prove that he had no intention of paying his fare, and that there was a tacit understanding between him and Davis, the conductor of the freight train, that he was to be permitted to ride on this train from Laramie to Cheyenne without the payment of any fare. He did not pay or offer to pay fare, nor did the conductor or anyone else ask him to do so.

The bill of exceptions contains a statement that all evidence tending to show the fact or character of the defendant's negligence is found in it, and that there was no evidence in the case tending to show wanton, wilful, or reckless disregard on the part of the company of the safety of the deceased. These are the principal facts disclosed by the record which condition the determination of the questions presented by the alleged errors specified in this case, which all relate to the charge of the court and to its refusal to give certain requested instructions.

Argued before *Caldwell, Sanborn, and Thayer*, Circuit Judges.

Messrs. Hutchings & Keplinger, for plaintiff in error:

The evidence shows that the train upon which Purple was riding at the time of his death was represented on the time-table, and therefore it was a regular freight.

It was not sufficient for defendant to show that the train which Purple entered was not entitled to carry passengers. It must at least go one step further, and show that the train upon which he was riding at the time of the accident was not entitled to carry passengers. The train upon which he entered may not have been, while the one upon which he was riding at the time of the accident may have been, entitled to carry passengers.

Assuming that the sectionizing of the train changed it from one which was not, into one which was, entitled to carry passengers, the fact that there was an understanding that no fare was to be paid did not prevent one from being a passenger.

Louisville & N. R. Co. v. Scott, 22 Ky. L. Rep. 30, 50 L. R. A. 381, 56 S. W. 674; *Bryant v. Chicago, St. P. M. & O. R. Co.* 4 C. C. A. 146, 12 U. S. App. 115, 53 Fed. 997; *Buck v. People's Street R. & Electric Light & P. Co.* 108 Mo. 179, 18 S. W. 1091.

Whatever the rule may be in cases where freight trains are exclusively for the carriage of freight, a different rule governs in cases and as to roads where, as a general rule, freight trains carry passengers, and where all freights do so under some circumstances.

Whitehead v. St. Louis, I. M. & S. R. Co. 99 Mo. 267, 6 L. R. A. 409, 11 S. W. 751; *Lucas v. Milwaukee & St. P. R. Co.* 33 Wis. 54, 14 Am. Rep. 735; *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; *Dunn v. Grand Trunk R. Co.* 58 Me. 187, 4 Am. Rep. 267.

Purple was not a trespasser. The only wrongful act on his part was in accepting transportation without payment of fare; but this did not render his presence in the caboose a trespass.

Whitehead v. St. Louis, I. M. & S. R. Co. 99 Mo. 267, 6 L. R. A. 409, 11 S. W. 751; *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460, 51 L. R. A. 886, 58 S. W. 861; *Dunn v. Grand Trunk R. Co.* 58 Me. 187, 4 Am. Rep. 267; *Ecliff v. Wabash, St. L. & P. R. Co.* 64 Mich. 196, 31 N. W. 180; *Gradin v. St. Paul & D. R. Co.* 30 Minn. 219, 14 N. W. 881; *Philadelphia & R. R. Co. v. Derby*, 14 How. 483, 14 L. ed. 508.

Messrs. A. L. Williams, N. H. Loomis, and R. W. Blair, for defendant in error:

The freight train upon which plaintiff's husband was riding was not permitted to carry passengers. He was a trespasser upon the train.

Purple was guilty of perpetrating a fraud upon the rights of the company, and he was simply a trespasser.

Powers v. Boston & M. R. Co. 153 Mass. 188, 26 N. E. 446; *Flaherty v. Union P. R. Co.* 6 C. C. A. 167, 12 U. S. App. 532, 56 Fed. 908; *Virginia Midland R. Co. v. Roach*, 83 Va. 375, 5 S. E. 175; *Robertson v. New York & E. R. Co.* 22 Barb. 91; *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513; *Pennsylvania R. Co. v. Langdon*, 92 Pa. 21, 37 Am. Rep. 651; *Louisville & N. R. Co. v. Hailey*, 94 Tenn. 383, 27 L. R. A. 549, 29 S. W. 367; *Dalton v. Louisville & N. R. Co.* 22 Ky. L. Rep. 97, 56 S. W. 657; *Duff v. Allegheny Valley R. Co.* 91 Pa. 458, 36 Am. Rep. 675; *Cooper v. Lake Erie & W. R. Co.* 136 Ind. 366, 36 N. E. 272; *Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19; *Condran v. Chicago, M. & St. P. R. Co.* 28 L. R. A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522; *Mc-*
57 L. R. A.

Vesty v. St. Paul, M. & M. R. Co. 45 Minn. 268, 11 L. R. A. 174, 47 N. W. 809; *Richmond & D. R. Co. v. Burnsed*, 70 Miss. 437, 12 So. 958; *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 245; *Chicago & A. R. Co. v. Michie*, 83 Ill. 427; *Union P. R. Co. v. Nichols*, 8 Kan. 505, 12 Am. Rep. 475; *Hendryx v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 377, 25 Pac. 893.

ceased being a trespasser upon the train, defendant would be responsible for his death only in the event of a wilful, wanton, or reckless disregard of his safety.

Condran v. Chicago, M. & St. P. R. Co. 28 L. R. A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522; *Hendryx v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 377, 25 Pac. 893; *Kansas P. R. Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730; *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 17 Pac. 54; *Kansas City, Ft. S. & G. R. Co. v. Kelly*, 36 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172; *Union P. R. Co. v. Mitchell*, 56 Kan. 324, 43 Pac. 244; *Richmond & D. R. Co. v. Burnsed*, 70 Miss. 437, 12 So. 958; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 495, 23 L. ed. 374, 376; *Perkins v. New York C. R. Co.* 24 N. Y. 207, 82 Am. Dec. 281; 1 Thomp. Neg. p. 20; *Terre Haute & I. R. Co. v. Graham*, 95 Ind. 286, 49 Am. Rep. 719; *Stringer v. Alabama Mineral R. Co.* 99 Ala. 397, 13 So. 75; 16 Am. & Eng. Enc. Law, pp. 426, 427; *McAdoo v. Richmond & D. R. Co.* 105 N. C. 140, 11 S. E. 316; *Wilson v. Brett*, 11 Mees. & W. 113.

It was the duty of deceased to ascertain whether the extra freight train which he boarded at Laramie was one which was allowed to carry passengers.

Flaherty v. Union P. R. Co. 6 C. C. A. 167, 12 U. S. App. 532, 56 Fed. 908; *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513; *Powers v. Boston & M. R. Co.* 153 Mass. 188, 26 N. E. 446; *Waterbury v. New York C. R. Co.* 21 Blatchf. 314, 17 Fed. 671; *Texas & P. R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118; *Hutchinson, Carr. §§ 554, 555; Patterson, Railway Accident Law, §§ 215, 379; Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 17 Pac. 54.

Sanborn, Circuit Judge, delivered the opinion of the court:

The court refused to instruct the jury that the deceased was a passenger on the freight train of the defendant at the time he was injured, and that if he was killed by the negligence of the company the plaintiff was entitled to recover. This ruling is the first and the chief complaint of counsel for the plaintiff in error. There are, however, two reasons why this specification of error cannot be sustained.

In the first place, Purple had no pass, ticket, or permit to ride free upon this train, he paid no fare, and there was evidence tending to prove that he did not intend to pay fare, and that there was a tacit understanding between him and the conductor, Davis, that he should ride free. He was a man of years, intelligence, and experience. He had been employed upon this

railroad for about nine years. He knew that he had no right to ride, and that the conductor of this train had no authority to permit him to ride, without the payment of his fare. The rules governing the operation of this railroad during the nine years when he was employed upon it prohibited this course of action, and they forbade it when he was killed. He had been familiar with these rules during the nine years of his employment upon this railroad, from 1884 to 1893, and in the seven years which followed, from 1893 to 1899, before he was injured, it is hardly possible that he could have forgotten or could have become ignorant of the specific fact that conductors were not empowered to grant free transportation upon this railroad, or of the general and universally known fact that it is not the custom to permit them to do so upon any railroad. If, knowing this fact, he entered and rode upon this train with the deliberate intention not to pay his fare, under the tacit understanding between himself and the conductor that he should not pay it, the entire transaction was a fraud upon the railroad company, and a deliberate attempt to appropriate transportation without compensation, in violation, not only of the rules of the company, but also of the civil and the moral law. If he entered and continued upon this train under this understanding with the settled intention not to pay his fare, the relation of passenger and carrier was never created between him and the company, but he was a mere trespasser upon its property, fraudulently appropriating his ride, and the only duty which the company owed to him was to abstain from wilfully or recklessly inflicting injury upon him. One who, knowing that a conductor has no authority to grant free transportation, enters and rides upon his train with the deliberate intention not to pay his fare, under an agreement or under a tacit understanding with the conductor that he shall ride free, commits a fraud upon the railroad company, and is not a passenger, but is a mere trespasser, to whom the only duty of the company is to abstain from wilful or reckless injury. *Condran v. Chicago, M. & St. P. R. Co.* 28 L. R. A. 749, 14 C. C. A. 506-508, 32 U. S. App. 182, 185, 67 Fed. 522, 523; *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 250; *Chicago & A. R. Co. v. Michie*, 83 Ill. 431; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 84, 28 Am. Rep. 613; *Chicago, B. & Q. R. Co. v. Mehlaack*, 131 Ill. 64, 22 N. E. 812; *McVeety v. St. Paul, M. & M. R. Co.* 45 Minn. 269, 11 L. R. A. 174, 47 N. W. 809; *Robertson v. New York & E. R. Co.* 22 Barb. 91; *Union P. R. Co. v. Nichols*, 8 Kan. 505, 12 Am. Rep. 475; *Prince v. International & G. N. R. Co.* 64 Tex. 146; *Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex. 175, 13 S. W. 19; *Way v. Chicago, R. I. & P. R. Co.* 64 Iowa, 48, 52 Am. Rep. 431, 19 N. W. 828, 73 Iowa, 463, 35 N. W. 525; *Hendry v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 377, 25 Pac. 893; *Kansas P. R. Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730; *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 17 Pac. 54. A contract is indispensable to the relation of carrier and passenger. The minds of the parties must meet upon the agreement that the carrier will transport and the passenger will pay for the transportation, in the absence of a specific agreement or permission by the proper officer of the transportation company that the latter will carry the passenger without compensation. This contract of carriage may, it is true, be express or implied, but if it does not exist in either form the relation of carrier and passenger cannot have been created. An implied agreement to pay fare, and hence the relation of carrier and passenger, undoubtedly arises where one enters a passenger car and rides towards his destination. But it is equally true that if one enters and rides under an express or implied agreement with a conductor, whom he knows or has reasonable cause to believe has no authority to make such a contract, that he shall not pay his fare, but shall cheat the company out of the transportation, no contract of carriage is created, but the existence of such an agreement is conclusively negated by the actual fraudulent contract so that it cannot exist. Therefore, if the deceased entered and rode under the fraudulent understanding with the conductor that he should pay no fare and with the deliberate intention to pay none, there was neither an express nor an implied agreement that he should pay for his transportation, and no relation of carrier and passenger arose, because the minds of Purple and the conductor never met upon any such contract, but came together upon the contrary understanding that Purple should pay no fare and should not be a passenger, but should fraudulently appropriate his transportation. The bill of exceptions instructs us that there was evidence tending to establish this state of facts, and in the presence of it the court properly refused to instruct the jury that Purple was a passenger, and that the plaintiff was entitled to recover if he was killed by the negligence of the defendant, because if this state of facts existed he was not a passenger, and the limit of the duty of the defendant toward him was to refrain from wilful and reckless injury to him.

In the second place, Purple was riding on a train which was prohibited from carrying passengers by the rules of the company, and there was evidence tending to prove that he either knew this fact, or had notice of such facts as would have led a person of ordinary prudence and diligence to an inquiry which would have disclosed its existence. The record is clear that at the time Purple boarded the train on which he rode to his death that train was an extra freight train, which was forbidden to take or carry passengers. After he started upon his ride and at Sherman it was made the second section of regular passenger train No. 6 by the orders of the train despatcher, but the character of the train and the num-

ber of the cars remained unchanged. It still contained the 27 or 28 freight cars and caboose with which it started from Laramie, and it contained no passenger cars. The orders of the despatcher made this the second of five sections running on the time of regular passenger train No. 6. The first section which preceded it was a freight train, the two sections which followed it were passenger trains, and the fifth or last section was a freight train. Thus, this passenger train No. 6 consisted of five sections, the first, second, and fifth of which were composed exclusively of freight cars and cabooses, and were in fact freight trains.

It will be convenient to notice here the earnest argument of counsel for the plaintiff presented in the discussion of another specification of error to establish the proposition that, if the extra freight train on which Purple was riding was prohibited from carrying passengers before it reached Sherman, it was permitted to do so after it passed that point, so that at the time Purple was killed it was not under this ban. Stated in syllogistic form, this is the contention: The rules permitted regular freight trains to carry passengers and forbade extra freight trains to do so. They declared that regular freight trains were those running on schedule time, while extra freight trains were those which did not run upon such time. Prior to its arrival at Sherman the train on which Purple rode was not running on the schedule time of any train. After it passed Sherman it ran on the schedule time of regular passenger train No. 6. It therefore became from that time a regular train, because it was running on the schedule time of the regular passenger train, and hence it became authorized to carry passengers before the fatal injury was inflicted. This argument is not persuasive or convincing, because the composition, character, and function of the train on which Purple rode remained the same after it became a section of the passenger train that it was before that time, and because after it passed Sherman it was not running on any schedule time prescribed for it upon the time card, but upon the time of a passenger train, under the special and temporary orders of the train despatcher. It is, however, unnecessary to discuss this question, because the right of the conductor of this train to carry passengers upon it after it passed Sherman is conclusively negatived by another admitted rule of the company. That rule is that, where freight trains on which passengers are allowed to be carried are run in sections, the last section of the train only will be permitted to carry the passengers. If, therefore, this became a regular freight train authorized to carry passengers when it passed Sherman, it was only the fifth section of this freight train which was permitted to do so, while the conductor of the second section, on which Purple was riding, was expressly prohibited from exercising this privilege. The train

upon which Purple rode, therefore, was when he boarded it, and continued to be until the fatal collision, a train which was forbidden by the rules of the company to accept or carry him as a passenger.

Purple had worked on this railroad for nine years,—from 1884 to 1893. During a part of this time he had been a conductor upon the railroad. The rules for the operation of the railroad were the same in 1899, when he was injured, that they were in 1893, when he left his employment. At and before that time he was familiar with them. It is difficult to believe that in 1899 he could have forgotten that these rules permitted some freight trains to carry passengers and prohibited others from doing so. For a day or two before he started on his fatal ride he had been visiting at Laramie, where he boarded the train. On the day upon which he started he had been in the office of the train despatcher, where he could have readily learned by a simple inquiry whether or not the train upon which he entered was permitted to carry passengers. Beyond all question, these facts charged Purple with notice sufficient to put any man of ordinary prudence and diligence upon inquiry for the answer to the question whether or not this train was authorized to carry passengers, and brought him far within the established rule that notice sufficient to put one on inquiry for a fact is notice of all the facts relative to the matter in question that a reasonably diligent investigation and inquiry will disclose. In this state of the evidence the court below rightly charged the jury: "It was the duty of the deceased to inquire whether this train was such as was authorized to carry passengers. It does not appear that he did so; consequently he was charged with such knowledge and information as reasonable inquiry would have elicited." No exception was taken to this portion of the instructions of the court, and it comes here, the established law of this case. If, therefore, Purple knew, or by a reasonably diligent inquiry he could have learned, that the train which he boarded was not permitted to carry passengers, he was not a passenger upon it, but was a mere trespasser on that train, because, in the eyes of the law, he was there knowingly violating the rules of the company. There was evidence tending to show this state of facts, and in the presence of it the court could not have lawfully instructed the jury that Purple was a passenger, and that the defendant was liable for his death if it was caused by its negligence, because, if this state of facts existed, Purple was a trespasser, and not a passenger, and the only duty of the defendant to him was to abstain from wantonly or recklessly inflicting injury upon him. One who enters and rides upon a car or train which he knows, or by the exercise of reasonable diligence would know, is prohibited from carrying passengers, is a trespasser, and not a passenger, and the only duty of the railroad company toward him is to abstain from wanton or reckless in-

jury to him. *Virginia Midland R. Co. v. Roach*, 83 Va. 375, 5 S. E. 175; *Robertson v. New York & E. R. Co.* 22 Barb. 91; *Eaton v. Delacare, L. & W. R. Co.* 57 N. Y. 382, 384, 15 Am. Rep. 513; *Pennsylvania R. Co. v. Langdon*, 92 Pa. 21, 37 Am. Rep. 651; *Powers v. Boston & M. R. Co.* 153 Mass. 188, 191, 192, 26 N. E. 446; *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251; *Ecliff v. Wabash, St. L. & P. R. Co.* 64 Mich. 196, 31 N. W. 180.

The conclusions which have now been announced have not been reached without a careful perusal and consideration of the authorities cited by counsel for the plaintiff in error, such as *Dunn v. Grand Trunk R. Co.* 58 Me. 187, 4 Am. Rep. 267; *Lucas v. Milwaukee & St. P. R. Co.* 33 Wis. 41, 54, 14 Am. Rep. 735; *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 484, 14 L. ed. 502, 508; *Gradin v. St. Paul & D. R. Co.* 30 Minn. 217, 220, 14 N. W. 881; *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; and *Whitehead v. St. Louis, I. M. & S. R. Co.* 99 Mo. 263, 6 L. R. A. 409, 11 S. W. 751,—in which boys and men who had never been employed upon the railroad, or who had no notice of facts sufficient to put them upon inquiry as to the power of the conductor or officer in charge of the train to permit them to ride upon it as passengers, were held, under the circumstances of these particular cases, to stand in this relation to the companies. The rules and principles announced in those cases are inapplicable to the facts of the case in hand, because the evidence here conclusively establishes the fact, which did not exist in those cases, that before the alleged passenger boarded the extra freight train he knew facts which would put any man of reasonable prudence upon inquiry to ascertain—First, whether or not that train was permitted to carry passengers; and, second, whether or not the conductor had any authority to allow him to ride upon it, and because there was evidence in this case, which was not presented in any of those cases, tending to show that the alleged passenger entered and rode upon the train with the deliberate intention not to pay his fare, under a tacit understanding with the conductor that he should ride free. Purple did not approach this train in the relation to the company of a boy or of an ordinary individual honestly seeking transportation without knowledge of the rules or practices of the company. The conceded facts that he had been employed upon the railroad for nine years, had been familiar with the rules and practices upon the road, and the evidence of his intention not to pay, and tacit understanding with the conductor that he should not pay fare, gave him notice of facts, and suggested inquiry which the ordinary applicant for passage upon the train of a railroad company does not have. This case is not governed by the authorities cited by the plaintiff in error, which declared the liabilities of railroad companies upon very different states of facts, but is controlled by the rules and the 57 L. R. A.

decisions to which reference has been made in the earlier portion of this opinion.

It will be convenient to notice here another contention of counsel for plaintiff in error allied to those which have already been considered. It is that although Purple was not a passenger he was not a trespasser, and the court should have instructed the jury that the defendant was liable to him for gross negligence. In support of this proposition cases are cited like *Philadelphia & R. R. Co. v. Derby*, 14 How. 483, 14 L. ed. 502, where a passenger who was riding free upon the railroad by the invitation of the president of the company was carelessly injured, and *Farmers' Loan & T. Co. v. Baltimore & O. S. W. R. Co.* 102 Fed. 17, where one riding in a passenger car upon a pass sustained injury through the negligence of the company, and it was held that the defendant was liable to these persons for the exercise of ordinary care and diligence, and that any failure to exercise such care might well be characterized as gross. These authorities, and the rules of law upon which they rest and which they announce, have no application to the case in hand. Purple was not traveling on a free pass. He was not a licensee. He was either a passenger without knowledge and without notice of facts suggesting an inquiry which would have led a prudent man to knowledge of the fact that the conductor of this train was not authorized to permit him to ride upon it as a passenger, or he was a trespasser with knowledge, or with notice charging him with knowledge, of this fact, engaged in executing a deliberate intention to ride upon the train in violation of the rules of the company. He was not a licensee, and he could occupy no middle position. There was, therefore, no error in the refusal of the court to charge that if he was not a passenger the railroad company was liable to him for gross negligence. The term "gross" in this connection is nothing but an epithet. It means no more than the failure to exercise ordinary diligence in the circumstances of the particular case. It distinguishes no legal degree of negligence, and it is not error to refuse to apply it to the negligence for which a defendant may be liable, because its use merely tends to create doubt and to increase confusion. *Wilson v. Brett*, 11 Mees. & W. 113; *The New World v. King*, 16 How. 474, 14 L. ed. 1021; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 494, 23 L. ed. 374, 376; *Beal v. South Devon R. Co.* 3 Hurlst. & C. 337; *Grill v. General Iron Screw Collier Co.* (1866) L. R. 1 C. P. 600; *Perkins v. New York C. R. Co.* 24 N. Y. 196, 207, 82 Am. Dec. 281.

Another complaint of the plaintiff in error is that the court instructed the jury that there was no evidence in the case sufficient to warrant them in finding that there was any wanton, wilful, or reckless disregard by the company of the safety of the deceased. But the bill of exceptions contains these two statements: "All evidence tending to

show the fact or character of defendant's negligence is contained in this bill of exceptions;" and "there was no evidence in the case tending to show wanton, wilful, or reckless disregard on the part of the company of the safety of the deceased." Counsel review the evidence contained in the bill of exceptions, and ask a holding that there was evidence tending to show wilful and reckless injury. But this question is not here for our consideration. The only way in which it could have been presented in the present state of the record was by an exception to the statement in the bill of exceptions that there was no such evidence in the case taken and recorded in the bill itself. No such objection or exception was taken, so that the question whether or not there was such evidence was not presented to the court below when it certified the record, and as, in an action at law, this is a court for the correction of errors exclusively, there could have been no error in the court below, because that question was not presented to or ruled upon by that court when the bill of exceptions was made. In this court the record presented by that bill, in the absence of objection or exception thereto, is conclusive.

It is assigned as error that the court refused to instruct the jury that, although the conductor did not intend to demand transportation, the fact that he had such intention could not in any way affect the right of the plaintiff to recover, in the absence of evidence to show that Purple in some way induced the conductor to form such intention. But there was evidence tending to show that Purple did induce him to form this intention by presenting himself for transportation, by forming with him the tacit understanding that he should ride free, and by entering and riding upon the train without the payment or the offer to pay fare, in pursuance of his deliberate intention and tacit understanding that he should ride without the payment of any. The instruction requested was therefore inapplicable to the facts of this case, and there was no error in its refusal. It is not the duty of a trial court to instruct the jury what the law would be in the absence of material evidence which has been presented and submitted to the jury upon the crucial issues in the case. It completely discharges its duty when it gives the law applicable to the evidence before the jury.

For the same reason there was no error in the refusal of the court to charge the jury that some of the defendant's freight trains carried passengers, that Purple was riding on one of them with the knowledge and assent of the conductor in charge, and that under these circumstances, in the absence of evidence to the contrary, it would be presumed that he was a passenger. This instruction ignored all the material evidence in the case upon which the jury based its finding that he was not a passenger, the ev-

idence of his deliberate intention not to pay fare, of the tacit understanding that he should ride free, of his employment upon the road for nine years, and his familiarity with the rules, and of his presence and opportunity to learn the facts at Laramie before he started upon his fatal ride.

It is said that it was error for the court to refuse to charge that the payment of fare is not necessary to give rise to the liability to pay it, and that if the carrier permits the passenger to take his seat without requiring payment the obligation to pay will stand for actual payment. But the rule of law embodied in this request was fairly given to the jury in the general charge of the court. Although the evidence was conclusive that Purple never paid any fare, and never was asked to pay any, the court instructed the jury that if he was invited onto a train authorized to carry passengers, either by express words or by a tacit understanding between him and the conductor, he became a passenger, and it was the duty of the company to exercise the highest degree of practicable care for his safe transportation.

It is contended that the court erred because it failed to submit instructions (1) that if the car on which Purple was riding was of the same general appearance of other trains on which passengers were carried on that division of the railroad, but by reason of other facts, unknown to Purple, the train was not permitted to carry passengers, and if the failure of the conductor to demand fare was not procured by Purple, he was a passenger; and (2) that a person riding by the unauthorized permission of the conductor on a train not intended for the carriage of passengers is not a trespasser, unless it was known to him that the conductor exceeded his authority. It may be conceded for the purpose of this discussion, although the proposition is not considered or decided, that one without any knowledge and without any notice of facts sufficient to put him upon inquiry which would lead to knowledge of the lack of the authority of a conductor upon or of the character of a train which was not permitted to carry passengers might become a passenger upon that train under the circumstances stated in these propositions. The difficulty with the instructions is that Purple was in no such situation. He was an old employee on the road. In its practical operation he had known and had experienced the fact for nine years that regular freight trains might carry passengers and that extra freights might not. It is certainly probable that he knew this fact when he boarded the train, seven years later. Whether he did or not, the record clearly shows that he had ample knowledge of facts to put him upon an inquiry which would have led to an acquaintance with this fact. Under these circumstances, he could not escape this duty of inquiry. He was in this situation: If

he had forgotten the rules and the practices, then he did not know that any freight trains on that railroad carried passengers, and the fact that he placed himself upon a freight train was notice to him that he was wrongfully there, because the presumption is that freight trains are for freight and passenger trains for passengers. In the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that one riding for his own convenience on a freight train, an engine, a hand car, or any other carriage of a common carrier that is evidently not designed for the transportation of passengers, is unlawfully there and is a trespasser. *Bryant v. Chicago, St. P. M. & O. R. Co.* 4 C. C. A. 146, 147, 12 U. S. App. 115, 123, 53 Fed. 997, 998; *Powers v. Boston & M. R. Co.* 153 Mass. 188, 190, 26 N. E. 446; *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513; *Files v. Boston & A. R. Co.* 149 Mass. 204, 21 N. E. 311; *Hoar v. Maine C. R. Co.* 70, Me. 65, 72, 73, 35 Am. Rep. 209; *Gardner v. New Haven & N. Co.* 51 Conn. 143, 50 Am. Rep. 12; *Graham v. Toronto, G. & B. R. Co.* 23 U. C. C. P. 541; *Sheerman v. Toronto, G. & B. R. Co.* 34 U. C. Q. B. 451; *Chicago & A. R. Co. v. Michie*, 83 Ill. 427.

If, on the other hand, Purple knew the rules and the practice of the railroad company, then he knew that conductors were forbidden to carry passengers, and passengers were prohibited from riding, on extra freight trains. So that, whether he knew the rules or not, the duty was imposed upon him to inquire and to ascertain whether or not the train upon which he entered was a regular or an extra freight train. The instructions under consideration ignore this duty of inquiry which the situation and knowledge of Purple imposed upon him, and for that reason they were properly refused. He was a trespasser, not only if he knew that the train on which he rode was not permitted to carry passengers and that the conductor was not authorized to allow him to ride upon it, but also if he knew such facts relative to this matter as would have put a man of ordinary prudence and diligence upon an inquiry which would have led to a knowledge of these facts.

The specifications of error in this case are numerous. They have not all been specifically set forth, but the rules and principles of the law and the facts, by which they must be judged, have now been carefully considered and declared. Our conclusion is that the material issues in this case were fairly and impartially tried, that the charge of the court tersely and correctly presented to the jury the rules of law applicable to the evidence, and that there was no error in the refusal of the court to submit the requested instructions of counsel for the plaintiff.

The judgment below is accordingly affirmed.

57 L. R. A.

SOUTHERN PACIFIC COMPANY, *Plff. in Err.*,
v.

H. A. SCHOER.

(114 Fed. 466.)

1. The states have the right to regulate within reasonable limits the relations between employers and employees within their borders, and to fix by legislative enactments the liabilities of the former for the acts and negligence of the latter.
2. Sections 1342 and 1343 of the Revised Statutes of Utah make all servants employed in the service of a master doing business in that state, who are intrusted by him with authority to command his other servants, or with the authority to direct another of his servants in the discharge of his duties, vice principals of their master, and charge him with liability for their negligence, whether it was committed in the discharge of the positive duties of the master or in the performance of the primary duties of the servants.
3. Those sections make the master liable for the negligence of superior servants committed in the discharge of their duties as employees, whether the negligence was committed while they were exercising their authority to command or superintend others, or not.
4. A writing which contains competent evidence upon a material issue cannot be lawfully rejected because it also contains evidence which is incompetent and irrelevant.
5. Nothing less than such a fortuitous gathering of circumstances as prevents the performance of a duty, and such as could not have been foreseen by the exercise of reasonable prudence, or overcome by the exercise of reasonable care and diligence, constitutes an act of God which will excuse the discharge of a duty.

(March 24, 1902.)

ERROR to the Circuit Court of the United States for the District of Utah to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Argued before *Caldwell, Sanborn, and Thayer*, Circuit Judges.

Messrs. Thomas T. Fauntleroy and Cornelius Fauntleroy for plaintiff in error.

Messrs. W. L. Maginnis and A. J. Weber for defendant in error.

*Headnotes by *SANBORN*, Circuit Judge.

NOTE.—As to vice principalship determined by the character of the act which caused the injury, see also *Lafayette Bridge Co. v. Olsen* (C. C. App. 7th C.) 54 L. R. A. 33, and *note*; also *Kelly v. New Haven S. B. Co.* (Conn.) *ante*, p. 494.

As to vice principalship considered with reference to the superior rank of a negligent servant, see *Stevens v. Chamberlin* (C. C. App. 1st C.) 51 L. R. A. 513.

Sanborn, Circuit Judge, delivered the opinion of the court:

Between 1 and 2 o'clock on the dark and foggy morning of December 20, 1899, the second section of a passenger train of the Southern Pacific Company, upon which H. A. Schoer was a fireman, ran into the rear of the first section near the yard limits of the company at Terrace, in the state of Utah, threw this fireman against the boiler of the engine, and fastened him there under a mass of coal which was thrown from the tender by the shock of the collision, until he was so scalded by steam that escaped on account of the breaking of the water gauge that he died. C. Schoer, the administrator of his estate, brought an action against this company for alleged negligence causing his death, and obtained a verdict and judgment which this writ of error has been sued out to review.

The main complaint of the company is that the court below charged the jury that under the statutes of the state of Utah the engineer of the locomotive on which the deceased was a fireman was the representative of the company, and that his negligence, if any, in following the first section of the train too closely, and in running his engine too rapidly as he approached the yard limits at Terrace at the time of the collision, was the negligence of the company. The sections of the statute of Utah which induced this instruction are:

"1342. All persons engaged in the service of any person, firm, or corporation, foreign or domestic, doing business in this state, who are intrusted by such person, firm, or corporation as employer with the authority of superintendence, control, or command of other persons in the employ or service of such employer, or with the authority to direct any other employee in the performance of any duties of such employee, are vice principals of such employer, and are not fellow servants.

"1343. All persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being intrusted by such employer with any superintendence or control over his fellow employees, are fellow servants with each other; provided, that nothing herein contained shall be so construed as to make the employees of such employer fellow servants with other employees engaged in any other department of service of such employer. Employees who do not come within the provisions of this section shall not be considered fellow servants."

Utah Rev. Stat. 1898.

It is not denied that the engineer in charge of the engine upon which the deceased was employed at the time of his death was intrusted by the company with authority to superintend and direct him in the performance of his duties, but it is contended that this master was not responsible for his negligence, because the negligence

which caused the injury was committed while this engineer was discharging the primary duty of a servant, and was not engaged in performing one of the positive duties of the master, and because this negligence was committed while he was not exercising his authority to superintend the action of the fireman or to direct him in the performance of any of his duties.

The argument in support of the first contention is: Under the general law the master was not liable for the negligence of this engineer, because he was discharging one of the primary duties of the servant, and was not performing one of the positive duties of the master, when he committed the fatal acts of negligence. The purpose and effect of the sections of the statute of Utah which have been cited were not to change or to extend the liabilities of masters for the negligence of their servants, but their sole object and effect were to give an authoritative legislative definition of the terms "vice principal" and "fellow servant," and to leave the liabilities of the masters for the acts of their servants as they were before these sections were enacted. Therefore, since the Southern Pacific Company would not have been liable for the negligence of this engineer under the general law, it is not liable for it under this statute. The truth of the major premise of this syllogism is conceded. In the absence of a statute the liability of a master for the negligence of his servant is a question of general law, upon which the decisions of the state courts are not controlling upon the Federal judiciary, and, unless the negligent servant is the general manager or general superintendent of the business of the master, it is not his grade, rank, or authority over other employees, but it is the nature of the duty he is discharging when he is guilty of the negligence, that determines whether he is a vice principal or a fellow servant, and when the master is liable or is exempt from liability for the injury caused by his carelessness. If he is discharging one of the absolute duties of the master, the latter is liable for his acts and for his negligence. But, if he is discharging one of the primary duties of the servants, his employer is exempt from liability. *Minneapolis & St. L. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *New England R. Co. v. Conroy*, 175 U. S. 323, 327, 44 L. ed. 181, 184, 20 Sup. Ct. Rep. 85; *Minneapolis v. Lundin*, 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525. 527; *What Cheer Coal Co. v. Johnson*, 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. 810. The construction and maintenance of a railroad is the business of the master. Its operation is the business of his servants. The failure to exercise reasonable care in construction and maintenance is the negligence of the master. The failure to exercise such care in the operation of a railroad is the negligence of the servant for which the master is not liable. The alleged negligence of the engineer of the second section of this train in running his engine too

close to the preceding section, and too rapidly as he approached the yard limits at Terrace, was negligence in the operation of the railroad, for which the Southern Pacific Company was not liable, in the absence of a statute which changed the rules and principles of the general law. *St. Louis, I. M. & S. R. Co. v. Needham*, 25 L. R. A. 833, 11 C. C. A. 56, 58, 27 U. S. App. 227, 63 Fed. 107, 109; *Northern P. R. Co. v. Mass*, 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 114, 115; *Brady v. Chicago & G. T. R. Co.* 114 Fed. 100. These principles and authorities amply sustain the first proposition of counsel for the plaintiff in error.

But the correctness of the second premise of their syllogism is not so obvious. A vice principal is the representative of the master, for whose acts and negligence the master is responsible. *Minneapolis v. Lundin*, 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525, 527. The rule that the master is liable for the negligence committed by a servant while he is discharging one of the positive duties of the master, and that he is not liable for his negligence when he is performing one of the primary duties of a servant, was not adopted to measure the liability of the master for the acts of a vice principal. It was established to determine who were and who were not vice principals. The master has been invariably held liable by all the courts for the acts and for the negligence of his vice principals. The question upon which they have disagreed—the question which has occasioned debate—has been, Who were vice principals? Under the general law in the Federal courts and in many of the state courts that question has been answered by the rule which has already been stated, based upon the nature of the duty the servant was discharging when the negligence was committed. In this condition of the law and of the decisions the legislature of the state of Utah enacted the statute which has been quoted. It declares that employees who are intrusted by their employers with the authority to superintend other employees of the same master, or with the authority to direct any other employee in the discharge of any of his duties, are vice principals of such employer. This declaration is a plain departure from the general rule of law which we have been considering; an unequivocal declaration that servants who have the authority to direct and superintend other servants are vice principals of their masters, whether they are engaged in discharging the duties of their employers or the duties of their servants. There is no ambiguity in the terms, or uncertainty in the meaning of this statute, and no possible doubt of the purpose of the legislature in enacting it. It is too positive to be disregarded, too plain for construction, and its manifest legal effect cannot be ignored. To sustain the position of counsel for the plaintiff in error that this clear and authoritative declaration of the relation of superior servants to their masters in the state of Utah did not modify or extend the

liability of the master beyond that fixed by the general law would be to defeat the manifest object of the legislature in passing this act, and to arbitrarily strike down a law which that body had the undoubted right to enact and to enforce; for the unquestioned rule is that the states have the right to regulate within reasonable limits the relations between employers and employees within their borders, and to fix by legislative enactments the liabilities of the former for the acts and the negligence of the latter. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 378, 37 L. ed. 772, 777; 13 Sup. Ct. Rep. 914; *Northern P. R. Co. v. Hogan*, 11 C. C. A. 51, 27 U. S. App. 184, 63 Fed. 102, 105. Our conclusion is that §§ 1342 and 1343 of the Revised Statutes of Utah of 1898 make all servants employed in the service of a master doing business in that state, who are intrusted by him with authority to command his other servants, or with the authority to direct another of his servants in the discharge of his duties, vice principals of their master, and charge him with liability for their negligence, whether it was committed in the discharge of the positive duties of the master or in the performance of the primary duties of the servants.

Another reason why counsel for the plaintiff in error insist that the Southern Pacific Company is not liable for the negligence of this engineer is that when he committed the acts of negligence charged he was not engaged in exercising his authority to superintend the fireman, or his power to direct the performance of any of his duties. It is earnestly contended that it is only when the superior servant is guilty of negligence while he is actually engaged in exercising his authority of superintendence and control over those subject to his direction that his master is liable for his negligence under the provisions of this statute. In support of this position *Shaffers v. General Steam Nav. Co.* L. R. 10 Q. B. Div. 356, 357; *Fitzgerald v. Boston & A. R. Co.* 156 Mass. 293, 31 N. E. 7; *Brittain v. West End Street R. Co.* 168 Mass. 10, 46 N. E. 111, and *Dantzler v. De Bardeleben Coal & I. Co.* 101 Ala. 309, 22 L. R. A. 361, 14 So. 10, have been cited, and these cases adopt and enforce the rule for which counsel contend. But they enforce it because the limitation which counsel seek to read into the statute of Utah was written into the statutes these decisions were interpreting by the legislative bodies which enacted them. The employers' liability act of 1880 (43 & 44 Vict. chap. 42) § 1, subsec. 2, which the opinion in the *Shaffers Case* was construing, charges the master with liability for injuries caused "by reason of the negligence of a person in the service of the defendants who had superintendence intrusted to him whilst in the exercise of such superintendence." The Alabama and Massachusetts statutes under which the cases from those states arose contain a like limitation. *Dantzler v. De Bardeleben Coal & I. Co.* 101 Ala. 318, 22 L. R. A. 361, 14 So. 10; Mass.

Stat. 1887, chap. 270, § 1, subsec. 2. The statute of Utah under which this case arose contains no such limitation, and no indication that the legislature intended to adopt any such restriction. On the other hand, it plainly declares that all persons intrusted by the master with the authority of superintendence of other persons in his employ are vice principals, and are not fellow servants. This is a declaration that they are vice principals, not only when they are engaged in performing acts of superintendence and control, but at all times when the authority of superintendence and control is vested in them, and they are engaged in discharging their duties as servants of their master. This statute is so plain that it cannot be lawfully construed. To write into it the limitation suggested by counsel and found in the laws of England, Alabama, and Massachusetts would be to so amend it as to deprive it of the greater portion of its effect, in violation of its terms, and of the intention of the legislature which its words clearly disclose. It would be judicial legislation, which it is not the province of the courts to enact.

In their brief in reply counsel for the company suggest a third reason why, in their opinion, the Southern Pacific Company was not liable for the negligence of this engineer. It is that this company pleaded in its answer that the night was so dark and foggy that the proximity of the first section of the train could not be discovered by employees on the engine of the second section in time to stop the latter. But, if the night was so dark and foggy that this engineer could not discover the first section in time to stop his engine, reasonable care and prudence on his part demanded that he should either send forward his fireman as he approached the yard limits at Terrace to ascertain its location, or should run his engine so slowly and carefully that he could stop at any moment, and could surely avoid a collision. The complaint of the plaintiff did not estop him from a recovery for the negligence of this engineer which the evidence at the trial established. The result is that there was no error in the charge of the court that the engineer upon the second section of this train was the representative of the company, and that, if his negligence in operating his engine caused the injury, the company was liable to the plaintiff for the damages that resulted. *Dryburg v. Mercur Gold Min. & Mill. Co.* 18 Utah, 410, 412, 55 Pac. 367; *Gulf, C. & S. F. R. Co. v. Calvert*, 11 Tex. Civ. App. 297, 32 S. W. 246, 247; *San Antonio & A. P. R. Co. v. McDonald* (Tex. Civ. App.) 31 S. W. 72; *Ft. Worth & D. C. R. Co. v. Wrenn*, 20 Tex. Civ. App. 628, 50 S. W. 210.

It is assigned as error that the train sheet of the railroad company, which disclosed the times when the two sections of the train which collided left the various stations of Toana, Montello, Tacoma, Gartney, and Lucin before they arrived at Terrace, and which also disclosed the time of

the collision at Terrace, was admitted in evidence over the objection of counsel for the company. An examination of the record, however, discloses the fact that the only objection to this train sheet was leveled at the entries thereon of the times when the two sections arrived at Terrace. No objection whatever was made to the introduction of the train sheet for the purpose of showing the movements of the sections of the train before they reached Terrace, or to the train sheet as a whole; and the train sheet disclosed the times when the sections left all the stations mentioned above before they arrived at Terrace. It was tacitly conceded that for the purpose of showing everything which appeared upon this sheet except the time of the arrival of these sections at Terrace it was admissible evidence. Conceding, without deciding, that the entries upon the train sheet of the times of the arrival of the two sections at Terrace and of the time of the collision were not competent testimony of those facts, the train sheet was still admissible, and the objection of counsel was properly overruled. If the train sheet contained any evidence competent and material to the issue, it could not be lawfully rejected; and it was tacitly conceded that the entries of the times when the sections of the train left the preceding stations were competent evidence of those facts, for no objection was made to these entries, and no objection was interposed to the train sheet as a whole. Since a portion of the train sheet was competent evidence, the objection to its introduction could not be sustained, and the proper remedy of counsel for the company was to request the court to instruct the jury at the time of its introduction or at the close of the case that it must not be considered as evidence of the time of the collision, or of the times of the arrival of the two sections at Terrace. No such request was made and there was no error in the ruling of the court upon this subject.

The next objection to the trial of this case is that the court refused to instruct the jury that, if the death of the deceased was proximately caused by a sudden and unusual fog, and without fault or negligence of the defendant, their verdict must be for the company. The court clearly and emphatically instructed the jury that there could be no recovery in this case, and that their verdict must be for the defendant, unless they were satisfied by a reasonable preponderance of the evidence that the death of the fireman was caused by its negligence. There was evidence at the trial that the night was dark and foggy, that it was difficult to distinguish objects at any considerable distance, and that the headlight of the second section of the train was not perceived until it was very near to the employees upon the first section. But there was nothing in all this, or in any of the evidence in the case, to warrant an instruction to the jury that they might find that this collision was caused by an act of God; and nothing less than an act of God would

relieve the defendant from the duty of exercising reasonable care in the operation of these trains. The foundation of the rule that the act of God excuses the failure to discharge a duty is the maxim, *Lex neminem cogit ad impossibilia*. If, by the use of reasonable care, prudence, and diligence under the circumstances of a particular case, it is possible to discharge the duty, then those circumstances do not constitute a valid excuse for a failure to perform it. Nothing less than such a fortuitous gathering of circumstances preventing the performance of a duty as could not have been foreseen or overcome by the exercise of reasonable prudence, care, and diligence constitutes an act of God which will excuse the discharge of the duty. The record discloses no such circumstances. The night was dark and foggy. This condition of the atmosphere imposed upon the operators greater watchfulness and care to prevent collisions and the duty of driving their engines with less speed and more caution. But there was nothing in the foggy air or in the darkness of the night which would have prevented them from safely operating their trains if they had exercised a care, watchfulness, and diligence proportionate to the situation and the circumstances in which they were placed. In other words, it was not impossible to operate these trains safely by the use of reasonable care; and in this state of the case there was no error in the refusal of the court to submit to the jury the question whether or not the death of the deceased was the act of God. It discharged its full duty when it told the jury that the defendant was not liable for his death unless it appeared by a fair preponderance of the testimony that the defendant was guilty of negligence which caused it.

Another complaint is that the court refused to instruct the jury that, if there was ample time for the flagman to go back and warn the second section of the train after the first section stopped, and no flagman went back a sufficient distance to give that warning, and if the failure or neglect to do so was the proximate cause of the death of the deceased, the verdict of the jury must be for the defendant. But the court instructed the jury in its general charge that there had been some evidence introduced tending to show negligence on the part of the employees of the first section of the train, and that, if there was any such negligence, the defendant was not in any way liable for it, because the employees of that section did not represent the company, but were fellow servants of the deceased. It further instructed them that the risk flowing from the negligence of these servants was a risk assumed by the fireman. This instruction, in view of the evidence in the case, sufficiently presented to the jury the principle of law stated in the request which was refused. That principle was that, if the proximate cause of the death was the negligence of the brakeman on the first section of the train, the plaintiff could not recover. A charge that the defendant was

not liable if the proximate cause of the death was the negligence of any of the employees on the first section of the train clearly announced this rule, because the brakeman was one of those employees, and the whole is greater than any of its parts. Where a rule or principle of law is clearly declared by the court in its general charge, it is not error for it to refuse to repeat it in the words of counsel. *Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co.* 114 Fed. 133; *Western U. Teleg. Co. v. Morris*, 44 C. C. A. 350, 353, 105 Fed. 49, 53; *Trumbull v. Erickson*, 38 C. C. A. 536, 97 Fed. 891; *Union P. R. Co. v. Jarvi*, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65.

One of the charges of negligence was the failure to use reasonable care to keep the coal gate of the engine in proper repair, and it is assigned as error that the court admitted the testimony of a witness that this gate was defective and weak thirty days before the accident. The only ground for this specification is that the time named by the witness was too remote from the date of the accident. But it is competent to prove defects in tools and machinery for a reasonable time before the accident which those defects are charged with inducing, and it cannot be said that thirty days is an unreasonable time within which to permit such testimony to range. There is at least a reasonable probability, in the absence of other evidence, that a defect existing thirty days before an accident was not remedied before the casualty occurred. There was no error in the admission of this evidence.

Finally, it is contended that the court erred because it permitted one witness to testify that a rule of the company which required trains to keep ten minutes apart did not apply to any train in particular, and permitted another to state that the conductor upon the first section of this train had "full charge of the running of the train over all the employees on the train." The only grounds for these objections are that the rules are the best evidence of their contents, and that the testimony of the witness as to the power of the conductor was a conclusion of law. Conceding that the written rule was the best evidence of its terms, it was competent for the witness to testify whether or not this rule applied to all the trains of the company or only to a portion thereof, and conceding that the statement of the witness who testified to the authority of the conductor was a conclusion of law, the admission of that testimony was not prejudicial, because the legal presumption is, in the absence of evidence, that the conductor has exactly the power which this witness testified was vested in him (*Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 390, 28 L. ed. 787, 792, 5 Sup. Ct. Rep. 184; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 381, 37 L. ed. 772, 779, 13 Sup. Ct. Rep. 914), and error without prejudice is no ground for reversal.

There was, therefore, no error in these rulings, and the judgment below must be affirmed. It is so ordered.

Elizabeth BRADY, Admr., etc., of John J. Brady, Deceased, *Pff. in Err.*,

v.

CHICAGO & GREAT WESTERN RAILWAY COMPANY.

(114 Fed. 100.)

- *1. The duty of so operating a safely constructed and equipped railroad, subject to the rules and general supervision of the master, as to keep it reasonably safe for those employed upon it, is not a positive duty of the master, but a primary duty of the servant.
2. A railroad company operating its trains over the railroad of another corporation by permission is liable to its passengers for the negligence of the servants of the licensing corporation.
3. A railway company running its trains over another road by permission is liable to its employees for the negligence of the servants of the licensing corporation in the discharge of the absolute duties of the master.
4. But such a railway company is not liable to its servants for the negligence of the employees of the licensing corporation in the discharge of their duties as servants.
5. The power of the alleged master or principal to command or direct the alleged servant or agent is the test of the liability of the former for the acts of the latter, under the maxim, *Respondet superior*. If the master or principal has no power to command or direct the alleged servant or agent, he is not responsible for his acts, because there is no superior to respond.
6. The Great Western Railway Company was operating a train through the yards of a depot corporation, under the customary contract for the use of the yards and depot jointly with other companies having like contracts, when one of its employees was killed by the alleged negligence of the servants of the depot company in failing to properly turn the switches, which were under the control of the latter company. *Held*, the switchmen of the depot company were not the fellow servants of the employees of the railway company; nor were they the agents or servants of that company, within the meaning of the fellow servant statute of Minnesota (Stat. 1894, § 2701).
7. The ordinary contracts between a depot corporation and several railroad companies for the use of a depot and transfer yards do not establish a partnership relation between the companies, nor make the depot corporation the servant or agent of the railroad companies, so that they become liable for the negligence of its servants, under the maxim, *Respondet superior*.

(Caldwell, Circuit Judge, dissents.)

(March 3, 1902.)

*Headnotes by SANBORN, Circuit Judge.

NOTE.—As to which of two or more persons is the master of another who is conceded to be the servant of one of them, see note to *Hardy v. Sheddens Co.* (C. C. App. 6th C.) 37 L. R. A. 33, especially as to relation between a lessor or licensor and the servants of the lessee or licensee, on page 65.

57 L. R. A.

ERROR to the Circuit Court of the United States for the Northern District of Iowa to review a judgment in favor of defendant in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed*.

The facts are stated in the opinion.

Argued before Caldwell, Sanborn, and Thayer, Circuit Judges.

Messrs. Charles A. Clark & Son and William G. Clark, for plaintiff in error:

There was a breach of the primary duties which defendant owed decedent. Defendant owed to the decedent the primary duty to maintain the safety of the complicated system of tracks and switches which it had adopted as a part of its railroad, by all reasonable and needed precautions to secure its safety.

Northern P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Rogers v. Ludlow Mfg. Co.* 144 Mass. 198, 59 Am. Rep. 68, 11 N. E. 77; *Mather v. Rillston*, 156 U. S. 391-399, 39 L. ed. 464-470, 15 Sup. Ct. Rep. 464; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Town v. Michigan C. R. Co.* 84 Mich. 214, 47 N. W. 665; *Denver & R. G. R. Co. v. Stipes*, 26 Colo. 17, 55 Pac. 1093; *Patterson, Railway Accident Law*, p. 39; *Smith v. New York, S. & W. R. Co.* 46 N. J. L. 7; *Flike v. Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545; *Southern P. Co. v. Lafferty*, 6 C. C. A. 474, 15 U. S. App. 193, 57 Fed. 536; *Bailey, Master's Liability for Injuries to Servant*, § 3288; *Grace & H. Co. v. Kennedy*, 40 C. C. A. 70, 99 Fed. 679; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 32 C. C. A. 44, 59 U. S. App. 283, 87 Fed. 133; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 89-91, 39 L. ed. 624-631, 15 Sup. Ct. Rep. 491; *Clune v. Ristine*, 36 C. C. A. 450, 94 Fed. 745; 1 *Shearm. & Redf. Neg.* § 193; *Booth v. Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97; *Grand Trunk R. Co. v. Ives*, 144 U. S. 417, 36 L. ed. 489, 12 Sup. Ct. Rep. 679; *Union P. R. Co. v. Novak*, 9 C. C. A. 640, 15 U. S. App. 400, 61 Fed. 573; *Stetler v. Chicago & N. W. R. Co.* 46 Wis. 502, 1 N. W. 112; *Gulf, C. & S. F. R. Co. v. Dorsey*, 66 Tex. 148, 18 S. W. 444; *Lockhart v. Little Rock & M. R. Co.* 40 Fed. 633; *Illinois C. R. Co. v. Barron*, 5 Wall. 104, 18 L. ed. 594; *McElroy v. Nashua & L. R. Corp.* 4 Cush. 402, 50 Am. Dec. 794; *Central Trust Co. v. Denver & R. G. R. Co.* 38 C. C. A. 145, 97 Fed. 239; *Harding v. Railway Transfer Co.* 80 Minn. 504, 83 N. W. 395.

Defendant is liable for defaults of the Union Depot Company as its agent and servant, under the compeer statute of the state of Minnesota.

Lockhart v. Little Rock & M. R. Co. 40 Fed. 633; *Murray v. Lehigh Valley R. Co.* 66 Conn. 512, 32 L. R. A. 539, 34 Atl. 508; *Gulf, C. & S. F. R. Co. v. Dorsey*, 66 Tex. 148, 18 S. W. 444; *Wabash, St. L. & P. R. Co. v. Peyton*, 106 Ill. 540, 46 Am. Rep. 705; *McMarshall v. Chicago, R. I. & P. R. Co.* 80 Iowa, 762, 45 N. W. 1065; *Evan*

v. *Lippincott*, 47 N. J. L. 192, 54 Am. Rep. 148; *Wiggett v. Fox*, 11 Exch. 832; *Johnson v. Boston*, 118 Mass. 117; *Rourke v. White Moss Colliery Co.* 46 L. J. C. P. N. S. 283.

Where there is a partnership agreement, or other agreement of that nature, between the roads, the employees of the different roads which are parties to the agreement may become fellow servants so as to prevent a recovery for one another's negligence.

12 Am. & Eng. Enc. Law, p. 994; *York & M. Line R. Co. v. Winans*, 17 How. 40, 15 L. ed. 30; *Thomas v. West Jersey R. Co.* 101 U. S. 83, 84, 25 L. ed. 952; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 308, 30 L. ed. 91, 6 Sup. Ct. Rep. 1094; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 40, 35 L. ed. 61, 11 Sup. Ct. Rep. 478; *Bostwick v. Champion*, 11 Wend. 571.

Where different railway companies unite in paying switchmen or flagmen or gatemen in the same yards or for the same tracks, each railway company is responsible for the negligence of such switchmen or flagmen or gatemen so far as relates to its own business, although they may be employed and paid in the first instance by one of the associate railway corporations, which alone reserves the right of ultimate control and discharge of the servants.

Brow v. Boston & A. R. Co. 157 Mass. 402, 32 N. E. 362; *Vary v. Burlington, C. R. & M. R. Co.* 42 Iowa, 246; *Kastl v. Wabash R. Co.* 114 Mich. 53, 72 N. W. 28; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 10 L. R. A. 696, 25 N. E. 799; *Wisconsin C. R. Co. v. Ross*, 142 Ill. 13, 31 N. E. 412.

Where the servant is employed by one, and another joins in paying his wages in consideration of certain duties to be performed by that one, he is, as to those duties, *pro hac vice* the servant of the one thus contributing.

Vary v. Burlington, C. R. & M. R. Co. 42 Iowa, 246; *Taylor v. Western P. R. Co.* 45 Cal. 323; *Wabash, St. L. & P. R. Co. v. Peyton*, 106 Ill. 540, 46 Am. Rep. 705; *Miller v. Cornwall R. Co.* 154 Pa. 474, 26 Atl. 779; *Mills v. Orange, A. & M. R. Co.* 2 MacArth. 314; *Gulf, C. & S. F. R. Co. v. Dorsey*, 66 Tex. 148, 18 S. W. 444; *Lockhart v. Little Rock & M. R. Co.* 40 Fed. 633; *Murray v. Lehigh Valley R. Co.* 66 Conn. 512, 32 L. R. A. 539, 34 Atl. 508; *Atkyn v. Wabash R. Co.* 41 Fed. 197.

The defendant was bound, as master, to see that reasonable precautions were taken to prevent collision with unguarded cars on the "dead track" in the night. The habitual leaving of that track open, without care, in the night, was not provided for. That was the negligence of the master, and not of the servant.

Northern P. R. Co. v. Herbert, 116 U. S. 650, 29 L. ed. 759, 6 Sup. Ct. Rep. 590; *Union P. R. Co. v. Jarvi*, 3 C. C. A. 436, 10 U. S. App. 439, 53 Fed. 65; *McGovern v. Central Vermont R. Co.* 123 N. Y. 289, 25 N. E. 373; *Bushby v. New York, L. E. & W. R. Co.* 107 N. Y. 383, 14 N. E. 407; 57 L. R. A.

Abel v. Delaware & H. Canal Co. 103 N. Y. 586, 57 Am. Rep. 773, 9 N. E. 325; *Sheehan v. New York C. & H. R. R. Co.* 91 N. Y. 340; *Dana v. New York C. & H. R. R. Co.* 92 N. Y. 641; *Zeigler v. Danbury & N. R. Co.* 52 Conn. 543.

Messrs. Cummins, Hewitt, & Wright and Carroll Wright, for defendant in error:

The master's duty extends to procuring and maintaining his appliances. He is bound to provide proper road machinery, equipments, and proper servants. For the management of his machinery and the conduct of his servants he is not responsible.

Bailey, Personal Injuries Relating to Master & Servant, § 241; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

Defendant is not liable at common law for an injury received through the act of a stranger, or through the temporary obstruction of its track, that obstruction being placed there by a person in no manner under the control of the defendant.

Clark v. Chicago, B. & Q. R. Co. 92 Ill. 43; *Atwood v. Chicago, R. I. & P. R. Co.* 72 Fed. 447; *Hilsdorf v. St. Louis*, 45 Mo. 98, 100 Am. Dec. 352; *Pawlet v. Rutland & W. R. Co.* 28 Vt. 297; *Miller v. Minnesota & N. W. R. Co.* 76 Iowa, 655, 39 N. W. 188; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605; *Wood, Railway Law*, p. 1337; *Re Merrill*, 54 Vt. 200.

Persons are not fellow servants within the rule exempting a master from liability to one servant for the negligence of another, unless they are in the employ, or at least under the control, of the same master.

12 Am. & Eng. Enc. Law, 2d ed. p. 992; *Kastl v. Wabash R. Co.* 114 Mich. 53, 72 N. W. 28; *Zeigler v. Danbury & N. R. Co.* 52 Conn. 543; *Northern P. R. Co. v. Craft*, 16 C. C. A. 175, 29 U. S. App. 687, 69 Fed. 124; *Central R. Co. v. Stoerner*, 2 C. C. A. 360, 1 U. S. App. 276, 51 Fed. 518; *Robertson v. Boston & A. R. Co.* 160 Mass. 191, 35 N. E. 775; *Phillips v. Chicago, M. & St. P. R. Co.* 64 Wis. 475, 25 N. W. 544; *Sawyer v. Rutland & B. R. Co.* 27 Vt. 370.

Sanborn, Circuit Judge, delivered the opinion of the court:

Elizabeth Brady, as administratrix of the estate of John J. Brady, brought an action against the Chicago & Great Western Railway Company for negligence resulting in the death of Brady, and at the close of the evidence produced on her behalf the court instructed the jury to return a verdict in favor of the defendant. The judgment, based upon this instruction, is challenged by this writ of error.

The facts established at the trial were these: John J. Brady was the foreman of a switch crew in the employment of the Chicago & Great Western Railway Company engaged in discharging the customary duties of such crews at the city of St. Paul. In the early morning of November 1, 1896, while it was yet dark, it became Brady's

duty to take his train, which consisted of an engine, tender, and caboose, from West St. Paul across the Mississippi river, and through the yards of the St. Paul Union Depot Company, to Mississippi street, a distance of 2 or 3 miles. He had exclusive charge of this train, and he directed the crew to couple the caboose on to the rear of the engine, and to back the train across the river and through the yards. He took his station on the forward end of the caboose as it was sent into the darkness. The only light he had at that end of the train was a lantern. As he was backing this train through the yards at a speed of about 6 miles an hour, it collided with a refrigerator car on a portion of one of the transfer tracks of the depot company, called the "dead track," and so injured Brady that he died. This dead track was long enough to hold four or five cars. It was used by several railroad companies as a place of deposit of cars that were ready to be transferred from one railroad to another. It was provided with a switch at each end, by means of which trains could be sent around it when it was occupied by cars. When the switches were turned to send trains around it they displayed red switch lights, and when the dead track was clear, and was lined up with that on which Brady approached it, the switches displayed green lights. At such times it formed a part of the main track through the depot yards used by the defendant for the passage of its freight trains. At the time of the accident the switch lights were green, thus indicating that the dead track was clear. It was not the duty or the privilege of the servants of the Great Western Railway Company to operate these switches. The dead track, the switches connected with it, and all the railroads and switches in this yard were the property of the St. Paul Union Depot Company, a corporation of the state of Minnesota. This company had the exclusive management and control of all these tracks and switches, and the Great Western Railway Company had a contract with it for a transfer of its cars and engines and for permission to run its trains through the yards. Six other railroad companies had similar agreements with the terminal company. The depot company employed three or four switchmen whose exclusive duty it was to throw the switches in the yards for those who were entitled to use them under these contracts. The dead track on which the accident happened was used largely in the daytime for the deposit of cars to be transferred from railroad to railroad, but it was used at night only for special work, such as perishable freight and stock. One of the plaintiff's witnesses said that from his experience it was lined up anywhere after 10 o'clock at night until 5 o'clock in the morning so that it was proper to proceed without delay or bothering a switch tender to be there; that there was liable to be some transferring at night, and the placing of cars upon this dead track; that all the trainmen and switching crews

57 L. R. A.

knew that this track was used for standing cars; and that the customary way of protecting these cars on this dead track was to set the switches so that they would display red lights, and send approaching trains around it. He also testified as follows: "The crew of one railroad company would set cars there, to be afterwards received and taken by the crew of another company. But the cars were to be immediately afterwards taken or protected. To the best of my knowledge they were always immediately taken or else protected. If they were protected, then they might remain there for some considerable length of time. It is a piece of track that is busily used for transfer work, and very seldom anything stands there long, but there may be some delay where they could not possibly get the car, and it would stay there for half an hour. They couldn't allow anything to stand there any longer, you know, to make a rule of it. It is true that this dead track was very much in use, and that cars were frequently stood there for a greater or less length of time,—freight cars which were not attached to an engine. At various times in the evening they wouldn't even allow you to cut your engine from the car there at all, and leave it there. You could stay right there and hold the car until the other engine was ready to take right hold of it; that is, at certain times. The Union Depot yards at the place in question are very thickly laid and covered with switches. The yards at that time consisted of almost a complete net-work of railway tracks running in all directions, used by the various railroad companies I have referred to and by the Union Depot Company for transferring, switching, and handling freight trains, and also passenger trains. . . . It was not defendant's custom to have anyone at the dead track in question to watch or protect cars placed upon the dead track by other companies. It was the custom for the Union Depot switch tenders to protect those cars."

There was no evidence that the defendant or any of its servants placed the refrigerator car with which Brady's train collided upon the dead track.

Upon this state of facts counsel for the plaintiff in error insist that the direction of the court to the jury to return a verdict for the defendant was erroneous (1) because the railway company was liable for the negligence of the depot company in its discharge of the positive duty of the master to exercise ordinary care to provide a reasonably safe place for the servant to work, and there is some evidence of such negligence on the part of the terminal company; and, (2) because the servants of the depot company were the fellow servants of the employees of the railway company, there was some evidence that the servants of the former company were negligent in the discharge of their primary duties as servants, and under the statute of Minnesota a railway company is liable to its em-

ployees for injuries inflicted upon them by the negligence of their fellow servants.

Before entering upon a discussion of these contentions, it will be well to fix clearly in mind the negligence and the nature of the negligence which was the cause of this deplorable accident. Was it negligence in the construction, repair, or maintenance of the road, its switches and appurtenances, or was it carelessness in their operation? For the line of demarcation which separates the absolute duty of the master from the primary duty of his servants lies here. It is the duty of the railroad company to use ordinary care to furnish a reasonably safe railroad machine; to exercise reasonable diligence to keep it in repair; to use ordinary care to employ a sufficient number of reasonably competent servants to operate it; to establish reasonable rules for, and to exercise proper supervision of, its operation. But when this duty is performed an equally positive duty rests upon the servants to keep the great machine from becoming dangerous by their operation of it and to work it with reasonable care. The railroad tracks, the switches, the engine, and the caboose were on November 1, 1896, well constructed and in good repair. If they had been operated with ordinary care, they would not have caused the death of Brady. If the servants who put the refrigerator car on the dead track had placed red lights upon it, if when it was placed there the switchman of the depot company had turned the switches so as to display red lights and so as to send Brady's train around it, or if Brady had run his train through the yard in the dark with the engine and its blazing headlight foremost rather than the caboose (*Southern P. Co. v. Yeargin*, 48 C. C. A. 497, 109 Fed. 436), the fatal result could not have followed. The failure to do these things was negligence, but it was not negligence in the discharge of any duty of the master. It was negligence in the discharge of the duties of the servants; negligence in the operation of the railroad machine, which had been safely constructed and maintained, and which was made dangerous by the negligent discharge of the duties of these servants in its operation. *St. Louis, I. M. & S. R. Co. v. Needham*, 25 L. R. A. 833, 11 C. C. A. 56, 58, 59, 27 U. S. App. 227, 231, 63 Fed. 107, 109; *Northern P. R. Co. v. Mase*, 11 C. C. A. 63, 64, 27 U. S. App. 238, 240, 63 Fed. 114, 115.

Bearing in mind the nature of the negligence which caused the accident, let us now consider the first position of counsel for the plaintiff in error. It is that the defendant was liable for the death of Brady because the depot company was negligent in the discharge of the positive duties of the master. The defendant was operating its trains in the yard and over the railroads of the depot company under a contract which excluded it from all management and control of this yard, its railroads and switches, and imposed upon the depot com-

pany exclusively all the positive duties of the master in this regard. The rules of law governing the liability of a railroad company while running its trains over the railroad of another corporation are too well settled to admit of discussion. Such a company is liable to passengers and shippers for the casual negligence of the licensing company and of its servants, whether this negligence occurs in the discharge of the positive duties of the master or in the performance of the primary duties of the servant. *Illinois C. R. Co. v. Barron*, 5 Wall. 104, 18 L. ed. 594; *McElroy v. Nashua & L. R. Corp.* 4 Cush. 400, 402, 50 Am. Dec. 794; *Central Trust Co. v. Denver & R. G. R. Co.* 38 C. C. A. 143, 97 Fed. 239; *Murray v. Lehigh Valley R. Co.* 66 Conn. 512, 32 L. R. A. 539, 34 Atl. 506, 508. The reason for this rule is that the carrier contracts with the passengers and shippers to carry them and their property with reasonable safety, and the failure so to do is equally a breach of this contract, whether it results from negligence in the discharge of the duties of the master or of those of the servants. There is, however, no such contract between the railroad company and its employees. Their relations and their liabilities are governed by the relative duties imposed upon them by the law. They join in a dangerous occupation. The servants know its dangers as well as the master. If they are operating over the railroad or in the yards of a corporation which does not employ them, they are aware of that fact and of the risk of accident from the negligence of the employees of that corporation. All these risks which they know, or which they might know by the exercise of reasonable prudence and diligence, excepting only those dangers which it is the positive duty of the master to protect them from, they assume as between themselves and their master when they enter upon and continue in the employment. They may undoubtedly recover of those who are guilty of the negligence which causes their injury just as they may recover of any stranger who commits a tortious act that inflicts injury upon them while they are operating their trains. This is all that the cases of *Lockhart v. Little Rock & M. R. Co.* 40 Fed. 631, and *McMarshall v. Chicago, R. I. & P. R. Co.* 80 Iowa, 757, 45 N. W. 1065, cited by plaintiff in error's counsel, decide.

But their master does not assume and is not liable to them for the negligence of the servants of the licensing company when the latter are not engaged in the discharge of the positive duties of the master. *Clark v. Chicago, B. & Q. R. Co.* 92 Ill. 43; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605, 608; *Miller v. Minnesota & N. W. R. Co.* 76 Iowa, 655, 659, 39 N. W. 188; *Hilsdorf v. St. Louis*, 45 Mo. 94, 98, 100 Am. Dec. 352.

On the other hand, the master cannot renounce his absolute duties to his servant, or so delegate them to another as to relieve himself from liability for their discharge,

and a railroad company which operates its train over another's road remains liable to its servants for any failure of the employees of the latter in their discharge of the positive duties of the master. *Stetler v. Chicago & N. W. R. Co.* 46 Wis. 497, 1 N. W. 112; *Harding v. Railway Transfer Co.* 80 Minn. 504, 83 N. W. 395; *Gulf, C. & S. F. R. Co. v. Dorsey*, 60 Tex. 148, 18 S. W. 444.

The Great Western Railway Company, therefore, was liable to the plaintiff for any negligence of the servants of the depot company in the discharge of the absolute duties of the master which contributed to the death of Brady, and for that negligence only; and the first question presented to the court was whether or not the testimony presented any substantial evidence of such negligence which would warrant the jury in returning a verdict to that effect. There is always a preliminary question for the judge at the close of the evidence before a case can be submitted to the jury, and that question is not whether or not there is any evidence, but whether or not there is any substantial evidence, upon which the jury can properly render a verdict in favor of the party who produces it. *Chicago, St. P. M. & O. R. Co. v. Belliwirth*, 28 C. C. A. 358, 362, 55 U. S. App. 113, 121, 83 Fed. 437, 441; *Railway Officials & Employees' Acci. Asso. v. Wilson*, 40 C. C. A. 411, 413, 100 Fed. 368, 370; *Marion County v. Clark*, 94 U. S. 278, 284, 24 L. ed. 59, 61; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 733, 31 L. ed. 287, 288, 8 Sup. Ct. Rep. 266; *Dclavare, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Laclede Fire-Brick Mfg. Co. v. Hartford Steam Boiler Inspection & Ins. Co.* 9 C. C. A. 1, 4, 19 U. S. App. 510, 515, 60 Fed. 351, 354; *Gowen v. Harley*, 6 C. C. A. 190, 12 U. S. App. 574, 585, 56 Fed. 973; *Motey v. Pickle Marble & Granite Co.* 20 C. C. A. 366, 368, 36 U. S. App. 682, 687, 74 Fed. 155, 157.

It is not claimed that the railroad, the switches, or any of the apparatus of the Union Depot Company were defective, or that there was any negligence in their construction or maintenance. It is, however, urged that there was evidence that that company was negligent (1) in promulgating reasonable rules, (2) in failing to employ a sufficient number of switchmen, and (3) in exercising control and supervision of the operation of its yard. The argument in support of this position proceeds upon the assumption that there was evidence in this record from which the inference may properly be drawn that there was no rule or supervision of the depot company which required a switchman to be in attendance in the yards and to protect cars placed upon the dead track by turning the switches between 11 o'clock at night and 5 o'clock in the morning. But this assumption is unwarranted by the evidence. It rests on this statement of one of the witnesses: "From my experience these tracks were lined up anywhere after 11 o'clock at 57 L. R. A.

night until 5 o'clock in the morning, so that it was proper to proceed without delay or bothering a switch tender to be there." This testimony does not indicate that no switchman was required to be there or that no switchman was there during these hours. It tends to show that there was one in attendance, because it speaks of bothering him, and, if he had not been there, he could not have been bothered. If it shows anything, it proves that there were one or more switchmen in attendance, but that it was proper for Brady to proceed without bothering them, because at the hour when he passed through the yards the tracks were usually lined up and clear. Other portions of the testimony of this witness make it plain that it was the custom and practice of the depot company to have switchmen in the yards, to protect cars left on this dead track, at all hours of the day and night. He says: "There was liable to be some transferring at night, and placing of cars on the dead track. . . . It was the duty of the switch tenders employed by the Union Depot Company to set the switches in this locality, including the switches that led to and from the transfer track referred to. . . . The crew of one railroad company would set cars there to be afterwards taken and received by the crew of another company, but the cars were to be immediately afterwards taken or protected. To the best of my knowledge, they were always immediately taken or else protected. . . . It was not the defendant's custom to have anyone at the dead track in question to watch or protect cars placed upon the dead track by other companies. It was the custom for the Union Depot switch tenders to protect those cars."

The plain effect of this testimony is that, while it was not the duty or the custom of the defendant to protect these cars, it was the invariable custom and the practice of the switch tenders of the depot company to do so, both by night and by day.

Now, the burden was on the plaintiff to prove the negligence upon which its counsel relies. The legal presumption was that the depot company made and announced reasonable rules, and that it exercised reasonable supervision. Conceding that it should have made such rules, and should have exercised such supervision, that it would have been the duty and the practice of its switchmen to protect this refrigerator car on the dead track by turning the switches at night, the legal presumption is that it made such rules and exercised such supervision. There is no evidence to the contrary, and the necessary inference from the testimony is that this terminal company fully discharged its duty, for the evidence is that it was the duty and custom of all the switchmen to protect these cars, and the only conceivable way in which this duty could have been imposed and this custom established was by a rule and supervision which required it. Such a rule and supervision constitute the discharge of the whole duty of the depot company in this regard. It was not re-

quired to go farther. The duty of supervision does not require a master to place a spy or a watchman by the side of each switchman or employee to see that he discharges his duty. It is enough that reasonable rules are established and made known to him, and that a supervision and control are exercised which establish the custom of compliance with them. The legal presumption is that the servant as well as the master will discharge his duty, and upon this presumption the master has the right to rely in the performance of his duty. There was no evidence in this case which would have sustained a finding of the jury that there was any negligence on the part of the depot company in promulgating rules for, or in exercising supervision over, the operation of its railroads and yards.

There is no claim that it did not employ competent servants, but it is said that it did not engage a sufficient number of them. The suggestion is without support in the evidence. The only testimony on the subject is that there were something like 100 switches in the yard, and three or four switchmen, who did nothing but throw them. There was no evidence that these switchmen were at any time insufficient in number to speedily and carefully work the switches, much less that they were so in the night when this accident happened and when the business in the yard was necessarily light. Nor was there any evidence that the accident was the effect of a lack of employees. The result is that there was not only no evidence from which the inference could have been fairly drawn that the depot company was guilty of negligence in the discharge of any of the positive duties of the master, but the legal presumptions and the testimony alike concur in establishing the conclusion that it completely discharged these duties, and that the sole cause of the accident was the negligence of one or more servants in the discharge of the primary duties imposed upon them. The defendant, therefore, was not liable on account of its own negligence or on account of the negligence of the depot company in the discharge of the absolute duties of the master.

The second proposition of counsel for the plaintiff in error is that the depot company and its employees were fellow servants of Brady and the other employees of the defendant, and that the latter is liable for their negligence in failing to turn the switches and protect the refrigerator car under the Minnesota statute, which reads: "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part." Minn. Stat. 1894, § 2701.

Let it be borne in mind in the consideration of this contention that, if there was any act of negligence on the part of the servants of the depot company established in this case, it was the failure of its switch-

men to throw the switches and protect the refrigerator car when placed on the dead track. The question, then, is whether at the time this car was set upon the track, and the switchmen of the depot company failed to turn the switches, they were the agents or servants, or their master was the agent or servant, of the defendant, so that the latter may be held for their carelessness under the doctrine of *respondeat superior*. This question must be answered by a determination of the question whether or not the defendant had the power to command these switchmen, and to direct them what to do and where to do it, when that car was set upon the track. The power of control is the test of liability, under the maxim, *Respondeat superior*. If the master cannot command the alleged servant, then the acts of the latter are not his, and he is not responsible for them. If the principal cannot control and direct the alleged agent, then he is not his agent, and the principal is not liable for his acts or his omissions. In such case the maxim, *Respondeat superior*, has no application, because there is no superior to respond. In an action against an alleged master or principal for the act of his alleged servant or agent under the maxim, *Respondeat superior*, there can be no recovery in the absence of the right and power in the former to command or direct the latter in the performance of the act charged, because in such a case there is no superior to answer. *Atwood v. Chicago, R. I. & P. R. Co.* 72 Fed. 447, 454, 455; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605, 608; *Hilsdorf v. St. Louis*, 45 Mo. 94, 98, 100 Am. Dec. 352; *Pauley v. Rutland & W. R. Co.* 28 Vt. 297, 300; *Müller v. Minnesota & N. W. R. Co.* 76 Iowa, 655, 659, 39 N. W. 188; Wood, Railroads, § 388; *Donovan v. Laing, W. & D. Constr. Syndicate* [1893] 1 Q. B. 629; *Rourke v. White Moss Colliery Co.* L. R. 2 C. P. Div. 205.

Let us test the claim of the counsel for the plaintiff by this rule. The defendant was a railway corporation which owned and operated railroads from St. Paul to Chicago and from St. Paul to Kansas City. The depot company was a corporation of the state of Minnesota which owned and operated the union passenger depot and the transfer yard in the city of St. Paul. Its capital stock was \$350,000, and this stock had been taken in equal amounts by seven railroad corporations, which used the yard and the depot. It had mortgaged its property for \$250,000. On January 15, 1894, it made a contract with the defendant in which the parties agreed that the railway company should have the use of the station and yard of the depot company with the other six railroad corporations until 1979, and that it would make this station its main passenger depot in St. Paul; that the depot company would maintain and operate with its own employees its station and its yard; that it would provide all necessary buildings and machinery and all

needed mechanics and workmen; that the defendant would pay its proportionate share, to be fixed by the board of directors of the depot company, of the aggregate annual rental of the property of the latter company, which should consist of the current expenses of maintaining and operating the depot and yards, the interest on its mortgage debt, and a dividend of 6 per cent on its capital stock, less the income derived from the rent of the use of the privileges in or on the property to others than the seven railroad companies; that the depot company should have the exclusive right and power to establish reasonable rules and regulations for the operation of the property used, and that the railway company should comply with them; that the depot company would permit the railway company to transfer to and receive from other companies passenger and freight cars, engines, and trains through its yard; that the depot company should have the general control, management, and supervision of the passenger depot, grounds, tracks, and railways constituting its property, and of the business conducted thereon; "that inasmuch as the officers, agents, and employees of the party of the first part (the depot company) are in fact employed for and in furtherance of the business of the companies using said grounds" the depot company shall not be liable to the railway company for any damage resulting to the latter from the negligence of the servants of the former, and the railway company will indemnify the depot company against any claims for damages caused by its engines or cars, or by the negligence of the employees of the depot company while acting for or in furtherance of the business of the railway company, or as the mutual servant of both.

Counsel seize upon the stipulation of this contract last quoted, and insist that by it the depot company and its servants are made the agents and the servants of the defendant, because it recites that they are employed for and in furtherance of the business of the companies using the grounds, and because it promises indemnity against their negligence when acting in furtherance of the business of the defendants or as mutual agents of both. But the relation of the parties to this contract is not to be determined by a single excerpt from it. It must be found by a careful perusal and interpretation of the entire agreement. When the entire contract is read, the true intent of the parties is ascertained, and the test of the power of the defendant to command and direct the switchmen in the performance of the fatal act of negligence is applied, there can remain little doubt that they were neither the servants nor agents of the defendant, and that it was not liable for their omission. The express provisions of the contract that the depot company should have the exclusive management and control of the station grounds and railroads and of the business thereon, the exclusive right and power to

make rules and regulations for their operation, and that it should furnish the employees to carry on this business, cannot fail to prevail over the mere recital on which counsel relies for success, and they demonstrate the fact that the defendant company was without any power or authority to control or direct the switchmen in the discharge of any of their duties. It had no right to turn a switch or to command any employee of its own or of any other company to throw one. The limit of its privilege was its right to demand that its cars and trains should be transferred under its agreement; but the exclusive power to determine and to direct its servants how, when, and where this transfer should be made was expressly reserved to the depot company.

The provision that the defendant will indemnify the terminal company against claims for damages arising out of the acts and omissions of the latter's servants while acting in furtherance of the business of the defendant or as the mutual agents of both cannot change the established relations of the parties. It is nothing but a contract of indemnity, and a contract of indemnity does not make the persons against whose acts the indemnity is promised the agents or servants of the indemnifier.

Nor is there anything inconsistent with this conclusion and with the express stipulations of the contract that the depot company shall have the exclusive control and management of its yards and servants in the recital that the latter are employed for and in furtherance of the business of the companies using the grounds. The servants of contractors for the construction of buildings, of railways, and of machinery are employed in furtherance of the business of the parties with whom such contracts are made. But the latter are not the superiors of such servants, within the meaning of the doctrine *respondet superior*. In the same way the servants of the depot company were employed for, and in furtherance of the business of, the companies using the yards. Yet not one of those companies was their superior, within the true interpretation of the maxim here invoked, because no one of them had the right to control, direct, or command these servants how, when, or where they should discharge their duties. Their acts and omissions, therefore, were not the acts or omissions of the railway companies, and they cannot be charged with liability for them.

The next contention of counsel is that, if the switchmen were not the general agents of the defendant, yet in the omission to throw the switches when the refrigerator car was set upon the track they were acting in its business, and were its servants *pro hac vice*. This position is untenable for two reasons. In the first place, the act of negligence was not committed when the switchmen were acting for, or in the business of, the defendant. It was committed when they were acting for, and in the business of, one of the other companies using the

grounds, viz., in the business of that company which deposited the car upon the dead track. The testimony is that it was the duty and the custom of these switchmen to protect every car deposited on the track at the time it was left there by then throwing the switches. It was in the transaction of the business of the company which left this car, and not in the transaction of the business of the defendant or of any other company, that this duty devolved upon the switchmen. This is demonstrated by the fact that this duty never would have been imposed upon them at all if the car had not been left upon the track. Before it arrived there the switches and the track were in proper position for the passage of the defendant's train. If the car had not been placed there, no change of the switches, no act on their part, would have been required of the switchmen. The deposit of the car imposed upon them the duty to immediately throw the switches to protect it. This duty would have been as fully imposed and the negligence of these switchmen would have been as complete if the defendant had never run another engine or train upon the tracks after the car was deposited. The fatal act of negligence was not committed in furtherance of any business of the defendant, and it is only when the servant of another is engaged in transacting the business of the defendant that he can be held to be the latter's servant *pro hac vice*.

In the second place, if the switchmen had committed the act of negligence in furtherance of the business of the defendant, they would not have been the servants of the latter, because by the express terms of the contract between the two corporations and by the testimony these switchmen would not have been subject to the control or the direction of the defendant. The testimony is that they were employed and paid by the depot company, that they had exclusive control of the switches, and that no servant of the defendant was permitted to touch them. The contract is that the depot company has the exclusive management and control of the grounds, railways, business, and necessarily of the employees who do the business of that corporation. This stipulation vests this power of control and direction of the switchmen in the depot company just as absolutely, and deprives the defendant of it just as completely, when they are assisting to transact the business of the latter, as when they are acting in furtherance of the business of other railway companies or of the depot company. They could not, therefore, have been the servants *pro hac vice* of the defendant in the transaction of its business in this yard, because they could not have been subject to its command or direction, under the contract and the testimony. *Northern P. R. Co. v. Craft*, 16 C. C. A. 175, 29 U. S. App. 687, 69 Fed. 124, 129; *Central R. Co. v. Stoermer*, 2 C. C. A. 360, 1 U. S. App. 276, 51 Fed. 518, 520; *Kastl v. Wabash R. Co.* 114 Mich. 53, 55, 58, 72 N. W. 28; *Phillips v. Chicago, M. & St. P. R. Co.* 64 Wis. 475, 486, 25 N. 57 L. R. A.

W. 544; Sawyer v. Rutland & B. R. Co. 27 Vt. 370, 380; *Zeigler v. Danbury & N. R. Co.* 52 Conn. 543, 555, 556; *Catawissa R. Co. v. Armstrong*, 49 Pa. 186; *Philadelphia, W. & B. R. Co. v. State use of Bitzer*, 58 Md. 372.

The cases cited by counsel for the plaintiff in error where, as in *Rourke v. White Moss Colliery Co.* 46 L. J. C. P. N. S. 283, an employer lends his men to another to perform services for him and under his direction; as in *Johnson v. Boston*, 118 Mass. 114, where he rents them to a city to work with its servants under its direction in constructing a sewer; or as in *Ewan v. Lippincott*, 47 N. J. L. 192, 54 Am. Rep. 148, and *Wiggett v. Fox*, 11 Exch. 832, where he furnishes them to others to perform services for them under their control; or as in *Wabash, St. L. & P. R. Co. v. Peyton*, 108 Ill. 534, 46 Am. Rep. 705; *Vary v. Burlington, C. R. & M. R. Co.* 42 Iowa, 248; *Taylor v. Western P. R. Co.* 45 Cal. 323; *Miller v. Cornwell R. Co.* 154 Pa. 474, 26 Atl. 779; and *Mills v. Orange, A. & M. R. Co.* 2 MacArth. 314,—where, under the agreement between two individual companies, the employee of the one becomes subject to the control and direction of the other in the very matter wherein the negligence is committed,—are plainly distinguishable from the case before us by the fact that in each of these cases the power to command, direct, and control all the employees in respect to the negligent act was vested in the master of the servant injured. The case of *Murray v. Lehigh Valley R. Co.* 66 Conn. 512, 32 L. R. A. 539, 34 Atl. 508, is not in point, because the cause of action in that suit was based on a contract with a passenger; and the case of *Gulf, C. & S. F. R. Co. v. Dorsey*, 66 Tex. 148, 18 S. W. 444, has no application to this issue, because the negligence there charged was a breach of one of the absolute duties of the master resulting in a defect of the cars and track.

In the case in hand Brady was employed, paid, and commanded by the defendant. The switchmen were employed, paid, and directed by the depot company. Neither corporation had any control over the men in the employment of the other; neither corporation could select, employ, or discharge them. The defendant never had any right or power to direct the switchmen of the depot company what to do or where or how they should discharge their duties. Their acts, therefore, were not its acts. It was not liable for their negligence, and they were not the fellow servants of Brady.

Finally, it is contended that the seven railroad companies which held the stock of the depot company were partners, and that each of them is therefore the coemployee of all the servants of the depot company and liable for all their torts. In the discussion of this proposition cases are cited wherein one corporation which held all the stock of another owned a part of its motive power, and employed and controlled its agents and servants, was held liable for its infringement of a patent (*York & M. L. R. Co. v.*

Winans, 17 How. 30, 15 L. ed. 27), and where three individual partners in operating a coach line were held liable for the negligence of the driver of one (*Bostwick v. Champion*, 11 Wend. 571). But these and similar authorities have little tendency to support the theory that this depot company is a partnership, and that each of its stockholders is liable for all of its torts. It acquired its charter from the state of Minnesota. The requisite acts have been done under the statutes of that state to make it a corporation. Those statutes declare that, those acts having been performed, it is a corporation. It has issued and sold its stock. It has made its mortgage and it has transacted the business for which it was chartered for many years. The laws of Minnesota prescribe the duties and fix the liabilities of its stockholders. These are not the duties and liabilities of partners. The stockholders, it is true, have made contracts with the corporation; but there is nothing in those contracts which dissolves the corporation, impairs its existence, or changes the legal relation of the holders of its stock to the legal entity which issued it from that of stockholders to that of partners. There is nothing illegal or inequitable in

the contracts. The law of the land fixes the liability of the parties to them, and that liability is not that of partners. The fact that under these agreements the stockholders share the prosperity and adversity of their corporation has no tendency to prove that they are partners, because the stockholders of all corporations share the same fate. The deeds of these stockholders will not convey the property of the corporation. Their only control of it is by the vote of its stock, and by the contracts it makes, and it has every attribute of a corporate entity, while they have every attribute of stockholders. Neither it nor its employees are subject to the command or control of any of its stockholders, within the maxim, *Respondeat superior*, and neither it nor its servants are either the agents or the servants of the defendant, under the fellow servant law of the state of Minnesota.

The result is that there was no substantial evidence in support of the alleged cause of action in this case, and the court's instruction to the jury to return a verdict for the defendant was right. *That judgment is accordingly affirmed.*

Caldwell, Circuit Judge, dissents.

ALABAMA SUPREME COURT.

HICKS BROTHERS, *Appts.*,
v.
SWIFT CREEK MILL COMPANY.

(133 Ala. 411.)

1. The revocation of a parol license to construct a dam and ditch on the land of the licensor is not prevented by the fact that large expenditures have been made on the faith of it, or that it was given with knowledge that such expenditures would be made.
2. A conveyance of land upon which a third person has been given a parol license to construct a ditch operates as a revocation of the license.
3. A grantee of land over which a third person has been given a parol license to construct a ditch may maintain trespass in case the licensee attempts to act under the license after the grant.
4. Exemplary damages may be awarded for wilfully attempting to enjoy a parol license to maintain a ditch over another's land after the license has been revoked.

(April 22, 1902.)

APPPEAL by plaintiffs from a judgment of the Circuit Court for Autauga County in favor of defendant in an action brought to recover damages for trespass. *Reversed.*

The facts are stated in the opinion.

NOTE.—As to revocability of a license to maintain a burden on land after the licensee has incurred expense in creating the burden, see note to *Pifer v. Brown* (W. Va.) 49 L. R. A. 497; also *Ewing v. Rhea* (Or.) 52 L. R. A. 140.

57 L. R. A.

Messrs. Gunter & Gunter for appellants.

Messrs. Lomax, Crum, & Weil, for appellee:

An executed parol license, where the licensee has gone to expense in consequence thereof, is irrevocable, upon the theory that the revocation under such circumstances would clearly work a fraud upon the licensee, and that the licensor, by standing by and allowing the licensee to make expenditures, relying upon the license, has estopped himself from revoking it.

13 Am. & Eng. Enc. Law, 2d ed. p. 1145; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497; *Ricker v. Kelly*, 1 Me. 117, 10 Am. Dec. 38; *DeGraffenried v. Savage*, 9 Colo. App. 131, 47 Pac. 902; *Ferguson v. Spencer*, 127 Ind. 66, 25 N. E. 1035; *Buchanan v. Logansport, C. & S. W. R. Co.* 71 Ind. 265; *Lucce v. Miller*, 3 Gratt. 205, 46 Am. Dec. 188; *Nettleton v. Sikes*, 8 Met. 34; *Southern R. Co. v. Hood*, 126 Ala. 312, 28 So. 602; *Hendrix v. Southern R. Co.* 130 Ala. 205, 30 So. 596; *Campbell v. Indianapolis & V. R. Co.* 110 Ind. 490, 11 N. E. 482; *Curtis v. La Grande Hydraulic Water Co.* 20 Or. 34, 10 L. R. A. 484, 23 Pac. 808, 25 Pac. 378; *Woodbury v. Parshley*, 7 N. H. 237, 26 Am. Dec. 739; *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190; *Flick v. Bell* (Cal.) 42 Pac. 813; *Cook v. Pridgem*, 45 Ga. 331, 12 Am. Rep. 582; *Southern R. Co. v. Mitchell*, 69 Ga. 114; *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370; *House v. Montgomery*, 19 Mo. App. 170; *Noble v. Sherman*, 151 Ind. 573, 52 N. E. 150; *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152;

Saucer v. Keller, 120 Ind. 475, 28 N. E. 1117; *Hodgson v. Jeffries*, 52 Ind. 334; *Campbell v. Indianapolis & V. R. Co.* 110 Ind. 490, 11 N. E. 482; *Williams v. Flood*, 63 Mich. 487, 30 N. W. 93; *Vannest v. Fleming*, 79 Iowa, 638, 8 L. R. A. 277, 44 N. W. 906; *Upton v. Brazier*, 17 Iowa, 153; *M'Kellip v. M'Ilhenny*, 4 Watts, 317, 28 Am. Dec. 711; *Putney v. Day*, 6 N. H. 430, 25 Am. Dec. 470; *Chicosa Irrig. Ditch Co. v. El Moro Ditch Co.* 10 Colo. App. 276, 50 Pac. 731; *Motes v. Bates*, 80 Ala. 382; *Miller v. Auburn & S. R. Co.* 6 Hill, 61; *Lawrence v. Springer*, 49 N. J. Eq. 289, 24 Atl. 933.

When it is said that the license is irrevocable it is not meant that the privilege continues for all time, but that the interest continues until a certain right or interest is secured; and the license is, so far, irrevocable.

Note to *Ricker v. Kelly* (Me.) 10 Am. Dec. 42.

A license not creating an easement or giving rise to an interest in land, is not within the statute of frauds, and need not be in writing.

18 Am. & Eng. Enc. Law, 2d ed. p. 1130; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Sampson v. Burnside*, 13 N. H. 264; *Fentiman v. Smith*, 4 East, 108; *Taylor v. Waters*, 7 Taunt. 374; *Cook v. Stearns*, 11 Mass. 536; *Ricker v. Kelly*, 1 Me. 117, 10 Am. Dec. 38; *Hazelton v. Putnam*, 3 Pinney (Wis.) 107, 54 Am. Dec. 158; *Woodbury v. Parshley*, 7 N. H. 237, 26 Am. Dec. 739.

The licensor cannot, by a transfer of the lot to another, invest his alienee with larger rights than he himself had. The purchaser would take the property *cum onere*.

Troy v. Coleman, 58 Ala. 570; *Williams v. Flood*, 63 Mich. 487, 30 N. W. 93; *Campbell v. Indianapolis & V. R. Co.* 110 Ind. 490, 11 N. E. 482; *Buchanan v. Logansport, C. & S. W. R. Co.* 71 Ind. 265; *M'Kellip v. M'Ilhenny*, 4 Watts, 317, 28 Am. Dec. 711; *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370; *Simons v. Moorehouse*, 88 Ind. 395; *Stephens v. Benson*, 19 Ind. 369; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675.

Tyson, J., delivered the opinion of the court:

Practically but a single question is presented for our consideration and determination. It is whether the defendant, who is sued for a trespass upon the plaintiff's lands, acquired an irrevocable license from the plaintiff's grantor to use and maintain a ditch and dam for the purpose of floating logs. The facts out of which this question arose are undisputed, and are these: One Smith, being the owner of the lands, in 1896 gave verbal permission to the defendant to construct and operate the ditch and dam upon them, which was done by it at great cost. In August, 1899, the plaintiffs became the owners of the lands by deed upon which these structures were constructed, and went into possession of them, with full knowledge that the defendant was actively using and operating the ditch and dam,

claiming the right to do so under the permission given it by Smith. Preliminary to a discussion of the question, it may not be amiss to say that under these facts no question of adverse possession can possibly arise. The entry by defendant being permissive, its possession was not adverse, but was in subordination of the rightful title. *Collins v. Johnson*, 57 Ala. 304; *Jesse French Piano & Organ Co. v. Forbes*, 120 Ala. 471, 29 So. 683; 18 Am. & Eng. Enc. Law, 2d ed. p. 1130. It is not insisted by appellee that the permission granted to it created an easement. Clearly, such an insistence, if made, would be untenable, for the reason that it would have required a deed to have conveyed such a right; for "an easement must be an interest in or over the soil," and does not lie in livery, but in grant. Washb. Easements & Servitudes, p. 6; 10 Am. & Eng. Enc. Law, 2d ed. p. 409; Jones, Easements, § 80; Browne, Stat. Fr. § 232. The difference between an easement and a license is, the former implies an interest in land, while the latter does not. An easement must be created, as we have said above, by deed or prescription, while a license may be by parol. The former is a permanent interest in the realty, while the latter is a personal privilege to do some act or series of acts upon the land of another without possessing any estate therein, and is generally revocable at the will of the owner of the land in which it is to be enjoyed. Washb. Easements & Servitudes, *supra*; Jones, Easements, § 63. And when revocable, it is revoked by the death of the licensor, by his conveyance of the lands to another, or by whatever would deprive him of doing the acts in question or giving permission to others to do them. *Hodgkins v. Farrington*, 150 Mass. 19, 5 L. R. A. 209, 22 N. E. 73; 18 Am. & Eng. Enc. Law, p. 1141, and note 10; Jones, Easements, § 73, and note 4. Confessedly, the license to the defendant in this case was revoked by the conveyance of Smith, from whom it acquired it, unless he estopped himself to do so. And this, it is insisted, he did, because the defendant has been at great cost in constructing the ditch and dam, being induced to do so under the permission granted to it. It is further contended that the license has become an executed one, and therefore irrevocable. To use the language of Baron Parke: "It certainly strikes one as a strong proposition to say that such a license can be irrevocable; unless it amount to an interest in land." *Williams v. Morris*, 8 Mees. & W. 488. To say nothing of so thin and gauzy an attempt to evade the provision of the statute of frauds, requiring a sale of all interest in lands to be in writing except leases for a term not longer than one year; unless the purchase money, or a portion thereof, be paid, and the purchaser be put in possession of the land by the seller. Subdivision 5, § 2152, Code. In other words, we are asked to hold, although the license to the defendant, when granted, was not intended by either party to be anything more than a

mere personal privilege to it, revocable by Smith at his will, and knowing, as it did, that under this license it acquired no interest whatever in the lands, that, forsooth with a knowledge of all these facts, it acquired an indefeasible title to an easement over them because it expended money in constructing the ditch and dam. For it is too plain for argument that, if Smith is estopped to revoke the license, all others who may acquire his title would be, and the defendant would enjoy a fee-simple title to an easement, which had its origin in a mere license; and this, too, without paying one cent of consideration therefor, to say nothing of so plain and palpable a violation of the statute of frauds. Smith is not so much as shown, with or without consideration, to have made any promise that he would not exercise his privilege of revoking the license. And there is no pretense that he made any misrepresentation of any fact that induced the defendant to expend its money. The broad proposition is asserted that because he granted the license, knowing the purpose for which it was to be used, he could never revoke it, because it would be a fraud to allow him to do so, and because it has become executed. We are aware that many courts hold this contention to be sound, but we cannot subscribe to it. Reason and the great weight of authority is against it. In *Browne*, Stat. Fr. § 31, it is said: "In some of the earlier decisions, both English and American, the licensee was protected against revocation on the ground that the licensor was estopped to revoke a license on the faith of which the licensee had incurred expense; but it is now well settled that the doctrine of estoppel does not apply, inasmuch as the licensee is bound to know that his license was revocable, and that in incurring expense he acted at his own risk and peril. Courts of equity also have repeatedly declined to interfere on this ground." See also note 3, for cases cited. In *Jones*, Easements, § 84, it is said: "An oral promise to grant an easement is not sufficient to raise an estoppel in favor of one who has acted upon it. In a case not relating to easements, Mr. Justice Gray states a principle which is applicable to this subject: 'A promise, upon which the statute of frauds declares that no action shall be maintained, cannot be made effectual by estoppel merely because it has been acted upon by the promisee, and not performed by the promisor.'" In 18 Am. & Eng. Enc. Law, 2d ed. p. 1146, it is said: "According to the prevailing view of the courts in England and a large number of the courts of the states of the United States, however, neither the execution of the license nor the incurring of expense, nor both combined, affect the right of the licensor, and he may revoke under all circumstances. It is held that the statute of frauds prevents any act other than the giving of a deed from vesting an irrevocable interest in land." See cases cited in note 7 in support of this proposition. *Mr. Freeman*, in his note to *Lawrence v. 57 L. R. A.*

Springer (N. J. Eq.) 31 Am. St. Rep. 713, 715, says: "A parol license is founded in personal confidence, and is defined to be an authority given to do some act, or a series of acts, on the land of another without passing any interest in the land; . . . is a complete answer and defense to a claim of adverse possession set up by the licensee. . . . and is not assignable. . . . At common law a parol license to be exercised upon the land of another creates an interest in the land, is within the statute of frauds, and may be revoked by the licensor at any time, no matter whether or not the licensee has exercised acts under the license, or expended money in reliance thereon. In many of the states this rule prevails, while in others the licensor is deemed to be equitably estopped from revoking the license, after allowing the licensee to perform acts thereunder, or to make expenditures in reliance thereon. These two lines of cases cannot be reconciled, for one of them holds that an interest in land cannot be created by force of a mere parol license, whether executed or not, while the other declares that where the licensee has gone to expense, relying upon the license, the licensor may be estopped from revoking it, and thus an easement may be created. The former line of cases, it seems to us, is founded upon the better reason. They decide that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is revocable at the option of the licensor, and this although the intention was to confer a continuing right, and money has been expended by the licensee upon the faith of the license. Such license cannot be changed into an equitable right on the ground of equitable estoppel." Case after case might be cited to support the principles announced by these text writers, but they are too numerous to do so here. They can be found by reference being had to the notes referred to in the text quoted. However, before examining the decisions of our own court, we will refer to the case of *Thoenke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030, because of its striking analogy to the one in hand. We quote from a part of the opinion: "The oral agreement under which the ditch across the defendant's land was made did not create an easement in the land. An easement is a permanent interest in the lands of another, with a right to enjoy it fully and without obstruction. Such an interest cannot be created by parol. It can be created only by a deed . . . or by prescription. But this agreement did not have the effect of a parol license. A license creates no estate in lands. It is a bare authority to do a certain act or series of acts upon the lands of another. It is a personal right, and is not assignable. It is gone if the owner of the land who gives the license transfers his title to another, or if either party die. So long as a parol license remains executory, it may be revoked at pleasure. So an executed parol license, under which some estate or interest in the land

would pass, is revocable. Otherwise title would pass without a written conveyance, 'in the teeth of the statute of frauds.' Nor is such a license made irrevocable by the fact, . . . or because expenditures have been made on the faith of it. . . . Nor can the parol agreement be enforced in equity by way of specific performance."

We will now examine our own cases. In *Riddle v. Brown*, 20 Ala. 412, 56 Am. Dec. 202, it was held that the right "to dig and carry away iron ore" from the mine of another is an easement, and any contract for the sale of such right, to be binding, must be in writing; that a verbal contract conferring such a right, though not binding under the statute of frauds, will nevertheless operate as a verbal license, and while unrevoked will protect the person to whom it was given from trespass *quare clausum fregit* for digging ore, and vest in him the property in the ore that was actually dug under it; but that it is revocable at the pleasure of the party by whom it was given, and was personal and not assignable. In *Motes v. Bates*, 74 Ala. 378, it was said: "We find no evidence in the record tending to show that the plaintiff, Bates, had any claim of legal right to be upon this portion of the defendant's field. It is shown that the lessee agreed to use the public road; and his employees or subtenants had no greater rights than he had. If the plaintiff's alleged custom in using the pathway for some time previous could be construed into a permission by defendant to do so, this was, at best, only a parol license, which was revocable at the pleasure of the person giving it. Every license of this kind, by which one is permitted, without consideration, to pass over the lands of another, is essentially revocable in its very nature, its continuance depending upon the mere will of the person by whom it was created or granted,"—citing approvingly *Riddle v. Brown*, 20 Ala. 412, 56 Am. Dec. 202. In *Tillis v. Treadwell*, 117 Ala. 448, 22 So. 983, quoting from *Rudisill v. Cross*, 54 Ark. 519, 16 S. W. 575, where it was held: "The obligation of a landowner to build and maintain a division fence, in whole or in part, for the benefit of adjoining land, is something more, indeed, than an obligation to furnish the materials and labor necessary from time to time for the erection and reparation of the fence. It imposes a burden upon the land itself. A partition fence ordinarily must rest equally upon the land of the respective proprietors. Hence, an agreement of one of those proprietors to maintain such a fence necessarily imports a dedication of the use of the land required to support half of it. To that extent it is, therefore, an estate in the land itself. In accordance, then, with the general rule that an easement, being an interest in realty, cannot be conveyed or reserved by parol, an agreement by an owner of land to maintain a partition fence between such land and that of an adjoining proprietor cannot ordinarily rest in parol, but, to be binding, must be in writing,"—our court then pro-

ceeds: "A grant to an adjacent proprietor of the use of a wall on his own premises as a partition wall between their buildings is the grant of an easement, and a parol agreement to build and grant the use of such wall is within the statute. . . . Under our decisions parol agreements for the grant of easements are void under the statute. *Riddle v. Brown*, 20 Ala. 412, 56 Am. Dec. 202; *Hammond v. Winchester*, 82 Ala. 470, 2 So. 892." See also the following cases in which *Riddle v. Brown* is cited approvingly: *Heflin v. Bingham*, 56 Ala. 575, 28 Am. Rep. 776; *Chambers v. Alabama Iron Co.* 67 Ala. 357; *Louisville & N. R. Co. v. Boykin*, 76 Ala. 564; *Motes v. Bates*, 80 Ala. 382; *Hammond v. Winchester*, 82 Ala. 477, 2 So. 892. The right of a licensor to revoke a license given by him is fully recognized by our court, as will appear from a mere cursory examination of the cases cited above; and, indeed, is fully recognized in the case of *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439, upon which the defendant relies to support its contention of estoppel. Suffice it to say that in that case a consideration was paid for the easement or license, and the licensee or transferee put into possession of the land and water way over which the rights to him were agreed to be granted. There was, therefore, no question of the operation of the statute of frauds, and, indeed, could not be. This being true, upon the plainest principles of equity the licensor or seller should not have been permitted to retain the purchase money paid to him, and to destroy the rights which he had sold to the other party. This is far from sustaining the doctrine contended for here. In *Clanton v. Scruggs*, 95 Ala. 282, 10 So. 758, it is said: "The fact that one of the parties to such an agreement has acted on the faith of its validity does not raise up an estoppel against the other party to deny that it is binding on him. A mere breach of promise cannot constitute an estoppel *in pais*. *Weaver v. Bell*, 87 Ala. 385, 6 So. 298." Continuing, on page 283, 95 Ala., and page 758, 10 So., after quoting from *Weaver v. Bell*, 87 Ala. 385, 6 So. 298, that "a representation relating to future action or conduct operates as an estoppel only when it has reference to the future relinquishment or subordination of an existing right, which it is made to induce, and by which the party to whom it was addressed was induced to act," the court said: "The representation there referred to does not include a mere promise to do or to refrain from doing something in the future. . . . *Brightman v. Hicks*, 108 Mass. 246. Such a rule of estoppel would take the sting out of the statute of frauds, and defeat its manifest purpose." The case of *Brightman v. Hicks*, cited approvingly, is the one from which the quotation from Jones on Easements was taken.

It is clear that the decisions of this court are in harmony with the principles announced by us and with the text writers from whom we have quoted at length. Smith, not being estopped, his conveyance of the

land *ipso facto* was a revocation of the license to the defendant; and the plaintiffs, having acquired the legal title to the land and to the ditch, were entitled to the immediate possession thereof, and have a right to maintain this action, and to recover such damages as they may have suffered by reason of the trespass committed by defendant. *Davis v. Young*, 20 Ala. 151; *Boswell v. Carlisle*, 70 Ala. 244; *Dunlap v. Steele*, 80 Ala. 424; *Fields v. Williams*, 91 Ala. 502, 8 So. 808. And the jury may award exemplary damages if they see proper. *Wilkinson v. Searcy*, 76 Ala. 181; *Alley v. Daniel*, 75 Ala. 408. "Whatever is done," says Shaw, J., in *Wills v. Noyes*, 12 Pick. 324, "wilfully and purposely, if it

be at the same time wrong and unlawful, and that known to the party, is, in legal contemplation, malicious." *Lynd v. Pickett*, 7 Minn. 184, Gil. 128, 82 Am. Dec. 79.

There is nothing in the facts which tends in the remotest degree to show that the plaintiffs ever renewed the license. On the contrary, they are shown to have asserted their rights under the revocation by demanding the payment of rent of defendant.

It is scarcely necessary to say that no damages for the negligent maintenance or operation of the ditch or dam are sought to be recovered in the complaint, and, indeed, could not be under its averments.

Reversed and remanded.

ARKANSAS SUPREME COURT.

BRINKLEY CAR WORKS MANUFACTURING COMPANY, Appt.,

v.

Fred COOPER.

(.....Ark.....)

A boy six years old, knowing that hot water will burn, cannot recover damages for injuries received from voluntarily or carelessly walking into a pool of it formed by emptying a boiler on premises on which he is trespassing.

(April 12, 1902.)

A PPEAL by defendant from a judgment of the Circuit Court for Monroe County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by **Riddick, J.:**

The Brinkley Car Works & Manufacturing Company, a corporation organized under the laws of this state, has its plant located at Brinkley, Arkansas. It was the custom of the company to let the water out of its boiler once every two weeks to cleanse the boiler. When the water was thus let out, it flowed into a depression on the premises of the company, and formed a shallow pool of hot water, but in about an hour it sank into the earth. The water was usually let out on Sunday so that the boiler could be cleaned out on Monday following. On a Sunday, shortly after the boiler was emptied, Fred Cooper, a boy six years and two months old, who was playing on the premises of the company, walked into the pool of hot water, and was severely scalded on

his feet, legs, and hands. He brought this action against the company to recover damages for the injury. In explanation of the accident, he testified that he and another boy were on the side of the mill where the water came out of the box, and went into the pool. "We were," he said, "throwing bark and chips into the water in the mouth of the pit, and watching the steam rise. The pool was covered with bark, except when the force of the water had pushed it back at the mouth of the pool. The rest of the pool was covered up with trash and bark, so that the water could not be seen, and when I stepped in I thought it was ground, and did not see the water."

The court in its instruction No. 1 instructed the jury as follows: "If the jury believe from the evidence that the agent or agents of the defendant had knowledge, or ought reasonably to have known, that the plaintiff, and boys about the age of plaintiff, were in the habit of playing at the pool of water where the plaintiff was injured, and on and about its premises around and near said pool, and thereafter made no effort to protect said pool from exposure as would prevent the plaintiff and other children of his age from going into it and receiving said injury, the defendant would be guilty of negligence, and you will find for the plaintiff." Defendant duly objected, and saved exceptions to the giving of this instruction. The plaintiff recovered judgment for \$1,800, from which judgment the company appealed. This is the second time the case has been before this court, and a fuller statement of the facts can be found reported with former opinion, in 60 Ark. 545, 31 S. W. 154.

NOTE.—As to liability for maintaining upon private premises dangerous attractions for children generally, see also, in this series, *Penno v. McCormick* (Ind.) 9 L. R. A. 313; *Rodgers v. Lees* (Pa.) 12 L. R. A. 216; *Barney v. Hannibal & St. J. R. Co.* (Mo.) 26 L. R. A. 847; *Missouri, K. & T. B. Co. v. Edwards* (Tex.) 32 L. R. A. 825; *Siddall v. Jansen* (Ill.) 57 L. R. A.

39 L. R. A. 112; *O'Leary v. Brooks Elevator Co.* (N. D.) 41 L. R. A. 677; *Biggs v. Consolidated Barb-Wire Co.* (Kan.) 44 L. R. A. 655; *Kopplekom v. Colorado Cement Pipe Co.* (Colo. App.) 54 L. R. A. 284, with footnote as to liability for maintaining dangerous ponds, turntables, etc., causing injuries to children; and *Ryan v. Towar* (Mich.) 55 L. R. A. 310.

Messrs. N. W. Norton and C. F. Greenlee for appellant.

Messrs. M. J. Manning, J. P. Lee, and Grant Green, Jr., for appellee.

Riddick, J., delivered the opinion of the court:

This is an action brought for a minor by his next friend to recover damages for injuries received by him from a pool of hot water on the premises of the defendant company. The case has been twice tried, and is now before this court for the second time. On the first trial the plaintiff rested his right to recover on the fact that the company permitted a pool of hot water on its premises to be covered over and concealed by bark and trash, so that plaintiff, a boy of six years of age, while playing on the premises, and not knowing that there was a pool of hot water there, walked into it, and was burned. On the appeal from the judgment rendered on that trial the case was reversed by this court, for the reason that the instructions of the trial judge did not submit to the jury the question whether under the circumstances in proof, the company ought reasonably "to have anticipated that children of the age of the plaintiff would probably [go upon the premises and] receive such injury as the plaintiff did receive by reason of the situation and condition of the pool of water at the time the plaintiff received his injury." The court said that "the owner of land is not required to provide against remote and improbable injuries to children trespassing thereon, but he is liable for injuries to children trespassing upon his private grounds when it is known to him that they are accustomed to go upon it, and that, from the peculiar nature and exposed and open condition of something thereon which is attractive to children, he ought reasonably to anticipate such an injury to a child as that which actually occurs." Now, it seems from some of the instructions given on the second trial that the circuit judge understood from this language that the defendant company was liable in this case if its officers knew that boys about the age of plaintiff were in the habit of playing at or near the pool of water where the injury occurred, and made no effort "to so protect the pool from exposure as would prevent the plaintiff and other children of his age from going into it and receiving injury." But the language of the court in the opinion must be taken in connection with the facts as they were alleged and proved on the other trial. It was alleged on that trial, and the evidence tended to show, that the pool of hot water was concealed by trash and bark, and that the boy, not knowing of its presence, accidentally walked into it and was injured.

The court, in effect, said of this state of facts that the mere fact that there was a pool of hot water concealed by bark and trash on the premises of the defendant, into which a boy had accidentally walked and was burned, was not of itself sufficient to make out a case. This shallow depres-

sion into which the water ran from the boiler was on the private grounds of the defendant, some distance from the nearest street or traveled way. The water was turned into it only once in two weeks, and remained there but a short time before it cooled or sank into the earth and became harmless. Under these circumstances, the court held, in effect, that the proof must not only show that the pool was concealed and dangerous, but must go further, and show that the company knew that boys were in the habit of frequenting the place or would probably come there, and would be liable to receive injury from the pool left in such concealed condition. There are few boys of six years of age that do not know that fire or hot water will burn, and if this boy possessed that amount of intelligence, and yet went on the premises of the company, and of his own volition or carelessness walked into an open pool of water that he knew was hot, we think that no recovery can be had for injury thus sustained by him. If the law was otherwise, one could not boil water in an open kettle on his premises without being liable for damages to any boy who should come and put his hand into it, unless he went to extra precaution to prevent the boy from getting to the water. Such a rule, carried to its logical conclusion, would, as said by the supreme court of Pennsylvania, render the owner of a fruit tree liable for damages to a trespassing boy who in attempting to get the fruit should fall from the tree and be injured. It would charge the duty of protecting children upon every member of the community except upon their own parents. *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365. We did not intend to lay down such a rule in the former opinion in this case, but we hold that if the company owning the premises had notice that children did frequent the place of this pool, or were from the nature of the surroundings likely to do so, and if it carelessly left a pool of hot water there concealed in such a way that one would reasonably expect it to occasion injury to such children, the company would be liable for damages to a boy who by reason of its concealed nature walked into the pool of hot water and was burned.

An owner of land has the right to use it for any lawful purpose, and this company had the right to operate its manufacturing plant and empty the hot water from its boilers on its own premises when it became necessary to do so, and before it can be made liable for an unintentional injury caused to a boy of six years of age by such hot water two things are necessary: First, it must be shown that the company had notice that this boy or other children were likely to come upon its premises; and, second, that by reason of the concealed nature of the pool of water, or the want of notice on the part of the children of the condition of the water, injury to them ought reasonably to have been foreseen on the part of the company as a consequence of leaving the pool of water in that condition. Wat-

son, Damages for Personal Injuries, p. 291, § 234.

If the pool of water was open, and not concealed, and the boy had notice that it was hot, we think the company could reasonably suppose that a boy six years of age would not intentionally or carelessly put his foot into water known by him to be hot, and if he did so, and injury resulted, we do not think the company is responsible. The law on this point was correctly stated in the sixth instruction given at the request of the defendant, and other instructions given at the trial were correct, but others were not so clear, and instruction No. 1, given at the request of the plaintiff, seems in conflict with some of those given for the defendant.

We said in the former opinion that the instructions were erroneous because they assumed that the company was liable to any child trespassing on its grounds for an injury caused by a concealed pool of hot water; whether there was anything to put the company on notice that a child was likely to come upon the premises or not, and now we must hold that one of them is erroneous for the reason that it assumes that the company, if it had notice that children were accustomed to frequent its premises, is liable for any injury inflicted on a boy by a pool of hot water, though he may have known that the water was hot, and may have possessed sufficient intelligence to appreciate the danger, and yet walked into it of his own volition or carelessness. Such a rule might be just as to very young children having no knowledge or appreciation of such danger, but a boy over six years

of age should know better than to knowingly or carelessly put his foot into a pool of scalding water. He testified in this case that he did know better. His testimony shows that he knew the water in the pool was hot, and he stepped in it unintentionally. He said that he and a companion were watching the steam rise from the end of the drain where the water ran into the pool. "The pool," he says, "was covered with bark, except where the force of the water had pushed it back at the mouth of the pool. The rest of the pool was covered up with trash and bark, so that the water could not be seen, and where I stepped in I thought it was ground, and did not see the hot water." This tends to show that he was misled by the concealed nature of the pool. But there is conflict in the evidence on this point, and that question was not fairly submitted to the jury. Instruction 1, given at the request of the plaintiff, permitted a recovery without regard to whether the boy had notice that the water was hot or not, or whether the pool was concealed or open.

We think that this instruction was erroneous and prejudicial, and for that reason *the judgment is reversed*, and a new trial ordered. The appellant did not comply with the rule requiring all the instructions given on the trial to be set out in the abstract, where a reversal is asked on account of error in instructions. For that reason it is ordered that no costs for printing briefs be taxed in its favor.

Rehearing denied.

CALIFORNIA SUPREME COURT.

STIMSON MILL COMPANY, *Respt.*,
v.

F. W. BRAUN *et al.*, *Appts.*

(136 Cal. 122.)

A statute making a contract for the construction of a building, in which the contract price is payable with something besides money, so far invalid as to furnish the owner no protection from the claims of subcontractors and materialmen, is an unconstitutional infringement of the owner's right to the possession and enjoyment of his property.

(March 22, 1902.)

NOTE.—The power of the legislature to compel payment of obligations to be made in money, so far as it relates to the payment of wages of employees, is considered in a *note* to *Avent-Beattyville Coal Co. v. Com.* (Ky.) 28 L. R. A. 273.

As to the power of the legislature to prescribe the kind of money in which payment may be made by agreement, see cases in *note* to *Skinner v. Santa Rosa* (Cal.) 29 L. R. A. on page 516.
57 L. R. A.

A PPEAL by defendants from a judgment of the Superior Court for Los Angeles County in favor of plaintiff in a proceeding to enforce mechanics' and materialmen's liens. *Reversed.*

The facts are stated in the opinion.

Messrs. Borden & Carhart, for appellants;

Section 1184, Code Civ. Proc., is repugnant to the Constitution of the state of California.

Liens of subcontractors, materialmen, and laborers, under a valid original contract, are dependent on the contract, and can only be enforced in subordination to the terms of such contract.

Bowen v. Aubrey, 22 Cal. 571; *Dore v. Sellers*, 27 Cal. 594; *Dingley v. Greene*, 54 Cal. 336.

The subcontractor cannot acquire any rights against the owner in violation of the terms of the original contract.

Shaver v. Murdock, 36 Cal. 298; *Walsh v. McMenemy*, 74 Cal. 355, 16 Pac. 17; *Kellogg v. Howe*, 81 Cal. 170, 6 L. R. A. 588, 22 Pac. 509; *Latson v. Nelson*, 11 Pac. Coast L. J. 589; *Whittier v. Hollister*, 64

Cal. 283, 30 Pac. 846; *O'Donnell v. Kramer*, 65 Cal. 353, 4 Pac. 204; *Wilson v. Barnard*, 67 Cal. 422, 7 Pac. 845; *Wiggins v. Bridge*, 70 Cal. 437, 11 Pac. 754.

Given a valid contract, the lien claimant can only enforce his lien for that portion of the contract price which remains due and unpaid from the owner to the contractor when the lien is filed.

Turner v. Strenzel, 70 Cal. 28, 11 Pac. 389; *Whittier v. Hollister*, 64 Cal. 283, 30 Pac. 846; *Kellogg v. Howes*, 81 Cal. 170, 6 L. R. A. 588, 22 Pac. 509.

That portion of § 1184 which says that the owner shall be deemed to order the materials, etc., is an effort to force upon the owner a liability which he never assumed. This is in violation of his constitutional rights.

Dore v. Sellers, 27 Cal. 588.

The statute is repugnant to the Constitution of the United States.

Messrs. Wilson & Bulla, George D. Blake, and Brown & Newby for respondents.

Harrison, J., delivered the opinion of the court:

The appellants were the owners of certain property in Los Angeles, upon which was a five-story building, known as "Vickery Block," and entered into a contract with the defendants Parton and Tuttle for its improvement. This improvement included taking out all the interior work of the building and furnishing the material and labor necessary to reconstruct it in accordance with certain drawings and specifications. The contract provided that the appellants should pay to the contractors for the work and materials \$12,254 in certain instalments, the last of which, amounting to \$3,064, was to be paid thirty-five days after the completion and acceptance of the work. One provision of the contract was, "all old material to be the property of the contractor," and in the specifications attached thereto was the provision, "The contractors shall have the right to use such old material in building the new building and reconstructing the old as may be in conformity with the specifications and plans, to the approval of the architect." No sum was agreed upon between the owners and the contractors as to the value or price of the said old material, but the court found that the value of that portion which was not used in the reconstruction of the building was \$2,200. The above-named plaintiff furnished certain materials to the contractors, which were used by them in the performance of their contract, for which it filed a claim of lien, and it is also the assignee of other materialmen and laborers who had filed notices of their respective claims of lien upon the said property. The present action is for the foreclosure of these liens. The appellants paid to the contractors the several instalments of the \$12,254 agreed to be paid by them as they became due, except the final one of \$3,064, and at the time of filing their answer herein brought into court 57 L. R. A.

and deposited with the clerk said last-named sum, to be distributed by the decree of the court to the parties entitled thereto according to their respective rights. Other actions brought by other lien claimants were consolidated with the action brought by the above-named plaintiff, and were tried at the same time. The court found the value of the labor and materials furnished by the several plaintiffs and their assignors to be \$9,804.44, for which, together with attorneys' fees amounting to \$553, and the costs of the actions, they were entitled to a lien upon the property. Judgment was thereupon entered, directing a sale of the property, and that the plaintiffs be paid the said amounts out of the proceeds thereof. From this judgment the owners have appealed.

The court held that the provision in the contract that all the old material of the building not used in its reconstruction was to be the property of the contractors was in effect a part of the contract price for the improvement, and being in violation of the provision of § 1184, Code Civ. Proc., that the whole contract price shall be in money, the labor done and materials furnished by the plaintiffs were, under another provision in the section, deemed to have been done and furnished at the personal instance and request of the appellants. This provision of § 1184 is as follows: "As to all liens, except that of the contractor, the whole contract price shall be payable in money. . . . In case such contracts and alterations do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." The section does not declare a contract not made in these terms to be void, but, while holding that it is valid between the owner and the contractor, it purports to give to the materialmen and laborers the right to enforce payment from the owner of the value of the materials and labor furnished by them, irrespective of the contract price or compensation agreed upon between him and the contractor, notwithstanding he may have fully and strictly complied with the terms of the contract. Under many decisions of this court, if the statute was susceptible of such a construction, it would be invalid. See the cases cited in *Kellogg v. Howes*, 81 Cal. 175, 6 L. R. A. 588, 22 Pac. 511, where it was said that, "where there is a valid contract between the owner and contractor, such contract is the measure of the owner's liability." The provision in the Constitution respecting mechanics' liens (art. 20, § 15) is subordinate to the declaration of rights in the same instrument, which declares (art. 1, § 1), that all men have the inalienable right of "acquiring, possessing, and protecting property," and, in § 13, that no person shall be deprived of property "without due process of law." The right

of property antedates all constitutions, and the individual's protection in the enjoyment of this right is one of the chief objects of society. He has the right to enjoy his property and improve the same according to his own desires, in any way consistent with the rights of others, subject only to the just demands of the state. This right is invaded if he is not at liberty to contract with others respecting the use to which he may subject his property, or the manner in which he may enjoy it. The legislature may prescribe the form in which contracts shall be executed in order that they may be valid or binding, but it cannot limit the right of parties to incorporate into their contracts respecting property, otherwise valid, such terms as may be mutually satisfactory to them. A statute declaring invalid any contract by the owner of real property for the construction of a building thereon, unless it is provided therein that the contract price shall be payable only in money, is unconstitutional, in that it is an infringement upon the right of the owner in the possession and enjoyment of his property. The legislature could with equal right declare that all contracts for the sale of merchandise, or for the manufacture of machinery, or for the employment of artisans, should be invalid unless they should provide that the payment thereunder should be made only in money. The right of the owner of land to contract with a builder for its improvement, and to compensate him therefor with other real property, or with personal property other than money, is the same, and as inalienable, as the right of the owner of any other property to contract respecting the payment for any improvement thereof. The materialmen and the laborers are protected in their right to a lien by the provision in § 1183, Code Civ. Proc., requiring such contract to be in writing and made a matter of public record. They know that, in accordance with the decisions of this

court, the legislature cannot give a right of lien to an extent greater than the contract price. By being placed upon record the contract is open to their inspection and examination, and if they are not content with its provisions they may decline to furnish any materials for the building, or perform any labor thereon. But if they do furnish any, their right to a lien must be limited by the terms of the contract. If, after the owner has agreed with the contractor to compensate him with property other than money, they may, with knowledge of the terms of such contract, still enforce a lien upon the building for the value of materials and labor furnished by them to the contractor, the owner would be deprived of his property without due process of law, by being compelled to pay more for the improvement than he had contracted for. The principle involved herein is cognate to that recently discussed by Mr. Justice Temple in *Gibbs v. Tally*, 133 Cal. 373, 65 Pac. 970, where it is held that the provision in § 1203, Code Civ. Proc., requiring the contract to be accompanied by a bond, places an unreasonable restraint upon the owner of property in regard to its use, and is therefore invalid. The reasoning of the opinion in that case is applicable to the above provision of § 1184, as is also the rule there stated as follows: "Where there is a valid contract under which the work was done, and which is performed by the owner, all that the statute attempts to do, and in fact all that can be done, is to enable the laborer, materialmen, and subcontractors to cause the contract price to be applied to the payment of their demands."

The judgment and order denying a new trial are reversed.

We concur: Garoutte, J.; Van Dyke, J.

Rehearing denied.

VIRGINIA SUPREME COURT OF APPEALS.

NATIONAL VALLEY BANK of Staunton,
Appt.,
v.

James HANCOCK, Trustee under the Will
of A. G. Hancock, Deceased, et al.

(.....Va.....)

1. An indorsee of a note is not pre-

cluded from attacking a voluntary conveyance of property by a remote indorser on the note by the fact that it occurred before the note came into possession of the indorsee.

2. A man who receives property in trust for the support of his wife and children cannot, after mingling the income with his own funds for a period of

NOTE.—Parent's duty to support child as affected by child's interest in trust estate or other property.

- I. Introductory, 729.
- II. Obligation of parent who has ability to support, 729.
- III. Application of child's property.
 - a. In general, 730.
 - b. In particular cases.
 1. Contract, 731.
 2. Express trust for maintenance, 733.
 3. Gift to parent for maintenance, 733.

III. b—continued.

4. Where trustees have discretion, 734.
5. Where there is a direction for accumulation, or no express authority for use of income, 735.
6. Where infant's rights are contingent, 736.
- c. To what extent.
 1. Need of child, 738.
 2. Past and future maintenance, 739.
 3. Income and principal, 740.
- IV. Rights of creditors, 741.
- V. Summary, 743.

years without keeping or stating an account, and making improvements on the trust property, go back, charge himself with the income received, and credit the account with the cost of the improvements, leaving himself debtor to the beneficiaries, on the theory that it was his personal duty to support his family, for the purpose of preventing his creditors from reaching the improvements.

(January 23, 1902.)

A PPEAL by complainant from a decree of the Circuit Court of Lynchburg in favor of defendants in a suit to subject to payment of complainant's claim property held by defendants in trust. *Reversed.*

The facts are stated in the opinion.

Messrs. Randolph Harrison and A. R. Long, for appellant:

Defendant's creditors have a right to in-

This note does not collate the cases that turn upon the status of parents who have been divorced or judicially separated.

I. Introductory.

The father is under legal obligation to support his infant child. Authorities to this effect are cited in note to Porter v. Powell (Iowa) 7 L. R. A. 176. In addition, reference may be made to the following cases: Gilley v. Gilley, 79 Me. 292, 9 Atl. 623; Dawes v. Howard, 4 Mass. 97; Raymond v. Loyl, 10 Barb. 483; Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441.

An infant has no right to an action in equity to compel his father to support him. Huke v. Huke, 44 Mo. App. 308.

The cases differ upon the question whether, in case of the death or disability of the father, the mother is under like obligation to support her infant children. The following cases affirm this obligation: Alling v. Alling, 52 N. J. Eq. 92, 27 Atl. 655; Wilkes v. Rogers, 6 Johns. 566; Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; Freyre v. Tiernan, 76 Tex. 286, 13 S. W. 370; State use of Smith v. Martin, 18 Mo. App. 468; Missouri P. R. Co. v. Palmer, 55 Neb. 559, 76 N. W. 169; Bradley v. Sattler, 156 Ill. 603, 41 N. E. 171; Ellis v. Soper, 111 Iowa, 631, 82 N. W. 1041.

The following cases deny the existence, on the part of the mother, of an obligation that is legally enforceable: Englehardt v. Yung, 76 Ala. 534; Hughart v. Spratt, 78 Ky. 313; Whipple v. Dow, 2 Mass. 415; Worcester v. Marchant, 14 Pick. 510; Strawbridge's Appeal, 5 Whart. 568; Jordan v. Coffield, 70 N. C. 110 (Criticism in *Re Lewis*, 88 N. C. 81); Jackson v. Jackson, 1 Gratt. 143; *Re Cottrell*, L. R. 12 Eq. 566, 41 L. J. Ch. N. S. 70, 25 L. T. N. S. 405, 19 Week. Rep. 1076.

The universal rule is that a stepfather, as such, is not under obligation to support the children of his wife by a former husband, but that, if he takes the children into his family or under his care in such a way that he places himself *in loco parentis*, he assumes an obligation to support them, and acquires a correlative right to their services. Billingsley v. Critchett, 1 Bro. Ch. 268; Williams v. Hutchinson, 3 N. Y. 312, 53 Am. Dec. 301; *Re Ackerman*, 116 N. Y. 654, 22 N. E. 552; *Freto v. Brown*, 4 Mass. 675; Mulhern v. McDavitt, 16 Gray, 404; Kirchgassner v. Rodick, 170 Mass. 543, 49 N. E. 1015; Livingston v. Hammond, 162 Mass. 375, 88 N. E. 968; *Re Dissenger*, 39 N. J. Eq. 227; *Brown's Appeal*, 112 Pa. 18, 5 Atl. 13; *Hardy v. Leary*, 43 N. C. (8 Ired. Eq.) 57 L. R. A.

sist that he be required to charge the trust property with the support of his family to the extent of the income, and he will not be permitted, by this voluntary surrender of a right which the law gives, to impose on his creditor the burden of his bounty.

Hauser v. King, 76 Va. 731.

If there is an agreement that the father shall have maintenance out of the trust property, the trustee must apply the income to the support of the children without reference to the father's ability to support them.

Perry, Tr. § 612; 3 Pom. Eq. Jur. § 1309; *Thompson v. Griffin*, 1 Craig & P. 317, 5 Jur. 90; 2 Story, Eq. Jur. p. 600.

Under the Virginia statute a transaction of the sort now in question is absolutely void as to creditors whose debts have been previously contracted.

94; *Mull v. Walker*, 100 N. C. 46, 6 S. E. 685; *Davis v. Harkness*, 6 Ill. 173, 41 Am. Dec. 184; *Rawson v. Corbett*, 43 Ill. App. 127; *Mowbry v. Mowbry*, 64 Ill. 383; *Bond v. Lockwood*, 38 Ill. 212; *Meyer v. Temme*, 72 Ill. 574; *Capek v. Kropik*, 129 Ill. 509, 21 N. E. 836; *McMahill v. McMahon*, 113 Ill. 461; *Grossman v. Lauber*, 29 Ind. 618; *Webster v. Wadsworth*, 44 Ind. 283; *Gildewell v. Snyder*, 72 Ind. 528; *Gerdes v. Welser*, 54 Iowa, 591, 37 Am. Rep. 229, 7 N. W. 42; *Bradford v. Bodfish*, 39 Iowa, 681; *Staal v. Grand Rapids & I. R. Co.* 57 Mich. 239, 23 N. W. 795; *Re Besondy*, 32 Minn. 385, 50 Am. Rep. 579, 20 N. W. 366; *Elken v. Elken*, 79 Minn. 360, 82 N. W. 667; *Dixon v. Hosick*, 101 Ky. 231, 41 S. W. 282; *Norton v. Allor*, 11 Lea, 563; *Hennesey v. Bavarian Brewing Co.* 63 Mo. App. 111; *Smith v. Rogers*, 24 Kan. 140, 36 Am. Rep. 254; *Ellis v. Cary*, 74 Wis. 176, 4 L. R. A. 55, 42 N. W. 252; *Gerber v. Bauerline*, 17 Or. 115, 19 Pac. 849.

II. Obligation of parent who has ability to support.

The obligation of a parent, or of one standing *in loco parentis*, who is able to support the child, is not affected by the child's interest in a trust estate or other property.

Where the testator gave the residue of his estate to his grandson "at the age of twenty-one, and if he die before that age" then to one Freeman, Lord Chancellor Hardwicke said: "The law of nature obliges only fathers to maintain their children, and, unless the child from the mean circumstances of the case is in danger of perishing for want, the court will not direct the interest that should be made of a contingent legacy to be applied for that purpose; so that, unless the parent is totally incapable, or under particular circumstances, as having a numerous family of children, and is bordering upon necessity, the law of the land and of nature make it incumbent upon the parent to maintain his child." *Butler v. Freeman*, 3 Atk. 58.

Where the father is of sufficient ability to maintain his child no allowance will be granted from the child's estate. *Jackson v. Jackson*, 1 Atk. 515; *Wood's Estate*, 13 Phila. 391; *Re Harland*, 5 Rawle, 323; *Haglar v. McCombs*, 66 N. C. 845; *Burke v. Turner*, 85 N. C. 500; *Myers v. Myers*, 2 McCord, Eq. 254, 16 Am. Dec. 648; *Cruger v. Heyward*, 2 Desaus. Eq. 94; *Hines v. Mullins*, 25 Ga. 696; *State ex rel. Duncan v. Roche*, 94 Ind. 372; *Buckley v. Howard*, 35 Tex. 565.

Where there was a legacy to the children if

2 Am. & Eng. Enc. Law, 2d ed. pp. 1024, 1025; *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812; *Clough v. Thompson*, 7 Gratt. 26.

Messrs. Caskie & Coleman and Wilson & Manson, for appellees:

If the expenditure was intended as a gift to the beneficiaries, and not as a loan, yet, the amount having been returned to the trustee from the trust property that received the benefit of the expenditure, prior to the institution of this suit, the trust fund owes the trustee nothing, and the improvement cannot be subjected.

Norris v. Jones, 93 Va. 176, 24 S. E. 911.

The beneficiaries have shown that they furnished adequate consideration for the improvement; but if they have shown that they furnished any consideration at all, the decree of the lower court must be sustained,

they attained to twenty-one years of age, and if they died without issue before that age a gift over to others, the interest to be applied to the education and support of the children, a reference was ordered to report upon the father's ability before making an allowance to the father from the income. It was said: The court will not direct an allowance to the father of the infants out of their estate where they have any other sufficient provision for their maintenance, or a right, which can be enforced, to demand it from other sources. The court therefore will not direct an allowance to the father of the infants out of their estate, where he is of sufficient ability to maintain and bring them up without it, in reference to their situation and prospects in life, having due regard to the claims of others upon his bounty. *Re Kane*, 2 Barb. Ch. 375.

Where the infant had a small property, and her father had an income of \$7,000 a year, he was not allowed, as guardian, to charge against his daughter the expense of maintaining her for a year at college. *Re Wilber*, 27 Misc. 53, 57 N. Y. Supp. 398.

The mere fact that a mother has maintained her children gives rise to no implied promise to pay, the presumption being that it was a gratuity on her part. *Seltz's Appeal*, 87 Pa. 159.

Nothing will be allowed a father for maintenance out of an infant's estate except on special grounds. *Addison v. Bowle*, 2 Bland, Ch. 606.

A father who was guardian of his child was authorized to use income of the child's property for her support, but died without making such use of it, having himself maintained her. After the father's death, where the question arose between the infant and her father's widow and other children in reference to the amount that was due the infant from the trust fund left in the hands of the guardian, it was held that the claim of the widow and other children that the support of the infant should be charged against the fund in the father's hands could not be sustained. *Stigler v. Stigler*, 77 Va. 163.

A guardian will not be credited for the expense of supporting his ward where the ward's father was of ability to furnish such support. *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776.

The administrator of a father may not maintain a claim for the past maintenance of his children. Such maintenance creates no debt. *Presley v. Davis*, 7 Rich. Eq. 105, 62 Am. Dec. 396.

"The rule is that a father, if he be of ability, 57 L. R. A.

for the bill does not allege that the improvement was made on an inadequate consideration, but that it was made wholly without consideration.

Millhiser v. McKinley, 98 Va. 207, 35 S. E. 446.

A father is bound to maintain his infant children if he has sufficient ability; therefore a trustee cannot apply any part of the income of an infant's estate to its maintenance without an order of court. If the father has the means to maintain his children, the trustee cannot apply income to their support, although there is a provision for their maintenance in the instrument of trust.

2 Perry, Tr. § 612; *Jackson v. Jackson*, 1 Gratt. 146; *Griffith v. Bird*, 22 Gratt. 80; *Evans v. Pearce*, 15 Gratt. 515, 78 Am. Dec. 635; *Stigler v. Stigler*, 77 Va. 171.

must maintain his child, unless totally incapable, or, by having a numerous family of children, he borders upon necessity, the duty of providing for them devolves on him." *Dupont v. Johnson*, Ball. Eq. 279.

Where a father, on the ground of his inability, was given an allowance from the child's estate, and subsequently, and during the minority of the child, he became able to furnish support, he was held liable to reimburse the child. *Fuller v. Fuller*, 23 Fla. 236, 2 So. 426.

A claim against the estate of a deceased child for funeral expenses cannot be enforced where the father is able to pay them. *Rowe v. Raper*, 23 Ind. App. 27, 44 N. E. 770.

Counter to the authorities above given, is *Re Marx*, 5 Abb. N. C. 224, in which Surrogate Calvin states: "It is a mistake to suppose that a parent is under obligation to support his minor children where they have property that may be applied for that purpose."

III. Application of child's property.

a. In general.

Where a parent is unable to support his children in a manner suitable to the latter's position and expectation in life, a court having equity powers may authorize or sanction the use of the child's separate estate for its support and education. *Bethea v. McColl*, 5 Ala. 308; *Stewart v. Lewis*, 16 Ala. 734; *State use of Cannon v. Layton*, 1 Harr. (Del.) 324; *Holtzman v. Castleman*, 2 MacArth. 555; *Osborne v. Van Horn*, 2 Fla. 360; *Chapline v. Moore*, 7 T. B. Mon. 173; *Gerdes v. Weiser*, 54 Iowa, 591, 37 Am. Rep. 229, 7 N. W. 42; *Kinsey v. State ex rel. Shirk*, 71 Ind. 32; *Corbaley v. State ex rel. Holmes*, 81 Ind. 62; *Pyatt v. Pyatt*, 46 N. J. Eq. 285, 18 Atl. 1048; *Harring v. Coles*, 2 Bradf. 349; *Clark v. Montgomery*, 23 Barb. 464; *Kendrick v. Wheeler*, 85 Tex. 247, 20 S. W. 44; *Re England*, 1 Russ. & M. 499.

Such authority for, or sanction of, the use of the child's separate estate for its support and education, may also be given when the terms of the instrument making a provision for the child's benefit provide for it, notwithstanding the fact that the parent has ability to support it. See *infra*, III. b. 1, 2, 3.

"Suppose the father or mother should be in a low or mean condition in the world, the court will order, especially in the case of a mother, that the child should be maintained out of a provision left to it by a collateral relation." *Fawcner v. Watts*, 1 Atk. 406.

Where the wife had a separate estate, and

The right to impeach a transaction upon the ground that it is voluntary is not assignable.

Pom. Eq. Jur. § 1276; *Marshall v. Means*, 12 Ga. 61, 56 Am. Dec. 444; *Milwaukee & M. R. Co. v. Milwaukee & W. R. Co.* 20 Wis. 175, 88 Am. Dec. 740; *Sanborn v. Doe*, 92 Cal. 152, 28 Pac. 105; *Whitney v. Kelley*, 94 Cal. 146, 15 L. R. A. 813, 29 Pac. 624; *Lewis v. Berryville Land & Improv. Co.* 90 Va. 693, 19 S. E. 781; *Graham v. La Crosse & M. R. Co.* 102 U. S. 148, 26 L. ed. 106; *Jeffries v. Southwest Virginia Improv. Co.* 88 Va. 862, 14 S. E. 661.

Keith, P., delivered the opinion of the court:

It appears from the bill that the National Valley Bank of Staunton on the 20th of December, 1894, discounted for the Traders'

Bank of Lynchburg its note for \$5,000, which, after being curtailed from time to time, was renewed on the 19th of December, 1896, for \$3,150 at sixty days. Along with this note certain collaterals were delivered from which there was realized the sum of \$1,150.25. Those uncollected were returned to the Traders' Bank, and in place of them the Bank of Staunton received six notes as security for its debts. The collaterals thus received were three notes of Rucker, Clark, & Co., dated August 23, 1894, payable thirty-nine months after date to James Hancock, and indorsed by James Hancock and the Traders' Bank of Lynchburg, each for the sum of \$225.20; two notes of P. V. Rucker, dated October 1, 1894, payable three years and forty-two months, respectively, after date to Rucker, Clark, & Co., and indorsed by Rucker, Clark, & Co., James Hancock,

the father was without ability to maintain his children, it was held that the estate of the wife could not be taken into consideration, she not being under a legal obligation to maintain the children, and that maintenance should be allowed to the father from the children's estate. *Haley v. Bannister*, 4 Madd. 275.

Where the infants were entitled to the fund absolutely on attaining the age of twenty-one years, and only £30 each per annum was given by the will to the mother for their maintenance, and her own income was only £100 under the will, an increase of the amount granted for maintenance was allowed. *Aynsworth v. Pratchett*, 13 Ves. Jr. 321.

In England the general rule has been modified by statute. Section 126 of chapter 145, 23 and 24 Vict., passed in 1860, and § 43 of the conveyancing and law property act 1851, hereinafter referred to more at length under *infra*, III. b. 6, authorize trustees to apply income to the infants' support, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such support.

A widowed mother stands in the same relation to her child as the father does during his life. In a case where the mother was poor, and had become insane, a claim for board was charged against the children's property. *Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344.

In *Matthews v. Missouri P. R. Co.* 26 Mo. App. 75, and *Mauerman v. St. Louis, I. M. & S. R. Co.* 41 Mo. App. 348, it is held that on the death of the father the mother succeeds to the duties and obligations of her husband touching minor children.

In a case where the father had died intestate, leaving a large fortune, and it appeared that the income of the mother alone was not sufficient for all, it was held that the mother was entitled to an allowance for the support of the children. *Wilkes v. Rogers*, 6 Johns. 566.

In *Heyward v. Cuthbert*, 4 Desausa. Eq. 445, an allowance was made to the mother for the maintenance and education of her daughters and for the maintenance only of the sons, the education of the sons to be left to the executor of their father's estate.

In *Trimble v. Dodd*, 2 Tenn. Ch. 500, the court says: "If the father be without the necessary means to maintain his children according to their future expectations, or if he have the means but the income of the children is larger than his own, the modern usage is to make an allowance to the parent for maintenance."

57 L. R. A.

b. In particular cases.

1. Contract.

Certain English cases, some of which are referred to in *NATIONAL VALLEY BANK V. HANCOCK*, make a distinction between cases where the trust fund has its origin in a contract, usually a marriage settlement, and those in which it arises from a will or deed of gift. These cases go back to *Mundy v. Howe*, 4 Bro. Ch. 224, decided in 1793. In that case, pursuant to a marriage settlement and the will of the wife thereunder, trustees were "authorized and required" to pay for the maintenance and education of the children. The father of the children, without making any suggestion that he was not able himself to support them, applied for an allowance from the trust funds. The Lord Chancellor said: "It is perfectly clear from the cases that where the fund is given as a bounty, notwithstanding a provision for maintenance, the father if of ability must maintain the child; but in this case it is part of the execution of the trust contained in the contract." Maintenance was allowed.

Where by a marriage contract a fund, the property of the wife, was settled in trust for the children of the marriage at twenty-one, with a proviso that after the death of the wife, and until the children's shares should become payable, it was "upon trust to pay and apply" the income "for and toward the maintenance and education of such child or children" with a gift over to the husband for life, etc., the Master of the Rolls said: "This must be considered as a fund provided by the father, inasmuch as, but for the settlement, he would have taken it by virtue of his marital right. The settlement, however, altogether deprived him of any personal benefit (and so it was intended) so long as there was living issue of the marriage; but the proviso that the issue should have maintenance out of the trust fund clearly formed an integral part of the contract, and was one of the considerations which had moved the husband to join as a party in the settlement. He therefore had a right to have it strictly enforced in his favor without reference to the question of his ability." *Meacher v. Young*, 2 Myl. & K. 490.

In a similar case, where the settlement was by the wife's father, and trustees were authorized to apply the income, at their discretion, for the maintenance and education of the children during their minorities, it was held after the wife's death that the husband, without regard to his ability, was entitled to require that

and the Traders' Bank of Lynchburg, for \$250; and one note of W. E. Clark, dated October 1, 1894, payable thirty-nine months after date to Rucker, Clark, & Co., and indorsed by Rucker, Clark, & Co., James Hancock, and the Traders' Bank of Lynchburg, for \$250.

The bill charges that after exhausting every means to collect the collaterals in the possession of the Bank of Staunton, there was a balance due by the Traders' Bank of Lynchburg of \$1,999.75 of principal and \$267.55 of interest as of February 24, 1899, which will be wholly lost unless it can realize on the notes indorsed by James Hancock.

It is charged that James Hancock holds title as trustee under the fifth clause of the will of his father, the late A. G. Hancock, to a valuable house and lot situated on

Main street in the city of Lynchburg, called the "Traders' Bank Building," now occupied by the National Bank of Lynchburg. The trust declared by the will of A. G. Hancock is as follows:

"Item 5. I give and devise to my said son, James Hancock, as trustee for his wife and children, including those now born and all that may be born to him by his present or any future wife he may take, my storehouse and lot on Main street, Lynchburg, on the west side, between Ninth and Tenth streets, now occupied by M. E. Doyle, which I value at \$14,000, to be held in trust, not subject to his debts or liabilities, for the support and maintenance of his present and any future wife he may take and all his children; the said trust to continue during the life of the said James Hancock, and if at his death he shall leave a wife surviving

the income should be applied to the maintenance and education of the children, following the last two cases. *Stocken v. Stocken*, 4 Myl. & C. 95, 7 L. J. Ch. N. S. 305, 2 Jur. 693, 4 Sim. 152, 2 Myl. & K. 489.

Where by a marriage settlement trustees were merely given power to apply income to the maintenance and education, the father was held not entitled to an allowance without proof that he was unable himself to maintain the children. Referring to the distinction taken between cases where the property of the children is derived from the bounty of a stranger and under marriage settlements, such as *Mundy v. Howe*, 4 Bro. Ch. 224, *Stocken v. Stocken*, 4 Myl. & C. 95, 7 L. J. Ch. N. S. 305, 2 Jur. 693, 4 Sim. 152, 2 Myl. & K. 489, and *Meacher v. Young*, 2 Myl. & K. 490, Lord Chancellor Cottonham says that the distinction "has been carried quite as far as can be justified upon principle;" adding: "In both cases the question is one of construction and intention. In all the cases referred to there were distinct and positive trusts to apply the income to the maintenance of the children, applicable, according to the construction put upon the whole of the provision, to the case of a surviving father." It was held that where there is a mere power in the trustees to apply, the father cannot compel the exercise of that power, except as he can show that he is himself unable to support the children. *Thompson v. Griffin, Craig & P.* 317, 5 Jur. 90.

In *Ransome v. Burgess*, L. R. 3 Eq. 773, 36 L. J. Ch. N. S. 84, 15 Week. Rep. 189, there was a marriage settlement under which trustees were to apply the whole of the income, or so much as they might think fit, to the maintenance and education of the children,—the principal to be vested in them at the age of twenty-one years. Vice Chancellor Kindersley repeated and indorsed the criticisms upon the distinction made in *Mundy v. Howe*, 4 Bro. Ch. 224, and the cases that follow it, but held that in the case before him the father was entitled to have applied for the maintenance of the child so much of the income as might be necessary for that purpose, without reference to his own ability.

Attention is called to the references to the last case cited, and to *Hadow v. Hadow*, 9 Sim. 438, and *Brown v. Paull*, 1 Sim. N. S. 92, 20 L. J. Ch. N. S. 75, 15 Jur. 5, in *NATIONAL VALLEY BANK v. HANCOCK*.

Where trustees held two sums of £10,000 each, upon two trusts, one created by marriage settlement and one by will, but in the same terms, with the provision that the income

"shall and may be paid and applied and disposed of by the said trustees for the time being, for or towards the maintenance, education, and advancement in life of the children, or child, or issue who, for the time being, shall be presumptively entitled thereto, in such way and manner as they, the said trustees or trustee for the time being, shall think proper." Vice Chancellor Mallins says: "The words are 'shall and may' and those words in my opinion constitute a trust, and not merely a power, and the consequence is that the father, whether he is of ability to maintain the children or not, is entitled to such part of the income of the property for the maintenance and education of the children as is necessary. . . . Although the question arises partly under a settlement and partly under a will, and although perhaps as to the latter on the cases the point is not quite clear, I think it is sufficiently so to enable me to make the same declaration as to both sums." *Newton v. Curzon*, 16 L. T. N. S. 696.

Where a father made a voluntary post-nuptial settlement for the benefit of his wife and children, and authorized the trustee to "apply the whole or such part as the said trustees or trustee shall think fit of the income" "for and towards" the maintenance or education of his child, Mallins, Vice Chancellor, uses the following language: "If this were a case of an ante-nuptial settlement, and therefore having its basis in contract, and where probably money of the wife would also be put into settlement, the case would have been completely settled by authority; because it has been treated as settled law, from *Mundy v. Howe*, 4 Bro. Ch. 223, downwards,—contrary, in my opinion, as well as in expressed opinions of Lord Cottonham and Vice Chancellor Kindersley, to sound principle,—that where there is a trust for maintenance in a settlement made upon marriage, and the father has maintained the children without calling for contribution from the fund, he is in the position of a purchaser of so much of the fund as it would have been proper to apply towards maintenance. The construction put upon the trust is, that it constitutes a contract which entitled the father to claim the fund, though no demand may have been made by him for contribution from it. These decisions are, in my opinion, most unreasonable, but I should have followed them in a case of a settlement upon marriage. There is, however, no case where the doctrine has been held to apply, except where the trust for maintenance is contained in an ante-nuptial settlement, and where, consequently, it can be sup-

him, until her death. Upon his death, if no wife survive him, or if one do survive him, upon her death, the said property shall pass in fee simple absolute to all the children of the said James Hancock in equal shares; the descendants of any who now have died leaving descendants them surviving to take the share of their deceased ancestor."

This will bears date April 17, 1888, and was recorded in the clerk's office of the corporation court of Lynchburg on June 6, 1888. Those interested in the foregoing clause are Alice Hancock, wife of James Hancock, and certain infant children.

The bill states that the building at present on the lot was "erected during the year 1895 by the said James Hancock, and paid for by him with his individual funds, at which time Hancock was indebted as afore-

said on the notes held by your orator herewith filed; and your orator is advised that the said Hancock, being thus indebted, could not lawfully divert his own estate to the improvement of the trust estate as aforesaid, and leave his indebtedness to your orator unpaid and unprovided for; that the money expended by Hancock out of his individual estate in improving the trust estate being voluntary, and without consideration, was in fraud of the rights of your orator, and that the estate can, in favor of your orator, be charged with the value of said improvements."

James Hancock, in his answer, denies that the present indebtedness of the Traders' Bank to the complainant, or that any part thereof, existed in 1895, and claims that only one of the respondent's notes ever came into the complainant's hands as collateral

ported by the marriage contract. The question, therefore, is still open in the case of a purely voluntary settlement like the present." *Re Kerrison's Trusts*, L. R. 12 Eq. 422. It was held, accordingly, that the accumulations of income belonged to the children, and could not be reached by the trustee of the father in bankruptcy. A further reference to this case is made *infra*, IV.

Mundy v. Howe is limited, and *Ransome v. Burgess* is disapproved, in *Wilson v. Turner* (1883) L. R. 22 Ch. Div. 521, 52 L. J. Ch. N. S. 270, 48 L. T. N. S. 370, 31 Week. Rep. 438. That was the case of a marriage settlement where personal property was settled upon trust for the wife for life, and after her death for the children, with a provision that after the death of the wife the trustees should "apply the whole or such part as the said trustees or trustee should think fit of the annual income of the share or fortune to which any child should for the time being be entitled in expectancy under the trusts thereinbefore declared for or towards the maintenance or education of such child, either directly, or to his or her guardians or guardian, without seeing to the application thereof, or requiring any account of the same." After the death of the wife the trustees paid the whole of the income to the father (who supported the infant) as the father's property and without exercising any discretion. After the father's death the son claimed repayment from his father's estate, with an accounting. This was decreed. *Jessel, M. R.*, said, in criticising *Mundy v. Howe*, 4 Bro. Ch. 223: "But it is difficult to see how the construction of a marriage settlement can be different from that of a will. . . . On the other hand, considering the number of times *Mundy v. Howe* has been recognized in this court, it is quite impossible for this court now to say that that case is not law and not binding upon it. But it does appear to me, having regard to the dissatisfaction of so many judges, and considering the effect of that decision, that it is not part of our duty to carry it any further."

In the same case *Lindley, L. J.*, says: "The question which arises must be looked at from two points of view: First, What is the principle? and secondly, how it has been applied. I understand the principle to be, that we must look at every clause that comes before us in order to see whether there is a trust for the maintenance of the children such as would enable the father to insist on the trust fund being applied for the maintenance of the children, although he is himself able to maintain them. If 57 L. R. A.

there is such a trust he is entitled to have the children maintained out of the trust fund; if there is no such trust he is not." It was held that in the case at bar there was no such trust. *Ransome v. Burgess*, L. R. 3 Eq. 773, 36 L. J. Ch. N. S. 84, 15 Week. Rep. 189, was said to be on all fours with the case at bar, the words of the trust in that case being undistinguishable from those under consideration; but that case was disapproved.

2. Express trust for maintenance.

Where the language of the instrument whereby the children obtain the title to the property is such as to constitute an express trust for their maintenance, then application of the income for that purpose must be made without regard to the father's ability to support them.

This principle is involved in *Newton v. Curzon*, 16 L. T. N. S. 696, and *Re Kerrison's Trusts*, L. R. 12 Eq. 422, *supra*, III. 1, b.

Where there was a bequest to the children of H. when they should attain the age of sixteen years, with the direction to pay the income to H. for their maintenance and education, there was a reference to consider what would be a proper allowance for such maintenance, notwithstanding the fact that the father had a considerable income. *Hoste v. Pratt*, 3 Ves. Jr. 730.

Where the trust included a direction to apply the income for the maintenance and education of the children, and the father received the rents and mingled them with his own funds, maintaining the children himself, it was held, after the death of the father, that his executors were entitled to be allowed, in account, sums which it would have been proper to apply for those purposes, on the ground that he had been entitled to an allowance independently of his own means. *Stocken v. Stocken*, 4 Sim. 152, 2 Myl. & K. 489, 4 Myl. & C. 95, 7 L. J. Ch. N. S. 305, 2 Jur. 693.

Where the will directed that the yearly income should be paid to the testator's husband "to be by him applied in or towards" the maintenance of the children, the court held that it constituted a trust, and, though the trustees were given discretion, directed the application of the income "for the maintenance and education of the children, but to no greater amount than is proper for the purpose." *White v. Grane*, 18 Beav. 571.

3. Gift to parent for maintenance.

Where the gift is to the parent for the main-

for the original debt. The answer denies the allegation that James Hancock expended money out of his individual estate in improving the trust property held under the will of his father, or that it was made in fraud of complainant's rights. His account of the transaction is that when the property was devised by his father it was valued at \$14,000, with a storehouse which was rented out up to January 1, 1895; that during this period respondent had a good income from his own property and business, which was that of a leaf tobacco dealer; that he was able to maintain and did maintain his wife and children from his own means, and, as the storehouse was old and getting into bad condition, he determined to tear it down, and erect a bank building on the trust property; that respondent owed the trust fund the sum of \$602.30, with in-

terest from November 5, 1888, and rents received from the trust property from 1888 to 1895, amounting to the sum of \$5,765; that he erected the building under a contract with the Traders' Bank to rent it at an annual sum of \$1,750; that it cost \$9,100; and that since January 1, 1895, and prior to the institution of this suit, he had collected from the rents of said property the sum of \$6,391.66, had paid the city taxes, amounting to \$408.90, and state taxes, amounting to \$109.08, so that the balance due respondent from the trust fund had been paid back to him in full.

Upon the issues thus made and the proof in support of them, the judge of the circuit court, "being of opinion that the allegation of the bill that the moneys expended by the defendant, James Hancock, trustee, in improving the trust property, was of his in-

tenance of the children it is regarded as in effect a gift to the father, and he is entitled to receive the income without regard to his ability to maintain the children.

Where the bequest was to the father, "the better to enable him to provide for his younger children," the income was ordered paid to the father. *Brown v. Casamajor*, 4 Ves. Jr. 498.

Where a grandfather vested his estate in trustees to pay certain annuities, and, subject thereto, to pay the residue of the income "for and towards the maintenance and education" of the grandchildren, the Lord Chancellor said: "The practice was to refer it to the master to inquire whether the parents were of ability to maintain the children; if not, then to report what would be a proper maintenance; and this practice did not vary where a maintenance was directly given by the will, unless in cases where it was given to the father, under which circumstances it was a legacy to him." *Hughes v. Hughes*, 1 Bro. Ch. 387.

In so far as the last case holds that maintenance of infants is not allowed where a parent is of ability, although there is a direction to that effect in the will, it has not been followed by later cases, and, as stated in *NATIONAL VALLEY BANK v. HANCOCK*, it is understood that Lord Thurlow, who pronounced the judgment in *Hughes v. Hughes*, himself changed his opinion upon that point.

Where there was a legacy to the testator's niece of a sum to be allowed to and expended by her, at her discretion, for the education of her son, and she was not to be accountable to her son, or to any other person, for such application of the money, it was held that the niece was entitled to the money subject to the setting apart of a sufficient sum for the education of her child during his minority, and this, notwithstanding the fact that the father of the child was living. *Hamley v. Gilbert*, Jac. 354; *Thurston v. Essington*, Jac. 361, note.

"Where the interest of the children's legacies is given to a parent to be applied for or towards their maintenance and education, there, in the absence of anything indicating a contrary intention, the parent takes the interest subject to no account, provided only that he discharges the duty imposed on him of maintaining and educating the children." *Browne v. Pauli*, 1 Sim. N. S. 92. See, to the same effect, *Berkeley v. Swinburne*, 6 Sim. 613, 3 L. J. Ch. N. S. 165, and *Hadow v. Hadow*, 9 Sim. 438, cited in *NATIONAL VALLEY BANK v. HANCOCK*.

The testator appointed his son guardian of 57 L. R. A.

his two daughters, granddaughters of the testator, and, after giving the two grandchildren eleven negroes, he directs that his son "shall have the use of the property herein devised to them until they come of age or marry, for their maintenance and education." It was held that the use of the slaves was given as an equivalent for the education and maintenance of the daughters, and that their father was not liable to any account other than to show that he had performed that obligation. *Rainsford v. Rainsford*, Rice, Eq. 348.

Where a testatrix gave the income of one fourth of her estate to her husband to be used in the maintenance of her children by him, it was held to be a gift to relieve the father of their support, and he was allowed credit for the entire amount, it appearing that it was a proper amount for their support. *Camden Safe Deposit & T. Co. v. Ingham*, 40 N. J. Eq. 3.

4. Where trustees have discretion.

Where a testator gave an annuity to his grandchild to be applied "in and towards her maintenance and education and for her benefit and advantage and in such manner as his trustees should in their absolute and uncontrollable discretion think fit, whether John Stephens, her father, should be able to maintain and provide for her or not," and the trustee made a very small payment, while the father had maintained the infant, it was ordered that the full amount of the annuity, both for the time past and as it accrued in the future, should be paid to the father, he undertaking properly to maintain and educate the daughter, and to abide by the order of the court. *Stephens v. Lawry*, 2 Younge & C. Ch. Cas. 87, 12 L. J. Ch. N. S. 71.

A testator gave £3,000 to three children or the survivor or survivors who should attain the age of twenty-one years, with a gift over if all died under that age, and a direction to the trustees to pay and apply the whole of the income, or such part as they should think fit, to the maintenance and education of the infants. It was held that the discretion of the court should control that of the trustees, and where they had allowed only £80 a year to the father for maintenance (the court being satisfied that the father was of insufficient ability), the court directed the whole income of £100 to be allowed for that purpose. Vice Chancellor Malins says: "Paying every respect, as I always do, and as I am bound to do, to the discretion of the trustees, I still must exercise my own judgment, and take that

dividual estate, and voluntary, and without consideration, is not sustained, but, to the contrary, the evidence shows that the moneys belonging to the children and the rents received from the trust property by said trustee constituted a valuable consideration for the expenditures made," dismissed the bill.

The case is before us upon an appeal from this decree.

There can be no doubt of the right of a creditor in a proper case to subject improvements made by his debtor on the property of another. This subject was recently considered by this court in *New South Bldg. & L. Assn. v. Reed*, 96 Va. 345, 31 S. E. 514, where the court, speaking through Judge Harrison, said: "D. V. Reed, having created the debts due to the appellants, could not thereafter lawfully divert his estate to

the payment of purchase money due from his wife on her separate real estate, or to the cost of improving said real estate, leaving his own debts unpaid, and without the means of payment. It is well settled that improvements put upon the wife's separate realty by the husband in fraud of creditors can be followed by the creditors on the premises where they are put, and the realty can, in favor of the creditors, be charged with the value of such improvements. It would be contrary to the plainest principles of right and justice to permit an insolvent husband to divert his means, and invest it in improving his wife's separate estate, which is not liable to his debts, and thus defeat the demands of his creditors."

Appellee insists, however, that, inasmuch as the notes with which it is now sought to charge the trust property were assigned to

course for my wards which I think is most for their benefit." *Davey v. Ward*, L. R. 7 Ch. Div. 754, 47 L. J. Ch. N. S. 335, 26 Week. Rep. 390.

Where trustees under a will were to pay the income of a bequest to children to their mother, "to be by her applied for their benefit at her discretion," and the father and mother lived apart and the father supported the children, on the petition of the father for an allowance to him the court held that the mother did not "exercise a sound discretion, and that, where the court finds such to be the case, though the income is by the words of the will left to the discretion of a given person, the court has power to control that discretion and to deal with the income." *Re Roper's Trusts*, L. R. 11 Ch. Div. 272, 27 Week. Rep. 408, 40 L. T. N. S. 97.

Where trustees were given power to apply income for the maintenance of children, notwithstanding their father might be living and able to maintain them, and the trustees desired to apply the same, the court held that it would not interfere with such discretion. *Brophy v. Bellamy*, L. R. 8 Ch. 798, 43 L. J. Ch. N. S. 183, 29 L. T. N. S. 380.

In *Davey v. Ward*, L. R. 7 Ch. Div. 754, 47 L. J. Ch. N. S. 335, 26 Week. Rep. 390 (cited in *NATIONAL VALLEY BANK V. HANCOCK*), there was a legacy to three children and to the survivor who should attain the age of twenty-one years; if none lived to be twenty-one, then over. Trustees were authorized to "apply the whole or such parts as they or he [the said trustees or trustee for the time being], shall think fit" of the income "for or towards" the maintenance, education, and advancement in the world of the infants. The surplus of income was to be accumulated. Vice Chancellor Mallins held that he had power to overrule the discretion of the trustees, and to direct a larger share of the income than the trustees were willing to appropriate for that purpose, to be paid to the father for the support and education of the children.—It appearing that the father was unable himself to give them proper advantages.

Where a trustee has discretion to apply income to the support of a child, and the father becomes bankrupt, and the trustee, in the exercise of his discretion, advances sums to the father for such support, and thereafter the father acquires property, he cannot be compelled to refund to the trustee the amount of the advancements. *Pearce v. Olney*, 5 R. I. 269.

Where a trustee is given discretion as to

the maintenance of children the court will not interfere if he has exercised that discretion within the limits of a sound and honest exercise of the trust. *Read v. Patterson*, 44 N. J. Eq. 211, 14 Atl. 490.

5. Where there is a direction for accumulation, or no express authority for use of income.

Under this and the next following subdivision certain cases are cited, not as directly involving the question of a parent's liability, but as laying down principles of construction that probably would be applicable in cases involving the additional element of a parent's inability to support his child. This explanation applies to *Harvey v. Harvey*, 2 P. Wms. 21; *Greenwell v. Greenwell*, 5 Ves. Jr. 194; *Kime v. Welfitt*, 3 Sim. 533; *Rhoads v. Rhoads*, 43 Ill. 239; *Lomax v. Lomax*, 11 Ves. Jr. 48; *Ex parte Kebble*, 11 Ves. Jr. 604.

The courts have gone far in favoring the application of income to the maintenance of infants when it seemed to be for their welfare.

A father had devised all his property to his eldest son, charged with the payment of £1,000 each to his younger children when they should attain the age of twenty-one years, but made no provision for maintenance for the younger children during their minorities. Application was made in behalf of the younger children for maintenance, "upon which the Master of the Rolls, having taken time to consider the case and having also been attended with precedents, decreed that the younger children should recover maintenance. His honor observed that, these being vested legacies and no devise over, it would be extremely hard that the children should starve when entitled to so considerable legacies for the sake of their executors, administrators, who, in case of their deaths, would have the legacies." *Harvey v. Harvey* (1722) 2 P. Wms. 21.

There was a direction for accumulation of income during the minority of infants, with a gift over in case none attained full age. Maintenance was allowed by Lord Chancellor Rosslyn, though he stated that he feared that it would be his will, and not the testator's. *Greenwell v. Greenwell*, 5 Ves. Jr. 194, *Cavendish v. Mercer*, 5 Ves. Jr. 195, note, and *Fendall v. Nash*, 5 Ves. Jr. 197, note, are to like effect, it appearing, however, in *Cavendish v. Mercer* that the father was of insufficient ability, and in *Fendall v. Nash* that the father was bankrupt.

In *Errat v. Barlow*, 14 Ves. Jr. 202 (where

the Bank of Staunton after the erection of the building, appellant would have no right to attack the transaction, even though it were conceded that Hancock had improved the trust property with his own funds, invoking for his protection the principle that "an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor will be held void as contrary to public policy, and as savoring of the character of maintenance."

It is true that a mere naked right to sue in equity to avoid a fraud is not assignable, but, as stated in 2 Am. & Eng. Enc. Law, 2d ed. pp. 1024, 1025, this rule applies only to a case where the assignment does not carry anything which has itself a legal existence and value independent of the right to sue for a fraud. It does not apply to a case where such right is merely incident-

al to a subsisting substantial property which has been assigned, and which is itself intrinsically susceptible of legal enforcement. In such a case the assignee is entitled to maintain an action to set aside a fraudulent conveyance of the property assigned, if his assignor might have done so.

Wait, Fraud. Conv. 2d ed. § 92, says "that the right to avoid a fraudulent conveyance is not personal to the then existing creditor. His successors and assigns may enforce the right. Thus, the subsequent purchaser of a pre-existing note may attack a transfer." *Warren v. Williams*, 52 Me. 349; *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812; *Schaferman v. O'Brien*, 28 Md. 585, 92 Am. Dec. 708.

2 Minor, Inst. p. 690, treating of the right to avoid voluntary conveyances, says

it appeared that the father was not of ability), *Greenwell v. Greenwell* and *Fendall v. Nash* were disapproved by Lord Chancellor Eldon, who states: "The result is that if the chance of surviving [among several children] is equal among all, and no other interest that upon any contingency would take effect would be defeated, maintenance shall be allowed out of the interest; but it is impossible to give it where, in any event, under the operation and construction of the will, that interest may possibly belong to other persons."

Where there was an express direction for accumulation during minority of infants (the testator, their father, understanding that other ample provision had been made for the children, which proved to be a mistake), with a gift over if no child lived to be twenty-one years of age; and it appeared that there was the possibility of issue unborn who might be entitled to the accumulated fund,—it was held that it would not be proper to affect their rights by an allowance for maintenance. *Kime v. Wellitt*, 8 Sim. 533.

Where the testator had directed his trustees to accumulate the income of the infant's trust fund it was held to be intended to preserve the income, and not to prevent the application of it to their benefit if necessary, and that therefore no "contrary intention" was expressed in the will, under § 43 of the conveyancing act of 1881 (*infra*, III. b, 6). It appeared that the income of the father of the children was not sufficient for their support. *Re Thatcher's Trusts*, L. R. 26 Ch. Div. 428, 53 L. J. Ch. N. S. 1050, 32 Week. Rep. 679.

In the case of an absolute direction for accumulation for twenty-one years of property worth £10,000 a year, thereafter to be held in trust for Sir Henry Havelock, a major general in the army, and "the brave, pious, and highminded son of the illustrious soldier, Sir Henry Havelock," and for his eldest son and other sons in tail,—it was held that, as Sir Henry Havelock was possessed of only a moderate income, the sum of £2,700 per annum from the death of the testator should be allowed him for the benefit of his two infant sons. *Havelock v. Havelock*, L. R. 17 Ch. Div. 807, 50 L. J. Ch. N. S. 778, 44 L. T. N. S. 168, 29 Week. Rep. 859.

The will of a father gave a trustee discretion to apply the income of a trust fund to the education of his infant child. The child's mother was the only other person who, in case of the death of the infant, could have an interest in the income, and upon her application the court ordered an allowance from the £7 L. R. A.

income for the maintenance, as well as the education, of the infant, proof being given of the necessities of the mother. *Pitts v. Rhode Island Hospital Trust Co.* 21 R. I. 544, 48 L. R. A. 783, 45 Atl. 553.

An allowance is made, even where the will directs accumulation during the minority of the infant, provided it appear that the father is unable to support. *Tompkins v. Tompkins*, 18 N. J. Eq. 303.

"Where legatees comprise a class, all or some of whom must absolutely take the fund, all having a common interest in it and an equal chance of taking or being survivors, . . . courts of equity will allow interest for maintenance to infant legatees, and this though there is a direction for the accumulation of the interest for the benefit of the common fund, and although the infant legatees have a father living, but without sufficient ability to support and educate them according to their future expectations." *Newport v. Cook*, 2 Ashm. (Pa.) 332.

Where a will directed an estate to be accumulated for fifteen years, it was held that the court could direct anticipation for maintenance of infants. The court says: "This does not subvert the will, or tend to defeat the intention of the testator, for the children were the darling objects of his solicitude, and were he living he would undoubtedly make ample provision for them. A court of chancery may do what it is evident from the will the testator would do if living." *Rhoads v. Rhoads*, 48 Ill. 239.

6. Where infant's rights are contingent.

The following English cases, in addition to those already cited, in which the element of contingency is found, occurred before the passage of the English statute modifying the early rule.

A petition was presented for maintenance out of the interest of a legacy to the children of testator's daughter, to be vested when the youngest child should attain the age of twenty-one years. Lord Chancellor Eldon says: "If all die under twenty-one, and a child, not yet in existence, should come into existence and attain that age, that child clearly would take the whole interest as well as principal. Therefore I may give it to these children who may never become entitled to it." The application was therefore refused. *Lomax v. Lomax*, 11 Ves. Jr. 48.

In *Ex parte Keble*, 11 Ves. Jr. 604, Lord Eldon says: "The case in which maintenance

that the statute upon the subject protects persons suing *ex maleficio*, as for adultery or seduction, or any tort, and, *a fortiori*, those claiming *ex contractu*, as for a debt, or for breach of an official bond; and that whether as the original creditor or his assignee. *Clough v. Thompson*, 7 Gratt. 28; *Staton v. Pittman*, 11 Gratt. 102; *Shirley v. Long*, 6 Rand. (Va.) 735.

This brings us to the consideration of the controlling question in the case: Does the record establish the allegation of the bill that Hancock, being at the time indebted, diverted his own estate to the improvement of the trust estate in derogation of the right of his creditors?

It is true that a father, if of ability to do so, is bound to maintain his infant children, even though they may have property of their own. *Evans v. Pearce*, 15 Gratt.

has been allowed, though not given by the will, is where there are children, some or one of whom must take the property, and all have an equal chance of surviving and a present interest. But it cannot be done if there is a gift over, or if the children are not all the persons among whom it is to go."

Where legacies with interest were given to grandchildren on their attaining the age of twenty-one years, with a gift over in case neither attained that age, maintenance was refused, though it appeared that the father was unable to furnish it. *Errington v. Chapman*, 12 Ves. Jr. 20.

In 1860, what is known as Lord Cranworth's act was passed, being 23 and 24 Vict., chap. 145, which provided as follows: "In all cases where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply, for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect to such property, whether there be any other fund applicable to the same purpose or any other person bound by law to provide for such maintenance or education or not." Then follows a provision for accumulation of residue of income "for the benefit of the person who shall ultimately become entitled to the property from which such accumulation shall have arisen," and a provision that the trustee might at any time "apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year."

In *Re Cotton*, L. R. 1 Ch. Div. 232, 45 L. J. Ch. N. S. 201, 33 L. T. N. S. 720, 24 Week. Rep. 243, Jessel, M. R., says that Lord Cranworth's act "really extends to all infants the benefit which in *Chambers v. Goldwin*, 11 Ves. Jr. 1 [cited herein under III. b, 5, *supra*] and other cases, the court had extended to infants for whom a provision had been made on the contingency of their attaining twenty-one, by a parent or a person standing *in loco parentis*. In cases where the person making the provision was a parent or stood *in loco parentis* the court held that the attaining of twenty-one was put in simply to fix the time of payment, and not to deprive the child of the benefit in the meantime, and accordingly it gave the income by way of maintenance. But it declined to ex-

515, 78 Am. Dec. 635; *Griffith v. Bird*, 22 Gratt. 73. This principle is stated by Perry on Trusts as follows: "A father is bound to maintain his infant children if he has sufficient ability. Therefore a trustee cannot apply any part of the income of an infant's estate to its maintenance without an order of court. If the father has the means to maintain his children, the trustee cannot apply income to their support, although there is a provision for their maintenance in the instruments." § 612.

There seems, however, to be an exception or modification of this rule, which, in the section just quoted from Perry, is thus stated: "If there is an agreement in a marriage settlement that the father shall have maintenance out of the trust property, the trustee must apply the income to the support of the children without reference to the

tend the rule to other cases, and consequently the legislature intervened."

Where a definite sum was set apart for maintenance, with a direction that the balance of the income of the trust fund should accumulate in order that it might form a part of the testator's general personal estate, it was held that the court could not, under Lord Cranworth's act, appropriate an additional sum from the income for maintenance (the capital being payable "if and when" the infant should be twenty-one, or marry). The court says: "The rule of law is well established that a contingent legacy does not carry interest while it is in suspense, except in the case of a legacy by a parent or one standing *in loco parentis* to the legatee; and that exception is subject to another exception that the rule giving interest to the child does not take effect when the testator has provided another fund for his maintenance so that the income of the legacy is supposed not to be required for the purpose." In that case it was held as to the infant: "If she attains twenty-one she will not become entitled to any of the intermediate income." *Re George*, L. R. 5 Ch. Div. 837, 47 L. J. Ch. N. S. 118, 37 L. T. N. S. 204, 26 Week. Rep. 65.

Where the trust fund was to go to the daughters who should attain twenty-one years of age, and their father was unable to furnish them maintenance, a charge upon the principal was allowed sufficient to raise a considerable amount for the maintenance of the daughters, together with the amount of a single payment of premium on insurance against the event that none of the daughters should attain the age of twenty-one. *DeWitte v. Pallin*, L. R. 14 Eq. 251, 26 L. T. N. S. 825, 20 Week. Rep. 858.

In 1881 was passed the English conveyancing and property act (44 & 45 Vict. chap. 41), § 43 of which provides: "Where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not." Then follow provisions for accumulation of income and use of the same as

father's ability to support them. If, however, the trustees have a discretionary power in that respect, the father cannot compel them to exercise it in his favor; nor will the court interfere if they choose to exercise their discretion. But where the income is expressly given to the father for the maintenance of his children, these rules do not apply, for such gift is in some sort a gift to the father."

3 Pom. Eq. Jur. § 1309, note, gives the exception to the rule as follows: "Where the property is not given to the infants simply with a direction for their maintenance, but is conveyed upon an express trust for their maintenance, then it must be so applied irrespective of their father's ability to support and educate them." This distinction is recognized in 2 Story, Eq. Jur. p. 600, note.

needed, and the following qualification of the effect of the act: "This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained."

Where the testator directed the trustees to accumulate the income of infant's trust fund, it was held, under the act last cited, that the provision was intended to preserve the income, and not to prevent the application of it for the infant's benefit if necessary, and therefore that no "contrary intention" was expressed in the will. *Re Thatcher's Trusts*, L. R. 26 Ch. Div. 426, 53 L. J. Ch. N. S. 1050, 32 Week. Rep. 679.

Section 48 of the act of 1881 was held to be an extension of Lord Cranworth's act, and to replace § 26 of that act, and to avoid the question raised in *Re George*, L. R. 5 Ch. Div. 837, 47 L. J. Ch. N. S. 118, 37 L. T. N. S. 204, 26 Week. Rep. 65. The act was held to give to the trustees "extraordinary powers of dealing with the interest upon infant's contingent legacy so that they can take away from the residuary legatee so much of the interest or accumulations as may be necessary for the infant's maintenance, education, or benefit." But where the contingency was the infant's survival of a third person then in being, it was held not to be a contingency "on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age;" and where in such a case the contingent legacy did not carry interest until it was payable, it was held that no application of the statute could be made. *Re Judkin's Trusts*, L. R. 25 Ch. Div. 743, 53 L. J. Ch. N. S. 496.

The court has no power to allow maintenance to infants out of a fund which may on the happening of a contingency belong to some other person. *Re Davison*, 6 Paige, 136; *Re Ryder*, 11 Paige, 185, 42 Am. Dec. 109; *Deen v. Coxsens*, 7 Robt. 178.

Where there is a legacy by a parent to his child, or a grandparent to his grandchild, or by one standing *in loco parentis*, equity may decree an allowance of interest, if necessary, for the support of the infant, whether the legacy be vested or contingent on the attainment by the infant of a certain age. *Seibert's Appeal*, 19 Pa. 49; *Leiby's Appeal*, 49 Pa. 182.

c. To what extent.

1. Need of child.

The general rule is well stated in *Ela v. 57 L. R. A.*

In a note to *Hughes v. Hughes*, 1 Bro. Ch. 387, it is said that maintenance of infants is not allowed by courts where the parent is of ability, although directed by the will. In a note it is said that Lord Thurlow continued of this opinion for some time, and the precedents certainly supported him; but that afterwards he changed his opinion, and the practice afterwards became varied, and was settled to the contrary. "It appears, therefore," says the annotator, "that each case must be viewed by the court so as to meet its exigencies by a sound discretion, unfettered by any strict rule of mere technicality; and that it will not only now allow maintenance for the time past, where it should be allowed at all, but will, in a fit case, direct maintenance, although the author of bounty may not have expressly prescribed it. The court

Brand, 63 N. H. 14, as follows: "What allowance, if any, shall be made to a father out of his children's property for their maintenance, is a broad question of equity. The circumstances of each case, including the respective estates of father and child, are considered, and the decision is a just and reasonable conclusion of fact with due regard for the general rule of parental duty."

Where the trustee was to receive the income, and "to apply and dispose of the same or a sufficient part thereof for and towards the maintenance, education, support, and bringing up" of the children, and it was shown that the father had a clear income of only £1,000 a year, Lord Chancellor Loughborough ordered a reference to consider what would be a proper allowance for the maintenance of the children. *Hoste v. Pratt* (1798) 8 Ves. Jr. 730.

"Where there is a numerous family of children who are infants, upon an application for maintenance for the eldest son, the court will make a liberal allowance to him that he may be the better able to maintain his brothers and sisters, considering him in the light of the father of the family." *Petre v. Petre*, 3 Atk. 511; *Lanoy v. Athol*, 2 Atk. 447.

In *Bradshaw v. Bradshaw*, 1 Jac. & W. 647, a liberal allowance was made to an infant in order that he might provide for the maintenance of an illegitimate brother otherwise unprovided for.

Where six children had an income of £8,600 a year, an allowance of £1,400 a year for their support was made to the father, notwithstanding he had himself an income of £6,000 a year. It appeared that the father had to maintain two houses to the absorption of his own income. Sir William Grant says: "It would be a harsh thing for the court to oblige the petitioner to put down his establishment in any part to educate his children when they have large incomes of their own." *Jervoise v. Silk*, Coop. Ch. 52.

Where the trust was to pay the income to the father "to be applied by him for the maintenance and education" of the infant children, and the misconduct of the father and mother had led the court to commit the guardianship of the children to others, and the parents were indigent, the allowance for the maintenance of the children was increased to provide for the support of their parents. The court said: "To do so is evidently for the benefit of the infants themselves." *Allen v. Coster*, 1 Beav. 202, 9 L. J. Ch. N. S. 131.

Where it appeared that the children had a joint income of between \$3,500 and \$4,000 a

will also dispense with any reference as to the father's ability where the circumstances are strong; as where the fortune of the child is very large, and the father has other children, or will be much inconvenienced by the burden of supporting the child adequately to a fortune in which he (the father) cannot participate."

In *Mundy v. Howe*, 4 Bro. Ch. 226, the Lord Chancellor said: "It is perfectly clear from the cases that, where the fund is given as a bounty, notwithstanding a provision for maintenance, the father, if of ability, must maintain the child; but in this case it is part of the execution of the trust contained in the contract."

In *Davey v. Ward* (1877-78) L. R. 7 Ch. Div. 754, a testator gave a legacy of £3,000 to three children, or the survivors or survivor, who should attain twenty-one; but,

year, and the father was unable himself to keep up an establishment such as would correspond to their prospects in life, he was allowed \$2,500 a year, the court stating that the rule was to seek that which was best calculated to promote the permanent interest, welfare, and happiness of the children, rather than an accumulation of income. *Re Burke*, 4 Sandf. Ch. 617.

In *McKnight v. Walsh*, 23 N. J. Eq. 136, the rule laid down in *Re Burke*, 4 Sandf. Ch. 617, and in the English cases just cited, is disapproved. The court says: "The *dotage* and authorities in the English cases are founded upon the law of primogeniture, and the established custom among the nobility and gentry by which the heir at law upon whom the family seat devolves, as well in infancy as when of age, is, by their customs, bound to keep up the family mansion as a home for his sisters and younger brothers, and is allowed out of his estate sufficient for that purpose." The testator had directed his executor to invest \$25,000, and after the death of testator's daughter to expend the legal interest toward the proper maintenance of her child or children during their minority. The executor paid the entire income to the father of the daughter's child. It was held that the executor was entitled to credit only for such part of the payments to the father as were reasonable for the support of the child, and that no further credit could be given on the theory that larger payments were proper to enable the father to live in a style suitable to the condition and prospects of the infant.

To obtain an allowance a father need not be actually bankrupt. The welfare of the child, the means of the father, the demands of others upon him, and the future expectancy of the child will all be considered. *Bedford v. Bedford*, 136 Ill. 354, 26 N. E. 662.

2. Past and future maintenance.

The old English rule was that if a father had by any means maintained his children the court would not grant him an allowance by way of reimbursement for what he had spent in the past. This was the doctrine of *Hill v. Chapman*, 2 Bro. Ch. 231, and *Andrews v. Partington*, 3 Bro. Ch. 60, 2 Cox, Ch. Cas. 223.

In *Hoste v. Pratt*, 3 Ves. Jr. 730, it was stated by Sir John Mitford as *amicus curie* that Lord Thurlow afterward changed his opinion on this point as expressed in *Andrews v. Partington*.

And in *Nisson v. Shaw*, 9 Ves. Jr. 286, the Master of the Rolls said, referring to *Andrews v. Partington*: "That case has been very much 57 L. R. A.

if all three died under twenty-one there was a gift over. The will contained a direction to the trustees to apply the whole or such parts as they should think fit of the income of the legacy for the maintenance and education of the legatees while under twenty-one. The court held that it had power to control the discretion of the trustees in the allowance to be made for children; and the court, in opposition to the trustees, directed that the whole income should be paid to the father of the children for their maintenance, together with an equal amount for past maintenance.

In *Ransome v. Burgess* (1866-67) L. R. 3 Eq. 773, Vice Chancellor Kindersley states the result of the cases to be "that, where the trust property is derived from the bounty of a stranger, the father, if of sufficient ability, is not entitled to have the in-

shaken. I have found two decrees of Lord Alvanley allowing maintenance for the time past."

In *Reeves v. Brymer*, 6 Ves. Jr. 425, and *Sherwood v. Smith*, 6 Ves. Jr. 454, Lord Eldon made orders for an allowance to the father for past maintenance, expressing his approbation of the change in the rule which permitted such allowance.

The later rule, however, was disapproved by the Master of the Rolls in *Re parte Bond*, 2 Myl. & K. 440, 4 L. J. Ch. N. S. 84, where the court said: "To allow for past maintenance, and to treat as a debt the expenditure which the law imposed upon the father as a duty, would be to go against the settled rule of the court."

Where the question was what allowance should be made to a mother for past maintenance, an inquiry was directed to ascertain as nearly as possible what had been the actual cost to her for maintenance, and an allowance for the past based on the amount of the child's fortune was refused, although it was held that, as to the future, such an allowance would be proper. *Bruin v. Knott*, 9 Jur. 979, 1 Phill. Ch. 572, 14 L. J. Ch. N. S. 440.

The fact that the father had lived out of the country, and could not make earlier application for an order for maintenance, was held to be a special circumstance permitting an allowance for past maintenance, it appearing that the father had incurred a large debt for that purpose. *Carmichael v. Hughes*, 6 Eng. L. & Eq. 71.

Where the father was unable to support his child, and had as her guardian received the rents of her property, and had maintained her and spent a considerable sum for her benefit, it was held that he was entitled to retain the rents by way of allowance for his expenditures for maintenance, etc. *Wright v. Vanderplank*, 8 DeG. M. & G. 133.

A mother maintained her infant son without making manifest any intention to seek repayment. Six years after attaining his majority the son died. The mother's claim as a creditor of the son's estate was rejected. The court said: "When a mother maintains an infant child, although not under any legal liability to do so, she may be considered to do it under one of three views: First, with the intention of afterwards claiming the amount as a debt due to her; secondly, as an act of maternal duty, or of kindness, or as bounty,—that is, as a gift; or thirdly, she may do it on an intermediate footing, that is to say, in the expectation or the hope of being recouped by means of an

come applied to the maintenance of his children; but that, if the trust property is the subject of a marriage settlement, and therefore the creation of the trust is a matter of contract, then, if the language of the settlement is so framed as to express a trust to apply the income or any part of the income in maintaining the children, although the *quantum* of income to be so applied is left to the discretion of the trustees, the father is entitled to have whatever is proper and necessary for the maintenance of his children applied for that purpose, without reference to his ability to maintain them; but, if the language of the settlement expresses merely a power so to apply the income, or any part thereof, to the maintenance of the children, then the father is not so entitled."

In *Hadow v. Hadow*, 9 Sim. 438, the tes-

order for maintenance out of some fund under the jurisdiction of the court, and which it would allow to be so applied, although such expenditure had not been previously sanctioned by the court. But if a mother, or any other person, confers a gift, intending it as a gift at the time, she cannot afterwards, under a changed state of circumstances, assert that it was a loan." *Re Cottrell*, L. R. 12 Eq. 566, 41 L. J. Ch. N. S. 70, 25 L. T. N. S. 405, 19 Week. Rep. 1076.

Where a father was of insufficient ability an allowance was made to him for past maintenance to the extent of the payment of a debt incurred by him for the benefit of the child. *Re Hodges*, L. R. 7 Ch. Div. 754, 47 L. J. Ch. N. S. 335, 26 Week. Rep. 390.

The guardian of a ward may, without leave of the court, pay to the ward's widowed mother a reasonable amount to reimburse her for the ward's support, theretofore furnished by her, subject upon his accounting to proof that the allowance was reasonable. *Melaney v. O'Driscoll*, 164 Mass. 422, 41 N. E. 654.

In *Wilkes v. Rogers*, 6 Johns. 566, there was an allowance to the mother for past maintenance.

Where an allowance for past support is asked for, the court will make only such as would have been granted if asked for in advance. A subsequent increase in the ward's fortune will not justify an allowance for the past greater than actual expenditure. *Ailing v. Ailing*, 52 N. J. Eq. 92, 27 Atl. 655.

Where application is made for past maintenance the court will consider whether it would have been allowed if application had been made in advance. *Norris v. Fisher*, 2 Ashm. (Pa.) 411.

On his accounting a father was allowed payments from his child's estate for her maintenance and education on his evidence that he would not have been able of his own means to give his daughter the advantages that she thus received. *Holtzman v. Castleman*, 2 MacArth. 555.

A guardian on the settlement of his accounts was allowed for payments to a ward's father for board, on proof of the father's indigent circumstances, and of a demand made by him. *Beasley v. Watson*, 41 Ala. 234.

In *Baines v. Barnes*, 64 Ala. 375, the court said that it was unwilling to extend the principle laid down in *Beasley v. Watson*.

Allowance will be made for past, as well as future, maintenance. *State use of Smith v. Martin*, 18 Mo. App. 468; *Otte v. Becton*, 55 Mo. 99.

57 L. R. A.

tator gave one third of his residuary estate to his wife, and the other two thirds to trustees in trust for his children at twenty-one, and directed that, until the shares of his children should be payable to them, the income thereof should be paid to his wife, to be by her applied, or, in case of her death, to be applied by the trustees for the maintenance of the children. It was held "that the wife was entitled to the income of the children's share during their minorities, she maintaining them in a proper manner."

In *Browne v. Paull*, 1 Sim. N. S. 92, the testator gave all his property to trustees in trust to pay an annuity to his wife, and, subject to that payment, to convey, assign, or transfer all his property unto and equally between his children when and as they severally attained twenty-one, and in the meantime to pay to his wife, or otherwise apply,

Where the guardian of infants loaned money to their mother, which she promised to repay out of her charges for the support of the infants, and she afterward refused to make such charges, the guardian may not have an allowance therefor on the settlement of his accounts. *Wyckoff v. Hulise*, 32 N. J. Eq. 697.

Where a father, who was guardian of his children, made no charge during his life for their maintenance, it furnishes the strongest proof that he was able to support them, and no charge therefor in favor of his estate will be allowed after his death. *Evans v. Pearce*, 15 Gratt. 513, 78 Am. Dec. 635.

Where there is no evidence that a mother intended to make a charge for the support of her daughter and ward, her administrator will not be allowed to set up a claim for it. *Guilon v. Guilon*, 16 Mo. 48, 57 Am. Dec. 223.

An allowance will be made to a mother for all reasonable payments for the past maintenance and education of her children from the time of the death of the father, even if the mother has a separate estate. *Re Belsel*, 110 Cal. 267, 40 Pac. 961, 42 Pac. 819.

Where a guardian paid income to the mother, and she spent the money for herself, but supported the child out of her own funds, in an accounting of the infant's guardian he is not entitled to credit for support of the ward furnished by the mother, she having furnished it gratuitously and never having made any claim therefor. *Taylor v. Hill*, 86 Wis. 99, 56 N. W. 738.

But in *Pierce v. Pierce*, 64 Wis. 73, 54 Am. Rep. 581, 24 N. W. 498, where a mother had supported her infant child, who, a short time before its death, had received real estate, the mother was permitted to enforce against the real estate her claim for support of the child. The court says: "The fact that the mother for a considerable part of the time supported the child when it had no estate, and she could not have had any expectation of an allowance therefor, can make no difference in equity, as her right to any allowance in such a case does not depend upon contract, either expressed or implied, or an implied assumpsit."

3. Income and principal.

Where the welfare of the child requires it, and especially where the legacy is a small one, the court will permit an encroachment upon the principal.

Where the legacy to a child was only £100 the Lord Keeper allowed an encroachment upon the principal for expenses of education. *Barlow v. Grant* (1684) 1 Vern. 235.

the rents and proceeds of their respective shares for or towards their respective maintenance, education, and advancement. It was held that "where, during the minority of a child, the interest of such child's legacy is directed to be paid to the parent, to be applied for or towards its maintenance, there the direction as to the application is a mere charge for the benefit of the child on what is substantially a gift to the parent subject to such charge."

These cases are not cited because of their similarity to the case under consideration, but as showing that the rule which requires a father to support his child is one which has been in later years greatly relaxed, and which depends in its application upon the circumstances of the particular case. As was said by Judge Robertson in *Evans v. Pearce*, 15 Gratt. 515, 78 Am. Dec. 635:

The same was done, without a reference, in the case of a legacy of \$298. *Ex parte Green*, 1 Jac. & W. 253.

The earlier English cases were much more strict in requiring authority from the court in advance to break in upon the principal. In *Walker v. Wetherell*, 6 Ves. Jr. 473, the Master of the Rolls said: "My impression is that the rule has been never to permit trustees of their own authority to break in upon the capital. I am not aware that the court has ever sanctioned that conduct in a trustee. It very rarely has occurred that the court itself has broke in upon the capital for the mere purpose of maintenance, though frequently for the purpose of putting the child out in life; but as to mere maintenance I doubt it, even upon a petition presented. It is a great misfortune if the capital is so small as not to leave a comfortable maintenance and education, but what can the court do?"

The principal may be impaired where necessity is shown. This was a case where the mother had the use of the income, the principal to go to her children on her death, and she was unable to support the children. *Re Bostwick*, 4 Johns. Ch. 100.

The court may direct application of the principal of a legacy on need shown. *Re Muller*, 29 Hun, 418.

Where a legacy is given to a child, which vests at once, but is payable at a future time, and the father is unable to support the child, and the income from the legacy is insufficient, the court may authorize application of the principal. The court says: "The source of the power is easy to trace. It is found in the fact that the infant is the absolute owner of the property, no other person having either a present or prospective legal interest in it; and that, if the present enjoyment of the property is withheld, the infant must suffer, possibly for the advantage of some person who has no interest in the infant and was never thought of by the testator as a possible recipient of his bounty." *Stephens v. Howard*, 32 N. J. Eq. 244.

"A guardian will not be permitted to expend upon the maintenance and education of his ward more than the income of the estate, without the sanction of the court." *Villard v. Robert*, 2 Strobb. Eq. 40, 49 Am. Dec. 654.

The breaking in upon the capital without a previous order of the court is at the guardian's peril. *Osborne v. VanHorn*, 2 Fla. 360.

A guardian may maintain a bill for reimbursement from the sale of his ward's lands, for payments made by him for maintenance and

"The court, however, will look with liberality to the circumstances of each particular case, and to the respective estates of father and children, and will authorize the income arising from the estates of infants to be applied to their support whenever, under all the circumstances, it appears to be proper."

In *Griffith v. Bird*, 22 Gratt. 73, the court held that where a father, who was the guardian of two of his children, maintained and educated them at his own expense, and made no charge against them, and died in February, 1861, up to which time his estate was ample to pay his debts, but became insufficient to do so by losses incurred thereafter, that between the father and his creditors his child would not be charged in the guardianship account with the cost of their maintenance and education.

education, where the father was poor, and the principal and income of the personal estate insufficient. *Bellamy v. Thornton*, 103 Ala. 404, 15 So. 831.

In Mississippi the statute is peremptory that a guardian shall not exceed income except by order of the court, and this has been construed to mean a precedent order. *Boyd v. Hawkins*, 60 Miss. 277.

In *Bybee v. Tharp*, 4 B. Mon. 313, 320, the court says: "The law will not allow the guardian, but at his own peril, to expend upon the ward more than the income of his or her estate, allowing him, however, to look to future years for remuneration as to any casual excess."

Except under stress of special necessity, a guardian has no power to break into the principal without the authority of the court. *Beeler v. Dunn*, 3 Head, 87, 75 Am. Dec. 761; *Hobbs v. Harlan*, 10 Lea, 268, 43 Am. Rep. 309; *Hart v. Czapski*, 11 Lea, 151.

IV. Rights of creditors.

In *Re Kerrison's Trusts*, L. R. 12 Eq. 422, the facts in which are referred to under III. b, 1, *supra*, a case of post-nuptial settlement where the father himself maintained the children for nine years and subsequently became bankrupt, it was held that his assignee in bankruptcy was not entitled to receive any portion of the accumulations of the income that might have been applied. The Vice Chancellor says: "Here a man of large means desires to set apart a fund which may be applied for the benefit of his family. He therefore places it in the hands of trustees, and directs them to apply such part as they shall think fit for the maintenance of his children. Then from the time of making the settlement for a period of nine years there is no application by him for any portion of the income. He might have required it to be paid, but he preferred to let it accumulate, and I must conclude that he only intended to apply for a contribution towards the maintenance of his children in case of some unforeseen necessity, and that the original £15,000, and all such accumulations as he did not require, were meant to be treated as the settlement fund. He intended to have the fund ready to be applied if he required it, but if not, that it should accumulate for the benefit of his wife and children. It is clear that he did not intend to benefit himself, or he would have given himself a life interest."

In *Beardsley v. Hotchkiss*, 96 N. Y. 201, a mother had devised and bequeathed property

The financial condition of James Hancock at his father's death does not appear. The trust property vested in him as trustee under the fifth clause of his father's will for the support of his wife and children passed at once under his control. He collected the rents, commingled them with his own funds, rendered no account, and in January, 1895, claims that he was indebted to that fund in the sum of \$5,765.85, which, if true, proves that he had during that period appropriated that much of the rents derived from the trust property to his own use, in violation of the terms of the trust which had been reposed in him. Is that true? Had there been during that period any diversion by the trustee of the trust fund confided to his care? The house valued at \$14,000 was devised to him by his father as trustee for his wife and children, to be held, not subject to his own debts or liabilities, but in trust for the support and maintenance of his present or any future wife that he may take, and his children, the said trust to continue during the life of James Hancock; and if, at his death, he

shall leave a wife surviving him, until her death. Upon the death of James Hancock and wife, the trust ceased, and the property vested in fee-simple absolute in all of his children in equal shares. His claim now is that in 1895 he was indebted to the trust fund, because it was his duty to support his children; that he was of ability to do so; and that he was guilty of a breach of trust in appropriating the trust property in part discharge of the duty which the law had imposed upon him. If the will of A. G. Hancock had merely conferred a power upon the son, as trustee, so to apply the rents and profits of the trust property, it would be a most dangerous precedent, in our opinion, to allow him, after he had exercised that power, and appropriated the rents of the trust property to the maintenance and support of his wife and children, to recall the exercise of the discretion with which he had been invested, and permit him to reconstruct the past as between himself and the trust fund and his beneficiaries, and after a lapse of eight years to constitute himself a debtor to the fund

to her children and to the survivors, if any should die before arriving at the age of twenty-one years. The will contained the clause: "And I hereby commit the guardianship of all my children until they shall respectively attain the age of twenty-one years unto the said Lemon B. Hotchkiss, my said husband, and give him the power to use, occupy, and control as such guardian, for the use and benefit of my said children, all my real and personal estate devised and bequeathed to my children as aforesaid." After her death the husband, as executor, took possession of the property, occupied portions of the real estate himself at times, rented portions of it to other persons, used the personal property and the avails of the real estate in his own business, and in all respects managed and controlled the property at his discretion. He afterward made a general assignment for the benefit of creditors in which he preferred his three children for the amounts justly due them on account of moneys and property of his wife, their mother, which he had received, as such amounts should be found upon a settlement. Other creditors postponed to the children claimed that the court should have made to Mr. Hotchkiss in diminution of his liability to his children a reasonable allowance for their maintenance, education, and support during their minority. The court says: "He was of sufficient ability to support his children, and did support them from his own means, making no charge against them, and he now makes no charge; but his creditors seek to make it for him. A father is under a natural obligation to support his minor children, and, generally, if of sufficient ability, he is obliged to, without reference to their pecuniary circumstances. There is no doubt of the power of an equity court to make to a father a reasonable allowance for the past and future support of his minor children, out of their property, in his hands, or in the hands of their trustees. But such allowance is not made as matter of course. It depends upon the circumstances of each case, and the interests of the children alone are considered. When the father is of sufficient ability to support his minor children, the circumstances would have to be very peculiar which would authorize or require the court to make the allowance. . . . 57 L. R. A.

If the children were still minors, and the father was of insufficient means, and had become in debt or insolvent, by his efforts to support and educate his children, then there would have been a case, upon his petition, for a reasonable allowance to him out of their property, for both past and future support, that he might continue to furnish them a suitable home. But in such a case no court would make the allowance in order that the husband's creditors might sweep it away in such manner that the infants would in no way be benefited thereby. Here the infants have become of age, and the allowance would neither benefit them, nor their father. In such a case, we cannot say that the court below erred in refusing the allowance."

Where a father, as guardian in socage, had assumed to surrender a life insurance policy owned by his infant children, and the court held that he had no authority so to do, in an action by the beneficiaries to have the policy restored, the insurance company claimed the right to deduct therefrom the money paid to the father, or so much as the father had used for the benefit of the children. This relief was denied. The court says: "There was no proof that Foley was not perfectly able to respond to the defendant for the amount of money received by him from it upon the surrender of the policy. He was bound to support his own children out of his own means, and it does not appear that he was not abundantly able to do so; and if he took this money and used it for the support of his children, instead of using his own means for that purpose, the children did not become responsible for the money so used." *Foley v. Mutual L. Ins. Co.* 138 N. Y. 333, 344, 20 L. R. A. 620, 34 N. E. 211.

In *Griffith v. Bird*, 22 Gratt. 73, it appeared that a father, who was guardian of his children and able to support them, had supported them and made no charge against them during his lifetime. After his death a general creditor of the father sought, through a court of equity, to charge the property of the children with their support. The relief was denied by the court.

Where a father, guardian of his children, has given a deed of trust for the benefit of cred-

which had been confided to his control. If, we repeat, the will had clothed him with the exercise of a mere power, and that power had been exercised in accordance with its terms, the court would be slow to reopen the transaction and restate the account, for to do so would be to multiply opportunities for fraud and imposition upon innocent creditors. But in the case before us the trustee was not clothed with a mere discretionary power. He received the property impressed with a trust for the support of his wife and children. Its income seems to have been applied during all these years in strict conformity with his duty as prescribed by his father's will, and where is the wrong and injustice of which his beneficiaries can now be heard to complain?

This house and lot which is the subject of the trust was, at the date of the testator's death, rented for the sum of \$900 a year. By reason of the improvements which have been placed upon it under the circumstances which have been detailed, a contract for its rental was entered into before its

erection at the sum of \$1,750 per year. Its yearly value had been increased more than 90 per cent.

The conduct of the trustee in this case was well calculated to beguile and mislead those who dealt with him. Had he settled his accounts, and charged himself with the accumulation of rents from the trust property, all who extended credit to him would have done so with their eyes open; but there was nothing to disclose the true condition of his affairs, and much to lull them into a false security. He not only stated no account, but, for all that appears, he kept none. He commingled what he received from the trust with his own money, and drew upon it as a common fund.

A trustee cannot, of course, by such conduct, prejudice the trust; but the question here is whether he shall defeat his creditors, not for the protection of the trust from loss, but its augmentation by the process of capitalizing the rents derived from it. Equity enjoins upon us the duty of being just before we are generous. As we have seen, if the trustees have a discretion as to

itors, the trustee may not, in a settlement of the guardian's accounts, charge the children with the amount expended for their education, the father having been of sufficient ability to provide for such education. *Walker v. Crowder*, 37 N. C. (2 *Ed.* Eq.) 478.

Where land was conveyed to a father as trustee for his children "for the sole support, use, benefit, and behoof" of the children, with power to the trustee "to use the rents, issues, and profits in educating and supporting said children," it was held that this was not a gift of the rents, etc., to the father in consideration of such support, but merely a grant of power, and that neither the trustee nor his creditors or grantees had any beneficial interest therein. *Neal v. Bleckley*, 51 S. C. 506, 29 S. E. 249.

Where a parent held the property under a will of a grandparent of the children, it having been given to the parent to be used for the support of the children, the creditors of the parent cannot obtain a lien thereon. *Spicer v. Spicer*, 21 Ga. 200.

Where a widowed mother maintains her children without making a charge against them her creditors cannot compel the amount of her expenditures to be charged against their estate to the exoneration of her property. *Hanford v. Prouty*, 133 Ill. 339, 24 N. E. 565.

V. Summary.

The father, and in some jurisdictions the mother, is under obligation to support the child whether the child has a separate property or not. The court, however, may authorize or sanction the use of the child's separate estate for the support or education of the child where the parent is unable from his own means to provide for such support or education in conformity with the child's estate and position in life, or where it appears that the instrument creating the child's estate was intended, either to provide for the child's support without regard to the parent's ability, or to vest the property in the parent in aid of, or to provide him means for, the support of the child, irrespective of the parent's income derived from other sources. The earlier distinction between contract and bounty has come to be regarded as of less importance as a guide to construction, and it is now looked upon as a question of 57 L. R. A.

intention to be determined from the language of the instrument, whether marriage settlement, gift, or will. Where trustees have been vested with discretion as to the application of the trust fund to the support of the children, the court will, where the welfare of the children requires it, control the fund in opposition to the will of the trustees, but where the father is able to support the children, the court will not, on the father's application, interfere with the discretion of trustees. In its anxiety for the welfare of infants, the court will, if possible, spell out from the terms of the instrument creating the trust an intention that the infants shall profit thereby, and, where the father is unable to support them, will authorize the use of income for that purpose when there is no express direction therefor, and even, in some cases, where there is a direction to accumulate income. Where infant legatees comprise a class, all or some of whom must absolutely take the fund, all having a common interest and an equal chance of survivorship, the income may be applied to the support of the infants if the father is of insufficient ability; but, except as the rule has been modified by statute in certain jurisdictions, this cannot be done where there is a gift over, or the children are not all the persons among whom the fund is eventually to be distributed. The extent of the allowance by the court from the infant's funds will be measured by the welfare of the infant. A trustee who makes an allowance without a previous order of the court will do so at his peril; but the courts are liberal in giving subsequent sanction to that which would have merited previous authority. What is intended as a gratuity cannot afterward be changed into a debt. Where the infant is the absolute owner of the fund, the court may authorize breaking into the principal for support if need be. Creditors of a parent must stand in his shoes. Where a parent has supported children from his own income his creditors cannot require repayment for their benefit from the children's estate; nor where the parent was authorized to use the income from the children's estate for their support and has so used it, will he be permitted to reverse the situation and return an equivalent to the trust fund to the detriment of his creditors.

H. W. C.

the application of the fund to the support of the children, the court will not, at the father's instance, compel them to exercise it, he being of ability. Nor will the court interfere with their discretion if they see fit to exercise it. 2 Perry, Tr. § 612. So, by parity of reasoning, where the trustee has exercised the discretion and supported the children, the father will not be permitted to restore to the trust fund what had been rightfully appropriated in order that he may augment the trust fund and evade the payment of his honest debts, for that would be to make the rights of men depend, not upon law, but the whim, the caprice, the preference, or the interest of the individual.

If the will is to be construed as not clothing the trustee with a mere discretion, but as creating an express trust for the support of the wife and children,—which we think is the true construction,—then the case is still stronger for appellant, for then it must be so applied irrespective of their father's ability to support and educate them. 3 Pom. Eq. Jur. *supra*. Either view is conclusive of the case, for, if such be the law where there is a discretionary power or an express trust in cases in which the father is not the trustee, the union of the two relations in one person can have no influence upon the result.

The case of *Norris v. Jones*, 93 Va. 176, 24 S. E. 911, seems to be relied upon by appellees. An insolvent son had made a gift to his mother, and a creditor, whose debt arose prior to the gift, brought a suit to hold the mother liable for its payment, and subject it to the payment of his debt; but it appearing that prior to the institution of the suit the mother lent the son an amount larger than the gift, that there was no actual fraud, and that the mother had no knowledge of the insolvency of the son, the court held that there was no liability upon her. It could not have been otherwise. There was no actual fraud. There had been a restoration to the son's estate by the mother of what she had received. The ability of the son to meet his obligations had not been diminished, and the creditor in no respect prejudiced by the transaction.

We are of opinion that to sanction what was done in this case would be to permit a trustee to change his course of conduct in the light of subsequent events and of his altered financial condition, and to permit him to simulate a debt to the estate under his control in order that it might be augmented for the benefit of his wife and children at the expense of existing creditors.

The decree of the Circuit Court must be reversed.

Harrison and Whittle, JJ., absent.
57 L. R. A.

J. W. GORDON, Plff. in Err.,
v.
COMMONWEALTH of Virginia.

(.....Va.....)

1. Although a check is so irregular in form that the bank would be justified in refusing payment of it, yet it may be the subject of forgery as to its effect as a receipt, after it has passed through the hands of several indorsers, and has been paid by the bank and returned to the hands of the drawer.
2. To add to a canceled check the words, "in full of account to date," with intent to alter its effect as a receipt, constitutes forgery.
3. The averment of extrinsic circumstances to give efficiency to an instrument so as to make it the subject of forgery is not necessary in an indictment for that offense, where it is sufficient to enable the court to perceive judicially that it might be made the vehicle of fraud and prejudice as charged.
4. That one who forges a receipt in full on a payment on account has in fact paid his indebtedness in full, will not prevent his liability to indictment for the forgery.
5. The addition to a check of the words, "in full of account to date," may constitute a forgery if made at any time after the check is delivered to the payee.
6. A verdict cannot be impeached by the affidavit of a juror that he was induced to assent to a verdict of guilty on the understanding that the jury would recommend the pardon of accused.

(June 12, 1902.)

ERROR to the Circuit Court for Augusta County to review a judgment convicting defendant of forgery. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles Curry, J. J. L. Bumgardner, R. Bumgardner, and Hulst Glenn, for plaintiff in error:

The indictment in this case is found under § 3737 of the Code of Virginia, and that statute expressly provides that the paper purporting to be forged must be to the prejudice of another's right.

Terry v. Com. 87 Va. 673, 13 S. E. 104.

If, at the date of the check, petitioner owed Hughes only \$10, and Hughes took the check and got the money on it, and, after the check had been returned to petitioner, petitioner wrote on the check, "in full of account to date," that, then, would not be capable of prejudicing the rights of Hughes or of anybody else.

NOTE.—As to what may be the subject of forgery, see also *note* to *People v. Munroe* (Cal.) 24 L. R. A. 33; also, in this series, *State v. Evans* (Mont.) 28 L. R. A. 127; *Thomas v. State* (Tex. Crim. App.) 46 L. R. A. 454; and *White v. Wagar* (Ill.) 50 L. R. A. 61.

As to forgery by making or altering mere memorandum, see *note* to *State v. Hendry* (Ind.) 54 L. R. A. 794.

The bank is directed to do an impossible thing,—to pay to a nonexistent, impossible, and unascertainable thing. There is no payee mentioned, and no certain sum of money is directed to be paid.

2 Dan. Neg. Inst. § 1566; *Oarberry v. State*, 11 Ohio St. 410.

It is an indispensable element of the crime of forgery that the forged paper be such as, if genuine, would injure another, and it must appear from the indictment that it is legally of such a character.

9 Enc. Pl. & Pr. pp. 559-561; *People v. Farrington*, 14 Johns. 348; *People v. Heed*, 1 Idaho, 531; *Cunningham v. People*, 4 Hun, 455; *Roode v. State*, 5 Neb. 174, 25 Am. Rep. 475; *People v. Harrison*, 8 Barb. 560; *Barnum v. State*, 15 Ohio, 717, 45 Am. Dec. 601; *People v. Fitch*, 1 Wend. 198, 19 Am. Dec. 477.

A writing affirmatively invalid on its face cannot be the subject of forgery, because it has no legal tendency to effect a fraud.

2 Bishop, New Crim. Law, §§ 524 (2), 533, 538 (1); *Anderson v. State*, 20 Tex. App. 595; *Roode v. State*, 5 Neb. 174, 25 Am. Rep. 475; *State v. Evans*, 15 Mont. 539, 28 L. R. A. 127, 39 Pac. 850.

No writing can be held to be a forgery unless upon its face it appears to be a vehicle of ideas.

2 Bishop, Crim. Law, 525; *Powell v. Com.* 11 Gratt. 822; *Chitty*, Crim. Law, 1121; 2 Russell, Crimes, 318.

An instrument which is void, or without legal efficacy on the face of it, or which is not shown, by proper averments of extrinsic facts, to be capable of affecting the rights of another, cannot be the subject of forgery.

Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 194; *People v. Shall*, 9 Cow. 778; *Roode v. State*, 5 Neb. 174, 25 Am. Rep. 475; *Com. v. Hinds*, 101 Mass. 209; *State v. Greenlee*, 12 N. C. (1 Dev. L.) 523; *Hobbs v. State*, 75 Ala. 1; *Reed v. State*, 28 Ind. 396; *People v. Stearns*, 21 Wend. 409; *State v. Briggs*, 34 Vt. 501; *Rembert v. State*, 53 Ala. 467, 25 Am. Rep. 639; *Arnold v. Cost*, 3 Gill & J. 219, 22 Am. Dec. 314; *State v. Evans*, 15 Mont. 539, 28 L. R. A. 127, 39 Pac. 850; *People v. Tomlinson*, 35 Cal. 506; *Barnum v. State*, 15 Ohio, 717, 45 Am. Dec. 601; *Raymond v. People*, 2 Colo. App. 329, 30 Pac. 504; *State v. Wheeler*, 19 Minn. 98, Gil. 70; *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427; 2 Bishop, New Crim. Law, § 533; Wharton, Crim. Law, § 740.

The paper in the indictment is a mere nullity for any purpose, and it cannot be made good by any possible averments; but if it is not a mere nullity, it is certainly not a vehicle conveying any meaning, and to give it meaning it would certainly be necessary in the indictment to explain the meaning of the words in the check by innuendoes, or by the averment of extrinsic facts, and this is not done; and it is confidently believed that the indictment cannot be sustained.

State v. Greenlee, 12 N. C. (1 Dev. L.) 523; *State v. Thorn*, 66 N. C. 644; *State v. Lamb*, 65 N. C. 419; *People v. Shall*, 9 57 L. R. A.

Cow. 773; *People v. Harrison*, 8 Barb. 560; *State v. Weaver*, 84 N. C. 836, 55 Am. Rep. 648.

To constitute a writing a forgery, it must be an instrument which may be the foundation of a suit against another, or one that may be used as a receipt in repelling or setting off liability.

Wharton, Crim. Law, § 682.

If there is no property of anyone upon which the writing might possibly be used to operate, then the writing cannot be held to be a forgery.

Barnum v. State, 15 Ohio St. 717, 45 Am. Dec. 604.

There can be no inference of intent to defraud, where, upon the proofs, the person named in the indictment could by no possibility in law be defrauded.

2 Bishop, New Crim. Law, § 599; *Reg. v. Marcus*, 2 Car. & K. 356; 2 Russell, Crimes, p. 579; 13 Am. & Eng. Enc. Law, p. 1112; *Barnum v. State*, 15 Ohio, 717, 45 Am. Dec. 604.

The fact that the order was accepted in no way gave the instrument validity. The defect of the paper in this case is "open and palpable," so that no one could be deceived by it without the grossest neglect.

Com. v. Linton, 2 Va. Cas. 478.

If the check was in full payment of all that Gordon owed Hughes, then it would be impossible for Hughes to be prejudiced in his rights, or injured in any way, shape, or form.

Wharton, Crim. Law, § 740; Bishop, New Crim. Law, § 546, ¶ 4.

Mr. William A. Anderson, Attorney General, for defendant in error:

There may be forgery of a writing which is of questionable validity, and which, if genuine, would not be effectual to its purpose, if the paper is such that it may be used to the prejudice of another's right.

Com. v. Linton, 2 Va. Cas. 478; *Perkins v. Com.* 7 Gratt. 651, 56 Am. Dec. 123; *Terry v. Com.* 87 Va. 674, 13 S. E. 104; 2 Bishop, New Crim. Law, § 533.

Under the circumstances of this case, this check, thus falsely and fraudulently made a receipt in full of \$10, was to the prejudice of the rights of Hughes, or might so operate; which is all that is required to constitute this element of its criminality.

Snell v. State, 2 Humph. 349; *Williams v. State*, 61 Ala. 39; 1 Wharton, Crim. Law, §§ 691, 692; 2 Bishop, Crim. Law, 8th ed. § 546, cl. 5.

Whittle, J., delivered the opinion of the court:

At the October term, 1901, of the county court of Augusta county, the grand jury returned an indictment against J. W. Gordon for forgery, under § 3737 of the Code.

There were two counts in the indictment. The first count charged that on July 6, 1901, J. W. Gordon, having in his possession a certain order for the payment of money, commonly called a "check," purporting to be the order or check of the said J. W. Gordon upon the Farmers' & Merchants'

Bank of Staunton, for the payment of \$10, which was of the following purport and effect:

Staunton, Va., October 17, 1899.
Farmers' and Merchants' Bank of Staunton:
Pay to the order of.....Ten.....
W. E. Hughes.....Dollars
\$10.00

J. W. Gordon.

—Indorsed: "W. E. Hughes." "Pay to the order of Cashier, Nat'l Valley Bank. H. Hutchinson & Co." "Nat'l Valley Bank, Staunton, Va. Paid Oct. 31;" and with the following words on the face thereof: "Paid Oct. 31, 1899. Farmers' and Merchants' Bank, Staunton, Va.;" and with a 2-cent United States internal revenue stamp duly canceled thereto; and that the said J. W. Gordon, on the said 6th day of July, 1901, at the said county, feloniously did forge on the face of said order or check a writing in the following words, that is to say, "in full of account to date," with intention to defraud, and to the prejudice of the rights of others, against the peace and dignity of the commonwealth of Virginia. The second count charged that J. W. Gordon uttered and attempted to employ as true the forged writing aforesaid, with intent to defraud.

There was a demurrer and motion to quash the indictment, both of which the court overruled, and thereupon the accused pleaded "not guilty." At the trial he was found guilty by the jury, and his term of imprisonment in the penitentiary was fixed at two years.

After the verdict of the jury was rendered, the prisoner moved the court to arrest the judgment, and also to set aside the verdict, as contrary to the law and the evidence, which motions were likewise overruled, and judgment was rendered in accordance with the verdict. During the progress of the trial a number of exceptions were taken by the accused to rulings of the court.

The case having been carried to the circuit court of Augusta county, and the judgment of the county court there affirmed, it was brought here upon a writ of error awarded by one of the judges of this court. The assignments of error will be considered in the order in which they were presented at bar.

The objection to the indictment raised by the demurrer and motions to quash and in arrest of judgment is that the instrument alleged to have been forged was invalid and meaningless, or, if in fact valid, that its validity depended upon extraneous circumstances to give it efficacy, which were necessary to be averred, and that, even if the words "in full of account to date" were written by the accused on the face of the paper after it had been paid and returned to him, it was not a forgery, in contemplation of the statute, because the words were written upon a void instrument, and could not, therefore, have operated to the prejudice of

another's rights. *Terry v. Com.* 87 Va. 673, 13 S. E. 104.

The authorities sustain the principle invoked, but it is conceived that the case in judgment does not come within its influence. It must be conceded that, as a check, the paper in question was irregular,—possibly so irregular that the bank would have been justified in refusing payment. But the gravamen of the charge is not the forgery of the check, as such, but, with its indorsements, as a receipt. After it had been construed and treated by the parties as a valid check for \$10, drawn by J. W. Gordon, payable to the order of W. E. Hughes, indorsed by Hughes in blank, indorsed by H. Hutchinson & Co. to the cashier of the Valley National Bank, indorsed and stamped "Paid" by the Valley National Bank, and stamped on its face "Paid" by the Farmers' & Merchants' Bank, upon which it was drawn, and had been delivered to the drawer, J. W. Gordon (and this is the legal import of the paper, with its indorsements, etc., as set out in the indictment), however irregular it may have been in its inception, according to business usage and custom and common understanding, it constituted a valid voucher from Hughes to Gordon for \$10, which the former, by his indorsement and conduct, was estopped to deny. That being the legal import of the paper with its indorsements, the addition of the words "in full of account to date," alleged to have been fraudulently written upon the face of it by the accused after the paper came to his possession, had the effect of converting a genuine receipt from Hughes to the accused for \$10 into a spurious receipt "in full of account to date," and necessarily injured to the prejudice of Hughes's rights. The writing, with the indorsements set out in the indictment, was sufficient to enable the court to perceive judicially that it might be made the vehicle of fraud and prejudice, as charged, and hence the averment of extrinsic circumstances was unnecessary. *Henry v. State*, 35 Ohio St. 128; *Snell v. State*, 2 Humph. 347; *Rea v. Martin*, 7 Car. & P. 549.

Forgery at common law is defined by Blackstone as the fraudulent making or altering of a writing to the prejudice of another's rights. 4 Bl. Com. 247. And that definition is substantially embodied in § 3737 of the Code.

Bishop's definition, which has been adopted by this court in the case of *Terry v. Com.* 87 Va. 673, 13 S. E. 104, is: "Forgery is the fraudulent making of a false writing, which, if genuine, would be apparently of legal efficacy." Bishop, *Crim. Law*, 3d ed. § 95.

The doctrine may be stated generally that an instrument is one of legal efficacy, within the rules relating to forgery, where by any possibility it may operate to the injury of another. *People v. Rathbun*, 21 Wend. 509; *Williams v. State*, 61 Ala. 33; *Com. v. Linton*, 2 Va. Cas. 476; *People v. Munroe*, 100 Cal. 664, 24 L. R. A. 33, 35 Pac.

326; *Hickson v. State*, 61 Neb. 763, 54 L. R. A. 327, 86 N. W. 509.

In *Rollins v. State*, 22 Tex. App. 548, 58 Am. Rep. 659, 3 S. W. 759, it was held that the following writing was the subject of forgery: "Apolas, Halsal, Please let Mr. G. B. Rowlands, have 4 \$ 00 d. in goods and oblige. Charge to me, Jack E. 3 ler." This was held to be an order on Apolas & Halsal for \$4 in goods, and that extrinsic proof was admissible to show whose signature it was.

So, in *Hobbs v. State*, 75 Ala. 1, a writing: "Please send me word how long you will give Stephen to pay for the bed, and if you will allow him time enough to pay for it let him have a cheap bureau, as cheap as possible, and I will see that you will get so, and oblige, much a week. J. W. Hall, Huntsville. Just write it off the whole thing and send it to me,"—was held to be an instrument of apparent legal efficacy, and not so obscure as to be unintelligible without reference to extrinsic facts, and therefore a subject of forgery.

In *Hendricks v. State*, 26 Tex. App. 176, 9 S. W. 555, 557, it was held that a written communication as follows: "Mr. Gladstone, please let Bare Have the sume of \$5. in Grosses, and charge the same to Dr. F. T. Cook,"—was an order for merchandise or goods or property of some kind, and was the subject of forgery; no averment of extrinsic facts being necessary to show that such was its character.

And it has been held that a bank note in which a blank is left in the body of the note, where the number of dollars should appear,—the denomination appearing elsewhere in the bill,—is a note of that denomination, and may be a subject of forgery. *State v. Dourden*, 13 N. C. (2 Dev. L.) 445. And so, also, though the word "pounds" is omitted in the body of the note, when the amount of the note, with the sign "£" is placed in the margin. *Res v. Elliott*, 2 East, P. C. 951, 1 Leach, C. L. 175.

It is immaterial, therefore, whether the paper in question was or was not a valid negotiable instrument. It is only necessary, according to the foregoing definitions and authorities, that it was a writing of such apparent legal efficacy that the forgery of it might have been used to the prejudice of another's rights. That, with the indorsement upon it at the time of the alleged fraudulent alteration, it was such a writing, there can be no question.

It follows from these views that there was no error in the action of the trial court in overruling the demurrer to the indictment, and the motions to quash and in arrest of judgment.

At the trial, over the objection of the prisoner, the court gave the following instruction to the jury:

"The court instructs the jury that if they believe from the evidence that the accused altered the check after it had been paid in the bank, with intent to defraud, or that the accused altered said check after it had been paid in bank, and, after said alteration,

uttered or attempted to employ as a true receipt said altered check, then they must find the accused guilty; and this is true whether at the date of said check the accused actually owed the payee of said check, W. E. Hughes, or not."

The objection to this instruction is based on the theory that, if at the time of the alteration of the check the accused was not indebted to Hughes, the alteration could not have been to the prejudice of his rights, and was therefore not a forgery, in contemplation of the statute. It is believed that this contention is not sustained either by reason or authority. It would be, indeed, a dangerous doctrine to make the guilt or innocence of a person, who undertakes to manufacture defensive evidence in his own behalf, dependent upon the ultimate result of a settlement of accounts between the parties, rather than upon his fraudulent and wrongful conduct in fabricating false and forged evidence to sustain his side of the controversy. Let the result be what it may, Hughes had a right to have the litigation pending between himself and the accused decided according to the law and the evidence; and the fraudulent conversion of a check for \$10, drawn by Gordon in his favor, into a receipt in full, necessarily deprived him of that right, and operated to his prejudice,—at least, in that it increased the burden of proof which rested upon him.

The essence of the crime in this case consisted in the false making or alteration of the receipt in question, with fraudulent intent, and to the prejudice of another's rights. The false making of the receipt by the accused, to maintain his contention with Hughes, fulfilled all these conditions; and the crime was complete, irrespective of the standing of accounts, or merits of the controversy between the parties. It was not essential that the accused should be indebted to Hughes, or that Hughes was defrauded by his act, or that the accused reaped the fruits of his crime. His status was not affected by the justness or unjustness of Hughes's demand, or whether the receipt was or was not allowed. It is not permissible for one to forge an acquittance to defeat even an unjust demand. The accused had no right to manufacture evidence, and, if he had no such right, his conduct in doing so was prejudicial to the person against whom the testimony was fabricated. Hughes may have been honest in the belief that Gordon was indebted to him, and yet mistaken. He had a right to submit his claim to the arbitrament of the courts, and, when the accused undertook to defeat the result by false evidence, he was guilty of a crime which operated to the prejudice of Hughes.

A gave his clerk, B, a blank check, and directed him to fill it up with an amount of a bill and expenses (for which A had to provide, and which amount B was to ascertain), and get the check cashed, and pay the amount to W, and take up the bill. The bill was for £156 9s. 9d. The expenses were about 10s. B filled up the check with the sum of £250, had it cashed, and kept the

whole amount, alleging that it was due to him for salary. It was held that B was guilty of forgery, and that this was so even if B bona fide believed that the £250 were due him from A, or even if it were really due to him. *Reg. v. Wilson*, 2 Car. & K. 527.

"In an indictment for forging a receipt, it is not necessary that it should be averred that the person charged with the offense is indebted to the individual against whom the receipt is forged, in order to show that the latter stands in a situation to be defrauded by the former." Wharton, *Crim. Law*, 4th and Revised ed. § 1482; *Snell v. State*, 2 Humph. 349; *Com. v. Ladd*, 15 Mass. 526; *Williams v. State*, 61 Ala. 39; 1 Wharton, *Crim. Law*, §§ 691, 692; 2 Bishop, *Crim. Law*, 8th ed. § 546, cl. 5; *Flower v. Shaw*, 2 Car. & K. 703; *Claiborne v. State*, 51 Ark. 88, 9 S. W. 851; *State v. Kimball*, 50 Me. 409; *Bush v. State*, 77 Ala. 83.

The court also gave five instructions, at the instance of the accused, which liberally and fairly expounded the law as to the presumption of innocence, reasonable doubt, and the quantum of evidence necessary to warrant a conviction.

The accused asked for eight other instructions, all of which were refused. The first of these instructions was to the effect that the presumption of the innocence of the accused should be considered as evidence in his favor. In a certain sense, presumptions are evidence, and text writers so declare of presumptions of innocence. 1 Greenl. Ev. Lewis's ed. § 34. But the accused was only interested in having the jury informed of the existence and effect of the presumption, and his rights in that respect were amply guarded by the instructions given.

Instructions 2, 4, 5, and 8, in the order in which they were presented, in one form or another, embody the theory that, unless the accused owed Hughes at the date of the alteration of the check, he was not guilty of the forgery charged. But that, as has been remarked in connection with the instruction given at the instance of the commonwealth, is not the criterion of the guilt or innocence of the accused.

The third instruction told the jury that it devolved on the commonwealth to show, beyond a reasonable doubt: First, that the check was altered by the accused after it had been paid and delivered to him; second, that the alteration was made by the accused with intent to defraud; and, third, that the alleged alteration of the check was or may have been to the prejudice or injury of the rights of the prosecutor or someone else. Conceding the soundness of the second and third propositions, the first condemns the instruction. The accused might have been guilty of forgery although the check had never been paid or delivered to him. Indeed, if the entire writing—check, indorsements, stamps, and alleged forged words—had been all made by the accused, and had never passed out of his possession, the offense might still have been consummated. But in any event the time fixed for the al-

teration should have been after the check was delivered to Hughes, rather than after it had been paid and delivered to the accused.

The remaining instructions, 6 and 7, are liable to the same objections as the third. With respect to the instructions generally, it may be affirmed that those given by the court clearly and correctly expound the law applicable to the case made by the evidence, and that those refused were properly rejected, for the reasons set forth in connection with them, respectively.

Nor was there any error in the ruling of the court in refusing to set aside the verdict for the alleged misconduct of the jury. That motion was based upon the affidavit of a member of the jury to the effect that affiant and another juror were induced to consent to a verdict of guilty with the understanding that the jury would recommend the pardon of the accused. It is sufficient to say of this assignment that public policy forbids that the precincts of the jury room should be invaded and verdicts impeached in that manner. *Bull v. Com.* 14 Gratt. 613; *Danville Bank v. Waddill*, 31 Gratt. 469; *Stepoe v. Flood*, 31 Gratt. 323; *Moses v. Cromwell*, 78 Va. 671.

The remaining exception is to the action of the court in overruling the motion of the prisoner to set aside the verdict of the jury and grant him a new trial because the verdict was contrary to the law and the evidence. The rigorous rules which by the provisions of the statute must be applied to the consideration of this motion are well understood. Acts 1889-90, p. 36. But if the limitations thereby imposed were less stringent, this court would not be warranted in setting aside the verdict. The evidence is voluminous, and a detailed discussion of it would serve no good purpose. The subject might be dismissed with the observation that the charge against the accused is sustained by the direct testimony of Hughes, supported by many of the circumstances of the case. This, coupled with the evidence of the bad character of the prisoner, and the fact that the theory of the defense is practically broken down and destroyed by the inconsistent and irreconcilable statements of the accused himself, demonstrates that the verdict of the jury was right. Upon the trial of a civil warrant between the parties, the accused testified that he met Hughes in front of Hoge & Hutchinson's store, in Staunton; that Hughes told him he was hard up and needed money badly, and asked him to pay his account; that thereupon, he wrote the check in question, which Hughes accepted and delivered to Hoge & Hutchinson. He was thoroughly committed to that view, and suggested none other in connection with the making of the check. On the trial of this prosecution an entirely different theory was propounded. His new version of the matter may be given in his own language. "Mr. Hughes came up there, and I was not at home. He came back the second time, and he saw a man by the name of Hunter working in the mill at the end of the orchard,

and he told him he wanted me to send him some money; that he needed it very badly. Mr. Hunter told me that Mr. Hughes said I owed him \$10. That night I fixed up the check, and intended to send it by Mr. Hunter, but he was going to pack apples early next morning, so soon I asked my wife to take it down. She was going along to bring the buckboard back. So the next morning I was out talking to them, just before they started, and I said, 'I will go back and make this a receipt in full, and if he does not accept it, bring it back to me.' That he sent the check by his wife, and she delivered it to Hughes. In this manner, he undertook to account for the alleged difference in appearance of the ink with which the words "in full of account to date" were written and the other writing on the check. Some of the witnesses testified that the ink in the "in full of account to date" looked fresher, and was of a different shade. A lapse of memory could not have accounted for the discrepancy between these clearly defined and detailed statements. Upon the trial of the

civil warrant, accused did not pretend that the transaction had faded from his memory, but, on the contrary, declared that he remembered the time, place, and circumstances of giving the check, including the conversation between Hughes and himself which led up to it. His attempted explanation tends still further to show that he was not telling the truth. He pretended to have confounded the check in controversy with a check for \$1.50, dated October 19, 1899, about which he says he had the conversation with Hughes, and delivered it to him in front of Hoge & Hutchinson's store. But when asked to explain why he gave Hughes that check, if, as he maintained, he had the day before settled with him in full with the \$10 check, he replied that his wife might have bought other goods. It is not surprising that the jury refused to give credence to such an unreasonable story, emanating as it did from a discredited source.

There is no error in the judgment complained of, and it must be affirmed.

GEORGIA SUPREME COURT.

J. M. GARDNER, Plff. in Err.,
v.

A. G. RHODES.

(114 Ga. 929.)

*A landlord is not liable for injury received by a person from falling on ice which had been allowed by the tenants to accumulate and remain on a sidewalk abutting the rented premises. This is true, though the ice resulted from water which had flowed from the landlord's property through a ditch placed there for the purpose of carrying off the refuse water across the sidewalk; the ice not being on the sidewalk when the tenants entered into possession, although the ditch was on the property at that time, and put there for the purpose above indicated.

(March 12, 1902.)

ERROR to the City Court of Atlanta to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

*Headnote by COLB, J.

NOTE.—As to liability of landlord generally to third person for condition of premises in possession of tenant, including liability for injuries from ice on sidewalks, see, in this series, *Lee v. McLaughlin* (Me.) 26 L. R. A. 197, and note; *Henson v. Beckwith* (R. I.) 38 L. R. A. 717; *Canandalgua v. Foster* (N. Y.) 41 L. R. A. 554; *Waterhouse v. Joseph Schlitz Brewing Co.* (S. D.) 48 L. R. A. 157; and *West Chicago Masonic Asso. v. Cohn* (Ill.) 55 L. R. A. 235.

57 L. R. A.

Mr. Burton Smith for plaintiff in error.

Messrs. Dorsey, Brewster, & Howell, for defendant in error:

A landlord who has leased premises to a tenant is not liable for a nuisance maintained upon the premises by the tenant during the lease.

Vason v. Augusta, 38 Ga. 543; *Taylor, Land. & T.* 95; *White v. Montgomery*, 58 Ga. 204; *Shearm. & Redf. Neg.* §§ 56-60, 501; *Froidenbourg v. Jones*, 63 Ga. 612, 66 Ga. 505, 42 Am. Rep. 86; *Edgar v. Walter*, 106 Ga. 454, 32 S. E. 582; *Collier v. Hyatt*, 110 Ga. 317, 35 S. E. 271.

The duty of a city to exercise reasonable care to keep its sidewalks in a safe condition does not extend to the removal of ice which constitutes no other defect than slipperiness, there being no such accumulation of ice as to constitute an obstruction to travel, and no ridges or inequalities of such height, or lying at such inclination or angle, as would be likely to trip passengers or cause them to fall.

Henkes v. Minneapolis, 42 Minn. 530, 44 N. W. 1026.

Where a city ordinance requires the citizens to keep their sidewalks free from ice, no action lies in favor of an individual against a citizen for an injury occasioned by his breach of that duty.

Hartford v. Talcott, 48 Conn. 525, 40 Am. Rep. 189; *Taylor v. Lake Shore & M. S. R. Co.* 45 Mich. 74, 40 Am. Rep. 457, 7 N. W. 728; *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76; *Russell v. Shenton*, 2 Gale & D. 573; *Shindelbeck v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584; *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695; *Cook v. Milwaukee*, 24 Wis. 270, 1 Am. Rep. 183;

Elkhart v. Wickwire, 87 Ind. 77; *Olifford v. Atlantic Cotton Mills*, 146 Mass. 47, 15 N. E. 84; *Brown v. Wysong*, 1 App. Div. 423, 37 N. Y. Supp. 281; *Shearm. & Redf. Neg.* §§ 343, 708.

Cobb, J., delivered the opinion of the court:

Gardner sued Rhodes for damages. At the trial a nonsuit was granted, and this is the error assigned in the bill of exceptions. The substance of the allegations of the petition is as follows: The defendant is the owner of certain real estate in the city of Atlanta, abutting on a sidewalk. On January 31, 1900, petitioner was injured by falling upon ice which had formed on the sidewalk in front of the defendant's property. The presence of this ice at this place was due to the following conditions: There is a ditch or drain located on the defendant's property, and running across the same to the sidewalk. This ditch had been there for many years, and was there when the defendant rented the property to certain washerwomen, who were in possession at the time the petitioner was injured. Near the head of the ditch there were two water-closets and two hydrants, from which hydrants the washerwomen draw water. They pour the refuse water upon the ground, and it runs into the ditch and across the sidewalk. The ditch was made to receive, and necessarily does receive, and for many years has received, the water from the running or overflow of the hydrants, and from the refuse water of the washerwomen, and from any defect, clogging, or overflow of the water-closets. The property of the defendant is higher than the sidewalk, and the water flowing into the ditch discharges across the sidewalk. On the day the plaintiff was injured, and for many days previous thereto, water discharged upon the sidewalk in the manner above indicated had become frozen. The ice so formed was uneven on its surface, rendering the sidewalk dangerous to pedestrians. On these facts, the plaintiff charges that the effect of making the ditch was to create a nuisance, by the continuous discharge of water across the sidewalk, and by the freezing of such water on the sidewalk, and also that the defendant negligently maintained the ditch, and negligently permitted water to run across the sidewalk, and negligently permitted ice to remain on the sidewalk. It is alleged that plaintiff was free from fault, and different items of damage are set out, which are alleged to have resulted from specified injuries. The petition further charged that the maintenance of the ditch, and the consequent overflow of water upon the sidewalk, was a violation of a city ordinance of Atlanta, which provided that "any person who shall throw or discharge from any lot or building any water or fluid substance so as to affect injuriously any street, lane, alley, way, or sidewalk in said city shall on conviction" be fined, etc. The

57 L. R. A.

defendant answered, admitting that he owned the property; that a ditch or drain as described in the petition was located on the property when the same was rented to certain tenants, who were in possession at the date of the plaintiff's alleged injury. The defendant also admitted the presence of the water-closets and hydrants at the head of the ditch, that the tenants pour refuse water upon the ground, that this water runs into the ditch and across the sidewalk, and that the ditch was made for the purpose of receiving this water. He denied that he had damaged the plaintiff; denied that the ditch, and the discharge of water therefrom onto the sidewalk, and its freezing thereon, constituted a nuisance; and denied that he had negligently maintained the ditch, and negligently permitted the water to flow therefrom onto the sidewalk and freeze. The above summary of the petition and answer shows that the only material questions about which the parties were at issue were as to whether the ditch, and the flow of water therefrom, and the formation of ice upon the sidewalk, constituted a nuisance, and whether, if so, the defendant could be chargeable with negligence for maintaining the same.

We think it can be conceded, for the purposes of this case, that the formation of the ice on the sidewalk, and the overflow of water from the ditch, and even the ditch itself, all taken together, amounted to a nuisance which was being maintained on the defendant's premises and the abutting sidewalk. This nuisance was, however, the result of the acts of the defendant's tenants, who were in exclusive possession of the premises; and under such circumstances the landlord cannot be held liable in damages for injuries resulting to a person from a nuisance maintained by a tenant. It will be noticed that the city ordinance set out in the plaintiff's petition does not purport to make a landlord liable for the maintenance of a nuisance on or abutting his property, and it seems to be clear that the ordinance refers only to those who actually originate and maintain the nuisance. So far as appears from the record, there is no ordinance of the city making it the duty of a landlord to remove from a sidewalk abutting his property an obstruction which has been placed there by the tenant. Nor is such a duty imposed by the law of the state. It is true that in this state the landlord is bound to keep the premises in repair (Civil Code, § 3123), and that a landlord will be liable under some circumstances to third persons for injuries resulting from his failure to repair (Id. § 3118). The section last cited also provides that "the landlord having fully parted with his possession and right of possession, is not responsible to third persons for damages resulting from the negligent or illegal use of the premises by the tenant." See also *Ocean S. S. Co. v. Hamilton*, 112 Ga. 901, 38 S. E. 204, and cases cited. The present petition, how-

ever, is based solely on the theory that the landlord is liable for injuries resulting from a nuisance. In the case of *White v. Montgomery*, 58 Ga. 204 (2), the case of *Vason v. Augusta*, 38 Ga. 542, is cited for the proposition that a landlord is "not liable for a nuisance maintained upon the premises by the tenant during the lease." In the case last referred to it was held: "A landlord who has leased premises to a tenant is not liable for a nuisance maintained upon the premises by the tenant during the lease. If the nuisance existed upon the premises when the lease was made, the landlord is liable. But if the tenant continues the nuisance after he obtains exclusive possession and control, he alone is liable for its continuance." The nuisance which the plaintiff alleged was not the ditch, or the overflow alone, or the ditch and the overflow, but a combination of the ditch, the overflow, and the ice on the sidewalk. So far as appears from the evidence, the ditch itself was not a nuisance, nor was it a nuisance *per se* to allow water to flow across a sidewalk; but the nuisance consisted in the formation of ice on the sidewalk, making it dangerous for pedestrians to walk along the sidewalk at that point. There was no danger to pedestrians, nor, so far as appears, any inconvenience, resulting either from the ditch or the flowing water. But the gravamen of the complaint is the fact that ice which resulted from the presence of water on the sidewalk was allowed, after its formation, to remain on the sidewalk. In *Center v. Davis*, 39 Ga. 210, two judges (Brown, Ch. J., dissenting) held that the principle laid down in the *Vason Case*, 38 Ga. 542, was applicable only in case of a public nuisance. The Code provides that a public nuisance gives no right of action to any individual, unless such a nuisance causes special damage, in which the public do not participate, when an action will lie for such special damage, and that a private nuisance gives a right of action to the person injured. Civil Code, §§ 3858-3860. But whatever may be the character of the nuisance, the action must, of course, be brought against the person who creates or the one who maintains the same. Even in case of injury from a private nuisance the landlord will not be liable, where the tenant had exclusive possession of the premises, and where the nuisance was created by the tenant. *Freidenburg v. Jones*, 63 Ga. 612, 66 Ga. 505, 42 Am. Rep. 86; *Edgar v. Walker*, 106 Ga. 454, 32 S. E. 582. (2) This is manifestly the sound rule, for, as was said in *White v. Montgomery*, 58 Ga. 204: "The use of the tenements really belongs to the tenant during the lease. They are his property to use for the term for which they are rented, and the landlord has no right to enter upon them, except by permission of the tenant, during the term for which they are rented." The case of *Center v. Davis*, 39 Ga. 210, 217, above referred to, in so far as it lays down the rule that a landlord will be liable for injuries resulting from a private nuisance

which was maintained by his tenants, and with the creation of which he had no connection, has not been followed; and, being a decision by two judges, it is to be treated, at least to the extent above referred to, as having been overruled by the later cases. An obstruction on a sidewalk caused by allowing ice to remain thereon for such a time and in such a way as to render the same unsafe for travel is a public nuisance. See, in this connection, 1 Wood, Nuisances, 3d ed. § 248. The Code provides that if "a public nuisance causes special damage to an individual, in which the public do not participate, such special damage gives a right of action." Civil Code, § 3859. A right of action against whom? Against the person creating or maintaining the same; and, if it is upon a sidewalk in a city, then against the city, if it suffered it to remain after the authorities knew, or should have known, of its existence, or against the individual creating it, or possibly against both. But certainly not against a landlord who, before the nuisance was created, had parted with the possession of the property, and who was not connected in any way with the maintenance of the nuisance. So that, whether we treat the nuisance alleged in the present case as a private or as a public nuisance, no liability arises, under the facts proved, against the landlord. It is true, the landlord knew the ditch was being used to carry water from the property across the sidewalk. But this in itself was not shown to be a nuisance. The injury to the plaintiff was not caused by the presence of the ditch alone, even if it be conceded that the landlord was directly responsible for the presence of the ditch. The injury was the result of a combination of circumstances, consisting of the presence of the ditch, the use of the same by the tenants when the weather was so unusually cold that water upon the ground would form into ice, the flowing of the water upon the sidewalk at such a time, the formation of the ice thereon, and allowing the same to remain upon the sidewalk after it had formed. The connection of the landlord with the matter terminates altogether at the point where the ditch is made upon the premises, and as he was in no way responsible for the acts of his tenants in using the ditch at a time when its use would probably result in the formation of ice upon the sidewalk, and as there is nothing appearing in the record which made it his duty to remove from the sidewalk the obstruction thus caused, it seems to be clear that nothing done by the landlord directly contributed to the injury which the plaintiff sustained. Certainly, under the circumstances, the mere presence of the ditch upon his property was not the proximate cause of the injury. There was no error in granting a nonsuit.

Judgment affirmed.

All the Justices concur, except Little, J., absent on account of sickness.

PHENIX INSURANCE COMPANY of
Hartford, *Plff. in Err.*,
v.

E. A. SCHWARTZ.

(.....Ga.....)

- *1. A clause in a policy of fire insurance, requiring the assured to keep the books and inventories of his business "securely locked in a fireproof safe at night, and at all times when the building [in which the stock insured is located] is not actually open for business, or, falling in this," to "keep such books and inventories in some place not exposed to a fire which would destroy the . . . building," does not apply to a suspension of business caused by such an emergency as a fire raging in the vicinity and threatening the consumption of the building, the same not being actually shut up, and business operations being interrupted because of the threatened danger. Under such circumstances, the clause in question does require the insured to exercise reasonable diligence to preserve the books and inventories.
2. Defects in a motion for a new trial, caused by the failure to properly assign error upon the rulings of which complaint is made, cannot be cured by setting out in the bill of exceptions the various grounds of the motion, and specifically assigning error upon the overruling of each ground.
3. Under the ruling of this court in *Phenix Ins. Co. v. Hart*, 112 Ga. 765, 38 S. E. 87, § 2140 of the Civil Code, which authorizes the plaintiff in an action upon a policy of insurance to recover, under certain conditions, damages and attorneys' fees, is unconstitutional.

(April 2, 1902.)

ERROR to the City Court of Richmond County to review a judgment in favor of plaintiff in an action brought to enforce payment of the amount alleged to be due on a fire insurance policy. *Reversed.*

The facts are stated in the opinion.

Mr. M. P. Carroll, for plaintiff in error:

If the store was not actually open for business when the fire occurred, and the inventories and books were not placed in an iron safe, there was a violation of the promissory warranty upon the part of the assured, and the policy would therefore be void.

Scottish Union & Nat. Ins. Co. v. Stubbs, 98 Ga. 754, 27 S. E. 180; *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 52 L. R. A. 70, 36 S. E. 821.

If it appears that plaintiff lost her books and inventories from culpable negligence, and therefore could not produce them for inspection, she cannot recover, because she violated her promissory warranty, for she agreed therein to produce them for inspection

by the insurer, and, being a condition precedent, it must be complied with in order to recover on the policy.

Liverpool & L. & G. Ins. Co. v. Kearney, 36 C. C. A. 265, 94 Fed. 314; *Connecticut F. Ins. Co. v. Jeary*, 60 Neb. 338, 51 L. R. A. 702, 83 N. W. 78.

Messrs. J. R. Lamar and C. H. Cohen for defendant in error.

Fish, J., delivered the opinion of the court:

A policy of insurance, issued by the Phoenix Insurance Company of Hartford, Connecticut, to Mrs. E. A. Schwartz, upon her stock of goods and merchandise, contained, among others, the following provisions: "The following covenant and warranty is hereby made a part of this policy: 1st. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year; and, unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of the issuance of this policy, or this policy shall be null and void from such date. . . . 2d. The assured shall keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, from date of inventory, as provided for in the first section of this clause, and during the continuance of this policy. 3d. The assured will keep such books and inventory, and also the last and preceding inventories, if such have been taken, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually open for business, or, failing in this, the assured shall keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building. In the event of failure to present such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon." Mrs. Schwartz's store was consumed by a fire which originated during business hours in another store on the same block. Her books and inventory were destroyed by the fire. They were not in the safe, but had been tied up in a bundle in anticipation of the possibility that the fire might spread to that store, and placed near the door, so that they might be removed in case of danger. The company refused to pay the policy, on the ground of the failure of the assured to produce her books of account and inventories in accordance with the terms of the contract of insurance, and upon the further ground of noncompliance with the "iron-safe" clause of the policy, the provisions of which we have quoted. Mrs. Schwartz thereupon brought suit for the amount of the policy, together with damages and attorneys' fees. The defendant demurred to so much of the petition as sought to recover damages and attorneys' fees.

*Headnotes by **FISH, J.**

NOTE.—On the question of condition in fire policy as to keeping, producing, and preserving books or papers, including cases as to iron-safe clause in policy, see, in this series, *Connecticut F. Ins. Co. v. Jeary* (Neb.) 51 L. R. A. 698, and *note*; also *Southern F. Ins. Co. v. Knight* (Ga.) 52 L. R. A. 70, 36 S. E. 821.

This demurrer was overruled, and the case proceeded to trial, resulting in a verdict for the plaintiff for the full amount sued for, including \$625 damages for bad faith on the part of the defendant company in refusing to pay the policy, and \$500 as attorneys' fees, whereupon the defendant made a motion for a new trial, which the court refused. To the overruling of its demurrer, and to the refusal of the court to grant a new trial, the insurance company excepted.

1. The proper determination of the issues involved in the case before us depends largely upon the construction to be placed upon what is known as the "iron-safe" clause in the policy of insurance. It seems clear from the record that the plaintiff below had in her store at the time of the fire an iron safe, which was open, and into which the books and other records of the business could easily have been placed; that upon the approach of the fire, however, they were not placed in the safe, but were tied in a bundle and put conveniently at hand, so that they might be removed from the building in the event that the conflagration, which was then some distance away, should seem to threaten the safety of the store; that the fire spread much more rapidly than was expected, with the result that a wall of the building in which the plaintiff's store was located fell in, destroying her entire stock of merchandise; and that the books and inventory were not removed, but were destroyed with the building. It was the contention of counsel for the insurance company, as disclosed by their brief and the written requests for instructions to the jury, that upon the approach of the fire the plaintiff's store was no longer "open for business," within the meaning of the iron-safe clause of the policy; that it thereupon became the duty of the plaintiff to promptly place the books (which up to that time had been in use) in the safe; and that her failure to do this, resulting in her inability to produce the books and inventory for the inspection of the company, was a bar to her right to recover on the policy. We cannot, however, concede that this is a fair construction of the iron-safe clause. It is plain that on all ordinary occasions when her store was not open for business, such, for instance, as Sundays, holidays, and after the store had closed at night, the plaintiff was required by the clause in question to do one of two things: She must either have kept the books and inventories in her safe at the store, or else have removed them to some place where they would not be exposed to danger from fire. The clear intent of the clause is to guard against the possible destruction of these records during the absence from the store of those whose duty it was to look after them, and to that end it was provided that if the books were to be left in the store at night, and on other occasions when business was not being transacted, they must be kept in an iron safe, which, presumably, was the most secure place for them in the store. But we see no warrant for the con-

struction that this clause was intended to apply to occasions of actual impending danger from fire, nor are we aware of any rule for determining just when, under circumstances such as are disclosed by the record now under consideration, a store ceases to be "open for business." The fire took place during business hours, and it does not appear that the premises were ever actually closed. It was a time of great and sudden emergency, and, as a matter of fact, it is conceivable that the books might have been in greater danger from destruction, under the circumstances, in the iron safe than if removed to some place outside the store. Applied to the peculiar circumstances of the present case, we think that a fair interpretation of the iron-safe clause would be as follows: The insured was required to preserve, and, in case of fire, to produce, her books of account and inventories; the preservation of them being solely for the purpose of enabling her to produce them when required. On all ordinary occasions when the store was not open for business, certain hard and fast rules were laid down to insure their preservation. In cases of sudden emergency, the insured must exercise all reasonable diligence to effect the main end of the iron-safe clause, *viz.*, to put the books in a place of safety, so that they could be produced for the inspection of the company's agents after the fire. Whether such diligence required the placing of the books in the iron safe, or their removal from the building, and whether, in the present case, the plaintiff used such diligence, were questions of fact, to be determined by the jury. See *Liverpool & L. & G. Ins. Co. v. Kearney*, 2 Ind. Terr. 67, 46 S. W. 414; *East Texas F. Ins. Co. v. Harris*, 7 Tex. Civ. App. 647, 25 S. W. 720.

2. Certain grounds of the motion for a new trial complain of portions of the judge's charge, and of various rulings upon the admission of evidence, but do not point out in what the alleged error consisted. Apparently, counsel for the plaintiff in error attempted to cure this defect in the motion by incorporating these grounds in the bill of exceptions, and there specifically assigning error on each; but under the ruling of this court in *Hill v. State*, 112 Ga. 32, 37 S. E. 441 (2), and the cases there cited, these assignments of error cannot now be considered.

3. Under the ruling of this court in the case of *Phoenix Ins. Co. v. Hart*, 112 Ga. 705, 38 S. E. 67, it is clear that the court erred in overruling the demurrer to so much of the plaintiff's petition as sought to recover damages and attorneys' fees under § 2140 of the Civil Code. We accordingly reverse the judgment of the court below. Upon another hearing it should be tried upon the line indicated in the first division of this opinion.

Judgment reversed.

All the Justices concur, except **Little** and **Lewis, JJ.**, absent on account of sickness.

Elizabeth K. BIGBY, *Plff. in Err.*,
v.

J. T. WARNOCK.

(.....Ga.....)

- *1. A conveyance of property, with intention to delay or defraud creditors, and such intention known to the party taking, is void as to them, though made in payment of a debt, which in amount approximates the value of the property so conveyed.
2. Where in such a case a wife is the fraudulent grantee of her husband, and in order to procure a loan to herself, conveys the property, as security, to one ignorant of the fraud, she is personally liable to a judgment creditor of her husband, as to whom the conveyance to her is void, for the amount of the loan, or a sufficiency thereof to satisfy such judgment.
3. In an action brought by the judgment creditor of the husband against the wife in such a case, she cannot, to reduce a recovery, plead a debt due her by her husband. Moreover, it is immaterial what she did with the borrowed money, provided she did not apply it to her husband's debts.
4. An assignment of error upon the refusal of the court to allow a witness to answer a specified question propounded by the party calling him is not properly made unless it states what evidence was thus sought to be elicited, and that the court was informed thereof at the time of the ruling.
5. There was sufficient evidence to warrant the verdict. The rulings announced cover all of the material points in the case. In none of the grounds of the motion for new trial not therein dealt with does any error of material consequence appear.

(April 29, 1902.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of plaintiff in an action brought to enforce payment of judgments which had been obtained against John S. Bigby. *Affirmed.*

The facts are stated in the opinion.

Messrs. Dorsey, Brewster, & Howell, B. H. Hill & C. D. Hill, and Smith, Hammond, & Smith, for plaintiff in error:

The vendee purchasing property from his debtor in payment of a bona fide debt does not occupy the same relation to § 2695, ¶ 2, as the vendee who volunteers to purchase from a debtor his property and pay him money therefor.

Ga. Code, § 2697.

A conveyance by a debtor of his own property in discharge of a debt, though taken by the grantee with the knowledge that it is intended to hinder, delay, or defeat other creditors, is good as against the lat-

ter, unless the grantee takes more than the amount of his debt, either for himself, or for the debtor, or others.

Dodd v. Bond, 88 Ga. 359, 14 S. E. 581; *Bump, Fraud. Conv.* § 205; *Martindale, Conv.* § 36; *Worland v. Kimberlin*, 6 B. Mon. 608, 44 Am. Dec. 785; *Oovanhovan v. Hart*, 21 Pa. 495, 60 Am. Dec. 57; *Hodges Bros. v. Coleman*, 76 Ala. 103; *Lucas v. Clafflin*, 76 Va. 269; *Knowles v. Street*, 87 Ala. 357, 6 So. 273; *Moore v. Penn*, 95 Ala. 200, 10 So. 344; *Shelley v. Boothe*, 73 Mo. 77, 39 Am. Rep. 481; *Kohn Bros. v. Clement*, 58 Iowa, 591, 12 N. W. 550; *Arn v. Hoersemann*, 26 Kan. 413; *Moline Wagon Co. v. Rummell*, 14 Fed. 158; *Werner v. Zierfuss*, 162 Pa. 360, 29 Atl. 737; *Brittain v. Burnham*, 9 Okla. 522, 60 Pac. 241; *Jones v. Loree*, 37 Neb. 816, 56 N. W. 390; *Erdall v. Atwood*, 79 Wis. 1, 47 N. W. 1124; *Sunday Creek Coal Co. v. Burnham*, 52 Neb. 364, 72 N. W. 487; *Broach v. Garth* (Tex. Civ. App.) 50 S. W. 594; *Texas Drug Co. v. Baker*, 20 Tex. Civ. App. 684, 50 S. W. 157; *Ellis v. Valentine*, 65 Tex. 548; *Haas v. Kraus*, 86 Tex. 689, 27 S. W. 256; *Martin-Brown Co. v. City Nat. Bank* (Tex. Civ. App.) 41 S. W. 525; *Morrow v. Campbell*, 118 Ala. 330, 24 So. 852; *Meyer v. Sulzbacher*, 76 Ala. 120; *Pollock v. Meyer*, 96 Ala. 172, 11 So. 385; *Bleiler v. Moore*, 94 Wis. 385, 69 N. W. 164; *Wall v. Beedy*, 161 Mo. 625, 61 S. W. 864; *Head v. Bracht* (Tex. Civ. App.) 40 S. W. 630; *Olmstead v. Mattison*, 45 Mich. 617, 8 N. W. 555; *Carr v. Briggs*, 156 Mass. 78, 30 N. E. 470; *Hasie v. Connor*, 53 Kan. 717, 37 Pac. 128.

Where the laws permit a debtor to prefer one creditor to another: (1) If the debt which is the consideration of the conveyance by the debtor to the creditor is bona fide; (2) the value of the property conveyed is approximately not greater than the amount due on the debt; (3) no benefit is reserved to the debtor; (4) no benefit is to accrue to the creditor beyond the payment of his debt; (5) if there is no injury to other creditors beyond the mere payment of the preferred debt,—then the conveyance is valid, independent of the intention of the debtor making it, or the knowledge of such intention on the part of the creditor accepting the conveyance.

If the rule shall prevail as enunciated by the court, it is easy for the husband to absorb the wife's property to himself.

We cannot believe such a rule is correct in this state.

Phipps v. Sedgwick, 95 U. S. 3-10, 24 L. ed. 591-594; *Clark v. Beecher*, 154 U. S. 631, appx., and 24 L. ed. 705; *United States Trust Co. v. Sedgwick*, 97 U. S. 304, 24 L. ed. 954; *Huntington v. Saunders*, 120 U. S. 78, 30 L. ed. 580, 7 Sup. Ct. Rep. 356.

Messrs. Slaton & Phillips, for defendant in error:

It is not the effect which renders the conveyance void, but the purpose.

Monroe Mercantile Co. v. Arnold, 108 Ga. 449, 34 S. E. 176; *Moore v. Williamson*, 44 N. J. Eq. 496, 1 L. R. A. 336, 15 Atl. 587;

*Headnotes by FISH, J.

NOTE.—As to the remedies of a creditor in case of a transfer to defraud creditors, see also *Field v. Siegel* (Wis.) 47 L. R. A. 433, and note on the subject of actions for damages brought against third party on account of fraud in disposing of the debtor's property or preventing the creditor from collecting his claim. 57 L. R. A.

14 Am. & Eng. Enc. Law, p. 262; *Peck v. Land*, 2 Ga. 1, 46 Am. Dec. 368; *Blepner-hassett v. Sherman*, 105 U. S. 100-117, 26 L. ed. 1080-1085; *Jones v. Simpson*, 116 U. S. 609, 29 L. ed. 742, 6 Sup. Ct. Rep. 538; *Herman v. McKinney*, 47 Fed. 758; *Rose's Notes on 6 Cranch*, 263, 7 Cranch, 59, 60; 8 Am. & Eng. Enc. Law, pp. 852, 856.

The contention of the complainant was that the defendants were guilty of an elaborate scheme of fraud, and every fact evidencing such fraud was admissible.

Claffin v. Ballance, 91 Ga. 411, 18 S. E. 309.

The courts even allow in evidence the insolvency of a husband four years after the alleged fraud between husband and wife.

King v. Poole, 61 Ga. 373; *Thompson v. State*, 60 Ga. 82; *Cruger v. Tucker*, 69 Ga. 558; *Booker v. Worrill*, 57 Ga. 238; *Kelly v. Simmons*, 73 Ga. 716; *Hoffer v. Gladden*, 75 Ga. 532; *Clayton v. Brown*, 30 Ga. 490; *Planters' & M. Bank v. Wilcox Cotton Mills*, 60 Ga. 168; *Howard v. Snelling*, 32 Ga. 195; *Hollis v. Rodgers*, 106 Ga. 13, 31 S. E. 783.

The evidence in this case shows that the defendants were guilty of evasiveness and generalities. Generalities indicate fraud.

Harris v. Collins, 75 Ga. 97.

Fish, J., delivered the opinion of the court:

J. T. Warnock brought an equitable petition against John S. Bigby and his wife, Elizabeth K. Bigby, and the British American Mortgage Company, Limited, herein-after referred to as the "Mortgage Company." The petition alleged, in substance, that on July 8, 1896, petitioner recovered a judgment against John S. Bigby for \$9,515.56, principal, interest, and costs, and on September 10th of the same year he recovered another judgment against him for \$617.85, principal, interest, and costs; that the executions issued on these judgments were returned with entries of *nulla bona*; that John S. Bigby claimed to be insolvent; that prior to 1896 he had large means, consisting of realty, and bank, railroad, and other stocks, etc.; that in 1891 he was made president of the Eagle & Phenix Manufacturing Company, of Columbus, Georgia, and continued in the control of the affairs of that company until June 13, 1896, when it was placed in the hands of receivers; that while president of that company he became indorser for large amounts on its obligations, and that after he discovered that the company would fail he began to hide and dispose of his property for the purpose of hindering, delaying, and preventing his creditors from collecting their debts; that in pursuance of such purpose, and without any consideration, he transferred to his wife, Elizabeth K., large amounts of stock in two national banks in Newnan, and in the West View Cemetery Company, and the West View Floral Company, and that she knew at the time of the transfers that they were made for such fraudulent purpose; that on May 4, 1896, for the purpose of hindering, delaying, and defrauding petitioner and

other creditors (Mrs. Bigby knowing of such purpose at the time), Mr. Bigby conveyed to her, by a deed, a certain described house and lot, situated on Washington street, in the city of Atlanta; that though the deed stated the consideration to be \$18,700, and though Mrs. Bigby claimed that the conveyance was made in payment of debts due to her by her husband, as a matter of fact there was no consideration for the conveyance, and it was executed for the fraudulent purpose above stated; that on July 15, 1896, Mrs. Bigby, for the purpose of aiding her husband in hindering, delaying, and defrauding petitioner and other creditors of her husband, conveyed by deed the Washington street property to the mortgage company, to secure a loan to her of \$15,000; and that she had no property except that which had been given to her by her husband. The petitioner prayed that the transfers of stocks and the conveyance of the Washington street property be decreed to be void, that the equity of redemption in the Washington street property be decreed to be subject to petitioner's judgments, and that Mrs. Bigby be decreed to be liable, as trustee *ex maleficio*, for any sum realized by her upon the security deed given to the mortgage company. The mortgage company was not served, and made no appearance. Bigby and his wife denied specifically all allegations of fraud made in the petition, and set up that the transfers of stock and the conveyance of the Washington street property were executed in good faith, and with no intention to hinder, delay, or defraud the creditors of Mr. Bigby; that the consideration of such transfers and conveyance was an indebtedness due her by him, and three notes given by him to her, in payment of which he conveyed to her the Washington street house and lot specified,—one dated January 4, 1893, due one day after date, for \$10,500 (being for 100 shares of stock in the Atlanta & West Point Railroad Company, which he had given to her in 1883, and which she sold to him at the time the note was given); one dated July 12, 1893, due on demand, for \$3,200, for money borrowed by him from her; and one dated May 3, 1895, payable on demand, for \$5,000, the consideration being money loaned him by her, which she had received from the first National Bank of Newnan on stock he had given her in January, 1895. Bigby died pending the suit, and his wife, as executrix of his will, was made a party defendant. On the trial a verdict was rendered finding the conveyance of the Washington street property to be void; that petitioner recover of Mrs. Bigby \$9,503.71 "on account of the proceeds of the mortgage made by her;" and "in favor of defendant as to the claim on account of stocks." A motion for a new trial was made by Mrs. Bigby on numerous grounds, which being overruled, she excepted.

1. One of the controlling questions presented in this case for determination is whether, under our law, a conveyance of property made by a debtor with intention

to delay or defraud his creditors (such intention known to the party taking) is void as to other creditors, when made in payment of a debt which in amount is approximately the value of the property conveyed. Whatever may be the rulings of other courts on this question, it is well established by the former decisions of this court that a conveyance made under such circumstances is void as to creditors. In *Phintzy v. Clark*, 62 Ga. 626, Mr. Justice Bleckley said: "A fraudulent conveyance cannot stand against creditors, whether made to secure a debt or not. The conveyance must be pure; it must be made bona fide, and with no purpose known to or suspected by the creditor to hamper and entangle the property as against other creditors, for the sake of hindering or delaying them. If made partly to secure a debt, and partly to hinder, delay, or in any way defraud other creditors, and the creditor taking the deed has knowledge of this latter intention, or grounds for reasonable suspicion, no title will pass as against the other creditors." A like ruling was made in *Palmour v. Johnson*, 84 Ga. 91, 10 S. E. 500. In *Conley v. Buck*, 100 Ga. 188, 28 S. E. 97, a conveyance by a husband to his wife was attacked by his creditors as being void, because made to delay and defraud them. The wife contended that she was a creditor of her husband, and had paid him full value for the land he conveyed to her. The case was tried before his honor Judge J. H. Lumpkin, who also presided upon the trial of the case now in hand. His charges upon the question of fraudulent conveyances were practically the same in both cases. In passing upon exceptions to his charge in the former case, this court said: "There was no error on the trial of such a case, while the court was submitting to the jury the question as to whether or not a given deed from the defendant in execution to his wife, she being one of the defendants to the petition, was made with intent to hinder, delay, or defraud the husband's creditors, in charging, in substance, that if the husband made the deed with such intent, and this was known to the wife, it was void as to the creditors, 'even though it may appear that she had paid a valuable consideration;' nor in charging that if, in accepting such a deed, she did so with the intention and purpose of delaying and defrauding such creditors, the deed would be void, 'although it may have been based upon a valuable consideration.'" The doctrine was again recognized in *Monroe Mercantile Co. v. Arnold*, 108 Ga. 449, 34 S. E. 176, where Mr. Justice Lewis said: "... Where the sole purpose of a debtor is to secure his creditors, and there is no intent to either defraud or delay others, such preference of a particular creditor will be upheld, although the natural result of it may be to delay other creditors. Were the doctrine otherwise, it would be almost impracticable for a debtor to exercise the privilege of preference given him by law, for he can in good faith secure a creditor by making to him a conveyance

of all his property, yet the natural result of that would be necessary to delay, if not prevent, the collection of debts due to others. But whenever the purpose of a conveyance is to bring about such delay, then the law itself is violated, and the contract by which his property is transferred becomes tainted with a legal fraud." The validity of the conveyance is to be determined, not by its consideration or effect, but by the intention with which it is made and accepted. There is nothing ruled in *Dodd v. Bond*, 88 Ga. 355, 14 S. E. 581, cited by counsel for plaintiff in error, which is in conflict with the decisions from which we have quoted. The point adjudicated in that case was that "a creditor who gives credit to a mother on the faith of property to which she has the legal title, but which in equity belongs to her children, acquires no lien upon the property by a judgment rendered against her after she has conveyed it to a trustee for their benefit, although she may have been actuated in making the conveyance by an intent and purpose to defeat such creditor, and such intent and purpose may have been known to the trustee when the conveyance was made. The property being equitably that of the children, and the creditor having acquired no lien upon it before his debtor parted with the legal title, he cannot subject it to a sale under his judgment." It is true that in delivering the opinion in that case the present Chief Justice remarked that "there is authority to the effect that a conveyance by a debtor of his own property in discharge of a debt, though taken by the grantee with the knowledge that it is intended to hinder, delay, or defeat other creditors, is good, as against the latter, unless the grantee takes more than the amount of his debt, either for himself or for the debtor or others." He further said, however: "Whatever may be the true view of the law where a debtor conveys his own property to a creditor, we are satisfied that where one conveys property not his own, which he wrongfully holds, to the rightful owner, the law does not require the latter to yield his rights and decline taking it because the person who has withheld it wrongfully may, in returning it, intend thereby to keep his own creditors from getting it. One who takes merely what is his own is not punished for considerations which may operate upon the mind of the party who gives it up. In this case the wrongful holder of property was performing a legal and moral duty,—was doing that which, in the eyes of the law, ought to have been done, in placing the property where it belonged. We hold, therefore, that the conveyance is good as against these creditors, and that they cannot subject the property to sale under their judgments." It is obvious that the ruling made in that case is not helpful to the plaintiff in error.

2. Complaint was made in the motion for a new trial that the court erred in instructing the jury as follows: "If you find, under the evidence, and under the law as I

have given you in charge, that it [the deed to the Washington street property] was void as against this creditor, and should be so declared, then I charge you whatever amount Mrs. Bigby received by placing a mortgage on the land would be, as a sequence of such finding, a receipt of money from land which she was not entitled to as against this creditor, and therefore she would be liable to account to him for such money so received, to the extent of his judgment." One of the exceptions to this charge was, in substance, that even if Mrs. Bigby was the fraudulent grantee of her husband, and she disposed of the property to an innocent mortgagee, the plaintiff was not entitled to a personal judgment against her which would bind her separate estate. It is a well-established doctrine that a judgment creditor has the right, in equity, to a personal or money judgment against a fraudulent grantee of his debtor, where the grantee has so disposed of the property as to place it beyond the reach of the judgment. 14 Am. & Eng. Enc. Law, 2d ed. p. 341; Wait, Fraud. Conv. §§ 177 *et seq.*; Bump, Fraud. Conv. § 623; and numerous cases cited by the authors. The reason upon which the rule is founded is well stated in *Ferguson v. Hillman*, 55 Wis. 181, 12 N. W. 389, as follows: "The property in the hands of the fraudulent purchaser is held by him in trust for the creditors of his fraudulent vendor, and when the property is converted into money the money is impressed with the same trust. The original conveyance being void as to creditors, no title as to them ever passed to the grantee; and, if he sells it and receives the money, he must hold the money for the benefit of the creditors. In equity, such money in the hands of the fraudulent grantee is held for the benefit of the creditors." To same effect, see *Blair v. Smith*, 114 Ind. 118, 15 N. E. 817, and *Smith v. Sands*, 17 Neb. 498, 23 N. W. 356. Of course, the recovery against the fraudulent grantee will be limited to the amount of the creditor's judgment against his debtor, and cannot exceed the proceeds of the property or its value.

Does this rule apply where a wife is the fraudulent grantee of her husband? The Supreme Court of the United States, in *Phipps v. Sedgwick*, 95 U. S. 3, 24 L. ed. 591, which was on appeal from New York, held that it did not. Mr. Justice Miller, in delivering the opinion of the court, said: "The statutes of the different states have gone very far, in this country, to modify the peculiar relations of husband and wife, as they existed at common law, in reference to their property. But they have not, except, perhaps, in Louisiana, gone so far as to recognize the civil law rule of perfect independence in dealing with each other. While the statutes of New York have recognized certain rights of the wife to deal with and contract in reference to her separate property, they fall far short of establishing the principle that out of that separate property she can be made liable for money or property received at her husband's hands,

which in equity ought to have gone to pay his debts. . . . Such a proposition would be a very unjust one to the wife still under the dominion, control, and personal influence of the husband." This case was followed in *United States Trust Co. v. Sedgwick*, 97 U. S. 304, 24 L. ed. 954, and *Huntington v. Saunders*, 120 U. S. 78, 30 L. ed. 580, 7 Sup. Ct. Rep. 358, and these were approved in *Clark v. Beecher*, 154 U. S. 631, appx., and 24 L. ed. 705, 14 Sup. Ct. Rep. 1184. Mr. Wait, in his work on *Fraudulent Conveyances*, 3d ed. § 180, says: "These Supreme Court cases certainly accomplish an unfortunate result, and probably will not be universally accepted, if, indeed, the principles they embody are not superseded in some states by the removal of the disabilities incident to coverture. In *Post v. Stiger*, 29 N. J. Eq. 558, it appeared that property had been conveyed to a wife in fraud of the husband's creditors. The wife set up as a defense the fact that she had disposed of it. The court said that she must answer for its value. An attempt was made to show that she had subsequently lost by bad bargains all the property that she had acquired by the conveyance. The proofs did not seem to sustain this view, but the court remarked that, even if it had been so proved, this would not relieve her from liability, and, continuing, said: 'She held the property as trustee of her husband's creditors, and dealt with it at her peril. A fraudulent grantee cannot repel the claims of the creditors of the grantor by simply saying: "I have lost, by imprudent bargains or collusive foreclosures, the property I attempted to conceal, and therefore I am answerable for nothing." It may be urged that this case is a *dictum* on the points cited. This is probably a legitimate criticism, for the court practically found that the wife still had the property; yet as an expression of opinion of a highly intelligent court, pointing, as we claim, in the right direction, we regard the *dictum* as worthy of adoption as an absolute authority." In *Coale v. Moline Plow Co.* 134 Ill. 350, 25 N. E. 1016, it was held: "Where a wife to whom her husband has fraudulently conveyed land mortgages it to a bona fide mortgagee, and, when the conveyance is attacked by the husband's creditors, claims to own the land, and avows the execution of the mortgage, she will be personally liable to the creditors for the money obtained on the mortgage, though it went to the husband." In *Jones v. Davenport*, 44 N. J. Eq. 33, 13 Atl. 652, it was held: "Where a husband shortly before his death transferred to his wife, who was afterwards his executrix, certain shares of bank stock for an alleged consideration,—\$2,500 less than she realized several months afterwards,—the wife is personally liable to his creditors for the sum which she received from the sale. In *Blair v. Smith*, 114 Ind. 118, 15 N. E. 817, it was held: "Where a husband, to defraud his creditors, gives money to his wife, who yields no consideration, and who accepts the money with knowledge

of his fraudulent purpose, she is chargeable as a trustee, and may be compelled to account as such at the suit of the husband's creditors." It is true that in these cases the point seems not to have been raised that the wife was not personally liable, because she was presumed to have acted under the influence and control of her husband; but, if any such presumption existed in law, surely it would have been noticed by the learned judges who rendered these decisions. In *Phelps v. Smith*, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156, where the ruling in *Blair v. Smith*, 114 Ind. 118, 15 N. E. 817, was approved, Elliott, J., in delivering the opinion of the court, said: "The decision in *Phipps v. Sedgwick*, 95 U. S. 3, 24 L. ed. 591, if conceded to be otherwise relevant, is not in point, because the court placed its judgment upon the disability created by coverture, saying that 'such a proposition would be a very unjust one to the wife still under the dominion, control, and personal influence of the husband.' Manifestly this rule cannot apply in jurisdictions where a married woman possesses nearly all the rights of a *feme sole*, and where 'ability is the rule, and disability the exception.'" Under our law, a married woman, in dealing with her separate estate, stands upon the same footing as a man or a *feme sole*, with these restrictions only: She cannot bind it by any contract of suretyship, nor by any assumption of the debts of her husband, nor sell it to a creditor in payment of her husband's debts, nor sell it to her husband without an order of the superior court. Civil Code, §§ 2488, 2490. As said by Chief Justice Jackson in *Howard v. Simpkins*, 70 Ga. 322: "... The law in regard to a married woman, and all her rights and disabilities, has undergone a complete revolution in this state since the act of 1866, which, in effect, and as to all her property, makes her a *feme sole*, almost in every respect as if she never had been married, so far as property is concerned." Barring the exceptions above indicated, she may contract as if she were a *feme sole*, and she is certainly not under the dominion, control, and personal influence of the husband to the extent she was at common law. There the wife was not responsible, except as to certain offenses, for acts done in her husband's presence, for the reason that she was supposed to act under his coercion. Under our statute, however, there is no such presumption, but in order for the wife to stand excused for the commission of any offense, however small, on the ground of the presence of her husband, "it must appear that she was in fact coerced, or that he used violent threats, command, or some equivalent means of coercion calculated to overpower her will and render her a passive instrument rather than a voluntary agent of crime." *Bell v. State*, 92 Ga. 49, 18 S. E. 186. In *Vaughn v. Miller*, 76 Ga. 712, it was held that if a wife, by consent and arrangement with her husband, assist him to procure goods from another for the purpose of enabling her hus-

band to pay a debt she holds against him, which she cannot otherwise collect, or which she is doubtful about collecting, she is guilty of such a fraud as will make her liable to the person from whom the goods are procured, whether the credit for the goods be extended to her or to the husband.

It is further argued by counsel for plaintiff in error that: "It is the policy of our laws to protect [the wife's] separate estate against the influence of her husband, and . . . that the rule laid down by the court in his charge opens the gate to a method to subject the wife's separate estate to the obligations of the husband. If the rule shall prevail as enunciated by the court, it is easy for the husband to absorb the wife's property to himself." And the following illustration is given: "A man has a wife possessed of a large separate estate. He has a large estate. He wants money. The law presumes that the wife is subject to the husband's influence. He conveys to her, in fraud of his creditors, property of large value. He has her to mortgage it for its full value. He takes the money and appropriates it to his own uses. Creditors attack the conveyance. It is found, as in this case, fraudulent; and, as the property given her by her husband is mortgaged for its full value, a judgment against her for the amount realized from the mortgage is had. It sweeps away her entire separate estate. The law has been circumvented. The separate estate has been appropriated to the payment of her husband's debts, in spite of the statute enacted to protect it." Even granting, for the sake of the argument, that the wife's separate estate would be subject in the hypothetical case suggested by counsel, it is very improbable that a husband would ever resort to such a scheme for the purpose of defrauding his wife. When he undertakes to devise means for the purpose of fraudulently protecting his own property against the just demands of his creditors, he is not likely to use methods the purpose of which is to subject his wife's separate estate to the payment of his debts; but he will, in all probability, adopt some plan by which his property may be put beyond the reach of his creditors, and yet so placed that he and his wife may still enjoy both the benefits arising from its use, and the use of her property also. If the law were, as counsel for the plaintiff in error insists it is, that a personal judgment cannot be obtained against a wife who is the fraudulent grantee of her husband, a wide door, indeed, would be open for fraud. All that an insolvent husband who desired to defraud his creditors would then have to do would be to conspire with his wife, convey all his property to her, have her sell or mortgage the same to an innocent party, and conceal the proceeds. She would then be enabled to enjoy the fruits of her own wrong, while her separate estate, however large it might be, would be free from liability.

3. Another contention of the plaintiff in error was that no personal judgment should

be rendered against her, because the evidence showed that she borrowed \$10,000 from a bank, for which she gave her note, with her husband as surety; that she loaned this money to the Eagle & Phenix Manufacturing Company, and took its note, with her husband as indorser thereon; that, of the money she loaned it, the company paid \$5,000 in satisfaction of a note held by Warnock against it, upon which her husband was indorser; that she paid her note to the bank with part of the money she borrowed from the mortgage company, and for which the security deed was given; and that she had recovered a judgment against her husband, as indorser on the note given her by the Eagle & Phenix Manufacturing Company, for a sum larger than the amount she had received from the mortgage company. She therefore claimed that, as her judgment against her husband was larger than the amount which she had obtained by encumbering the realty which her husband conveyed to her, she was not liable to the plaintiff in the case, and, further, that she was not liable because she had, in effect, appropriated \$10,000 of the money she received from the mortgage company to the payment of her husband's debts. We do not think these contentions sound. As already seen, if Bigby fraudulently conveyed the house and lot to his wife for the purpose of defeating his creditors, and she participated in the fraud, she was liable as a trustee *ex maleficio* to Warnock, to the amount of his judgments, for the money she procured on the property by conveying it to the mortgage company, which took without notice of the fraud. If she was such a fraudulent grantee, and had really paid a part of the consideration for the property transferred to her by her husband in cash, she could not even set up against the plaintiff's recovery the amount of money which she thus paid. For the rule is that "the loss of the amount paid by the fraudulent grantee is the penalty which the law inflicts for the fraudulent transaction. To refund to the grantee the amount he has paid would be to remove all danger of loss, and destroy the salutary restraint which the law has built up against such transactions." 14 Am. & Eng. Enc. Law, 2d ed. p. 345. It seems that the spirit of this rule would preclude a fraudulent grantee from setting up a debt which the grantor owes him, to reduce the amount of the recovery against him by the grantor's creditor. But be this as it may, it is certainly true that the conveyance from Bigby to his wife was valid as between them, though made to defeat his creditors, and accepted by her with knowledge of the fraudulent purpose. *Flannery v. Coleman*, 112 Ga. 648, 37 S. E. 878. After such conveyance, the title to the property was in her as to all the world, except her husband's creditors; and it follows that she in like manner held the money she borrowed on the property from the mortgage company. This being true, this money,

57 L. R. A.

which as to the plaintiff, Warnock, she held as trustee, and which was subject to the debt he held against her husband, should not be applied to the payment of a debt she held against him, because, as between her and him, it was not his money, but hers, and it would be an anomaly for her to collect a debt she held against her husband out of her own property. Nor could the use made by Mrs. Bigby of the money she received by encumbering the property, if she was such a fraudulent grantee, affect the recovery against her, provided such money was not applied to the payment of her husband's debts. *Mason v. Pierron*, 69 Wis. 585, 34 N. W. 921. See 14 Am. & Eng. Enc. Law, 2d ed. p. 347. The portion of the money Mrs. Bigby received from the mortgage company which she paid to the bank was in satisfaction of her own debt, for which she had given her individual note, with her husband as surety. She, and not her husband, was the primary debtor on this note, and she got the benefit of the payment. That the Eagle & Phenix Manufacturing Company, to which she loaned the money she borrowed from the bank, had used part of it in paying a note which Warnock, the plaintiff below, held against it, and upon which Bigby was indorser, is wholly immaterial, as such payment was in liquidation of a debt for which it was primarily liable, and not Bigby. It is clear, therefore, that the \$10,000 paid to the bank by Mrs. Bigby was not a payment to any creditor of her husband. Our conclusion upon this subject is that, while recognizing the great weight which should be accorded to the decisions of the highest judicial tribunal in the land, yet the reasons given by the court in *Phipps v. Sedgwick*, 95 U. S. 3, 24 L. ed. 591, for holding that, where property is conveyed by a husband to his wife in fraud of his creditors, a personal judgment for its value cannot be taken against her, do not apply in this state, where married women are practically free from the disabilities imposed upon them at common law.

4. In one of the grounds of the motion for a new trial, complaint was made of the refusal of the court, upon objection made by counsel for defendant in error, to allow a witness to answer a question propounded by counsel for plaintiff in error. The motion set forth what the answer to the question would have been, but it does not appear that the court was informed at the time the ruling excepted to was made what answer was expected to the question. The exact point here presented was decided in *Southern Mut. Ins. Co. v. Hudson*, 113 Ga. 438, 38 S. E. 964. In discussing a ground of a motion for a new trial similar to the one now under consideration, Mr. Justice Little, speaking for the court, said: "Under repeated rulings of this court, the ground cannot be considered, because the material inquiry is, Did the court err in excluding the answer to that question from the jury? And there having been no statement made on the trial

as to what his answer would have been, the judge, of course, did not pass on the materiality of the proposed testimony; and, because he did not, we cannot overrule him. . . . He was entitled, at least, to have known, in substance, what the answer to the question would have been." There was therefore no merit in this assignment of error, as made in the motion for a new trial.

5. Counsel for plaintiff in error earnestly contended that the verdict was without evidence to support it; that the plaintiff below sought discovery from Mr. and Mrs. Bigby, and they both answered, denying that the conveyance from him to her of the Washington street property was made with any intent to hinder, delay, or defraud plaintiff or any other creditor, but asserted that the conveyance was made in good faith for the purpose of paying bona fide debts due her by him, which were set out in detail; and that their answers were not overcome by two witnesses, or one witness and corroborating circumstances. After a very thorough examination and consideration of the evidence in the record, we have concluded that it was sufficient to warrant the jury in finding that the conveyance of the Washington street house and lot was made by the grantor for the purpose of delaying or defrauding his creditors, and that the grantee knew of such purpose at the time, or had reasonable grounds of suspicion of that fact.

The contentions of the plaintiff below were (1) that the conveyance was voluntary, without valuable consideration, and made by an insolvent debtor; (2) that it was made with intention to delay or defraud creditors, and such intention was known to the grantee. The interrogatories propounded to Mr. and Mrs. Bigby in the plaintiff's petition were manifestly confined to questions relating to the first of these contentions. They were both interrogated as to the value of their respective estates during the years 1891, 1892, 1893, 1894, 1895, and 1896. They were asked of what their estates consisted during those years; what had become of the property; if any of it had been transferred, to whom, when, how, and for what consideration, and what was done with the proceeds received from it. The only interrogatories propounded specifically to Mr. Bigby in reference to the Washington street property were as follows: "Did your wife pay you any consideration when you transferred the Washington street house and lot to her? If so, what was the consideration? If it was in money, what did you do with the money, where did she get it, and from whom did she get it? If it was an indebtedness from you to her, state when and how it originated, and in what shape it was when you transferred said house and lot to her? If she loaned you the money, state when she loaned it to you, and where she got it?" The only interrogatories propounded to Mrs. Bigby as 57 L. R. A.

to such property were practically the same. The petition expressly stated that discovery from the defendants was waived, except as to the specific questions therein propounded. Granting that the answers responsive to the interrogatories would, after the defendants were sworn and examined as witnesses in their own behalf, have to be overcome by the testimony of two witnesses, or one witness and corroborating circumstances, this was not true as to answers which were not so responsive, and as to subjects in relation to which discovery had been waived. We will mention some of the circumstances in evidence from which, in our opinion, the jury could have found that the conveyance of the Washington street property was made to delay or defraud the creditors of the grantor, and that the grantee took with knowledge of the fraudulent purpose, or grounds for reasonable suspicion: The parties to it were husband and wife, and the familiar rule that transactions between them are to be closely scanned, and their bona fides clearly established, was applicable. The grantor was insolvent at the time, and the suits upon which defendant in error obtained judgments against him were then pending. The conveyance was executed May 4th, recorded May 28th, and the property conveyed by the grantee to the mortgage company on July 15th thereafter. The three notes of the grantor held by the grantee, the payment of which they claimed to have been the consideration for the conveyance, were dated, respectively, July 4, 1893, July 12th of the same year, and May 3, 1895,—two of them payable on demand; the other, one day after date; and the grantee never made any request for payment of either the interest or principal until within about two months before defendant in error obtained judgment against the grantor, when the grantee then demanded payment. The consideration stated in the conveyance was \$18,700, the sum total of the principal of the three notes. The grantor testified: "The consideration that was specified in the deed was purely an arbitrary one,—one that we thought would control in giving in taxes." "I transferred this house on May 4, 1896, to pay her this note, and dividends and other debts that I owed her. The fair valuation of the house and lot at that time was probably \$16,000 or \$17,000." The grantee, in her application to the mortgage company for the loan, valued the property at \$30,000, and there was evidence that it was worth \$25,000.

The rulings made cover all the material points in the case. In none of the grounds of the motion for a new trial not dealt with does any error of material consequence appear.

Judgment affirmed.

All the Justices concur, except **Lewis, J.**, absent on account of sickness.

INDIANA SUPREME COURT.

INDIANA NATURAL & ILLUMINATING
GAS COMPANY, *Appt.*,

v.

STATE of Indiana *ex rel.* James A. BALL.

(.....Ind.....)

1. A natural gas company having authority to lay its mains in a public street and supply gas to consumers, charging a flat rate by the month or a certain meter rate per 1,000 feet, cannot enforce the latter rate against a single consumer if it makes an unjust discrimination against him.
2. To entitle a consumer to an order requiring a gas company having authority to charge flat or meter rates to supply him at the flat rate the same as all other consumers are supplied, he must show that the enforcement of the meter rate against him will be an unjust discrimination.

(March 11, 1902.)

A PPEAL by defendant from a judgment of the Circuit Court for Boone County in favor of relator in a proceeding to compel defendant to supply it with gas at a flat, rather than at a meter, rate. *Reversed.*

The facts are stated in the opinion.

Messrs. S. M. Ralston and F. Winter for appellant.

Mr. Ira M. Sharpe for appellee.

Gillett, J., delivered the opinion of the court:

The appellee commenced this action in the court below to compel the appellant, by mandate, to supply the home of appellee's relator with natural gas service on the basis of what is known as a "flat rate," as distinguished from a meter rate. Issues were framed, and, pursuant to request, the court below, after hearing the evidence, prepared and filed special findings of fact, together with its conclusions of law thereon. It is not necessary to discuss the correctness of the rulings of the trial court on the pleadings, as the same matters arise upon the special findings of fact and conclusions of law. The material facts in the case, as found by the court below, are these: That the appellant is a corporation; that on the 19th day of November, 1891, the board of trustees of the town of Thorntown duly passed and adopted an ordinance prescribing the terms upon which corporations incorporated for such purposes might lay and

maintain pipes in the streets and alleys of said town for use in supplying said town and its inhabitants with natural gas for heating and illuminating purposes; that it was provided in said ordinance that any corporation accepting such grant should charge certain annual and monthly prices for the service furnished, but that it should have the right, if it provided a meter, to require "any consumer" to pay for the gas used by him at a rate not exceeding 20 cents per 1,000 cubic feet of gas supplied; that said ordinance was accepted by a corporation known as the People's Natural Gas Company, and that the appellant afterward, and on the 15th day of May, 1893, became its successor, and by virtue of the authority of said ordinance laid mains in the streets and alleys of said town, and entered upon and continued the business of supplying natural gas to said town and its inhabitants for heating and illuminating purposes; that it laid one of its mains in the street upon which the relator's lot abuts, and in front of the house thereon situated; that appellant connected the gas pipes in relator's house with said main, and from that time until the 5th day of January, 1900, supplied his house with natural gas for heating and illuminating purposes on the basis of the flat rate provided for in said ordinance; that on said day appellant's agent requested the relator to enter into a new and written contract, in consideration that appellant would not require him to thereafter pay for the gas he consumed by meter measurement, by which proposed contract, if signed by him, he would have agreed to pay a flat rate largely in excess of the ordinance requirement, and also have agreed to other conditions not provided for in said ordinance; that said relator refused so to do, and tendered payment of the amount that would be due from him for a certain time in the future on the basis of the flat rate that the ordinance provided for; that this tender was refused by appellant, and it shut off the flow of gas from relator's premises, and appellant's said agent informed him that he would be required to enter into said new proposed contract before it would furnish gas to him; that said relator afterwards, and on the same day renewed his tender, and demanded that the gas be furnished his said house; that the appellant refused so to do, but said agent immediately informed re-

NOTE.—For earlier cases in this series as to obligation of gas company to supply gas to consumer, see *Rushville v. Rushville Natural Gas Co.* (Ind.) 15 L. R. A. 321, and *note*; *Portland Natural Gas & Oil Co. v. State ex rel. Keen* (Ind.) 21 L. R. A. 639; *Coy v. Indianapolis Gas Co.* (Ind.) 36 L. R. A. 535; and *Richmond Natural Gas Co. v. Clawson* (Ind.) 51 L. R. A. 744.

For right to compel water supply, see *Hangen v. Albina Light & Water Co.* (Or.) 14 L. R. A. 424; cases in *note* to *Rushville v. Rushville Natural Gas Co.* (Ind.) 15 L. R. A. 321; New 57 L. R. A.

York Health Department v. Trinity Church (N. Y.) 27 L. R. A. 710; *Wood v. Auburn* (Me.) 29 L. R. A. 376; *American Waterworks Co. v. State ex rel. Walker* (Neb.) 30 L. R. A. 447; *State ex rel. Milsted v. Butte City Water Co.* (Mont.) 32 L. R. A. 697; *Kelsey v. Marquette Bd. of Fire & Water Comrs.* (Mich.) 37 L. R. A. 675; and *Turner v. Revere Water Co.* (Mass.) 40 L. R. A. 657.

As to discrimination against individual by gas company, see *Ladd v. Boston* (Mass.) 40 L. R. A. 171, and *Smith v. Capital Gas Co.* (Cal.) 54 L. R. A. 769.

lator that appellant would supply his house with said gas through a meter, and furnish and connect the meter at its own cost, if he would agree to pay for the gas consumed by meter measurement, at the rate of 20 cents per 1,000 cubic feet; that this offer was refused by relator; and that the gas was not furnished him. The court further found that at that time no other customer in said town was required to pay for gas on a meter basis, but that all others were supplied on the basis of the flat rates provided for in said ordinance.

When appellant laid its mains in the streets of Thorntown, and began to exercise the right to sell to the inhabitants of said town a commodity under circumstances calculated to give it more or less of a natural monopoly, since it would be impracticable for its inhabitants generally to supply said commodity each for himself, the undertaking of said company became impressed with a public character; and it became its duty, while it continued to exercise its franchise, to serve the inhabitants of the municipality without invidious discrimination. *Portland Natural Gas & Oil Co. v. State ex rel. Keen*, 135 Ind. 54, 21 L. R. A. 639, 34 N. E. 818; *Westfield Gas & Mill. Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033; *Coy v. Indianapolis Gas Co.* 146 Ind. 655, 36 L. R. A. 535, 46 N. E. 17; *State ex rel. Wood v. Consumers' Gas Trust Co.* 157 Ind. 345, 55 L. R. A. 245, 61 N. E. 674; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co.* 34 Ohio St. 572, 32 Am. Rep. 390; *Delaware, L. & W. R. Co. v. Central Stock-Yard & Transit Co.* 45 N. J. Eq. 50, 6 L. R. A. 855, 17 Atl. 146; *Shepard v. Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479; *Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236; *American Waterworks Co. v. State ex rel. Walker*, 46 Neb. 194, 30 L. R. A. 447, 64 N. W. 711; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 48 L. R. A. 568, 56 N. E. 822, and note as reported in 48 L. R. A. 568; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244; 2 Morawetz, Priv. Corp. § 1129; 2 Beach, Priv. Corp. § 835d.

The relator was not bound to take gas upon any other terms than those prescribed in the ordinance. *Westfield Gas & Mill. Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033. We are not, however, required to attach consequences to the action of appellant in turning off the gas. It is to be remembered that this action is to procure a peremptory mandamus,—a remedy comparable to a proceeding on the equity side of the court for specific performance; and, as mandamus looks to the future, we turn our attention to the question whether the relator was entitled to receive gas thereafter upon the basis of a flat rate. Appellant had an option, under the ordinance, to furnish gas on the basis of a flat rate or on the basis of a meter rate; but, in view of the fact that appellant had not seen fit to require its other patrons in said town to pay on the basis of a meter measurement, the 57 L. R. A.

question arises whether relator is compelled to have his liability so determined. While it is true that the ordinance of the town of Thorntown purports to authorize any natural gas company accepting the ordinance to charge 20 cents per 1,000 cubic feet for gas to "any consumer," yet we are of the opinion that such authorization will not allow the appellant to impose a burdensome discrimination upon relator. We base this ruling, not upon the statute which authorizes the granting of such franchises, but upon the fundamental law. We refer to the 14th Amendment to the Federal Constitution. While it is probably true that the "privileges and immunities" clause of that amendment will not protect a citizen of a state against hostile legislation by his own state (*Duncan v. Missouri*, 162 U. S. 377; *Cooley*, Const. Lim. 6th ed., 489 and note) yet in the subsequent portion of the amendment we find language used of a more comprehensive character. The words to which we refer are "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." The constitutional prohibition we are considering is but a crystallization of a principle that all who regard justice recognize as fundamental. The authority of municipalities to grant franchises, and the authority of private corporations to be such, and to thereby become such artificial entities that they may receive such grants, have their origin in the laws of the state; and municipalities lack the power to authorize arbitrary and burdensome discriminations as between their inhabitants in the conduct of a business that is public in its character, and private corporations lack the authority to receive such grants, because the general assembly that may be said to be the parent of both classes of corporations, had no such power to transmit. The Supreme Court of the United States has spoken in no uncertain terms upon this general subject. Thus, in *Ex parte Virginia*, 100 U. S. 339, 346, 25 L. ed. 676, 679, the court said: "We have said the prohibitions of the 14th Amendment are addressed to the states. They are: 'No state shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.' They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts in the name and for the state, and is clothed with the state's power, his act is that of the

state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or evade it. The constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a state, but upon the persons who are the agents of the state in the denial of the rights which were intended to be secured." To the same effect, see *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 168. An even more specific application of this general doctrine to the case before us is found in Elliott, *Roads & Streets*, 2d ed. § 430. It is there said: "It is not in the power of a state to enact any statute which operates to deny to citizens the equal protection of the laws. What the state cannot do directly it cannot authorize any of its instrumentalities to do. The inhibition contained in the 14th Amendment to the Federal Constitution extends to acts of state municipalities assuming to act under a state statute."

There can be no doubt that appellee's relator is entitled to insist that such ordinance did not warrant an unjust discrimination against him. While the 14th Amendment to the Federal Constitution does not protect individuals against the acts of third persons not acting under authority of the state, yet we deem it clear that appellant, having engaged in a business of a public character by governmental authority, was bound to afford appellee's relator the right to use gas without fixing terms for the privilege that were substantially more burdensome than it exacted of its patrons generally in the town of Thorntown. It was competent for appellant to require all of its patrons in said town to pay for the gas they respectively burned on a meter basis, as provided in the ordinance; but, if such meter rate was substantially higher than the flat rate, then appellant could not exact payment on the former basis from relator alone. It is clear, however, that it is not enough for relator to show that he is required to pay for gas in a manner different from that in which others pay, in a case where the ordinance purports to authorize the company so to require. An unlawful discrimination must be in some measure unjust and oppressive. It is difficult to accumulate a large number of authorities upon this subject. There are many cases in which recognition

is given, *arguendo*, to the doctrine we assert, but they generally refer to these elements in too general terms to make their citation entirely apposite. The most direct authority that we have been able to find is that of *Cleveland, C. C. & I. R. Co. v. Closser*, 126 Ind. 348, 354, 9 L. R. A. 764, 3 Inters. Com. Rep. 387, 26 N. E. 159, 161, where Elliott, J., in the course of a carefully written opinion, speaking on behalf of this court, said: "In the case upon which we are commenting, a recovery was adjudged on the ground that the difference in the rate charged shippers of large quantities of goods and that charged shippers of small quantities was so gross as to be against public policy. We have no such question here. So far as concerns the question of the right to discriminate between shippers, we concur with the general doctrine of the case cited, for we have no doubt that an unjust, unfair, or oppressive discrimination is prohibited by the soundest considerations of public policy; but, as we have already suggested, we do not believe that from the sole fact that there is a discrimination a conclusion can be inferred which invalidates the special contract between the carrier and the shipper, for, to warrant such a conclusion without defying principle, another element must be added to the premises, and that element is this: The discrimination is unjust or oppressive." We are not judicially advised, and the special findings of fact do not show, that under the terms fixed by the ordinance the use of natural gas on a meter basis would cost more than the flat rate. On the contrary, it seems to us that the inference is, since the optional provision as to the method of charging was agreed to by the town trustees, whose duty it was to represent the citizens of the town, that the rates are approximately equal. If they are unequal, we have no doubt that the fact would be susceptible of proof. Scientific observation must have been such that it can be determined with approximate accuracy what number of cubic feet of gas would flow through a particular meter per hour, under a given pressure.

For the reason shown in this opinion, the special findings of fact did not authorize the conclusions of law drawn by the trial court. We have concluded, however, as a matter of justice, not to order said court to restate its conclusions of law, but to reverse the judgment, with directions to the said court to grant a new trial, and to grant leave to the parties to amend their respective pleadings, if they apply for leave so to do.

Judgment reversed, with directions to the trial court to grant a new trial, and to otherwise proceed in conformity to this opinion.

IOWA SUPREME COURT.

C. M. ROBERTS, *Appt.*,

v.

J. W. PARKER, Sheriff.

(.....Iowa.....)

A bicycle used by a painter, paper hanger, and billposter to earn a livelihood is within the provisions of a statute exempting from execution the team of a laborer who is the head of a family, and the wagon or other vehicle by the use of which he habitually earns his living, although the bicycle was not known when the statute was enacted.

(Ladd, Ch. J., and Waterman, J., dissent.)

(May 31, 1902.)

APPEAL by plaintiff from a judgment of the District Court for Floyd County in favor of defendant in a replevin suit to recover possession of a bicycle upon which defendant had levied an execution. *Reversed.*

The facts are stated in the opinion.

Mr. Robert Eggert, for appellant:

That a bicycle is classed as a vehicle is now universally conceded.

4 Am. & Eng. Enc. Law, 2d ed. p. 16.

That a painter, paper hanger, and billposter is a laborer, is self-evident.

In case a laborer habitually earns his living by the use of a vehicle,—say, for instance, a delivery wagon,—without the help of a “beast of burden and the necessary tackle,” this delivery wagon should be exempt.

Williams v. Poor, 65 Iowa, 410, 21 N. W. 753; *State v. Myers*, 10 Iowa, 448; *State v. Brandt*, 41 Iowa, 593; *Boyles v. McMurry*, 55 Ill. 236.

Mr. J. W. Brown, for appellee:

No vehicle whatever is exempt unless it is exempted in connection with the beast of burden and proper harness or tackle.

State v. Smith, 46 Iowa, 673; *Ellsworth v. Sayre*, 67 Iowa, 449, 25 N. W. 699.

To add any other vehicle than the one pointed out by the statute would be to add a new class, and this court cannot add a new class to this statute.

Tyler v. Coulthard, 95 Iowa, 706, 64 N. W. 681; *Smith v. Dayton*, 94 Iowa, 109, 62 N. W. 650; *Davidson v. Sechrist*, 28 Kan. 324.

The grammatical sense of the word “otherwise” negatives all before it, so that, unless the whole working outfit is exempted together, it will not be exempted at all.

Corp v. Griswold, 27 Iowa, 379; *Ellsworth v. Sayre*, 67 Iowa, 449, 25 N. W. 699.

“Or” will not be construed to mean “and,” nor the grammatical sense disregarded, unless it is apparent that it is contrary to the

“express intention or declared purpose of the statute.”

State v. Smith, 46 Iowa, 673.

In construing this section, the construction must be made contemporaneous with its making.

McShane v. Independent District, 76 Iowa, 337, 41 N. W. 33.

When it was passed, there was not a bicycle in the state, and not until it had existed twenty-five years or more were bicycles recognized.

4 Am. & Eng. Enc. Law, 2d ed. p. 15.

Ladd, Ch. J., delivered the opinion of the court:

The assignments of error attached to the abstract were totally insufficient, but subsequently an amendment thereto was filed, specifically pointing out the errors alleged. As these had been clearly indicated in the appellant's argument, and fully met in the appellee's brief, no prejudice could have resulted from the delay. For this reason the motion to dismiss must be overruled.

2. Is a bicycle, habitually used by a painter, paper hanger, and billposter to earn a livelihood, he being the head of a family, exempt from execution? Section 4008 of the Code, in so far as applicable, reads: “If the debtor is . . . the head of a family he may hold exempt from execution, . . . if a physician, public officer, farmer, teamster, or other laborer, a team consisting of not more than two horses or mules, or two yoke of cattle, and the wagon or other vehicle, with the proper harness or tackle by the use of which he habitually earns his living, otherwise one horse.” That plaintiff was a laborer within the meaning of this section is not questioned. As certainly the bicycle is a vehicle. The decisions so holding are too numerous for citation. But is it a vehicle such as was contemplated by the legislature in enacting the statute? It is well settled that statutes of exemption should receive a liberal construction, such as shall aid, in so far as may be, in carrying out the beneficent object of the legislation (*Davis v. Humphrey*, 22 Iowa, 137; *Consolidated Tank-Line Co. v. Hunt*, 83 Iowa, 6, 12 L. R. A. 476, 48 N. W. 1057); and they are to be construed in favor of those claiming their benefits (*Bevan v. Hayden*, 13 Iowa, 122; *Kaiser v. Scaton*, 62 Iowa, 463, 17 N. W. 664). Because of the liberal construction usually given a statute of this character, the majority of the court hold that a bicycle is included in the term “other vehicle,” as found in the section quoted. While it was not in use, or even known, in the state at the time of such enactment, they are of opinion that the law should keep pace with progress and improvement in the industrial arts, and that the bicycle should be adjudged exempt to a laborer who is the head of a family, and habitually uses it to earn a living. On the other hand, the writer, with whom concurs Mr. Justice

NOTE.—For an extensive note on bicycle law, including question of when a bicycle is a necessary for a minor, see *Taylor v. Union Traction Co. (Pa.)* 47 L. R. A. 289.

Waterman, while conceding the force of these suggestions, reaches a different conclusion. Precisely what may be claimed as exempt is enumerated in the statute, and nothing is to be added. *Tyler v. Coulthard*, 95 Iowa, 705, 64 N. W. 681. Especially a new class ought not to be added. The wagon is mentioned in connection with the animals enumerated, and all with relation to the harness or tackle. Why was this done? For the reason, as it seems to us, that all were essential and ordinarily used in making up an outfit for the purposes of transportation. Certainly, a wagon would be of no benefit in earning a living without one or more animals, and these could hardly be made use of without a harness or tackle of some kind. A working outfit was intended. For what purpose? By the use of which to earn a living. If right in this, then it seems that the "other vehicle" contemplated must have been one of like character; that is, one which may be used in

connection with some of the animals enumerated and the harness or tackle. See 17 Am. & Eng. Enc. Law, p. 278. If this be not true, anything within the definition of "vehicle" may be exempt, such as an electric car or automobile, regardless of the value of either. To so hold would, as it seems to us, do violence to the spirit, as well as the letter, of the statute, in which the horse is recognized as the means of transportation, in the absence of the outfit referred to. Under the contention of appellant, both a bicycle and a horse, without the other of the property mentioned, could be held as exempt. See *Smith v. Horton*, 19 Tex. Civ. App. 28, 46 S. W. 401; *Shadewald v. Phillips*, 72 Minn. 520, 75 N. W. 717. In the opinion of the majority of the court, however, the plaintiff should have been awarded judgment for the return of his bicycle as exempt from execution.

Reversed.

KANSAS SUPREME COURT.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Plff. in Err., v.

S. SIMONSON et al.

(.....Kan.....)

*1. The provision of chapter 100, Laws 1893, which makes the specification of weights in bills of lading issued by railroad companies for hay, grain, etc., shipped over their lines conclusive evidence of the correctness of such weights, is unconstitutional because denying to the companies due process of law, and because wrongfully depriving the courts of the judicial power to determine the weight and sufficiency of evidence.

2. The statute cited is a measure in exercise of the police power of the state, and does not assume to regulate commerce between the states. It is not, therefore, repugnant to the commerce clause of the Federal Constitution, and, being a police regulation, the provision contained in it, allowing an attorney's fee for the successful prosecution of a case within its terms, is constitutional.

3. When the issue was whether a railroad company had delivered to the consignee all the goods it had received

*Headnotes by the Court.

NOTE.—As to constitutionality of statute prescribing rules of evidence generally, see *Chicago & N. W. R. Co. v. Dey* (C. S. D. Iowa) 1 L. R. A. 744; *Burlington, C. R. & N. R. Co. v. Dey* (Iowa) 12 L. R. A. 436; *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 24 L. R. A. 141; *Pennsylvania Co. v. McCann* (Ohio) 31 L. R. A. 651; *State v. Yardley* (Tenn.) 34 L. R. A. 656; *Meadowcroft v. People* (Ill.) 85 L. R. A. 176; *Daggs v. Orient Ins. Co.* (Mo.) 35 L. R. A. 227; *State v. Beach* (Ind.) 36 L. R. A. 179; and *Baltimore & O. S. W. R. Co. v. Read* (Ind.) 56 L. R. A. 468.
57 L. R. A.

from the consignor, it was error to reject evidence tending to show that the car in which the goods were shipped was sealed at the loading point, and remained under seal until delivery of the goods to the consignee.

(*Doster, Ch. J., and Smith and Ellis, JJ., dissent in part.*)

(April 5, 1902.)

ERROR to the District Court for Labette County to review a judgment in favor of plaintiffs in an action brought to recover for shortage of hay shipped by defendant's line. *Reversed.*

The facts are stated in the opinions.

Mr. T. N. Sedgwick, for plaintiff in error:

For the legislature to declare what shall be conclusive proof in any case is not due course of law.

Little Rock & Ft. S. R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55; *Cooley, Const. Lim.* p. 368; *Dartmouth College v. Woodward*, 4 Wheat. 519, 4 L. ed. 629; *Groesbeck v. Seeley*, 13 Mich. 329; *Case v. Dean*, 16 Mich. 12; *Wright v. Cradlebaugh*, 3 Nev. 341; *Wantlan v. White*, 19 Ind. 470; *McCready v. Seaton*, 29 Iowa, 356, 4 Am. Rep. 214; *Abbott v. Lindenbower*, 42 Mo. 162; *Corbin v. Hill*, 21 Iowa, 70; *White v. Flynn*, 23 Ind. 46; *People ex rel. Albany & S. R. Co. v. Mitchell*, 45 Barb. 212.

Under the bill of lading, defendant's liability was confined to such loss and damage as should occur entirely on its own line.

Berg v. Atchison, T. & S. F. R. Co. 30 Kan. 561, 2 Pac. 639; *Harris v. Grand Trunk R. Co.* 15 R. I. 371, 5 Atl. 305; *Sprague v. Missouri P. R. Co.* 34 Kan. 347, 8 Pac. 465; *Detroit & M. R. Co. v. Farmers' & M. Bank*, 20 Wis. 123; *Stewart v. Terre*

Haute & I. R. Co. v. McCrary, 312, 3 Fed. 768.

If Congress has passed no law attempting in any manner to regulate the shipment of hay, then its silence upon this question is equivalent to saying that there shall be no regulations, for it is confided exclusively to Congress.

Hardy v. Atchison, T. & S. F. R. Co. 32 Kan. 698, 5 Pac. 6; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547.

The imposition of an attorney's fee is a square denial by the state legislature of the equal protection of the laws to railroad companies.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

The rights of every individual must stand or fall by the same general law that governs every member of the body politic in the land under similar circumstances.

Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 256; *Graves v. Northern P. R. Co.* 5 Mont. 556, 51 Am. Rep. 81, 6 Pac. 16.

A law that is not general in its application is void.

Omnibus R. Co. v. Baldwin, 57 Cal. 160; *California State Teleg. Co. v. Alta Teleg. Co.* 22 Cal. 398; *San Francisco v. Spring Valley Waterworks*, 48 Cal. 493; *Waterloo Turnp. Road Co. v. Cole*, 51 Cal. 381.

Messrs. Kimball & Osgood, for defendants in error:

The manner in which railroad companies conduct the business of transportation requires regulations which are not necessary or applicable to other carriers. Laws enacted for that purpose are but an exercise of the police power of the state, and the fact that they apply only to railroad companies does not render them unconstitutional or class legislation.

Chicago & N. W. R. Co. v. Fuller, 17 Wall. 560, 21 L. ed. 710; *Com. v. Erie R. Co.* 62 Pa. 286, 1 Am. Rep. 399; *Gulf, C. & S. F. R. Co. v. Dwyer*, 75 Tex. 572, 7 L. R. A. 478, 12 S. W. 1001; *Gulf, C. & S. F. R. Co. v. McCown* (Tex. Civ. App.) 25 S. W. 437.

Dexter, Ch. J., delivered the opinion of the court:

This was an action against the Missouri, Kansas, & Texas Railway Company to recover for a shortage of hay shipped over its line. Judgment went against it, to reverse which it has prosecuted error to this court.

The action was brought under chapter 100, Laws 1893. The statute requires railroad companies to provide track scales for weighing car-load lots of hay, grain, etc., and to issue duplicate bills of lading for the shipment. It makes the companies responsible for the full amount of such shipment, less one fourth of 1 per cent of its weight, and it concludes its 6th section with the following provision: "And in any action hereafter brought against any railroad company, for or on account of any failure

or neglect to deliver any such grain, seed, or hay to the consignee, or his heirs or assigns, either duplicate of such bill of lading shall be conclusive proof of the amount of such grain, seed, or hay so received by such railway company." In defense to the action the railway company offered a deposition which tended to prove that the full amount of hay receipted for in the bills of lading had not been in fact received by it. This deposition was rejected, and its rejection constitutes the principal claim of error. A majority of the court are of the opinion that it was wrongly rejected so far as the question now to be noticed is concerned, and we are all of the opinion that it was wrongly rejected so far as another question, presently to be noticed, is concerned. The argument against its admission is based on the statutory provision above quoted, which makes the bill of lading, in the cases stated, conclusive evidence of the amount received. Is it in the power of the legislature to thus create a conclusive presumption in a matter of private contract? We are constrained to believe that it is not. Every suitor is entitled to his day in court, and to have his case determined on such evidence as legal policy will allow. It is doubtless competent for the legislature to prescribe many of the rules of evidence. The subjects of the competency of witnesses, the order of trial, the burden of proof, the effect of public records, the certification of copies of official documents, the prima facie character of certain evidence, and other like matters which pertain to the practice rather than the right of proving causes, are lawfully within the sphere of legislative regulation; but it is not within the power of the legislature to exclude from the courts that which proves the truth of a case, nor, on the other hand, to compel them to receive that which is false in character. A bill of lading contains two parts,—one, a receipt for the goods; the other, a contract for their carriage. As to the latter, it, as other written engagements, may not be contradicted by parol, but as to the former it stands on the same footing as other kinds of receipts. It may be shown to be incorrect. It may be shown to have been written by mistake or induced by fraud. *Hutchinson*, Carr. 2d ed. § 122. From time immemorial the mutual mistake of both parties to an instrument or the fraud of one of them has been admitted as a valid defense to the action. The allowance of such defense is a part of the substantive justice of all actions on contracts. It inheres in the very right of such cases, and it cannot be denied by the legislature under the guise of a rule of evidence. In *Cooley*, Const. Lim. 5th ed. 453, it is said: "But there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of regulating the presentation of

evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial; and there can be trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law." In Arkansas a statute was enacted which, according to a certain theory of construction, imposed upon railroad companies an absolute liability to pay for stock killed by their trains, and withdrew from the jury all considerations of negligence of the owner of the stock or due care on the part of the company. The court held that such theory of construction could not be applied, notwithstanding the language of the act lent some countenance to it, because, as was said: "It is not within the province of the legislature to divest rights by prescribing to the courts what should be conclusive evidence. . . . 'The legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be shown to be false,—at all events, if such facts are necessary to show that the substantial rights of property are to be affected, and he is made to lose his property.'" *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55. In Minnesota a statute was enacted which made the fact that a person performed labor or furnished material in the erection of a house on another's land conclusive evidence that the labor was performed or the material furnished with the owner's consent, unless the latter had by suit in the courts enjoined the act as a trespass. Of this act the court said: "A man cannot be thus deprived of his property without his consent. The legislature may doubtless establish rules of evidence; but to enact a law making evidence conclusive which is not so necessarily in and of itself, and thus preclude a party from showing the truth, would be nothing short of confiscation of property, and a destruction of vested rights, without due process of law." *Meyer v. Berlandi*, 39 Minn. 438, 1 L. R. A. 777, 40 N. W. 513. An act of Congress in 1862, in relation to enlistments in the military service of the United States, provided that "the oath of enlistment taken by the recruit shall be conclusive as to his age." In an action of habeas corpus brought by the parent or guardian of a minor recruit it was held that the statute was not binding

on the petitioner as establishing a conclusive presumption of age, for the reason that the declaration as to age was a "judicial act," a matter for judicial inquiry, from entering on which the courts could not be precluded. *Wantlan v. White*, 19 Ind. 470. The legislature of Minnesota enacted a statute providing that the schedule of rates for the transportation of property over the railroads of that state, made and published by the board of railroad and warehouse commissioners, should be final and conclusive as to what were equal and reasonable charges. The Supreme Court of the United States held the act void. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702. A statute of this state assuming to authorize counties to pay bounties for the killing of gophers was held unconstitutional for the reason that the subject had not been expressed in its title. Later, a statute was enacted, probably intended to be curative of the authority exercised under the former one, but which was so worded as to validate the mere ministerial act of issuing the warrants in payment of the bounty only, and not the original authority to issue them. The warrants so issued were declared "hereby legalized and hereby made county charges and payable out of the general fund of the county." This so-called "curative act" was held to be in the nature of a legislative judgment against the county in favor of the holders of the warrants, an endeavor to preclude investigation into the rightfulness of their issuance, and therefore a usurpation of the judicial function to try and determine causes, and consequently void. *Felix v. Wallace County*, 62 Kan. 832, 62 Pac. 667. The theory on which all these cases proceed is that an act of the legislature which undertakes to make a particular fact or matter in evidence involving the substantive right of the case conclusive upon the parties, and which precludes inquiry into the meritorious issues of the controversy, is an invasion of the judicial province and a denial of due process of law. The legislature may regulate the form and the manner of use of the instruments of evidence,—the media of proof,—but it cannot preclude a party wholly from making his proof. A statute which declares what shall be taken as conclusive evidence of a fact is one which, of course, precludes investigation into the fact, and itself determines the matter in advance of all judicial inquiry. If such statutes can be upheld, there is then little use for courts, and small room indeed for the exercise of their functions.

It will be observed that the statute in question by its terms shuts out all proof as to the occurrence of fraud or mistake in the making of the bill of lading. Admitting, however, that of necessity there must be read into the act an exception against fraud, why should there not be an exception in favor of mistake as well, for, if the bill of lading was executed by the mutual mistake of both parties, it does not evidence the contract of either one. In order to constitute a contract,

the minds of the parties thereto must have met. If by reason of mutual mistake no such concurrence has been had, it follows that no contract has been entered into, notwithstanding the fact that written evidence of one may have been executed. Therefore, to give effect to the act in question, we must say that the legislature has the power to force contracts upon parties by making indisputable that which in reality is only evidence of their contract. It is hard to see where this would end were its entrance admitted. Of course, the contracts of parties are binding on them. It does not require an act of the legislature to make them so. It is the function of the court, and not of the legislature, to determine when contracts exist, and what they are. To shut out proof that what purports to be a contract is not really such, by reason of the mutual mistake of the parties thereto, is in effect to require the performance of an act which was never agreed on between them; or, in other words, it is to allow the legislature to make for parties a contract which they never made for themselves. It is claimed that this sort of legislation is defensible and proper under the law of estoppel, and that, where the parties have entered into the seeming contract, they may be prohibited by the terms of their act from denying its effect as written. The trouble, however, lies in the application of the rule of estoppel, and in the assumption that the bill of lading speaks the contract of the parties. Whether it does is the very question at issue,—the very question on which the plaintiff in error sought to offer evidence. If the writing was not the expression of the contract of the parties to it by reason of mutual mistake or fraud, then how could either be estopped by it? Estoppel is only predicated of contracts which parties have really made. We do not intend to rule that there are no classes of acts or contracts that may not be made conclusive upon the parties thereto by the legislature, but we do intend to hold that it is incompetent for the legislature to make that conclusive of the fact and character of a contract which does not in reality express a contract because of fraud or mistake that may inhere therein.

There was error, also, for another reason, in rejecting the deposition. The evidence offered was to the effect that the cars in which the hay was shipped were sealed at the loading point, and that the seals were found unbroken at the point of destination. Had this evidence been admitted, it would have tended to prove that whatever hay the company received it safely transported, and, inasmuch as the plaintiffs claimed that the company received the amount receipted for in the bills of lading, the evidence therefore tended to prove that the same amount was transported and delivered. For this reason the deposition should have been admitted, and therefore its rejection was error.

The claim is made that the statute heretofore discussed is in violation of the interstate commerce clause of the Federal Constitution. This claim is untenable. It does not regulate rates, nor levy taxes, nor impose

restrictions of any kind on commerce between the states. It is a police regulation designed to promote accuracy in dealings between shippers and carriers by compelling the latter to furnish facilities for ascertaining the weight of products offered for shipment. A statute in Texas imposed a penalty on railroad companies for refusing to deliver freight on demand of the consignee and tender of the charges. It was contended that as to shipments originating in other states the act was a regulation of interstate commerce, and could not have effect. The contention was overruled. *Gulf, C. & S. F. R. Co. v. Dwyer*, 75 Tex. 572, 7 L. R. A. 478, 12 S. W. 1001. A statute of Iowa required railroad companies to post their schedules of transportation rates in their station houses, and affixed penalties to the nonperformance of the duty. The act, although applying to interstate as well as local rates, was held not to be a regulation of interstate commerce. *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560, 21 L. ed. 710. The principle on which these cases rest—*vis.*, that such enactments were police regulations—likewise underlies the statute in question.

The statute allows an attorney's fee for the successful prosecution of a case under its provisions. The reason for this is the negligence of the carrier in failing to safely transport and deliver the goods committed to its charge. The case in that respect comes fully within the principle of *Atchison, T. & S. F. R. Co. v. Matthews*, 58 Kan. 447, 49 Pac. 602, Affirmed by the Supreme Court of the United States in 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609. See also *British America Assur. Co. v. Bradford*, 60 Kan. 82, 55 Pac. 335.

For error in rejecting the deposition for the reasons above given, the judgment of the court below is reversed, and a new trial is ordered.

Johnston, Cunningham, Greene, and Pollock, JJ., concur.

Dexter, Ch. J., and Smith and Ellis, JJ., dissent as to the first paragraph of the syllabus and corresponding portion of the opinion.

Dexter, Ch. J., dissenting:

I dissent from the judgment of the majority of the court that the legislature may not give to the receipt contained in a bill of lading issued by a common carrier a conclusive effect as evidence of the weight of the thing receipted for, and am authorized to say that Justices Smith and Ellis likewise dissent. A proposition in denial of the legislative power in the case stated is incomprehensible to me. There is not a case in the books which in principle or in similarity of facts affords ground for the majority opinion. The instances in which the exercise of the power in question has been attempted are not numerous. Nearly all of them were cases in which the legislature sought to give tax deeds a conclusive effect to establish the substantive rightfulness of

tax-sale proceedings. This class of cases was not adverted to by the majority because of the obvious fact that in such cases the act from which it was sought to derive a conclusive effect was clearly the act of an adversary party, and the effort was to find those in which the legislature had exceeded its authority by undertaking to found a presumption of conclusiveness upon the act of the party himself. This could not be done. There are no such cases; that is, there are no cases in denial of the legislative right to found an estoppel upon the contract act of a party, and that—and it alone—is the case in hand. There are, however, decisions of a different character, which my associates have mistakenly regarded as authority for their holding. For instance, in one of them, as cited in the majority opinion, it appeared that the legislature had declared a conclusive presumption of negligence from the killing of live stock (*Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55); in another it declared a conclusive presumption of assent to a trespass from a failure to apply to the courts to enjoin it (*Meyer v. Berlandi*, 39 Minn. 438, 1 L. R. A. 777, 40 N. W. 513), in another it declared an officially published schedule of railway rates conclusive evidence of their reasonableness (*Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. R. A. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 702); and in another it sought to make a minor's declaration as to his age conclusive on his legal guardians (*Wanlan v. White*, 19 Ind. 470). It must be observed that, in the cases of the tax deeds and the schedule of railway rates and the minor's enlistment oath, the legislature sought to bind interested parties by the adversary action of others, not by any action of their own; and, in the cases of the imputed negligence and the imputed assent to the trespass, sought to bind them by accidental circumstances involving them in no manner of contractual relation. Manifestly, all such cases are to be governed by a principle different from that to be applied when it is sought to found the presumption on the conventional act or agreement of the party himself. I may well object to a law which from the hostile act of another seeks to raise against me a conclusive presumption, and I may well object to a law which seeks to found an estoppel against me upon some undesigned and easily explicable circumstance; but I can have no objection to a law which merely seeks to give to my own deliberate business engagement a conclusive and irrevocable effect.

Judge Cooley notes the distinction between the two classes of cases in the very quotation made from him in the majority opinion. In discussing the subject of the power of the legislature over the rules of evidence, he says: "Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of

evidence should preclude a party from establishing his rights in opposition to it." The legislature, therefore, in this case, has rested its enactment on the very exception noted by Judge Cooley, viz., estoppel or like reasons. The general doctrine upon which the exceptional class of cases rests was stated in another form by this court in the case of *Re County-Seat of Linn County*, 15 Kan. 500. A question in that case was as to the conclusiveness as evidence of the number of votes cast at a county-seat election to prove the total number of electors in the county. The Constitution (art. 9, § 1) declares that "no county seat shall be changed without the consent of a majority of the electors of the county." The statute regulating county-seat elections enacted that the place receiving the majority of the votes cast at the election should become the county seat. In view of the fact that the total of the votes cast at a county-seat election might not be equal to the whole number of electors of the county, the question as to what should be regarded as controlling evidence of the total number arose. It was held that the act providing for the change of county seats on a majority of the votes cast at the election declared a conclusive presumption as to the total electorate, and was a competent exercise of legislative power. The court said: "While a legislature may not, by the mere machinery of rules of evidence, override and set at naught the restrictions of the Constitution, or arbitrarily make conclusive evidence of a fact anything which in the nature of things has no connection with that fact nor reasonably tend to prove it, yet it may make that which, according to the ordinary rules of human experience, reasonably tends to prove a fact, conclusive evidence of it." The case of *Felix v. Wallace County*, 62 Kan. 832, 62 Pac. 667, is more nearly in support of the majority decision than any other case to be found. There is, however, a radical difference between that case and this one. In that case the legislature undertook to validate a particular specified class of instruments, contract in form, but which were wholly without binding force or legal existence. It undertook by legislative fiat to create a debt altogether and entirely out of that which possessed the mere semblance of a contract, but which lacked all the elements of an obligation. The act under discussion in this case undertook no such legally impossible thing. It did not undertake to create a debt. It did not undertake to make a contract between the parties. It only declared that the contract which they themselves had made should be conclusively presumed to express the obligation into which they had entered.

So far as decisions are concerned, the only one sufficiently close in point of fact to bear directly on the question is opposed to the theory of limitation on the legislative power in the special class of cases mentioned. It declares, I think, the correct principle, and is entirely applicable to the present controversy. It is *Orient Ins. Co.*

v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281. A statute of Missouri declared that "in all suits brought upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; and in case of total loss of the property insured, the measure of damage shall be the amount for which the same was insured," etc. Rev. Stat. 1889, § 5897. This provision, it will be observed, is the ordinary "valued policy" law of this and other states. In the case cited the objections to the statute were the same as those urged against the one now under consideration. The court stated them as follows: "The specific objections which, it is claimed, bring the statute within the prohibition of the Constitution, in the last analysis, may be reduced to the following: That the statute takes away a fundamental right, and precludes a judicial inquiry of liability on policies of fire insurance by a conclusive presumption of fact." Replying to this, the court, among other things, said: "It [the statute] makes no contract for the parties. In this it permits absolute freedom. It leaves them to fix the valuation of the property upon such prudence and inquiry as they choose. It only ascribes estoppel after this is done,—estoppel, it must be observed, to the acts of the parties, and only to their acts in open and honest dealing. Its presumptions cannot be urged against fraud. . . . The cases cited by plaintiff in error which hold that the legislature may give the effect of prima facie proof to certain acts, but not conclusive proof, do not apply. They were not of contract, nor gave effect to contracts. It is one thing to attribute effect to the convention of parties, entered into under the admonition of the law, and another thing to give to circumstances, maybe accidental, conclusive presumption and proof to establish and force a result against property or liberty." The above decision was rendered on error to the supreme court of Missouri, which had made a similar holding (*Daggs v. Orient Ins. Co.* 136 Mo. 382, 35 L. R. A. 227, 38 S. W. 85), and I think it well declares and elucidates the proposition that it is within the power of the legislature to give to the written declaration of a party, made as a basis for mutual engagement between himself and another, a conclusive and irrevocable character.

An objection to the statute is the generality of its terms. It does not state any exception, and it is said that fraud and mistake constitute necessary exceptions which it is beyond the power of the legislature to exclude. This objection does not seem to me to possess weight. As to fraud, I think it may be said that statutes, however general their language, are never to be so construed or enforced as to deny relief to one who, without fault on his part, has been entrapped into a seeming submission to their

terms. "When statutes are made, there are some things which are exempted and fore-prized out of the provisions thereof, by the law of reason, though not expressly mentioned. Thus, things for necessity's sake, or to prevent a failure of justice, are excepted out of statutes." Dwarrris, Stat. rule 5, p. 123. To the same effect, and with citation to instances, is Endlich, Interpretation of Statutes, § 258; and in *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281, it was expressly held that a conclusive presumption of fact, declared by statute, as in this case, could not be enforced as against a claim of fraud. As to mistake, the legislature has done no more than the courts themselves have done in like cases without the aid of statutes,—has declared a rule of estoppel by deed. It is true, the courts have not elevated a mere receipt to the grade of an estoppel, but they have often held other like written engagements and declarations of the existence of facts to be such. This has been especially true when one of the contracting parties has done or paid something as a consideration or equivalent for the engagement or declaration. This case, for aught we know, may be one falling within the rule, because here the shipper may have paid freight money on the basis of weight specified in the bill of lading. But admitting, as should be done, that the courts have not advanced the doctrine of estoppel to cover such class of cases, ought it to be said that the legislature is constitutionally powerless to do so,—that is, powerless to make that conclusive evidence which the courts themselves hold to be presumptive evidence; powerless for the sole reason that some instances of meritorious defense on the ground of mistake will be shut out? If we were required to search for reasons for the enactment in question we would not have to go far. The reason is to be found in the character of railways as common carriers. The relations existing between the public and the carriers make the regulation of the latter in many particulars not merely advisable, but highly important. It cannot be said, therefore, that a statute forbidding the carrier to dispute in court a written admission made by it as a basis of contract liability is an unwarranted exercise of legislative power. It must be borne in mind that the business of a common carrier is one which is "clothed with a public interest." That was pithily remarked by Sir Matthew Hale nearly 400 years ago. It was quoted by the Supreme Court of the United States in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, and made the basis of the decision in that case and in many subsequent ones decided by that and other courts.

Now, premitting the question as to the power of the legislature to found a conclusive presumption upon the admissions of private individuals, it cannot be doubted, in my judgment, that it possesses the power to declare that a receipt for goods, given by a transportation company in the conduct

of its public business as a common carrier, shall be conclusively deemed and held to express the measure of the liability incurred. In denying that the legislature possesses such power I think my associates have grievously erred.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,

v.

George W. HULL.

(.....Ky.....)

1. Mental suffering may be considered in assessing the damages against a carrier for breach of its contract to transport a corpse.
2. The question as to the negligence of a carrier in failing to forward a corpse by a certain train is for the jury.
3. The sum of \$1,640 is excessive damages for failure to forward a corpse by a certain train, whereby its interment was delayed from afternoon until the next morning, where its condition did not render speedy interment necessary, and the person complaining was treated with proper courtesy.
4. The pleadings should not be referred to by counsel in his closing argument to the jury for the purpose of claiming a change in the theory of defense, if they have not been given in evidence on the trial.
5. Counsel in arguing to the jury must not state facts of his personal experience, which are not in evidence, and are calculated to prejudice the jury.

(May 29, 1902.)

APPEAL by defendant from a judgment of the Circuit Court for Webster County in favor of plaintiff in an action brought to recover damages for failure to promptly transport a corpse. *Reversed.*

The facts are stated in the opinion.

Mcscrs. Yeaman & Yeaman, for appellant:

There can be no property in a human corpse.

Keyes v. Konkel, 119 Mich. 550, 44 L. R. A. 242, 78 N. W. 649.

There can be no recovery for mental anguish alone, disconnected from pecuniary loss, physical injury, wilful neglect, or insult.

Hobbs v. London & S. W. R. Co. L. R. 10 Q. B. 111; *Lynch v. Knight*, 9 H. L. Cas. 577; 1 Sutherland, Damages, pp. 156, 732, 734, 736; Webb's Pollock, Torts, pp. 56, 57; Wood's Mayne, Damages, p. 74; *Western U. Teleg. Co. v. Rogers*, 68 Miss. 748, 13 L. R. A. 859, 9 So. 823; 25 Am. & Eng. Enc. Law, pp. 822, 823; *West v. Western U. Teleg. Co.* 39 Kan. 93, 17 Pac. 807; *Dawson v. Louisville & N. R. Co.* 4 Ky. L. Rep. 801;

Newport News & M. Valley Co. v. Gholson, 10 Ky. L. Rep. 938; *City Transfer Co. v. Robinson*, 12 Ky. L. Rep. 555.

A different rule originated in Texas in *So Relle v. Western U. Teleg. Co.* 55 Tex. 308, 40 Am. Rep. 805, where damages were awarded for failure to deliver a social telegram. The courts of that state have since found it necessary to restrict the rule.

See *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 564, 46 Am. Rep. 278; *Western U. Teleg. Co. v. Cooper*, 71 Tex. 507, 1 L. R. A. 728, 9 S. W. 598; *Rowell v. Western U. Teleg. Co.* 75 Tex. 26, 12 S. W. 534.

This court has followed the *So Relle Case*, but has confined the rule to that particular class of cases (social telegrams), and, like the Texas court, has found it necessary to restrict its application.

Chapman v. Western U. Teleg. Co. 90 Ky. 265, 13 S. W. 880; *Western U. Teleg. Co. v. Mathews*, 21 Ky. L. Rep. 1405, 55 S. W. 427; *Western U. Teleg. Co. v. Johnson*, 21 Ky. L. Rep. 1391, 55 S. W. 427; *Western U. Teleg. Co. v. McIlvoy*, 21 Ky. L. Rep. 1393, 55 S. W. 428; *Western U. Teleg. Co. v. Van Cleave*, 22 Ky. L. Rep. 53, 54 S. W. 827; *Western U. Teleg. Co. v. Steenbergen*, 21 Ky. L. Rep. 1289, 54 S. W. 829; *Western U. Teleg. Co. v. Fisher*, 21 Ky. L. Rep. 1293, 54 S. W. 830; *Davidson v. Western U. Teleg. Co.* 21 Ky. L. Rep. 1292, 54 S. W. 830; *Western U. Teleg. Co. v. Crider*, 21 Ky. L. Rep. 1336, 54 S. W. 963; *Graddy v. Western U. Teleg. Co.* 19 Ky. L. Rep. 1455, 43 S. W. 468; *Morrow v. Western U. Teleg. Co.* 21 Ky. L. Rep. 1263, 54 S. W. 853; *Taliferro v. Western U. Teleg. Co.* 21 Ky. L. Rep. 1290, 54 S. W. 825.

Other corpse cases are, like the *So Relle Case*, from Texas, and are wholly unlike this case.

Hale v. Bonner, 82 Tex. 33, 14 L. R. A. 336, 17 S. W. 605; *Wells, F. & Co.'s Express v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. 824.

The damages are grossly excessive, and more than this court has approved of in any "social telegram" case,—the only other sort of case in which damages for mental suffering alone have been given.

Western U. Teleg. Co. v. McIlvoy, 21 Ky. L. Rep. 1393, 55 S. W. 428; *Western U. Teleg. Co. v. Van Cleave*, 22 Ky. L. Rep. 53, 54 S. W. 827; *Western U. Teleg. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725.

The statements of appellee's counsel to

NOTE.—For a similar case as to right to recover damages for mental anguish caused by delay in transportation of corpse, see also, in this series, *Hale v. Bonner* (Tex.) 14 L. R. A. 836.

As to damages for mental anguish suffered

through breach of contract safely to keep corpse, see *Benihan v. Wright* (Ind.) 9 L. R. A. 514.

As to damages for mental suffering because of mutilation of dead body, see *Larson v. Chase* (Minn.) 14 L. R. A. 85.

the jury were improper and highly prejudicial to appellant's rights, and the court below erred in refusing to exclude them from the jury.

Civil Code, subs. 2, § 340; *Brown v. Stineford*, 44 Wis. 282, 28 Am. Rep. 589; *Davis v. Brown*, 98 Ky. 475, 33 S. W. 614, 36 S. W. 535; *Cunningham v. Speagle*, 20 Ky. L. Rep. 1833, 50 S. W. 245; *Rhodes v. Com.* 21 Ky. L. Rep. 1070, 54 S. W. 170; *Gilbert v. Com.* 21 Ky. L. Rep. 544, 51 S. W. 805; *Oldham v. Com.* 22 Ky. L. Rep. 520, 58 S. W. 419.

Messrs. Gordon & Gordon, H. W. Bruce, E. W. Hines, and B. D. Warfield also for appellant.

Messrs. L. P. Little, W. A. Taylor, G. W. Hickman, and Baker & Baker for appellee.

Hobson, J., delivered the opinion of the court:

The wife of appellee, G. W. Hull, died at Ashville, North Carolina, on May 26, 1900. He lived at Slaughtersville, Kentucky, and started home with the corpse of his wife. He bought tickets to Nashville for himself, child, and the corpse. About sunup, as he was approaching Nashville, he saw the conductor, and had him telegraph to the ticket agent at Nashville to have the tickets ready for him. He did this for fear of want of time between the arrival of his train and the departure of the train for Slaughtersville. When he got to Nashville he went immediately with his little girl to the ticket office, and told the agent he wanted two whole tickets and a half ticket to Slaughtersville. The agent said to him to get back in line, and wait until his turn came. He said, "Didn't you get a telegram to have these tickets ready?" The agent answered, "Yes; but I knew you had plenty of time, and didn't get them ready." Hull then took his place in the line, and after a while got up to the window and received his tickets. He then said, "One of these tickets is for a corpse." The agent answered, "I know it, and have it already marked." Hull then asked, "What must I do with the corpse ticket?" The agent said, "Take that and show it to the baggage master in the baggage room." Hull went immediately to the baggage room, and handed the baggage master the corpse ticket, telling him he had a ticket for a corpse. The baggage master punched it and handed it back to him. Hull then said, "Now, who must I give it to?" He said, "Keep it and give it to the conductor on the train. That is all you have to do. You need not be uneasy. Everything will be all right." The corpse was then between the baggage-room door and the gate, setting on a truck between the door and the fence on the platform. Hull got on the train, and sat there some minutes. Presently he saw his trunk pass to the baggage car, and, not seeing the corpse go by, went out to the conductor, who was standing beside the train, showed him his tickets, and told him he had a ticket for a corpse, and wanted to be sure that everything was all right. He wanted to know

who to give the ticket to. The conductor said: "That is all right. Whenever you get a ticket like that, that is all you have got to do. I will take that ticket up on the train." Hull replied: "I am uneasy. I am afraid everything isn't all right. I have seen my trunk pass along, but I haven't seen the corpse." Then the conductor halloed to the porter, and asked if there was a corpse on the train. The porter said, "No." The conductor ran into the baggage room to see about it. He was gone probably two minutes, and when he came out the train started immediately. He came into the coach where Hull was, and told him that his wife's remains had been sent off on the Northwestern. Hull said: "How did this happen? This is an awful thing." He said: "I don't know. It is a terrible blunder. It is an inexcusable mistake." Hull asked what he was going to do about it, and he said that he would telegraph to the superintendent, and get the box brought back and sent up on another train. At Earlington he brought Hull a telegram, stating that he had found the corpse; had secured it on some other road; that it would be sent up on the first passenger train; and for him to extend to Hull any courtesies he could. Hull reached Nashville at 6:40 A. M. The train for Slaughtersville left at 7:10 A. M. The conductor was still looking for the corpse, when he was ordered by the station master to pull out, as it was then two minutes past leaving time. The box containing the corpse had tacked upon it a card reading: "Mrs. G. W. Hull, Slaughtersville, Kentucky." Hull had telegraphed to Slaughtersville that he would come on the morning train, and have the burial that evening. The train was due at Slaughtersville at noon. They got everything in readiness for the funeral, and, when the train arrived without the corpse, the relatives who had come to the station returned home, and those who had come to the church for the funeral, 3 miles in the country, were sent home. Some time after midnight the corpse reached Slaughtersville, and it was buried the next day. It rained the next morning, and a great many did not come. Quite a concourse had assembled the day before. Hull had been nursing his sick wife six months. His vitality was much exhausted, and he was in a weakened condition, so that it was only by a strong effort of the will that he was able to be on his feet. He seemed a good deal confused, looked like he was almost broken down, and was terribly worried over his trip, and the way he had been disappointed. He filed this suit to recover damages of the railroad company, and proved on the trial substantially the above facts. The proof for the company was to the effect that when the corpse reached Nashville it was placed on a truck by the side of the train, and remained there until after the Slaughtersville train left. After this it was taken to the baggage room of the road over which it had come, and later in the day, when the mistake was found out, was taken over to the baggage room of appellant. The baggage

master and the conductor denied the statements of Hull given above, and testified that the corpse was not in charge of appellant's agents until after the train for Slaughter'sville had left. Their testimony is confirmed by a number of employees about the station. Hull's version of the transaction is confirmed by his little girl, by the punched marks in the corpse ticket, and some other circumstances. The jury to whom the case was submitted returned a verdict in favor of Hull for \$1,640, and the defendant appeals.

The court instructed the jury that if, after Hull purchased the tickets, the box containing the corpse was placed in charge of the defendant in reasonable time for shipment on the train, and defendant agreed to ship it on that train, and negligently failed to do so, or if defendant had a reasonable time after receiving the corpse to ship it on the morning train by the exercise of proper diligence, and for the lack of such diligence it was not so shipped, and its arrival at Slaughter'sville was delayed on account thereof, they should find for the plaintiff such an amount in damages as would reasonably compensate him for the trouble, inconvenience, and cost caused by the delay, and they might also allow a reasonable amount for any mental anguish the plaintiff suffered by reason of the delay. But if he failed to inform the agents of the defendant as to the whereabouts of the corpse, or failed to notify them to put the same on the morning train for Slaughter'sville, the jury should find for the defendant, unless the defendant's baggage agent assured him when he punched his ticket that defendant would look after putting the corpse on the train. The jury were also told to find for the defendant if, after receiving the box, its agents did not have a reasonable time, by the exercise of proper diligence, to put it on the train and ship it to Slaughter'sville, and that they could in no event award anything to the plaintiff on account of the delay, inconvenience, or distress suffered by those who attended at the depot or graveyard, or who were prevented from attending the burial by the delay in the arrival of the corpse.

It is earnestly insisted for appellant that there is no property in a corpse (*Keyes v. Konkell*, 119 Mich. 550, 44 L. R. A. 242, 78 N. W. 649), and that mental suffering cannot be recovered for in a case of this character. In *Hale v. Bonner*, 82 Tex. 33, 14 L. R. A. 336, 17 S. W. 605, which was a suit for damages for delay in the shipment of a corpse, the court said: "We are unable to distinguish, in principle, this case from those in which recoveries against telegraph companies have been allowed for failure to deliver with promptness messages announcing the death or mortal illness of near relatives. Such cases are exceptional. As a rule, mental suffering is not an element of the damages which are recoverable for breach of a contract, or in an action for tort, founded upon a right growing out of a contract. Ordinarily the object in sending a telegraphic message announcing the death

or sickness of a relative is to afford the person to be benefited the solace that may result from being present during the last illness of the relative, or attending his obsequies, as the case may be. The direct result of the failure to perform the duty of delivering the message being to deprive the person addressed of this solace, and to cause distress of mind, it is not unreasonable that he should have his compensation therefor." This case was followed in *Wells, F. & Co.'s Express v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. 824. The right to recover for mental anguish for failure to deliver a telegram in the class of cases referred to was upheld in *Chapman v. Western U. Teleg. Co.* 90 Ky. 265, 13 S. W. 880, and after reconsideration this case was adhered to in a number of recent cases. In *Western U. Teleg. Co. v. Vancleave*, 22 Ky. L. Rep. 53, 54 S. W. 827, the court said: "It is probably in accordance with the views of a majority of the state courts that mental anguish and injured feelings alone, and unaccompanied with physical injury, do not furnish ground for recovery. But in this state the rule has been announced otherwise. . . . And so, likewise, a recovery in this class of cases can be had under the decisions in the states of Texas, Alabama, Indiana, Iowa, North Carolina, and Tennessee. It may be admitted that there are difficulties in the way of an exact measurement of such damages, but it does not seem to us that this is a sufficient reason why a negligent public carrier should escape with merely nominal damages. The same difficulty of accurately measuring such damages arises in cases of slander, breach of marriage contract, and in cases where mental suffering is accompanied with physical pain. If, as argued, the law does not deal generally with the feelings and emotions, it may be answered that here the parties themselves have contracted with respect to those very things, or at least have contracted with respect to those things which naturally affect the feelings and emotions." No sound distinction can be maintained between the *Telegraph Cases* and this case. They rest upon the principle that damages naturally resulting from a wrongful act, and fairly within the reasonable contemplation of the parties, may be recovered. The logic of appellant's position, if followed, would lead to the conclusion that if it had lost this corpse, however negligently, no action could be maintained, at least for any substantial recovery. For if there is no property in a corpse, and there can be no recovery for mental suffering for the failure to carry and deliver it at the proper time, then for a very great wrong there would be practically no remedy. The tenderest feelings of the human heart cluster about the remains of the dead. The duty of Christian burial is one which loving hands perform as a privilege. An indignity or wrong to a corpse is resented more quickly than a wrong to the living, and, if mental suffering may be recovered for in the one case, it is hard to see why it may not be recovered for in the other. The damages for the loss of a corpse

and those for the delay in delivering it differ only in degree. In actions for breach of a marriage contract, damages for mental suffering are allowed because these are the natural result of the defendant's wrong, and in no other way can proper compensation for it be had. The same rule must apply in actions for negligence in carrying a corpse, if the carrier is to be held to proper responsibility in this class of cases. We therefore conclude that there was no error in the instructions of the court.

The question of negligence was for the jury, and, while the evidence was very conflicting, we do not feel at liberty to disturb the verdict on the ground that it is against the evidence.

It is earnestly insisted that the damages are excessive, and that the plaintiff's counsel was guilty of misconduct in his closing argument to the jury. The plaintiff was treated with proper courtesy. There was only a delay in the interment of his wife's body from one afternoon until the next morning. The corpse remained at the baggage room from the time his train left until that evening, when it was put on the next train, and taken safely to Slaughter'sville. There is no intimation that the condition of the corpse rendered a speedy interment necessary. Appellant was not treated with indifference, but the conductor seems to have done all that he could; and, on all the evidence, it is hard to escape the conviction that the damages awarded are palpably excessive, and given under the influence of passion or prejudice. In making the closing argument to the jury, the attorney for the plaintiff commenced reading from the defendant's answer in the case, informing the jury that the defendant had entirely changed its theory of defense since it had taken its depositions, and that the plaintiff was not prepared to meet fully its present theory. On the objection of the defendant that this was a matter for the court alone, the court requested the attorney to desist from this course. Thereupon he proceeded with his speech by beginning to state the substance of the answer, and, on the objection of the defendant, the court again required him to desist. He then said the issues had been changed by the defendant. On the objection of the defendant, the court directed him to confine his discussion to the facts of the case, and the law as embodied in the instructions of the court, whereupon he said to the jury: "We have nothing in our pleadings that we wish to conceal from the jury. We do not have to ask the court to conceal our pleadings for us." All this was objected to, and the court refused to exclude it. It was improper. If it was desired to get before the jury the statements in the pleadings of the defendant, these pleadings should have been given in evidence on the trial, so that the defendant might have an opportunity to explain any inconsistency. When this was not done, they should not have been referred to in the concluding argument, which should have

57 L. R. A.

been confined to the evidence heard before the jury, and the law of the case as given in the instructions of the court. The attorney also said, in his concluding argument, this: "Time is precious with railroad companies sometimes. Mr. Hull telephoned me to meet him in Slaughter'sville to come here. I started there, and found that the Texas train was an hour late, and I was told that they had stopped the train at Louisville to load a negro minstrel show. I do not know this. I was told this. Stopped that train, wasted precious time, loading Ward & Howes' or some other negro minstrel show. That train carried the mail, too. That shows how railroads do. They are exceedingly accommodating when there is any money in sight. They will hold a train an hour for a negro minstrel show, but it could not hold its train three minutes to get a corpse on the train. There was no money in that." Again he said: "I am told that when a railroad company gets into trouble they get all their witnesses together to take their affidavits. I am no railroad lawyer. I do not know this, but railroad lawyers tell me that they just have to do this to hold their witnesses to the mark,—to keep them from forgetting. Mr. Fisher and Mr. Summerhays doubtless gave their affidavits when this matter came up." Again he said: "If I had been at fault in this case, it was in asking so little damages. Mr. Hull and I visited Nashville to take depositions in the case. We were in the magnificent depot of defendant at Nashville (defendant's counsel suggested that defendant owned no depot in Nashville, to which he said that it is true he referred to the Central Station), which is more magnificent than Solomon's Temple. The ticket office there cost more than this courthouse, I reckon; and the doors of that station, more than plaintiff asked for his damages in this case, I imagine." All this the defendant objected to, and moved the court to exclude it from the jury, which was refused. It was improper for the attorney to go outside of the evidence heard by the jury, and the law of the case as given by the court. It was especially improper for him to state facts of his personal experience which had not been testified to, and were calculated to prejudice the jury against the defendant, or to swell the amount of the verdict. Considering the size of the verdict, in connection with the argument of the counsel, we are clearly of opinion that a new trial should be granted.

It is certified in the bill of exceptions that it contains all of the evidence heard on the trial. This is conclusive, as the record is presented, that the bill contains all the evidence heard by the jury, although, from the grounds for new trial, it appears, complaint was made as to the reading of certain depositions, which are not incorporated in the bill of exceptions.

Judgment reversed and cause remanded, with directions to grant appellant a new trial.

City of LEXINGTON, Appt.,
v.

Ed THOMPSON.

(.....Ky.....)

The legislature cannot fix the salaries of firemen employed by municipalities, although there is no limitation on such power in the Constitution, since that is a matter of local government never delegated to the legislature.

(May 28, 1902.)

A PPEAL by defendant from a judgment of the Circuit Court for Fayette County in favor of plaintiff in an action brought to recover salary alleged to be due plaintiff as a fireman. *Reversed.*

The facts are stated in the opinion.

Mr. W. S. Bronston for appellant.

Messrs. Kinkead & Miller, for appellee:

It is now universally admitted to be the province, and indeed the duty, of the courts, in a proper case, to declare an act of the legislature unconstitutional; at the same time it is nevertheless uniformly held to be a duty so delicate in its nature that it is "only to be entered upon with reluctance and hesitation."

Cooley, Const. Lim. p. 193.

Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation, under the notion of having discovered something in the spirit of the Constitution upon a subject which is not even mentioned in that instrument.

Cooley, Const. Lim. pp. 202-204; *People ex rel. Smith v. Fisher*, 24 Wend. 220; *Oochran v. Van Surlay*, 20 Wend. 381, 32 Am. Dec. 570; *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 145, 19 N. E. 224; *Griswold v. Hepburn*, 2 Duv. 24.

When a state law is attacked it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States, or of the state, we are able to discover that it is prohibited.

Sill v. Corning, 15 N. Y. 303; *Adams v. Hoice*, 14 Mass. 340, 7 Am. Dec. 218.

Municipal corporations are mere creatures of the state, exercising governmental functions at its will, and within the limitations prescribed thereby. The state may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the state at large. It may enlarge or contract its powers or destroy its existence.

United States v. Baltimore & O. R. Co.

NOTE.—For other cases in this series as to right of local self-government, see *State ex rel. Bulkeley v. Williams* (Conn.) 48 L. R. A. 465, and *note*; *Newport v. Horton* (R. I.) 50 L. R. A. 330, and *note*; *O'Connor v. Fond du Lac* (Wis.) 53 L. R. A. 831; *Com. ex rel. El-*
57 L. R. A.

17 Wall. 329, 21 L. ed. 600; *Meriwether v. Garrett*, 102 U. S. 473, 26 L. ed. 197.

The maxim that local concerns shall be managed in the local districts, which shall choose their own administrative and police officers, and establish for themselves police regulations, is subject to such exceptions as the legislative power of the state shall see fit to make, and when made, it must be presumed that the public interest, convenience, and protection are subserved thereby.

Cooley, Const. Lim. p. 208; *People ex rel. Wood v. Draper*, 15 N. Y. 532; *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 146, 19 N. E. 224; *Police Comrs. v. Louisville*, 3 Bush, 602.

Du Relle, J., delivered the opinion of the court:

By the 4th section of an act amending the act for the government of cities of the second class, approved March 15, 1900 (Acts 1900, p. 15), it was provided: "The said fire department shall consist of one chief, whose salary shall not be less than \$150 per month; the engineer's salary shall be \$80 per month; the electrician's salary shall be \$70 per month, and the ordinary fireman's salary shall be \$65 per month." The appellee, Thompson, brought suit against the appellant, the city of Lexington, a city of the second class, alleging that he was a resident of that city, and employed by it as an ordinary fireman, having been appointed by the board of police and fire commissioners; that prior to the passage of the act his salary as fireman was \$50 per month, and by that act was increased to \$65 per month; that he continued to serve as ordinary fireman up to July 22, 1901, when he resigned; that from time to time he made demand upon the city for the increase of salary provided for by the act at the rate of \$15 per month, which was refused. His prayer was for judgment for the difference between the salary paid him and that fixed by the act during the period from March 15, 1900, to July 22, 1901, aggregating \$243.75. A demurrer to the petition was filed and overruled. The city stood by its demurrer, and judgment was rendered against it. The ground of the demurrer is that the act is violative of the right of local self-government by the city in a matter over which the municipality has exclusive control in its private or corporate capacity, and that the act is therefore void.

For appellee it is contended that the act does not violate any provision of the Constitution of the state, and therefore cannot be declared void because it is, or is supposed to be, in violation of the spirit which may be supposed to pervade that instrument. Mr. Cooley is quoted in support of this proposition: "If the courts are not at liberty to declare statutes void because of their

kin v. Molr (Pa.) 53 L. R. A. 837; *Redell v. Moores* (Neb.) 55 L. R. A. 740; *State ex rel. Geake v. Fox* (Ind.) 56 L. R. A. 893; *Americus v. Perry* (Ga.) 57 L. R. A. 230; and *State ex rel. White v. Barker* (Iowa) 57 L. R. A. 244.

apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the Constitution. The principles of republican government are not a set of inflexible rules, vital and active in the Constitution, though unexpressed, . . . nor are the courts at liberty to declare an act void because, in their opinion, it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words." Cooley, Const. Lim. 5th ed. pp. 202-204. Numerous other authorities are cited in support of the doctrine thus laid down, and among them the opinion of Chief Justice Robertson in *Griswold v. Hepburn*, 2 Duv. 24, where, after discussing the difference between the Federal Constitution as a grant of power and the state Constitution as a written limitation upon the powers of the legislative organ of the people, it is said: "But the same reason being inapplicable to state legislation of doubtful compatibility with a state Constitution, proper deference to the legislative department should preponderate in favor of the constitutionality of its acts, and require the judicial department to recognize them as laws, unless it shall be clearly satisfied that they are not. Whenever a jurist inquires whether a state statute is consistent with the state Constitution, he looks into that Constitution, not for a grant, but only for some limitation of the powers inherent in the people's legislative organ so far as not forbidden by their organic law." These general principles may be freely conceded. It is also urged that, as said by the Supreme Court in *United States v. Baltimore & O. R. Co.* 17 Wall. 329, 21 L. ed. 600, a municipal corporation is not only a representative of the state, "but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state. The state may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the state at large. It may enlarge or contract its powers or destroy its existence." These general statements of the legislative power over municipal affairs are always to be read in the light of the state of fact to which they are applied by the courts who give them utterance. Unless so read, they are apt, at times, to be misleading. In fact, the very authorities which thus state the general rule state also the limitations to be placed upon it. Speaking of the limitation upon legislative power, Judge Cooley says: "It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the Constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important where they are in the nature of exceptions to the general grant or pow-

er; and, if the authority to do an act has not been granted by the sovereign to its representative, it cannot be necessary to prohibit its being done." Const. Lim. 5th ed. p. 203. So, Von Holst, Const. Law, 271, after stating the general rule that the legislative power of the state legislatures is unlimited so far as no limits are set to it by the Federal or state Constitution, proceeds: "This does not mean, however, that these restrictions must always be expressed in explicit words. As it is generally admitted that the factors of the Federal government have 'certain implied powers,' so it has never been disputed that the state legislatures are subject to 'implied restrictions;' that is, restrictions which must be deduced from certain provisions of the Federal or state Constitutions, or that arise from the political nature of the Union, from the genius of American public institutions." And in *Meechem on Public Officers*, § 123, it is said: "Indeed, this right of local self-government, as it has been briefly termed, is held to be an established feature and incident of our political system, and it is not within the power of the legislature of a state to permanently fill by appointment the local offices established by law for purely local purposes." See also *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77. Said Mr. Edward Bates, in his argument in *Hamilton v. St. Louis County Ct.* (15 Mo. 13, cited with approval in Cooley, Const. Lim. 5th ed. p. 49), a constitution is "not the beginning of a community, nor the origin of private rights. It is not the fountain of laws, nor the incipient state of government. It is not the cause, but consequence, of personal and political freedom. It grants no rights to the people, but is the creature of their power, the instrument of their convenience, designed for their protection in the enjoyment of the rights and powers which they possessed before the Constitution was made. It is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought. . . . A written constitution is, in every instance, a limitation upon the powers of government in the hands of agents." And Mr. Webster said: "Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former." A municipality is a state agency for governmental purposes. It exercises political governmental powers delegated by the state. As to such powers, and as to the duties which attach to their exercise in the administration of justice and the preservation of the public peace, it is *imperium in imperio*; a part of the governmental machinery of the commonwealth. Therefore its charter and legislative acts regulating the use of state property held by it do not constitute contracts within the meaning of the constitutional provision. Its political powers are not vested rights as against the state. As well said by Mr. McQuillin in a recent article upon the subject (34 Am. Law Rev. p. 506): "It is thus

manifest that in matters of public concern, such as relate to the performance of functions by the city as the agent of the state, the legislature is not limited to conferring a discretionary power, but may exercise compulsory authority where the local officers or agencies neglect or refuse to discharge their public duty in providing for the public needs of the locality, or in voting or levying the proper taxes for public purposes. As to duties which the people in the several localities owe to the state at large, they cannot be allowed a discretionary authority to perform them or not, as they may choose, for such an authority would be wholly inconsistent with anything like regular and uniform government of the state."

The conceded legislative control over the exercise of these governmental functions has furnished the subject of numerous adjudications. What constitutional limitations, either express or implied, existed upon the exercise of this legislative control it is not necessary, nor is it our purpose, in this case to determine. But a municipal corporation is not merely a public agency of the state. Its governmental functions are not all the functions which it possesses or exercises. It is, in part, a corporation possessed of private franchises and rights, which it may exercise for its private, corporate advantage, for the benefit of the community, as distinct from the state government. It may hold and manage property, not for the benefit of the state, but to supply local needs and conveniences; and in respect thereto it acts as a private corporation, and in that capacity may sue and be sued. "With respect to its private or proprietary rights and interests," it is entitled to the protection of the Constitution, like other corporations. *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142. Assuming that as to the governmental functions of a municipality the contention of appellee is true to its broadest extent, and that what the legislature gives to the municipality by its act of incorporation it may alter or destroy at pleasure, it does not at all follow that the rights and privileges of the local community, which become vested in the corporate entity created by the legislature for the benefit of the community, are likewise subject to the legislative control. The legislature cannot take away from the community rights or property which existed or were acquired without the aid of legislation. A municipality has a dual character. In its character as a state agency it exercises governmental, political, public, and administrative powers and duties. In its capacity as a private corporation it exercises rights and powers inherent in the people of the community, which have never been surrendered to any department of the government, and which are property rights within the protection of the Constitution. From the earliest courts to recognize this dual capacity of municipalities are those of Kentucky. The question arose 57 L. R. A.

upon a claim by the city of Louisville to exemption from state taxation. In that case (*Louisville v. Com.* 1 Duv. 297, 85 Am. Dec. 624) this court, through Judge Robertson, said: "But a municipal corporation, like a state, a county, or the city of Louisville, is much more than a person. While nominally a person, it is vitally a political power; and each, in its prescribed sphere, is *imperium in imperio*. All are constituent elements of one total sovereignty. The city of Louisville, to the extent of the jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of Kentucky, governs for Kentucky, and its authorized legislation and local administration of law are legislation and administration by Kentucky through the agency of that municipality. The tax law of Kentucky constructively applies to persons only, and not at all to political bodies exercising in different degrees the sovereignty of the state. . . . And if, notwithstanding the specified exceptions, the public property of the state and counties is exempt, the same reason exempts the public property of Louisville used for carrying on its municipal government. But, so far as any of its property may be used, not for that purpose, but only for the convenience or profit of its citizens individually or collectively, this it owns and uses as a private corporation, and, like the property of all such corporations not expressly exempted, it is a legal subject of assessment for taxation. The more precise and distinctive test for classification is this: Whatever property, such as court house, prison, and the like, which became necessary or useful to the administration of the municipal government, and is devoted to that use, is exempt from state taxation; but whatever is not so used, but is owned and used by Louisville in its social or commercial capacity as a private corporation, and for its own profit, such as vacant lots, market-houses, fire engines, and the like, is subject to taxation." Mr. Dillon thus states the distinction: "The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essential matters of public concern; while the enforcement of municipal by-laws proper, the establishment of gas works, of water works, the construction of sewers, and the like, are matters which pertain to the municipality as distinguished from the state at large." *Mun. Corp.* § 58. The Massachusetts court, recognizing the waterworks, markets, hospitals, cemeteries, libraries, and the system of parks of Boston as established "for the benefit of the public," declares them to be "held more like the property of a private corporation," and therefore protected from legislative interference. *Mt Hope Cemetery v. Boston*, 158 Mass. 519, 33 N. E. 695. And again, in *Dillon on Municipal Corporations*, § 12a (4th ed. § 15) it is said: "In many of its more important aspects a modern American city is not so much a miniature state as it is a business corporation; its business being wisely to administer the lo-

cal affairs, and economically to expend the revenues of the incorporated community. As we learn this lesson, and apply business methods to the scheme of municipal government and to the conduct of municipal affairs, we are on the right road to better and more satisfactory results." In Nebraska the legislature passed an act establishing a board of police and fire commissioners, to be appointed by the governor, to whom there was given all powers and duties connected with the appointment, removal, and discipline of the members of the police and fire departments. It was there held (*State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175, overruling a former decision) that the act was void. Said the court: "It is true that the state Constitution is not a grant of legislative power, and the lawmaking body may legislate upon any subject not inhibited by the fundamental law; but it by no means follows from this that the legislature is free to pass laws upon any subject unless in express terms prohibited by the Constitution. The inhibition on the power of the legislature may be by implication as well as by expression. Laws may be and have been declared invalid, although not repugnant to any express restriction contained in the fundamental law." To the same effect, see *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15. The same conclusion was reached as to a similar law of Indiana in the cases of *State ex rel. Jameson v. Denny*, 118 Ind. 382, 4 L. R. A. 79, 21 N. E. 252; *Evansville v. State ex rel. Blend*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; and *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L. R. A. 65, 21 N. E. 274. In the case first named the court said: "The construction of sewers in a city, the supply of gas, water, fire protection, and many other matters that might be mentioned, are matters in which the local community alone is concerned, and in which the state has no special interest; . . . and they are matters over which the people affected thereby have the exclusive control, and it cannot, in our opinion, be taken away from them by the legislature." In *Western Sav. Fund. Soc. v. Philadelphia*, 31 Pa. 183, 72 Am. Dec. 730, Chief Justice Lewis, delivering the opinion of the court, said: "The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by these means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature

57 L. R. A.

in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises have been conferred."

The distinction between the two capacities in which a municipality may act is nowhere better stated than in the two great opinions of Judge Cooley in *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, and *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202. In the former case the question was as to the power of the legislature to appoint permanent officers for the full term, whose duties were purely municipal, and arose over an act which created and appointed a board of public works. In the opinion by Judge Cooley it was said: "In the case before us the officers in question involve the custody, care, management, and control of the pavements, sewers, waterworks, and public buildings of the city, and the duties are purely local. The state at large may have an indirect interest in an intelligent, honest, upright, and prompt discharge of them; but this is on commercial and neighborhood grounds, rather than political, and is not much greater or more direct than if the state line excluded the city. Conceding to the state the authority to shape the municipal organizations at its will, it would not follow that a similar power of control might be exercised by the state as regards the property which the corporation has acquired, or the rights in the nature of property which have been conferred upon it. There are cases which assert such power, but they are opposed to what seem to me the best authorities, as well as the soundest reason. The municipality, as an agent of government, is one thing; the corporation, as an owner of property, is in some particulars to be regarded in a very different light. . . . Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell, and enjoy property, and, generally, to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law, it would hardly do to call upon a protesting people to show where in the Constitution, the power to establish it was prohibited. It would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been

conferred. Some things are too plain to be written. . . . The state may mold local institutions according to its views of policy or expediency; but local government is a matter of absolute right, and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but, at discretion, sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally inadmissible to allow the people full control in their local affairs or no control at all." In the later case of *People ex rel. Park Comrs. v. Detroit*, the question was more nearly similar to that presented in the case at bar. It was the question of the legislative power to compel local improvements, which is practically the same question as here presented, viz., the legislative power to compel expenditure for a local purpose. The question, as stated in the opinion, was whether there rested upon the judiciary the duty, "by the compulsory process of this court, to coerce the city of Detroit into entering into contracts involving a debt for a very large sum for an object purely of local concern, which the legislative body of the city has refused to make." Said the court, through Judge Cooley: "In *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, we considered at some length the proposition which asserts the amplitude of legislative control over municipal corporations, and we there conceded that, when confined, as it should be, to such corporations as agencies of the state in its government, the proposition is entirely sound. In all matters of general concern there is no local right to act independently of the state; and the local authorities cannot be permitted to determine for themselves whether they will contribute through taxation to the support of the state government, or assist, when called upon, to suppress insurrections, or aid in the enforcement of the police laws. Upon all such subjects the state may exercise compulsory authority, and may enforce the performance of local duties, either by employing local officers for the purpose, or through agents or officers of its own appointment. . . . But we also endeavored to show in *People ex rel. Le Roy v. Hurlbut* that, though municipal authorities are made use of in state government, and as such are under complete state control, they are not created exclusively for that purpose, but have other objects and purposes peculiarly local, and in which the state at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens. Indeed, it would be easy to show that it is not from the standpoint of state interest, but from that of local interest, that the necessity of incorporating cities and villages most distinctly appears. State duties of a local nature can, for the most part, be very well performed through the employment of the usual township and county organiza-

tions; so that if the state alone, in its corporate capacity, were to be regarded, the conferring of special corporate powers on cities and villages might very well be dispensed with. . . . The twofold character of these corporations, as organizations on the one hand for state purposes, and on the other for the benefit of the individual corporators, has invariably been recognized by this court wherever there has been occasion to refer to it. We also referred, in *People ex rel. Le Roy v. Hurlbut*, to several decisions in the Federal Supreme Court and elsewhere to show that municipal corporations considered as communities endowed with peculiar functions for the benefit of their own citizens, have always been recognized as possessing powers and capacities and as being entitled to exemptions distinct from those which they possess or can claim as conveniences in state government. If the authorities are examined, it will be found that these powers and capacities, and the interests which are acquired under them, are usually spoken of as private, in contradistinction to those in which the state is concerned, and which are called public, thus putting these corporations, as regards all such powers, capacities, and interests, substantially on the footing of private corporations. . . . But it cannot be contended that authority in the legislature to determine what shall be the extent of capacity in a city to acquire and hold property is equivalent to or contains within itself the authority to deprive the city of property actually acquired by legislative permission. As to the property it thus holds for its own private purposes, a city is to be regarded as a constituent in state government, and is entitled to the like protection in its property rights as any natural person who is also a constituent. The right of the state, as regards such property, is a right of regulation, and, though broader than exists in the case of individuals, is not a right of appropriation. The constitutional principle that no person shall be deprived of property without due process of law applies to artificial persons as well as natural, and to municipal corporations in their private capacity, as well as to corporations for manufacturing and commercial purposes. And when a local convenience or need is to be supplied in which the people of the state at large, or any portion thereof outside the city limits, are not concerned, the state can no more, by process of taxation, take from the individual citizens the money to purchase it, than they could, if it had been procured, appropriate it to state use. To this extent the corporate right appears to us to be a clear and undoubted exception to the general power of control which is vested in the state.

It may be admitted that the line which distinguishes those matters with respect to which cities, as state agencies, exercise governmental functions from those as to which it acts in its private, corporate capacity, representing the people of the community, is not always well-defined. It may well be

that, in cases in which it is difficult to ascertain to which class a right, a power, or a function should be assigned, the courts would hesitate to annul an attempted exercise of legislative power. But in cases in which the proper classification can be ascertained the courts should not, and do not, hesitate to act. Upon a question of this kind it is to be expected that under the varying provisions of various state constitutions, and with the different procedures and customs which obtained in the various states at and before the date of the adoption of those constitutions, there should be conflict in the authorities. For example, in some of the cases we have cited the systems devised for police and fire protection seem to have both been regarded as purely municipal and local, and therefore exempt from legislative interference. The better opinion as to police system seems to be that, inasmuch as the state is charged primarily with the preservation of public peace and the protection of life and property in the cities as well as in the rural districts, the city police is, in large measure at least, a part of the state constabulary, and its members perform the functions of state officials in the exercise of delegated state sovereignty. Therefore, in so far as the police systems of our cities form a part of the state government, they are subject to legislative control. And this control has been distinctly recognized by this court in *Newmeyer v. Krakel*, 23 Ky. L. Rep. 190, 62 S. W. 518. But between the police systems of municipalities and the fire departments there seems to be a manifest distinction, though many of the courts—as in Indiana, Nebraska, and California—have recognized the officers of both departments as purely municipal and local. The act in question does not undertake to deprive the local authorities of the power of appointment or selection of the fire commissioners, but only to regulate and fix the salaries of the officers and employees. It seems conceded that the establishment of fire departments by municipalities is a voluntary act of self-protection; that the municipality, on grounds of public policy, is not responsible for negligence of its fire department; and that the property of the fire department is held by the municipalities in their capacity of private corporations. We do not undertake to say that the state is devoid of power to take measures for the protection of the property of its citizens from fire. The question before us is whether the rate of payment of the employees of such a system, devised for the benefit of the local community, of no special interest or advantage to the state, except in so far as it is advantageous and beneficial to the community, is municipal or governmental in its nature. If the rate of pay to be fixed for such employees is governmental, then, also, is the variety of fire engines to be used, the size and breed of the horses which pull them, the number of fire plugs or cisterns to be established, and the personnel of the force. If the legislature can arbitrarily fix the

rate of payment for such services at \$65 per month, it can fix it at any other sum which it deems reasonable; and if fixing the pay of firemen is a governmental function because firemen render service in the preservation of the property of citizens of the commonwealth, then it is also a governmental function to fix absolutely the *per diem* of the street sweepers and the monthly wages of the janitors in the city hall. We do not think such legislative interference in a matter in which no one but the firemen and the taxpayers of the city can possibly be interested could have been in contemplation of the framers of our Constitution, or of the voters who sanctioned its adoption. If such a power is governmental, it is governmental also to fix the wages of every employee of every city, of whatever class. There were cities and towns before the Constitution was adopted. At the date of its adoption they were managing their own little local affairs. They were employing and paying the members of their fire departments, as in times gone by they had managed their own volunteer fire departments. The makers of the organic law—the voters whose ballots operated to enact it—voted for it with these facts before them, and they limited the time which might be devoted to legislation to sixty days in each two years. Is it conceivable that they expected or intended to permit the legislature to take charge of the petty salaries of every hamlet in the state? As said by Judge Olds in *State ex rel. Holt v. Dewey*, 118 Ind. 449, 4 L. R. A. 65, 21 N. E. 282: "Is it fair to presume that the people of the state, in the adoption of the Constitution, did not intend to surrender the right of self-government in so far as to allow the legislature to even take charge of the fire department of every town and city of the state, and to appoint officers to take charge of and manage the affairs of such department, and limit the legislative body to sixty-one days in every two years? We do not believe that such was the intention of the people at that time, nor do we believe that such is their understanding of the power of the legislature at the present time; nor is there any word or sentence in the Constitution granting such power." As said by Judge Cooley, "Some things are too plain to be written." The state has no interest in the property within a city or town, except such indirect interest as it has in the property of all its citizens. Since the organization of the state government, towns and cities have universally exercised the exclusive right of self-government in the control and repair of streets, alleys, and sidewalks, in the construction of sewers and waterworks, and the organization and control of fire departments. They have been held liable for damages resulting by reason of defects in sidewalks, streets, and sewers. All property within its corporate limits is liable for the payment of debts created by the municipality in providing these necessities to the municipality, and in which the people other than those residing within the particular

town or city are in no way directly interested. We do not think the legislature can fix the salaries of firemen, any more than it can fix the pay of street sweepers, the drivers of ash carts; or fix the price per square yard which the citizen shall pay for an improvement of the public ways.

The doctrine stated in *McDonald v. Louisville*, 24 Ky. L. Rep. 271, 68 S. W. 413, are in full accord with the views here expressed.

For the reasons given, *the judgment is reversed*, and cause remanded, with directions to sustain the demurrer to the petition, and for further proceedings consistent herewith.

KENTUCKY & INDIANA BRIDGE COMPANY'S RECEIVERS, *Appts.*,

v.

Anna MONTGOMERY.

(.....Ky.....)

1. A peremptory instruction for defendant cannot be given in an action against a railroad company operating a portion of its railroad bridge as a toll bridge, to recover for injuries to a traveler on the latter by negligently frightening his horse, where the evidence shows that while the horse was on the bridge it met a train having an engine at each end, and that those in charge of the second engine, although knowing the horse was frightened, took no steps to prevent an accident, but permitted the engine to throw out an unusual quantity of smoke, steam, and cinders, which caused the horse to become unmanageable and injure the plaintiff.
2. A railroad company operating a portion of its railroad bridge as a toll bridge for travelers with horses must keep a lookout for the purpose of discovering whether or not teams on the bridge have become so frightened by trains also on it as to be unmanageable and dangerous; and if so, so far as is reasonable, it must shut off steam and avoid unnecessary noise.
3. A traveler attempting to use a portion of a railroad bridge fitted for teams is charged with notice that the railroad company, in operating its trains over the bridge, has the right to make all usual and reasonable noises incident thereto, and must act for his own safety with reference to such right.

(April 30, 1902.)

APPEAL by defendants from a judgment of the Circuit Court for Jefferson County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to liability of railroad company for frightening horse by escape of steam or blowing of whistle, see also, in this series, *Sellick v. Lake Shore & M. S. R. Co.* (Mich.) 18 L. R. A. 154; *Bittle v. Camden & A. R. Co.* (N. J. L.) 23 L. R. A. 283; *Omaha & R. Valley R. Co. v. Clarke* (Neb.) 23 L. R. A. 504; and *Mitchell v. Nashville, C. & St. L. R. Co.* (Tenn.) 40 L. R. A. 426.
57 L. R. A.

Messrs. Humphrey, Burnett, & Humphrey for appellants.

Mr. J. W. S. Clements for appellee.

O'Rear, J., delivered the opinion of the court:

Appellants operate a railway and toll highway bridge across the Ohio river connecting the cities of Louisville and New Albany. A board fence 7 feet high separates the railway track from that part of the bridge used by footmen and wagons. On January 16, 1898, appellee and a companion occupying her buggy, paid the toll for passage across the bridge from Louisville. They met a heavy freight train, with a locomotive at each end. Appellee's horse took fright at the noise of the train, and she claims, after that fact and her peril had been discovered by those in charge of the second locomotive, they took no steps to stop its noise, but continued it, the locomotive throwing out smoke and steam, as well as hot cinders, which lit on the horse's back, causing it to run away, demolishing the buggy and harness, and seriously injuring appellee. In this suit for damages the jury awarded her a verdict for \$800. The matters urged as error by appellants are: First, that the court should have given the jury a peremptory instruction at the close of plaintiff's case, or at the close of all the evidence, for a nonsuit; second, that the verdict is not sustained by the evidence; and, third, that certain instructions offered by appellants, but rejected by the court, should have been given, while those given did not correctly present the law of the case.

On the first point, if the evidence on behalf of plaintiff was such altogether as, full credit being given to it by the jury, would have warranted a verdict for the plaintiff, the peremptory instruction for a nonsuit should have been refused. Appellee and her companion each testified that the horse became frightened at the first locomotive, and showed plainly its nervousness, but was not beyond her control; that the train was of about twenty-two cars; that before they came up with the second locomotive the fireman and engineer were both on the side of the engine next to the driveway in use by plaintiff, and they saw her, and saw that her horse was frightened and trying to run, but that, instead of stopping or attempting to reduce the noise of the locomotive, which was, as they testified, throwing out an unusual quantity of steam, smoke, and sparks or cinders, and making a great deal of noise, these trainmen merely stood and laughed at her predicament; that the sparks or hot cinders from the locomotive fell on her horse's back and burned it,—from all of which it ran away, causing her serious injury. A trainman who was on top of the cars, and about 100 feet in front of the second locomotive, testified for plaintiff that he saw the horse was frightened; that the locomotive was making considerable noise, which was not stopped till after the horse ran

away. Other witnesses testified that the horse, when caught, a few minutes afterwards, showed a number of burned places on its back, described as such as might have been caused by sparks or hot cinders being dropped on it; that the horse was not wild, and had been frequently driven across that bridge before the accident. Appellee's physicians and others testified that her injuries were serious. She was unconscious for a time, suffering from a severe and dangerous wound on the back of the head; one leg broken or dislocated; wrist sprained and dislocated, and severely sprained and injured in the back and side; besides some minor wounds. Septic poisoning followed in a few days, from which appellee was unconscious for eight days or longer. She was confined for about three months by these injuries, and at the time of the trial—about three years after the injuries—continued to suffer from them, and her physician testified that it was probable that the injury to her head would prove to be a permanent one. If the jury believed this evidence, appellee was entitled to a verdict under the law governing her rights and appellants' duties and liabilities in the premises. The peremptory instruction was properly refused.

2. The engineers and firemen in charge of the two locomotives testified that their respective engines were in good order, spark arresters being provided of approved pattern, which were in good condition; that the engines were not making more noise than customary and necessary in their operation. Those in charge of the second locomotive denied that they saw any symptoms of fright in the horse, or that they laughed at plaintiff's situation, but that, seeing the buggy coming, with the two women in it, they shut off steam before the horse came up, and that the horse did not start to run till after it had passed them. They denied that sparks or cinders were being emitted by their engine. Thus there was a pretty well-defined issue of fact presented by this testimony. But it was shown that appellee was running a house of prostitution; that her companion on this occasion was a visitor, who was there probably for immoral purposes; that others of her witnesses were shown to be frequent visitors at her house, or employed there; that the trainmen who testified for appellee told an improbable tale in some particulars,—in fact, excepting appellee's physicians, about all of her witnesses were supposed to be discredited, either by their manner of testifying or their character as evidenced by their employments, or lack of them. This much, however, seems to be undoubtedly true: The women were passengers on the bridge, having paid the requisite toll. They were driving a horse that had frequently been driven over the same bridge, presumably meeting the ordinary conditions found there. That on this occasion the horse took fright after meeting the train, became unmanageable, ran away, and injured the occupants of the buggy. There was undeniably a cause for this. Both sides agreed that

meeting the first locomotive was not the sole cause of the runaway. Something somewhat unusual must have happened after that to have occasioned it. The women's story, as corroborated by the brakeman, is not an improbable one. It was necessary for the jury to believe one side or the other. They had before them facts, including certainly as much of the characters of plaintiff's witnesses as was proper to be shown in the manner done in this case. We cannot say that the jury gave improper weight to appellee's evidence. The conclusion of the jury on this point was certainly within the legitimate scope of the privileges of their office. We conclude that the verdict of the jury was not contrary to the evidence.

3. The court instructed the jury as to appellant's duty that in operating its train upon the bridge appellant was required to exercise the highest degree of care usually exercised by prudently managed corporations of the same character to prevent injury to passengers on foot or in vehicles that may be using the bridge the same time that a train is passing; that a failure to exercise that degree of care in the management of the train was actionable negligence. The court further said: "I will further say to you that if you believe from the evidence that in the operation of this particular train which is said to have caused the injury complained of no more noise was made than is usually incident to the operation of such trains, then the defendant cannot be said to be guilty of negligence in the operation of that train. But if you shall believe from the evidence that the plaintiff's horse became frightened, and those in charge of the train saw that it was frightened, then it became their duty to take such steps as were within their power to prevent the accident which is claimed to have resulted from the fright of the horse, and if they, after seeing the fright of the horse and peril of the lady, failed to take such steps as were at hand by which they could have prevented the noise and the consequent injury, if they could have so prevented it, then it was negligence upon the part of the defendant's agents in not so doing, if they did fail to do it." It is complained by appellants that the court should not have exacted from the bridge company a higher or different degree of care than was required of the traveler appellee. The opinion in case of *Louisville & N. R. Co. v. Smith*, 21 Ky. L. Rep. 857, 53 S. W. 269, is relied on. That case recognizes a principle which we believe to be sound, and in no wise in conflict with the one applied by the trial court in this case. In the *Smith Case* the traveler was upon a highway running parallel to the railroad. His horse took fright at the train. The court told the jury that, if the employees in charge of the engine could have known by the use of ordinary care that the continued whistling would cause plaintiff to lose control of his team, a recovery for plaintiff would be authorized for injuries caused by the act. This court held that the continued

whistling after those in charge of the engine saw that plaintiff's horses were frightened was negligence. "But," it was added, "there is no rule of law that would require employees in charge of an engine to discover the condition of a team or persons on a highway running parallel with the railroad. *Lamb v. Old Colony R. Co.* 140 Mass. 79, 54 Am. Rep. 449, 2 N. E. 932. While it is not their duty to discover such things, yet, if the employees do see the apparent danger, it then becomes the duty of such employees to use care to avert the injury. As to persons not on the railroad, the obligation to observe care begins when the danger is discovered." Another line of cases is relied on also by appellants to the effect that those using a railway highway crossing are bound to use the same degree of care to protect themselves from injury as the railway company is required to use to keep from injuring the traveler. *Louisville, C. & L. R. Co. v. Goetz*, 79 Ky. 449, 42 Am. Rep. 227; *Atchison, T. & S. F. R. Co. v. McClurg*, 8 C. C. A. 322, 19 U. S. App. 346, 59 Fed. 862; and *Louisville & N. R. Co. v. Cummins*, 23 Ky. L. Rep. 681, 63 S. W. 594. In all those cases the traveler was using the highway crossing. No amount of reasonable care on the part of those operating the railroad train would likely prevent injury to the traveler unless he too exercised the same care in using the crossing. Carelessness on his part in attempting to use the crossing at the time a train was passing would inevitably lead to his injury. The traveler upon the bridge in this case was the bridge company's passenger. As such she was entitled to that degree of care that looks out for her presence with a view to preventing her injury. This duty, in part growing out of the reasonable probability of frightening teams under the conditions existing, would seem to call for something more than a mere negative responsibility. The instruction given by the court really told the jury that the bridge company was required to use the highest degree of ordinary care,—not the greatest possible care. Ordinary care has no grades known to the law. This instruction, when reduced to analysis, was that the bridge company was required to observe ordinary care. The emphatic form used by the court, while improper, does not seem to have misled the jury, or prejudiced appellants' rights. As to appellee's contributory negligence the court told the jury: "Contributory negligence means the failure of a person to exercise the degree of care usually exercised by ordinarily careful and prudent persons under the same or similar circumstances to protect themselves from injury, and by reason of which failure they help to cause or bring about the injury complained of." In other words, the jury were told that it was the bridge company's duty to observe the best care usually observed by ordinarily prudent bridge operators under similar circumstances to avoid the injury, and that it was the duty of the traveler to use that degree of care usually exercised by ordinarily careful persons similarly situ-

ated to protect themselves from injury. There is no material difference between the degrees of care required to be observed. In this case there was no pretense of showing by the evidence that appellee was guilty of any contributory negligence. An instruction on that point might well have been refused. It is not seriously argued that too high a degree of care was required of the bridge company; simply that too low a degree was placed for the appellee. As she was shown not to have been guilty of any negligence, it is not material whether the instruction as to the care required of her was literally correct, so long as she has no reason to complain of it.

It is further complained by appellants that the instructions made it the duty of appellants to look out for teams, and that a failure to see them, when it might have been done by the exercise of proper care, was equivalent to seeing them when frightened, and then failing to use due precaution to stop the noises causing the trouble, so far as was possible. This is said to be in conflict with *Louisville & N. R. Co. v. Smith*, 21 Ky. L. Rep. 857, 53 S. W. 269. We do not place such construction on the instructions given, but rather the contrary. We are of opinion, though, that a different rule might be applied in a case like the one in hand than in one where the traveler is upon a parallel highway to the railway. The bridge company should maintain a reasonable lookout for the safety of its passengers on its bridge, from whatever cause connected with the company's acts or those of its servants. The court, in the instruction quoted, properly recognized that it was the right of the defendant to make such noise as was usual and incident to the movement and operation of its engines at the time and place and in the work in which it was engaged. No one is responsible for injuries resulting from unavoidable accidents while engaged in a lawful business. So a passenger using the highway part of the bridge does so with a knowledge that the company, in operating its railway trains over the bridge, has necessarily the right to make all usual and reasonable noises incident thereto, whether occasioned by the escape of steam, rattling of cars, or other causes, and persons whose duty calls them near a railway must be presumed to know of this right, and to act for their own safety with reference to such right. *Louisville, N. A. & C. R. Co. v. Schmidt*, 134 Ind. 16, 33 N. E. 774; *Newport News & M. Valley Co. v. Howard*, 14 Ky. L. Rep. 476. It also follows that those operating railroad trains over this bridge must know that people are using other parts of the bridge for the purpose of passing with their vehicles; that teams are liable, under such conditions, to take fright at even the usual, customary noises incident to the operation of trains. Therefore, as such bridge passengers are passengers of the company who are operating the trains, and are entitled to more than a negative care, the trainmen should keep a lookout for the purpose of discovering whether teams have become so fright-

ened as to become unmanageable and dangerous to their drivers and to others on the bridge. In such case it would be the duty of those in charge of the train, so far as they reasonably could, to shut off the exhaust of steam, and not cause any more of noise than is necessary under the circumstances. Nothing unreasonable is, by this, required of those operating the trains. They are simply compelled to keep a look-

out to observe whether their presence is causing danger to teams and passengers using other parts of the bridge by license from its owner, and, if they do observe that it is, then it becomes their duty to do what in reason and humanity they can do and ought to do to prevent an injury.

We perceive no error in the proceedings, and the judgment is affirmed, with damages.

GEORGIA SUPREME COURT.

W. L. TILLMAN, *Plff. in Err.*,
v.

P. W. DUNMAN, *Exr.*, etc., of Joseph Dunman, Deceased, *et al.*

(114 Ga. 406.)

- *1. It is the right of an executor offering land for sale at public outcry to withdraw the same at any time before the hammer falls.
2. Although the motive of the executor in withdrawing the property from sale before the bid was accepted was the result of collusion between himself and another who had bargained for the premises at a private sale, and the withdrawal was made with the design of completing the private sale, nevertheless the person who had made the last and highest bid before the same was withdrawn could not insist upon the right to take the land as a purchaser. While such collusion between the executor and another would be open to inquiry by legatees and creditors, it is not open to inquiry at the instance of a stranger.

(December 12, 1901.)

*Headnotes by LITTLE, J.

NOTE.—Right to withdraw property from an auction sale after it has been offered.

- I. Scope, 784.
- II. In England and Canada.
 - a. Withdrawal after bids, 784.
 - b. Withdrawal before bids, 787.
- III. In the United States.
 - a. In general, 787.
 - b. Judicial and official sales, 789.
- IV. Summary, 789.

I. Scope.

Although "puffing" or by-bidding may be, in a sense, in the nature of a withdrawal of the property,—as, for instance, in a sale without reserve, if a bidder is employed by the vendor to bid up to a certain point, such bidding is virtually a withdrawal up to that point,—the aim has been to confine this note to cases of specific withdrawal of the property; and therefore, with the exception of a few instances of relevant *obiter dicta* in the opinions, cases of "puffing" or by-bidding have been excluded.

II. In England and Canada.

a. Withdrawal after bids.

In 1859 three of the five judges of the exchequer chamber, in reviewing an action by a 57 L. R. A.

ERROR to the Superior Court for Harris County to review a judgment in favor of defendants in an action brought to compel specific performance of a contract to convey land. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hatcher & Carson, for plaintiff in error:

The private sale by these executors to Murrah Brothers is contrary to public policy and void.

Jackson v. Williams, 50 Ga. 553; *Furr v. Eddleman*, 80 Ga. 663, 7 S. E. 167; *Downing v. Peabody*, 56 Ga. 40; *Logan v. Gigley*, 9 Ga. 114; *Bond v. Watson*, 22 Ga. 637; *Nutting v. Thomason*, 46 Ga. 34; *Bagley v. Stephens*, 78 Ga. 304, 2 S. E. 505; *Neal v. Patton*, 40 Ga. 363.

Tillman being the best and highest bidder, and his bid having been accepted and cried, it became a perfected sale. When no one would raise his bid, there being no reason to postpone the sale by the executors, his purchase could not be defeated by the executors stating that they would withdraw the land from sale, their only object being to carry out the terms of a private sale to

bidder against an auctioneer for damages for refusing to accept his bid as highest bidder on a sale advertised to be without reserve, and for allowing the vendor to overbid him and withdraw the property, which had resulted in a nonsuit, held that, upon the pleadings as they then stood, such judgment of nonsuit must be affirmed, but, availing themselves of their inherent power, that they would decide in favor of plaintiff if he chose to amend his pleadings in conformity with such decision. And then the court stated that upon the facts it seemed to them that plaintiff was entitled to recover for the following reasons: The owner's name was not disclosed, and a sale was announced by the auctioneer to be "without reserve," which, according to all the cases, both at law and equity, means that neither vendor nor any person on his behalf may bid, and that the property shall be sold to the highest bidder whether the sum bid be equivalent to the real value or not; and, upon the same principle that a person giving information advertised for may sue, as upon a contract, the person offering a reward for such information, so it seemed to the court that the highest bona fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve; and further, the court states: "We think that the auctioneer who puts the property up for sale upon such a condition [without reserve] pledges himself that the sale shall be without

a third person, for a less price. This was not a legal reason for postponing an executor's sale. Hence, the best and highest bidder became the purchaser.

Logan v. Gigley, 9 Ga. 114; *Alexander v. Herring*, 54 Ga. 204.

Administrators' and executors' sales do not rest upon the same principles as auction sales. The doctrine of *locus penitentiae* (place of repentance), the opportunity of withdrawing from a contract before the parties are finally bound, does not exist to the same extent.

Plaintiff does not occupy the position of a stranger; and while it is true that creditors of the testator and legatees under the will can complain, it is also true that plaintiff has an equitable title and right springing out of this transaction, which authorizes him to invoke the aid of a court of equity for a specific performance.

reserve, or, in other words, contracts that it shall be so, and that this contract is made with the highest bona fide bidder, and, in case of a breach of it, that he has a right of action against the auctioneer. The case is not at all affected by the 17th section of the statute of frauds, which relates only to direct sales, and not to contracts relating to or connected with them. . . . We entertain no doubt that the owner may, at any time before the contract is legally complete, interfere and revoke the auctioneer's authority; but he does so at his peril; and if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified." Two out of the five judges concurred in the result, but preferred to arrive at it on the ground that from the facts, although the auctioneer did not have the power to sell without reserve *ab initio*, he undertook to do so, and that there was a breach of this undertaking. It was also stated that there was no reversal of the judgment of the court below, but if plaintiff chose to, he might amend and proceed to a new trial. This was not done, however, the parties agreeing to a *stet processus*. *Warlow v. Harrison*, 1 El. & El. 309, 28 L. J. Q. B. N. S. 18, 29 L. J. Q. B. N. S. 14.

If the theory thus laid down is the law, it would seem to follow that property cannot be withdrawn after a bid has been made; but there are several reasons why, under the existing state of the law, this doctrine is open to criticism; one of which is that the decisions uniformly hold that a bidder may retract his bid at any time before the hammer falls, and so it is argued that, while the auctioneer would be bound to sell if a bid were made, the bidder might retract, and therefore the mutuality necessary in a contract is lacking. To obviate this, Wharton on Agency, § 641, suggests that if the auctioneer is bound the bidder is also bound by the same contract, and if he withdraw his bid the auctioneer may have an action against him for his personal loss by the failure of the sale; but, in view of the facts that the great weight of authority is to the effect that the bidder may retract at any time before the hammer falls, and that no case can be found bearing out the above suggestion, it seems impractical. Another objection, also, to Wharton's theory, is expressed by counsel on the argument in *Jones v. Nanney* (1824) 13 Price, 76, that to hold that an action would lie on an implied undertaking not to retract a bid would furnish a mode of getting rid of the statute of frauds, 57 L. R. A.

It is a fraud in law to induce a purchaser to buy a part of a tract, and then refuse to sell to him another part which he had intended and was ready to buy and pay for to complete his purchase.

The successful bidder at an administrator's sale may compel a performance of the contract on the terms prescribed, if they are consonant with law.

Nesbit v. Richardson, 14 Tex. 656; *Nantahala Marble & Talc Co. v. Thomas*, 76 Fed. 59; *Re Metz*, 14 York Legal Record, 136.

All bids should be accepted at judicial sales.

17 Am. & Eng. Enc. Law, 2d ed. p. 978; *Morgan v. Moore*, 4 Ky. L. Rep. 717; *Creutz v. Knecht*, 9 Ky. L. Rep. 772, 6 S. W. 717; *O'Connor v. Woodward*, 6 Ont. Pr. Rep. 223.

Messrs. Terrell & Terrell and J. B. Burnside for defendants in error.

which could not be permitted. However, as we have seen, *Warlow v. Harrison* later held that the statute of frauds has no application to this preliminary contract, on the ground that it is not a contract of direct sale; but *Browne on the Statute of Frauds*, § 286, says that an agreement by which a party shall ultimately be bound to sell or purchase land is as much within the statute as if he bound himself immediately to do so, citing *Rucker v. Steelman*, 73 Ind. 397.

Nevertheless, the rule laid down by *Warlow v. Harrison* was approved (in 1899) in *England by Johnston v. Boyes* [1899] 2 Ch. 73, 68 L. J. Ch. N. S. 425, 80 L. T. N. S. 488, 47 Week. Rep. 517. This was an action by a woman against an auctioneer for damages for not allowing her husband, as her agent, to complete the sale by signing the contract and paying the required deposit, when he was the highest bidder and the property had been knocked down to him. The refusal of the auctioneer to complete the sale was on the ground of insolvency of the bidder and the tender by him of a check instead of cash. It was contended that, as the action was not for specific performance, no question as to the statute of frauds was involved, as that relates to direct sales, and not to contracts relating to, or connected with, them, and as it was held in *Warlow v. Harrison* that the statute, § 17, would not affect a case where chattels are advertised for sale by auction on printed conditions, and a member of the public accepts the offer and complies with the conditions, counsel argued that, in like manner, § 4 relates to direct sales of land, and not to contracts related to, or connected with, them. The court held that in point of law such an action as this could be sustained; that a vendor who offers property for sale at auction on the terms of printed conditions can be made liable to a member of the public who accepts the offer, if those conditions be violated; and that the statute of frauds would not afford any defense to such an action, for the plaintiff was not suing on a contract to purchase land, but simply because her agent, in breach of the conditions of sale, was not allowed to sign a contract which would have resulted in her becoming the purchaser of land, and that this conclusion results from the decision in *Warlow v. Harrison*. But the court held that the auctioneer might refuse to complete the sale on account of the insolvency of the bidder, and was not obliged to take a check in lieu of cash.

In dismissing a bill by a bidder to compel

Little, J., delivered the opinion of the court:

Tillman filed an equitable petition in the superior court of Harris county against P. W. and J. E. Dunman, executors of Joseph Dunman, deceased, and T. T. and G. N. Murrah, and Murrah Brothers, praying that the executors above named be required to execute and deliver to him a deed to certain described lands; that T. T. and G. N. Murrah, or Murrah Brothers, be required to surrender for cancellation such deed of conveyance as they may have received from these executors, as being a cloud on petitioner's title; that all the defendants be restrained and enjoined from changing the status of the property; and for general relief. The allegations of the petition are substantially as follows: Joseph Dunman died testate, seised and possessed of certain

described property. His will was duly probated, and letters testamentary issued to P. W. and J. E. Dunman, who, as executors, entered into possession of the lands of their testator for the purpose of administering his estate and carrying out the terms of the will, under the provisions of which they duly advertised for sale certain lands of decedent for the purpose of paying the debts of the estate, and for distribution among the legatees according to the statute and the terms of the will. The advertisement recited that the land was to be sold in five parcels, "for cash," before the court-house door of Harris county, on the first Tuesday in February, 1900. At that time, and at the place above stated, petitioner being present, the executors read the advertisement publicly, and began to sell the land in the order and parcels as therein stated. Peti-

specific performance, in *Day v. Wells*, 30 Beav. 220, 7 Jur. N. S. 1004, 9 Week. Rep. 857, the judge delivering the opinion of the court stated that he did not wish to be understood as intending to confirm such a proposition as that a vendor, as soon as a lot is knocked down, is entitled to say, "I will not ratify the sale," but that he dismissed the bill on the ground that the vendor bona fide made a mistake as to the authority which he thought he had vested in the auctioneer, and which he intended should be exercised.

Keightley v. Birch (1814) 3 Campb. 521 holds that a sheriff is not justified in selling goods to the highest bidder greatly under their value, but should make a return that they remain in his hands for want of bidders. (See *infra*, III. b.)

The doctrine of *Warlow v. Harrison* is evidently followed in Canada in the case of *McAlpine v. Young*, 2 Ch. Chamb. Rep. (Ont.) 85, where a motion, which was made to stay the settling of a new advertisement of sale, was granted on the ground that the previous sale could not be abandoned, and that where a bid had been made the property could not be withdrawn from sale, for the reason that the party bidding had certain rights which he was entitled to have protected.

Another Canadian case, which goes on the same theory, is *O'Connor v. Woodward*, 6 Ont. Pr. Rep. 223. This was an application to resell the property after a previous putting up of the same and repeated adjournments. The court stated that, according to the standing conditions under which the property was offered, the highest bidder was the purchaser, and could not be deprived of his right by the auctioneer refusing to knock the property down to him; and that, it having been once offered by the vendor, it was not open to him to refuse a bid, however small, on the ground of mere inadequacy of price; and that specific performance would not be refused on that ground unless the inadequacy was so great as to be evidence of fraud. These previous irregular proceedings, however, were held to be wholly null and void, but on another ground.

But, on the other hand, is the doctrine, firmly established, that a bidder may retract his bid at any time before the hammer falls; and many text books lay down the rule that either party may retract before that time. *Bateman, Auctions*, § 30; *Benjamin, Sales*, §§ 42, 270; *Story, Sales*, § 461; *Baker, Sales*, §§ 550, 569; note on *Auctions*, to *Thomas v. Kerr* (Ky.) 96 Am. Dec. 265; 2 Kent, Com. 10th ed. 756; *Murfree*, 57 L. R. A.

Sheriffs, § 1003; *Warvelle, Vendors & Purchasers*, § 7.

The leading authority upon these propositions is *Payne v. Cave* (1789) 3 T. R. 149. It was contended that a bidder is bound by the condition of a sale without reserve to the highest bidder, to abide by his bidding, and cannot retract, and that he is a conditional purchaser if nobody bids more; and that otherwise it is in the power of any person to injure the vendor, because all former biddings are discharged by the last; but the court held that "every bidding is nothing more than an offer on one side, which is not binding on either side until it is assented to."

How these two theories,—one, that the vendor is bound to sell without reserve, after so advertising, upon a bid being made, and the other, that the bidder may retract his bid at any time before the hammer falls—may be reconciled, it is difficult to say. *Langdell in his Summary of the Law of Contracts*, § 19, recognizes and considers this question as follows: "It was decided in *Payne v. Cave*, 3 T. R. 149, that a bid at an auction is in the nature of an offer, which is accepted by knocking down the hammer; and perhaps it is too late to question the correctness of the decision. On principle, however, it is open to much doubt. The true view seems rather to be that the seller makes the offer when the article is put up, namely, to sell it to the highest bidder; and that when a bid is made there is an actual sale subject to the condition that no one else shall bid higher. This view was urged by the plaintiff's counsel. If the bidder can retract at any time before the hammer falls, so also can the seller; and hence a bid will secure no right to the bidder whether there is any higher bid or not. The article may be withdrawn if the bidding is not satisfactory, though it were put up with the express announcement that it should be sold to the highest bidder. That the decision in *Payne v. Cave* has not been acquiesced in by sellers at auction appears from the frequent attempts that have been made to render bids irrevocable by a provision to that effect inserted in the conditions of sale. That such attempts are unavailing is no argument in favor of *Payne v. Cave*, but rather the contrary."

On the other hand, *Pollock, Contr.* § 14, criticises *Warlow v. Harrison*, and says that the "proposal of a definite service to be done for reward, which is in fact a request . . . for that particular service, though not addressed to anyone individually, is quite different in its nature from a declaration to all whom it may concern that one is willing to do

tioner, with others, bid for the same, and two parcels were knocked off to him, and one to another bidder. A certain described parcel of the land was then offered and cried for sale, and petitioner bid thereon, as did one of the defendants in this case (Murrah), and others present; and the bids were accepted and cried until finally petitioner bid a certain sum, which was accepted and cried by the auctioneer conducting the sale; and no person would raise petitioner's bid, which was the best and highest bid. Murrah then announced publicly that Murrah Brothers or himself had bought this tract at private sale, and whoever bought it would buy a lawsuit, and that he claimed the property, after which the bidding was continued. When petitioner announced that his bid had been accepted and cried, and if anyone wanted to bid, then to raise his bid; but no

one raised it, and he claimed the property, his bid being the highest and best offer. The executors then consulted their attorney, and said they would withdraw that parcel from sale, and then proceeded to sell the remaining tracts advertised. Petitioner publicly announced that he claimed the property, and denied the legal right of the executors to withdraw the land from sale to consummate a private sale previously made for a less amount than his bid, and thereupon tendered the amount of his bid, and demanded that the executors make him a deed to the tract; and they refused to accept the money, or execute and deliver to him a deed to the same. Petitioner thereafter frequently tendered the purchase price to the executors, and tenders the same into court upon filing his petition. It is charged that T. T. and G. N. Murrah, either as individuals

business with them in a particular manner. Of course the person who publishes such an invitation does contemplate that people who choose to act on it will do whatever is necessary to put themselves in a position to avail themselves of it. But acts so done are merely incidental to the real subject; they are not elements of a contract, but preliminaries. It does not seem reasonable to construe such preliminaries into the consideration for a contract which the parties had no intention of making."

Cull v. Wakefield, 6 U. C. Q. B. O. S. 178, which was an action against an auctioneer for selling goods so carelessly and negligently that they brought a sum much less than they were reasonably worth, may perhaps be distinguished by the fact that the sale was not expressly advertised to be without reserve, and the vendor informed the auctioneer of a sum which he thought the property ought to bring, although he did not expressly direct that it should not be sold for less. It was held that an action would lie against the auctioneer, but the court remarked that no adjudged cases could be found on this point. In the opinion it is stated that the auctioneer was not obliged, by anything shown by the evidence, "to let any lot go inevitably, merely because he had put it up; but, more especially, when the property was sold, as it was, in a succession of lots, it was, of course, competent to him, when he found that the earlier lots were not selling to advantage, to forbear putting up the remainder;" and further, the court states that it cannot be said, as a matter of law, that the auctioneer is not bound to exercise any discretion or caution whatever, or that there is no redress unless there has been something fraudulent or irregular in his proceedings, and that in point of fact the discretion of forbearing to sell at a ruinous sacrifice is often exercised. This case certainly recognizes no binding contract on the part of the vendor to sell to the highest bidder.

b. Withdrawal before bids.

In 1873, *Harris v. Nickerson*, L. R. 8 Q. B. Div. 286, 42 L. J. Q. B. N. S. 171, 28 L. T. N. S. 410, 21 Week. Rep. 635, held that an intending bidder is not entitled to recover for his loss of time and expenses in attending a sale at which property advertised to be sold, and which the bidder wished to purchase, had been withdrawn; and the court remarked that, while there is ground for saying that a contract is entered into between the auctioneer and the

highest bona fide bidder, that rule has no application where the lots were never put up, and no offer was made by plaintiff, or promise by defendant, except the advertisement that certain goods would be sold, and that it is impossible to say that there is a contract with everybody attending the sale that the auctioneer is to be liable for their expenses if any single article is withdrawn. The court states that this is a case of first impression.

And in another case, where a right of way through property was reserved by the vendor after the sale had been advertised but before it actually took place, by writing such reservation in a number of the notices of sale, it was held that a vendor has the power to revoke an authority to sell at any time before the sale, although such reservation is not known to the bidder, who became the purchaser under the impression that he was obtaining the property as first advertised. *Manser v. Back*, 6 Hare, 443.

In discussion on the argument in *Malnprice v. Westley* (1865) 6 Best & S. 420, 34 L. J. Q. B. N. S. 229, 11 Jur. N. S. 975, 13 L. T. N. S. 560, 14 Week. Rep. 9, one of the judges remarked to counsel that an auctioneer's withdrawing property from sale might render him responsible in damages; and also that, if he warranted that he would sell the property, that might make him responsible for not doing so; and further, that if, after issuing the handbill, the defendant (auctioneer) refused to hold the auction or to knock down the premises to the highest bidder, an action ought to be maintainable against him for the expense and loss of time incurred in attending the sale. From the facts it appeared that the property was advertised to be sold at a peremptory sale to the highest bidder, but at the sale the vendor's solicitor bid it in, stating that there was a reserved price. The decision in favor of the bidder does not take the merits of the case into consideration, but is based upon a technicality.

III. In the United States.

a. In general.

In the United States the rule is even less clearly defined than in England and Canada, and the influence of *Warlow v. Harrison* is much less plainly shown. As it is now settled that all auction sales, except strictly judicial sales, are within the statute of frauds, the scarcity of cases may, perhaps, be partly explained on the ground that if the property is withdrawn before any written memorandum is

or as a firm, have entered into a combination or conspiracy with the executors to defeat petitioner's title and prevent his possession and ownership of the land, and have procured from the executors deeds of conveyance thereto, and are now in possession, claiming title to the same. This tract of land has not since been advertised by the executors, who claim that they had made a private sale of this land to T. T. and G. N. Murrah, and that, when petitioner bid a higher price at the sale than had been agreed on at this private sale, they were forced to withdraw the land and protect

the purchasers in their private bargain. Petitioner insists that, after he had bought two parcels or tracts of the land, it would be inequitable and unjust for the executors to refuse to accept his bid for another tract, and consummate a sale of same made privately, before the date of the sale as advertised, at a less price than was bid by petitioner at the sale. A general demurrer to this petition was sustained by the trial judge and the petition dismissed, and, to the order sustaining the demurrer and dismissing the petition, Tillman excepted.

1. The questions to be determined in this

made in compliance with the statute, it is perhaps considered that those sales are void which come within the statute, and that therefore no cause of action exists, while sales too small to come within the statute are too small to be worth much litigation; and this theory of a preliminary contract, for a breach of which an action for damages will lie, is perhaps considered as too doubtful and uncertain to be relied upon.

In a brief memorandum of decision in *Newman v. Vonderheide* (1884) 9 Ohio Dec. Reprint, 164, it is held that, "where property offered at public auction for sale is withdrawn before the acceptance of a bid, there is no contract of sale, and the highest bidder cannot compel a conveyance by an action for specific performance, or obtain damages for refusal to convey." Further report of this case is not given, but as reported it is in direct opposition to the English theory.

An action by the bidder to compel specific performance failed in *Corryolles v. Mossy* (1831) 2 La. 504, where the auctioneer raised on the highest bid and withdrew the property; but this is a decision under the Louisiana Civil Code. The court referred to the rule laid down in 2 Kent, Com. 424, that every bidding is nothing more than an offer on one side, which is not binding on either side until it is assented to, and stated that the rule thus laid down would decide the case in favor of the vendor, but that the court preferred to decide the question under § 1795 of the Code, which provides that "the party proposing shall be presumed to continue in the intention which his proposal expressed. If, on receiving the unqualified assent of him to whom the proposition is made, he does not signify the change of his intention;" and the court thought that the change of intention was signified in this instance, and that the case does not come within the exception in the next article, § 1796, of a proposition being made in such terms as to exercise a design of giving the other party the right of concluding the contract by his assent.

The doctrine of *Warlow v. Harrison* seems to be recognized by *obiter dicta* in some cases of "puffing;" as, in *Hartwell v. Gurney*, 18 R. I. 78, 13 Atl. 113, the court says: "It seems to us that the stricter rule is the just and honest rule, and that it ought to prevail; for an offer to sell at auction is an offer to sell to the highest bidder, and every bid is an inchoate acceptance entitling the bidder to the property offered, if it turns out to be the highest, and there is no retraction on either side before the hammer falls," etc.; and further: "If it be said that without bidding the property offered may be sacrificed, the answer is that it is not necessary to offer it without reserve, and the risk of sacrifice may be avoided by publicly reserving the right to bid or to make one or more bids in the conditions of sale, or by starting the sale at an upset price. In this or 57 L. R. A.

some similar way good faith may be kept with the bidders, and at the same time the property be protected." This statement seems to recognize the theory that if property is advertised for sale without reserve it must go without reserve, and cannot be withdrawn unless special conditions are stated at or before the time of putting it up.

So, also, in the opinion in *Miller v. Baynard*, 2 Houst. (Del.) 559, 83 Am. Dec. 168, a case of "puffing," the court says that "It is perfectly competent for the seller to fix a minimum price, or to reserve to himself the right to bid, or to employ another to bid for him; but he must give fair notice of the fact, so that no one may be misled or deceived in such a sale."

In *New York*, in *Taylor v. Harnett*, 26 Misc. 362, 55 N. Y. Supp. 988, the court says, in substance, that there is no case in the state which is directly in point upon the proposition that, as a matter of law, where an auctioneer advertises a sale at public auction, and in response to this invitation bidders attend, an implied contract arises between them that the property will be knocked down to the highest bidder, for a breach of which an action for damages will lie against the auctioneer at the suit of such bidder; and, while conceding all respect due to the high authority of *Warlow v. Harrison*, which decides this question in England, it is not, of course, a controlling authority in New York. This was not a case of withdrawal of property, but the auctioneer refused to accept the highest bid on account of its trifling advance over the preceding one, and the court stated that the auctioneer has a certain amount of discretion with respect to the procedure on the sale; that it is well settled that he may refuse a bid tendered in bad faith, or proffered by a person who is insolvent, or otherwise disabled from completing the purchase; and without in the same reasoning comes the right of refusing trifling advances offered by bidders in the course of the sale, especially where that kind of bidding is initiated at the outset, and the sum so bid is utterly incommensurate with the actual known value of the property.

By § 1796 of the California Civil Code, and § 1026 of the Dakota Civil Code, it is enacted that "if at a sale by auction the auctioneer, having authority to do so, publicly announces that the sale will be without reserve, or makes any announcement equivalent thereto, the highest bidder, in good faith, has an absolute right to the completion of the sale to him; and upon such a sale bids by the seller or any agent for him, are void." But in both of these states it is also enacted that bids may be withdrawn at any time before the hammer falls. While most of the states have statutes regulating auctions, no others are found having provisions similar to Dakota and California.

Without doubt a vendor may put up his property for sale under such conditions as he may desire, and a withdrawal of the property

case are whether an executor has the right to withdraw property from sale after it has been duly advertised, offered for sale at public outcry by an auctioneer employed by the executor, and bids received and cried, before the same is knocked off to the highest bidder; and whether the highest bidder in such a case acquires any right, by reason of his bid, to compel the executor to accept the same and make him a deed upon tender of the amount so bid. As a decision of these two questions is controlled by the same principle of law, they will be considered together. It is well-recognized law that a

bidder at an auction sale may withdraw his bid, even after it has been cried, at any time before the hammer falls or the property is knocked off to him. See *Payne v. Cave*, 3 T. R. 149; 3 Am. & Eng. Enc. Law, 2d ed. p. 501, and cases there cited. In *Payne v. Cave*, 3 T. R. 149, the principle underlying this rule is thus stated: "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding, that is signified on the part of the seller by knocking down the hammer. . . . Every bidding is nothing more than an offer on one side, which is not binding on

follows as a matter of course if such conditions are not complied with.

b. Judicial and official sales.

Where the facts showed that at a commissioner's sale of land the property was withdrawn after being put up, it was held, in *Miller v. Law*, 10 Rich. Eq. 320, 73 Am. Dec. 92, that commissioners have, under the control of the court, the discretion to withdraw property temporarily from sales when they see that to press the sale would be to sacrifice the property; and the court affirmed a dismissal of a motion to show cause why the sale should not be complied with.

But this last case is in the nature of a judicial sale and the trend of opinion seems to be that in involuntary and judicial sales the officer making such sale is vested with the right to use discretion in regard to adjournments, and may even withdraw the property when it will serve the best interests of the parties concerned; and therefore the decision in *TILLMAN v. DUNMAN* may be justified on that ground, but such discretion is ever within the court's control.

Another example in this direction is *Blossom v. Milwaukee & C. R. Co.* 3 Wall. 196, 18 L. ed. 43, where, upon an application to have the sale confirmed to him by a bidder at a sale of mortgaged premises under a decree of the court, it was held that, as the property was not struck off to the bidder, nor his bid accepted by the seller, there was no sale, and that officers acting under such decrees are invested with a reasonable discretion; and that where there was but one bidder such an officer would be justified in postponing the sale to prevent a sacrifice of the property. In this case, after the property was put up and bid upon, and after repeated adjournments, the mortgage was finally paid and the property entirely withdrawn.

And in *Knox v. Spratt*, 19 Fla. 838, the court holds that merely being the highest bidder at a judicial sale does not entitle one to a deed of the premises, until the sale is confirmed.

Also, a sheriff is not bound to sell without reserve if he receives a bid, but if he can prevent the property being sacrificed by a little delay, he is justified in making a return of no sale for want of bidders. *Conway v. Nolte*, 11 Mo. 74; *Shaw v. Potter*, 50 Mo. 281; *State ex rel. Central Type Foundry v. Moore*, 72 Mo. 285; *Cole County v. Madden*, 91 Mo. 615, 4 S. W. 397; *Rogers & B. Hardware Co. v. Cleveland Bldg. Co.* 132 Mo. 458, 462, 31 L. R. A. 335, 34 S. W. 57; *Davis v. McCann*, 143 Mo. 178, 44 S. W. 795.

These cases seem to follow the old English case of *Keightley v. Birch* (1814) 3 Campb. 521, which see under *supra*, II. a.

But to the contrary is *State v. Johnston*, 2 57 L. R. A.

N. C. (1 Hayw.) 293, which holds that if but one bidder appears the sheriff must sell to him, unless he is irresponsible.

To the same effect is *McLeod v. McCall*, 48 N. C. (3 Jones, L.) 89.

Also, *Gilbert v. Watts-DeGolyer Co.* 169 Ill. 129, 48 N. E. 430, holds that a provision in the statute authorizing a sheriff to postpone an execution sale for want of bidders does not authorize postponement on the sole ground that only one bidder was present.

And in a brief memorandum of decision in *Morton v. Moore*, 4 Ky. L. Rep. 717, it is held that a commissioner making a sale has no right to refuse to accept a bid unless the bidder will not give the bond with good security required by the judgment of sale, but is bound to accept all bids and knock the property off to the highest bidder.

IV. Summary.

Upon the whole, it seems that the right to withdraw property from an auction sale after it has been put up depends upon the nonexistence of a binding obligation on the part of the auctioneer to sell after a bid has been made, and that the existence of such an obligation is still an open question, although the doctrine that the bidder may retract at any time before the hammer falls is considered as settled by many writers and decisions. How the vendor can be bound if the bidder is not, and how either can be bound in violation of the statute of frauds, are serious questions.

Upon principle, there may be this preliminary contract, consisting of an offer by the vendor to sell without reserve to the highest bidder, accepted and becoming binding upon a bid being made, subject to the bidder's release if a higher bid is offered. Upon such a contract both parties are bound, and an action in damages for personal loss by the failure of the sale might lie in favor of either if the other party withdraw. This contract is not within the statute of frauds, being entirely distinct from the direct contract of sale, which consists of an offer by the bidder, accepted by the vendor's knocking down the hammer and making a memorandum in compliance with the statute of frauds in those cases where it is necessary, and which the vendor can refuse to do only on the ground of irresponsibility of the bidder; and in this direct contract of sale, upon a withdrawal by either party an action for specific performance may be enforced if the statute of frauds has been complied with. But such a theory as this encounters the established doctrine that the bidder may retract at any time before the hammer falls, and in view of the decisions, at present, especially in the United States, principle must yield to adjudicated cases.

M. M. M.

either side till it is assented to." For the same reason, the seller has the right to withdraw the property before it is knocked off to the bidder. Mr. Story, in his treatise on the Law of Sales (§ 461), states the rule thus: "In a sale by auction the seller may withdraw the goods, or the bidder may retract his bid at any time before they are knocked off; for, so long as the final consent of both parties is not signified by the blow of the hammer, there are only mutual propositions, but no mutual agreement to one definite proposition." See 2 Kent, Com. 4th ed. *537; *Corryolles v. Mossy*, 2 La. 504. But it is claimed that this rule of auction sales does not apply to sales by administrators and executors, as they are regulated by statute, which must be strictly complied with, and that, while such representatives are vested with large discretion, they cannot lawfully withdraw property when it has been exposed for sale after due advertisement. There is a close resemblance between an executor or administrator's sale, when made under an order of court, to one made under an execution or decree, or other compulsory process; but, where the sale is made under a power contained in the will, the executor's sale more nearly resembles that of an individual offering his property for sale. But granting, for the sake of the argument, that the sale in question rested upon the same footing with judicial sales, we find that it has been determined that an officer of court has a right to withdraw property, even when offered for sale under compulsory process, and bids have been received and cried, and that the bidder at such a sale acquires no right to compel the officer to convey the property, even where his bid is the best and highest, unless the property is knocked off to him, or the hammer falls, and the sale is thus completed. Mr. Freeman, in his work on Executions (vol. 2, § 288, p. 1665), says, on authority: "Officers charged with the duty of conducting chancery, trustee, and other involuntary sales have also a discretion to withdraw the property after being offered for sale." In the case of *Miller v. Law*, 10 Rich. Eq. 320, 73 Am. Dec. 92, it was ruled that "the commissioner has a discretion, subject to the control of the court, to withdraw land from sale after it has been offered, and even after a bid has been received and cried. If he does so, the highest bidder . . . is not entitled to a conveyance, there being no contract with him." It was ruled by the Supreme Court of the United States in the case of *Blossom v. Milwaukee & C. R. Co.* 3 Wall. 198, 18 L. ed. 43, that "a bidder at a judicial sale at public auction, whose bid has not been accepted, . . . cannot insist, even though he has been the highest

and best bidder, on leave to pay the amount of his bid, and have a confirmation of the sale made to him." Mr. Justice Clifford, in delivering the opinion of the court in that case, after stating the rule above quoted from Story on the Law of Sales, says: "Same rules prevail upon a sale under common-law process as in other cases of sales at public auction." From the foregoing authorities it seems to be well settled that on principle, as well as by well-considered adjudications, the officer offering property at a judicial sale, except where his discretion is controlled by the order of sale, can withdraw the property offered for sale before the same is knocked off, and that a bidder at judicial sales acquires no right to compel a conveyance of the property offered until the same has been knocked off to him. See also, in this connection, *Scales v. Chambers*, 113 Ga. 920, 39 S. E. 396. It would therefore seem that, even if the rule governing judicial sales is to be applied to the sale by the executors in the present case, they had the right to withdraw the property offered from sale, and that Tillman, by reason of being the highest and best bidder at such sale, acquired no right to compel a conveyance by the executors, as the property was withdrawn before the same was knocked off to him by the auctioneer, for the reason that there was no acceptance of his offer and no contract.

2. But it is contended that it would be inequitable for the executors, after having advertised the land, and after having sold to petitioner other parcels, to withdraw this parcel from sale when he desired it to complete the tracts which he had purchased, and that to allow the executor to withdraw the land from sale for the purpose of carrying out a private sale for less than the amount of the petitioner's bid is against public policy. The reply to this contention is that petitioner, having acquired no right to compel a conveyance to him, and in fact having acquired no right at all, since his offer was rejected, is a stranger to that transaction, and has no right to inquire into the motives which prompted the executors to withdraw the property from sale; and, being such, he cannot make the question that the act of the executors was against public policy. The acts of the executors are open to inquiry only to the creditors, heirs, or legatees of the deceased, or to some other person having a beneficial interest in the estate of the testator.

We are therefore of opinion that the trial judge did not err in sustaining the demurrer and dismissing the petition.

Judgment affirmed.

All the Justices concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

William H. BAIN, by Next Friend,
v.

Hyman I. ATKINS et al.

(.....Mass.....)

Insurance against loss through liability for personal injuries does not constitute a trust fund for the benefit of the injured person, and he cannot maintain an action against the insurer to reach such fund, where, before his claim against the insured is established, the insurer satisfies its obligation to him under the policy, although, by reason of the insolvency of the insured, the claim will be otherwise unenforceable.

(April 3, 1902.)

RESERVATION by the Supreme Judicial Court for Suffolk County, for the opinion of the full bench, of an action brought to reach the proceeds of an insurance policy to satisfy the claim of plaintiff for personal injuries alleged to have been caused by the negligence of defendant Atkins. *Bill dismissed.*

The facts are stated in the opinion.

Messrs. Walter B. Grant and Thomas H. Buttler, for plaintiff:

A policy of insurance of this kind should be construed to be one in which the insurance company agrees to defend the action and assume and pay the liability to the extent of \$5,000; and the insurance company must see to the proper application of the insurance money to the plaintiff's benefit.

Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404, 29 N. E. 529.

The policy was not merely one of indemnity against any act of the employee; but, in case of an accident to an employee or other person, whereby he had a cause of action against the insured, the insurance company would assume and pay the liability.

Anoka Lumber Co. v. Fidelity & C. Co. 63 Minn. 286, 30 L. R. A. 689, 65 N. W. 353; *Hoven v. Employers' Liability Assur. Corp.* 93 Wis. 201, *sub nom.* *Hoven v. West Superior Iron & S. Co.* 32 L. R. A. 388, 67 N. W. 46; *Embler v. Hartford Steam Boiler*

NOTE.—For a case in this series somewhat similar to the above, see *Embler v. Hartford Steam Boiler Inspection & Ins. Co.* (N. Y.) 44 L. R. A. 512, although in that case a majority of the court put their decision on the ground that a recovery against the employer for the employee's death precluded recovery on a policy indemnifying the employer. But one judge, however, based his opinion on the ground that the employee had no right of action on the policy under any circumstances.

As to insurance against employer's liability generally, see, in this series, *Anoka Lumber Co. v. Fidelity & C. Co.* (Minn.) 30 L. R. A. 689; *Hoven v. West Superior Iron & S. Co.* (Wis.) 32 L. R. A. 388; and *Fenton v. Fidelity & C. Co.* (Or.) 48 L. R. A. 770.

As to right of third person to sue on contract made for his benefit, see *note* to *Jefferson v. Asch* (Minn.) 25 L. R. A. 257.
57 L. R. A.

Inspection & Ins. Co. 158 N. Y. 431, 44 L. R. A. 512, 53 N. E. 212; *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051; *Fidelity & C. Co. v. Fordyce*, 64 Ark. 174, 41 S. W. 420; *Fenton v. Fidelity & C. Co.* 36 Or. 283, 48 L. R. A. 770, 56 Pac. 1096; *Fritchie v. Miller's Pennsylvania Extract Co.* 197 Pa. 401, 47 Atl. 351; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199.

An injured employee who has recovered judgment against the assured may sue the insurer in equity as principal debtor, to compel payment of the full amount of the judgment, notwithstanding the insolvency of the assured.

Beacon Lamp Co. v. Traveller's Ins. Co. 61 N. J. Eq. 59, 47 Atl. 579; *Keller v. Ashford*, 133 U. S. 610; 33 L. ed. 667, 10 Sup. Ct. Rep. 494; *Coffin v. Adams*, 131 Mass. 133; *New Bedford Sav. Inst. v. Fairhaven Bank*, 9 Allen, 175; *Klapworth v. Dressler*, 13 N. J. Eq. 62, 78 Am. Dec. 69.

The fund could not legally be paid to the insured except to reimburse him for actual payment.

Hunt v. New Hampshire Fire Underwriters' Asso. 68 N. H. 305, 38 L. R. A. 514, 38 Atl. 145; *Beacon Lamp Co. v. Travellers' Ins. Co.* 61 N. J. Eq. 59, 47 Atl. 579; *Nash v. Com.* 174 Mass. 336, 54 N. E. 865.

The settlement with defendant Atkins does not impair plaintiff's right under the policy.

Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199.

If the fund is a trust fund, authority to bring this action exists by virtue of the relation of the parties; and, even if it is not held to be a trust fund, the same right of action exists in this case which existed for so many years in the case of a mortgagee under a fire insurance policy, who was held to have a right of action independent of any statutory enactment authorizing such action.

Palmer Sav. Bank v. Insurance Co. of N. A. 166 Mass. 189, 32 L. R. A. 615, 44 N. E. 211.

Messrs. Robert W. Nason, Thomas W. Proctor, and Nathaniel L. Foster, for defendants:

A stranger to a contract cannot sue either at law or in equity, upon a promise made therein for his benefit.

Mellen v. Whipple, 1 Gray, 317; *Cressy v. Willis*, 159 Mass. 251, 34 N. E. 265; *New England Dredging Co. v. Rockport Granite Co.* 149 Mass. 381, 21 N. E. 947; *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1; *Saunders v. Saunders*, 154 Mass. 337, 28 N. E. 270; *Borden v. Boardman*, 157 Mass. 410, 32 N. E. 469; *Walsh v. Packard*, 165 Mass. 190, 40 L. R. A. 321, 41 N. E. 577.

Barker, J., delivered the opinion of the court:

It is now settled by the findings and the

agreed facts that when the plaintiff began this attempt to reach, in liquidation of his claim against Atkins, a supposed obligation to Atkins on the part of the Union Casualty & Surety Company, that obligation was no longer in existence. The bill was filed on January 19, 1898. Nine days before that date the supposed obligation, disputed by the company, had been ended by an actual payment of money then made by the company to Atkins on a settlement made in good faith on the part of both, and without notice to either of any claim on the part of the plaintiff in the obligation, or founded upon it. The settlement was not made for the purpose of enabling Atkins to avoid his liability to the plaintiff, nor of enabling the company to avoid any liability to the plaintiff. When it was made the company had no knowledge of Atkins' financial condition. The settlement is found to have been made as in the ordinary course between two parties, one of whom denied all liability, and wanted to settle for as little as it could without injuring its reputation for fair dealing with those who insured with it, and the other of whom wanted to get all he could, up to the full amount of his claim. Atkins put into his business the \$3,000 which he received in the settlement, and, had it not been for the judgment of \$7,000 afterwards recovered against him by the plaintiff in the action of tort for personal injuries then pending, Atkins could have gone on with his business. He went into bankruptcy in consequence of that judgment, and has paid nothing upon the judgment, and the plaintiff has been unable to collect the judgment, in whole or in part.

We do not consider whether, if, when the bill was brought, the company had been under an existing obligation to indemnify Atkins against the plaintiff's demand, the latter could have compelled, in equity, the application of that obligation to the satisfaction of his claim against Atkins. The fact that when the plaintiff sought the aid of an equity court there was no such obligation is conclusive against the contention that there was an equity springing from such an obligation. Therefore the plaintiff is compelled to contend that the obligation of the company upon the happening of the accident constituted a fund for the benefit of the plaintiff, impressed with a trust for him; that such a trust fund could be paid to Atkins, if at all, only to reimburse him after he had satisfied his own liability to the plaintiff; and that the company's settlement with Atkins without the consent of the plaintiff was in the company's own wrong, and void as to the plaintiff. The essence of this contention, without which no part of it can stand, is that the insurance constituted a trust fund for the benefit of the plaintiff, and for this there is no ground. The only parties to the contract of insurance were Atkins and the company. The consideration for the company's promise came from Atkins alone, and the promise was only to him and his legal representatives. Not only was the plaintiff not a

party to either the consideration or the contract, but the terms of the contract do not purport to promise an indemnity for the benefit of any person other than Atkins. The policy only purports to insure Atkins and his legal representatives against legal liability for damages respecting injuries from accidents to any person or persons at certain places, and within the time and under the circumstances defined. It contains no agreement that the insurance shall inure to the benefit of the person accidentally injured, and no language from which such an understanding or intention can be implied. Atkins was under no obligation to procure insurance for the benefit of the plaintiff, nor did any relation exist between the plaintiff and Atkins which could give the latter the right to procure insurance for the benefit of the plaintiff. The only correct statement of the situation is simply that the insurance was a matter wholly between the company and Atkins, in which the plaintiff had no legal or equitable interest, any more than in other property belonging absolutely to Atkins. Most of the cases cited in support of the plaintiff's contention are entirely wide of the mark. In all of them the obligation which the plaintiff sought to apply to the extinguishment of his demand existed when he brought his suit. In *Anoka Lumber Co. v. Fidelity & C. Co.* 63 Minn. 286, 30 L. R. A. 689, 65 N. W. 353; *Hoven v. Employers' Liability Assur. Corp.* 93 Wis. 201, *sub nom. Hoven v. West Superior Iron & S. Co.* 32 L. R. A. 388, 67 N. W. 46, and *Fritchie v. Miller's Pennsylvania Extract Co.* 197 Pa. 401, 47 Atl. 351, the liability of the insurer was sought to be reached by process of garnishment. In *American Employer's Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, and *Fidelity & C. Co. v. Fordyce*, 64 Ark. 174, 41 S. W. 420, the question was whether the insured must first pay the judgment in favor of the employee, before an action could be brought upon the policy. In *Fenton v. Fidelity & C. Co.* 36 Or. 283, 48 L. R. A. 770, 56 Pac. 1096, the action against the insurer by a surgeon who had attended an injured employee was allowed because of an assignment to the plaintiff of the cause of action. In *Embler v. Hartford Steam Boiler Inspection & Ins. Co.* 158 N. Y. 431, 44 L. R. A. 512, 53 N. E. 212, the decision was that a suit could not be maintained by an assignee of the administratrix of an employee who had been killed by an explosion, against the insurer, upon a policy issued to the employer. The decision was put by the majority of the court upon the ground that there was no such relation between the employee and his employer, and no such privity on the part of the employee to the contract of insurance, as gave him or his representatives a right of action upon the policy of insurance. It is to be noted that this policy was written before the enactment of the New York statute of 1892 (chap. 690, § 55), which authorizes an employer to take out insurance for the benefit of his employees. The case of *Beacon Lamp Co. v. Travellers' Ins. Co.* 62 N. J. Eq. 59,

47 Atl. 579, was overruled by the court of last resort, which held that the obligation of the insurer was with the employer only, and left the person who had the claim for damages on account of the accident to rely only on obligations from the insurer to the employer existing when the bill was brought. *Moses v. Travellers' Ins. Co.* (N. J. Eq.) 49 Atl. 720. *Hunt v. New Hampshire Fire Underwriters' Asso.* 68 N. H. 305, 38 L. R. A. 514, 38 Atl. 145, grew out of the reinsurance by a solvent company of a part of a fire risk reinsured in part by a company which became insolvent after the loss by fire; and the right of the original insurer to the fund was a right in equity to avail itself of a then subsisting provision made by his insolvent debtor, the first reinsurer, for the payment of the claim of the original insurer. Neither that case nor those of the class of *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199, or *Keller v. Ashford*, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494, are put upon the ground of a trust. If the usual result of insurance

against liability for damages respecting accidental injuries to others was to give money to the insured, when he was not obliged to compensate the person injured, it would be for the legislature to say whether such insurance should not be disallowed as contrary to public policy. The insurance written by the policy held by Atkins was in fact permitted by our statutes, and for his own benefit, and not for that of the persons whose injuries might give them a claim against him. The fact that, owing to his bankruptcy, the plaintiff's claim cannot be satisfied, although he has in fact received the insurance money, or a part of it, cannot make that a trust fund which neither the statute which allowed the contract, nor the contract which created the fund, impressed with a trust. Atkins had as full a right to settle with the company, and to use in his business the proceeds of the settlement, as to deal at his will with any other part of his property; and the company had a right to settle with him as it did.

Bill dismissed, with costs.

MISSISSIPPI SUPREME COURT.

NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION of New York

v.

F. V. BRAHAN.

(.....Miss.....)

1. Whether or not a loan by a foreign building and loan association to a resident of the state, secured by mortgage on land within the state, is usurious, will be determined by the local laws, notwithstanding the notes are payable at the domicile of the corporation, if it has localized its business by establishing boards throughout the state to which payments on loans are to be made.

2. Amended notices and pleas seeking to inject a Federal question into a case nearly two years after it has been at issue and ready for hearing may be stricken from the files.

(April 7, 1902.)

CROSS-APPEALS from a judgment of the Circuit Court for Lauderdale County in favor of plaintiff for a part only of his demand in an action brought to recover usurious interest alleged to have been paid to

defendant; defendant appealing from so much as permitted any recovery, and plaintiff appealing from so much as denied recovery of his entire claim. *Reversed on plaintiff's appeal.*

Defendant is a corporation under the laws of New York. It had no office or general agent in the state of Mississippi, but did have special agents or local boards in various parts of the state, with authority to solicit subscriptions for stock, to receive payment of dues, interest, and premiums, to receive applications for loans which should be transmitted to the home office for approval. Plaintiff subscribed for stock, procured a loan, which was paid off without the cancellation of the stock, and afterwards procured another loan, which was paid before the stock matured. He surrendered his stock, received credit for the surrender value, and paid the balance by draft on New York. Subsequently he instituted this suit to recover all interest paid by him on the two loans. The court held that the first loan, having been made prior to the passage of the act of 1892, was not usurious, and denied a recovery as to that. It, however, permitted a recovery as to the balance.

Mr. A. S. Boxeman for appellant.

NOTES.—For other cases in this series as to what law governs in determining question of usury in contract by foreign building and loan association, see *Falls v. United States Sav. Loan & Bldg. Co.* (Ala.) 24 L. R. A. 174; *Bennett v. Eastern Bldg. & L. Asso.* (Pa.) 34 L. R. A. 595; *Floyd v. National Loan & Invest. Co.* (W. Va.) 54 L. R. A. 536; and the following case of *Shannon v. Georgia State Bldg. & L. Asso.* (Miss.)

As to usury in loans by building and loan associations generally, see *note* to *Reeve v. Ladies' Bldg. Asso., Perpetual* (Ark.) 18 L. R. A. 57 L. R. A.

A. 129; also *Pioneer Sav. & L. Co. v. Cannon* (Tenn.) 33 L. R. A. 113; *Post v. Mechanics' Bldg. & L. Asso.* (Tenn.) 34 L. R. A. 201; *Smoot v. People's Perpetual Loan & Bldg. Asso.* (Va.) 41 L. R. A. 589; *Iowa Sav. & L. Asso. v. Heldt* (Iowa) 43 L. R. A. 689; and *Borrowers' & Investors' Bldg. Asso. v. Eklund* (Ill.) 52 L. R. A. 637.

For a case holding that exemption of building associations from usury laws does not extend to foreign corporations, see *Rhodes v. Missouri Sav. & L. Co.* (Ill.) 42 L. R. A. 93.

Messrs. George B. Neville and F. V. Brahan for appellee.

Whitfield, Ch. J., delivered the opinion of the court:

This case is controlled on the direct appeal, as to the loan made under the Code of 1892, by the cases of *National Bldg. & L. Asso. v. Wilson*, 78 Miss. 993, 30 So. 56; *Shannon v. Georgia State Bldg. & L. Asso.* 78 Miss. 955, post, 800, 30 So. 61, and the authorities therein cited; and *National Mut. Bldg. & L. Asso. v. Burch*, 124 Mich., at page 63, 82 N. W. 839, wherein this very appellant was appellant there, and the same conclusion reached by us in the first two cases above was reached by the supreme court of Michigan, the court saying: "It is said the contract is a New York contract, and must be governed by the New York law, and for that reason can be enforced. We do not think it at all clear this is a New York contract, or that it was so understood to be when it was made. While, by the terms of the mortgage, the loan was to be paid in New York, it was expected the money would be paid to the treasurer of the local branch at Muskegon, and most of it was paid to him." And emphatically to the same effect are the very thoroughly considered cases of *Washington Nat. Bldg. L. & Invest. Asso. v. Stanley*, 38 Or. 340, 58 L. R. A. —, 63 Pac. 489, and *People's Bldg. Loan & Sav. Asso. v. Kidder*, 9 Kan. App. 390, 58 Pac. 798, and *Southern Bldg. & L. Asso. v. Atkinson*, 20 Tex. Civ. App. 516, 50 S. W. 170. In *Stanley's Case*, at pages 340, 341, 38 Or., 58 L. R. A.,—page 495, 63 Pac., Judge Wolverton, in the course of a masterly opinion, says with great power: "The plaintiff contends, however, that the agreement must be treated as a Washington contract, and therefore should be construed with reference to the usury laws of that state, and incidentally, that the transaction of making the loan, and taking a note payable at Seattle, Washington, and a mortgage upon lands in Oregon, to secure its payment, was not doing business within this state. It is strange reasoning to insist, on the one hand, that, in order to enable the plaintiff to sue in our courts, it has complied with the law with that particularity which will enable it to do business in the state, and yet, when it is suggested that it has violated the laws of usury here by a transaction consummated under the same authority that authorizes the suit, to insist that it has not done business within the state. The very purpose of the act is to enable those associations having their domicils in other states to do and transact business and sue and be sued here, and it ought to be alike effective under all conditions. When they come here under the statute, and have the license of the secretary of state to do business here, they become *pro hac vice* domestic corporations, and must operate as if actually domiciled in the state. They submit and render themselves amenable to the laws of the state, which must be taken to govern all their transactions entered into and consummated 57 L. R. A.

therein. Our own citizens would not be permitted to make contracts here payable in another state, and then insist upon having them construed here according to the laws of such state; and it does not seem consistent with principle and reason that a foreign corporation, securing citizenship in this state for the purpose of promoting its business, can insist upon making its contracts payable elsewhere, and then invoke the authority and process of our courts to enforce them according to laws other than our own. If such were to be recognized as good law, it would in many instances give foreign corporations, although domiciled in this state, advantages over those organized under its laws, and having their principal place of business here. But the transaction, under the conditions attending it, must be regarded as doing business within this state. *Bank of British Columbia v. Page*, 6 Or. 431; *Hacheny v. Leary*, 12 Or. 40, 7 Pac. 329; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739. The contract was made in Oregon, and must be construed and enforced according to our laws. The application for stock and the loan was made in Oregon, to and by an association domiciled and doing business therein, through a resident solicitor. The mortgage was given upon an Oregon farm, and was executed and acknowledged here. The money was used here, and this suit was instituted in the county in which the mortgaged premises are situated, as contemplated by the association when it acquired the license to do business in the state. All this, notwithstanding the mortgage stipulation to the effect that it is a Washington contract, clearly shows its Oregon nativity, and it is therefore solvable by the laws thereof. *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 882, 21 S. E. 924; *Martin v. Johnson*, 84 Ga. 481, 8 L. R. A. 170, 10 S. E. 1092; *Dickinson v. Edwards*, 77 N. Y. 573, 33 Am. Rep. 671; *Jackson v. American Mortg. Co.* 88 Ga. 756, 15 S. E. 812." All this is in exact line with what we held in *Shannon's* and *Wilson's Cases* as to what constituted "doing business" in a state, and as to the clear duty of the court to go behind the paper recital to the actual facts of the case as to the board being the agent of the company, and the money being really payable here. In *Kidder's Case* the whole contract was made by correspondence through the mail,—there was not only no local board, but not even an agent of the corporation in Kansas, and yet the court said: "These contracts were entered into by correspondence; they were drawn by plaintiff in New York and sent to defendants at Scandia, who executed and returned them to the plaintiff. All payments were to be made to the secretary of the association at Geneva, New York. . . . The contract for the purchase of stock and for the loan of money was made by correspondence between Kidder, in the state of Kansas, and the association, in New York; the place of performance as fixed was at the office of the association in the latter state. This contract, so far as

its language could control, was entered into with reference to the laws of the state of New York, and was to be there performed; that is, the purchase price of the stock and the principal and interest upon the loan were to be paid at the association's office. However, the mortgage could only be enforced in the state of Kansas. A contract usually is entered into with reference to the laws of the state or country where it is made, or to be performed; but where a contract must be enforced in a particular place, the laws of that state may apply to such provisions of the contract as are in conflict with the laws thereof. In the foreclosure of a real-estate mortgage, the usury law of the state in which the land is situated will govern, although payment of the loan in another state is provided for by the terms of the contract. The contract amounts to an evasion of the usury laws, and it cannot be enforced. . . . It seems, however, that while the association desires to claim all the benefits of a New York contract as an abstract proposition, it desires the courts of this state to enforce the same as a Kansas contract, for the purpose of enabling it to secure the foreclosure of its lien upon Kansas soil for the payment of a usurious contract. This contract made as it was by correspondence, with a view of being enforced in this state, is a Kansas contract." This goes far beyond our holding in the *Shannon* and *Wilson* Cases. In *Atkinson's Case* in 20 Tex. Civ. App. 516, 50 S. W. 170, the court holds the local boards the agents of the company, and the notes Texas contracts, on the evidence, notwithstanding recitals to the contrary in the contract. It looked, as we did, to the actual facts. We add these very recent, and well-considered cases, to those cited in *Shannon's* and *Wilson's* Cases. They support fully, in every particular, the law as announced by us in those cases. And we call special attention to the fact that in *Stanley's Case* the cases of *Alleyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, and *National Bldg. & L. Asso. v. Bedford*, 88 Fed. 7, were cited and relied on without avail. See brief of counsel, 38 Or. 326. The judgment on the direct appeal is therefore affirmed.

On the cross appeal, as to the loan made under the act of 1886, the case of this *Same Appellant v. Pinkston*, controls. 79 Miss. 468.* The judgment on the cross appeal is therefore reversed, and the cause, as to that loan, remanded to be proceeded with in accordance with the opinion this day delivered in *National Bldg. & L. Asso. v. Pinkston* (Miss.) 31 So. 834. We desire, in passing upon the merits of the case, to say for the satisfaction of learned counsel for appellant, that we have, both in this case and in the case of *Shannon v. Georgia State Bldg. & L. Asso.* and *National Bldg. & L. Asso. v. Wilson*.—both reported in 78 Miss., 30 So.,—carefully considered the opinion of Judge

Hammond in 88 Fed. 7, and Judge McKenna in *Bedford v. Eastern Bldg. & L. Asso.* 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597. The differences between that case and this and the *Shannon* and *Wilson* Cases are great and obvious. The statutes of this state construed by us in *Shannon's Case* and *Wilson's Case* are wholly different from the act of the legislature of Tennessee passed March 26, 1891, and from chapter 2 of the Acts of 1891, Laws of Tennessee, and the facts in this, and *Shannon's Case*, and *Wilson's Case*, are very much stronger for appellee than in *Bedford's Case*. The precise question for decision in *Bedford's Case* is thus stated in *Bedford v. Eastern Bldg. & L. Asso.* 181 U. S., at page 237, 45 L. ed. 843, 21 Sup. Ct. Rep. 600: The assignments of error present the question of the enforceability of the notes and mortgages under the Tennessee law, "or, as the question may be put, whether there was a contract between the parties,—a right in one, and an obligation in the other, arising from a consideration given and received; mutual covenants by which each party acquired the right to that which the other promised or engaged to do, and whether the laws of Tennessee as interpreted by its courts impaired that right." The question is again stated by the court at page 240, 181 U. S., page 844, 45 L. ed., and page 601, 21 Sup. Ct. Rep., thus: "The statutes of Tennessee relied on as a defense were passed March 26, 1891, and to repeat, the question is, Did the subscription to the stock of the association, its issuance and the application for a loan in pursuance of it, constitute a contract which was inviolable by the state legislature? We think the answer should be in the affirmative." The facts were shown to be, so far as decision is concerned, that Bedford made his application for a loan on the 20th of March, 1891, and that the business of the association in Tennessee, which business it had been there carrying on, was lawful at that time and up to March 26, 1891, when the legislature of the state of Tennessee passed chapter 122, § 2, of the Acts of 1891, prescribing the terms and conditions on which foreign corporations might do business in that state; that on the same day the legislature passed chapter 2 of the Acts of 1891 providing certain conditions, compliance with which the legislature made a condition precedent to the right of foreign building and loan associations to do business in that state, one of the conditions being that such foreign building and loan associations should "deposit and continually thereafter keep deposited, in trust for all of its members and creditors, with some responsible trust company, or with some state officer of this, or some other state of the United States, mortgages, or other securities, received by it in the usual course of its business amounting to not less than \$25,000, nor more than \$50,000 at the discretion of the state treasurer." The facts in the case show, as is clearly pointed out by Mr. Justice McKenna, that the contract was made and completed by Bedford's subscribing to the stock of the association, prior

*This case held that the act of 1886, which exempted building and loan associations from the statutes in regard to usury, did not apply to foreign building and loan associations.
57 L. R. A.

to the passage of both these statutes. And the facts further show that the court of chancery appeals of Tennessee, in *United States Sav. & L. Co. v. Miller* (Tenn. Ch. App.) 47 S. W. 17, which was affirmed on appeal by the supreme court of the state of Tennessee December 18, 1897 (and it will be specially noted, without written opinion), held that a contract, similar to the contract in *Bedford's Case*, was a New York contract. This had also been held by the supreme court of Tennessee in *Pioneer Sav. & L. Co. v. Cannon*, 96 Tenn. 603, 33 L. R. A. 112, 36 S. W. 386, without any citation of authorities. Note, that it seems to have been conceded in that case that the contract was a Minnesota contract, and no point was made as to that. The facts, however, in *Pioneer Sav. & L. Co. v. Cannon* are very different indeed from the facts in *Bedford's Case*, the facts in *Miller's Case*, and the facts in this case.

The precise point decided, therefore, in *Bedford's Case* in 181 U. S. 237, 45 L. ed. 843, 21 Sup. Ct. Rep. 600, was simply and only this, that, inasmuch as the contract of loan had been fully made prior to the passage of the two Tennessee statutes involved, a reciprocal fixed and vested right on Bedford's part to demand the loan, and on the company's part to require him to complete the loan, had attached prior to the passage of the acts,—the obligation of which contract so made prior to these statutes it was not within the power of the state of Tennessee, by legislation, to impair. That, that precisely, and nothing more nor less than that, was what was decided in *Bedford's Case*, and was all that was decided in *Bedford's Case*. Any observations of the court in 88 Fed. 7, beyond what was thus decided, were not necessary to decision, and were mere *obiter dicta*. We understand *Bedford's Case* as decided in 181 U. S. 237, 45 L. ed. 843, 21 Sup. Ct. Rep. 600, to be in perfect harmony with our decision in *Shannon's Case* and *Wilson's Case*, 78 Miss., 30 So. We put the decision in *Shannon's Case* as follows (see p. 964, 78 Miss., and p. 52, 30 So.): "The chief point of contention is whether this is a Georgia or a Mississippi contract. It is true the notes were payable in Georgia, but the mortgage was on land in Mississippi, and the debtor lived in Mississippi, where alone the mortgage could have been enforced. All the payments through a series of years were actually made in Mississippi, instead of Georgia, to the local treasurer here, and it is manifest it was intended they should be made here. This foreign corporation had the power to organize local boards throughout Georgia and other states. It did organize a local board, thoroughly officered, at Ellisville, in this state, and to the local secretary and treasurer of this board all payments were made by the appellant and his vendor, and by other members of this association, through a series of years. It is obvious that this foreign corporation has thus localized its Mississippi business within the state of Mississippi. It is not a case of a nonresident mon-

ey lender, or a foreign corporation, in a few isolated cases dealing with our citizens and taking notes payable in the state of the domicile of such person or corporation. It is the case of a localization, within this state, of a large business done by a foreign corporation on the faith of mortgages on land in this state, the payments to be made to the secretary and treasurer of their respective local boards scattered throughout the state. Wherever, under circumstances such as these, the foreign corporation, thus localizing its business within this state, has the payment made to the secretary or treasurer of a local board, the real intention of the parties is that the payments shall be made in this state, and the only purpose of reciting the contrary in the notes is to evade the usury laws of this state. The contract is a Mississippi contract according to the real facts and the real intention of the parties. Courts look through all disguises to the real case made by the actual facts." And again on page 970, 78 Miss., page 54, 30 So.: "And it is immaterial whether the foreign corporation is doing business under a license here, or has, without such license, localized its business and domesticated itself here as to such business. And the act of 1890, p. 10, places 'each branch office' and 'each agency' on the same footing exactly, treating each as a separate and distinct building and loan association, and taxes each as such. The general doctrine is, of course, well settled that the law of a place where the contract is to be performed governs the contract; and the presumption that this contract was to be performed according to the laws of Georgia, simply because the notes were payable in Georgia, is, at last, nothing but a mere presumption to that effect, subject to be overcome by proof that in truth and in fact they intended the money to be paid in Mississippi. When all there is, in a case like this, to show that the intention was to perform the contract in a foreign state, is a mere specious paper recital in the notes, and over against this, and contrary to this, are all the other facts in the case, and the whole course of dealing between the parties, it would be an abdication of common sense on the part of any court, to find the real intention of the parties in the paper recital, instead of in the real facts of the case. It must be remembered that the state has the power to prescribe the terms on which foreign corporations may do business. It is declared in § 849 of the Code of 1892, last clause: 'Such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy.' This is the plain mandate of our law, which must be rigidly enforced by the courts. And the Code elsewhere provides that (§ 2348) domestic building and loan associations are excluded from the operation of the usury laws, but foreign building and loan associations are subject to them; and to enforce this public policy, thus declared by the statute, is not to give extraterritorial operation

to our statutes. On the contrary, this corporation has come into the state, localized its business here, through local boards scattered all over the state, and must submit such business thus localized to the operation of the laws of the state. To hold otherwise would operate the grossest injustice to our citizens, and would virtually abrogate our statutes against usury." And again, on page 974, 78 Miss., page 55, 30 So.: "Foreign corporations wishing to do business with our citizens, and localizing that business within our state through local boards, must comply with the laws of this state. They cannot, under such circumstances, enforce here stipulations in contracts allowed by the law of the state which created them, if these stipulations violate our laws or public policy. Such laws of such foreign states can have, *ex proprio vigore*, no extraterritorial effect, and it is not competent for a foreign corporation, whose business has been localized in this state, or the borrower, or both, to abrogate, by attempted contract, stipulations whose purpose it is to evade our laws against usury,—the laws of this state on that subject. This holding in no way interferes with the right of a foreign corporation, whose business has not been localized here, to make contracts with borrowers, to be governed by the laws of the state of their domicile, if there be no purpose therein to evade the usury laws of this state. Such liberty of contracting, exercised in good faith, is not herein interfered with. The authorities cited to that point by counsel for appellee are not pertinent to cases like the one before us. All the cases are admirably collected in a note to *Bank of Newport v. Cook* (Ark.) 46 Am. St. Rep. 171. In that note the learned editor points out, on page 202, the distinction to be observed; saying: 'The proper answer to this argument is, that mere shams and evasions are not permitted to counteract and annul the law; and where it appears that the purpose of the parties in making the obligation payable in another state was to evade the law against usury of the state in which it was executed, it will be regarded as infected with usury.' " And in that decision we supported our conclusion by authorities drawn from many states to which we again refer, and which we again approve. Now, it is perfectly plain, to the most casual observation, that the point on which the *Shannon Case* hinged, which was supported by the facts in that case, and by the authorities cited, was not even presented to the court,—either to the judge of the circuit court of the United States in 88 Fed., or to the United States Supreme Court in 181 U. S., 45 L. ed., 21 Sup. Ct. Rep., *supra*. There was not a suggestion of this point in that case as presented either in the lower court or the Supreme Court, nor was any such point presented, in any manner, in any of the cases previously cited from the supreme court of Tennessee. In other words, the facts in *Shannon's Case*, a Mississippi case, presented a ground for decision under the statutes of this state, not even hinted at in *Bedford's Case*, or *Miller's Case*, or *Cannon's* 57 L. R. A.

Case, in 99 Tenn. 344, 41 S. W. 1054, or the other *Cannon Case* in 96 Tenn., 36 S. W., 33 L. R. A., and that ground of decision was that the foreign corporation had many local boards scattered throughout this state, which local boards were the agents manifestly of the corporation, through which boards the corporation had been for years transacting business in this state, making large numbers of loans, involving large sums of money, and had thus localized its business here, and had domesticated itself as to that business within this state. The very converse of this, it clearly appears, was true in *Bedford's Case*. Mr. Justice McKenna takes pains to point out, at page 236, 181 U. S., 45 L. ed. 837, page 600, 21 Sup. Ct. Rep., that after the passage of the act of March 26, 1891, the loan company transacted no further business in Tennessee (no new business), confining itself strictly,—so as to avoid the statute,—to completing loans contracted prior to the passage of these acts, and at page 241, 181 U. S., page 844, 45 L. ed., and page 602, 21 Sup. Ct. Rep., he says: "It might, indeed, have the right to decline any condition and retire from the state, and from all it had the option to retire from. But it could not retire from the execution of its contracts. It contracted with Bedford to make him a loan, if it had the means in its treasury, and his security was good. The state could not affect that obligation nor impair it. . . . We recognize the power of the state to impose conditions upon foreign corporations doing business in the state. We have affirmed the existence of that power many times, but manifestly it cannot be exercised to discharge the citizens of the state from their contract obligations." Language could not more plainly say that the only point decided in the case was that, inasmuch as Bedford and the company had already completed their contract before these acts were passed, the legislature could not by a subsequent act impair the contract; there is not the slightest suggestion in the opinion of the court that the facts on which the opinion in the *Shannon Case* was based were ever presented to the court. Again, the Supreme Court of the United States very naturally followed the supreme court of Tennessee, as to there being no usury in the Bedford contract, since that court, in the light of the contract in the pioneer case, had held that a similar contract made in Tennessee, payable in Minnesota, was a Minnesota contract, and had also held the same in the *Miller Case* (Tenn. Ch. App.) 47 S. W. 17. What the Tennessee supreme court thus held in construction of the contracts in those cases, and also in construction of their usury statutes, the Supreme Court of the United States properly followed, under the well-settled doctrine that that court will always follow the interpretation put upon state statutes—merely local laws—by the supreme court of the state whose statutes they are dealing with. Under our statutes, which are materially different, as is shown in *Shannon's Case*, from the statutes of Tennessee, and under the facts in this case and

Shannon's Case and *Wilson's Case*, which in all these cases are vitally different from the facts in *Bedford's Case*, we hold the contracts are usurious, and in so holding we are doing nothing more nor less than construing our own statutes as to usury, and our statutes imposing privilege taxes on "each branch office" and "each agency" of a foreign building and loan association. See Laws 1890, p. 10; *Shannon's Case*, 78 Miss. 970, 30 So. 51. Furthermore, it is made perfectly plain by Mr. Justice McKenna that the supreme court of Tennessee, in *Cannon's Case*, 99 Tenn., 41 S. W., and in *Miller's Case* (Tenn. Ch. App.) 47 S. W. 17, held that the contracts were not Tennessee contracts, but that they were nevertheless void, because the foreign corporations had not complied with the terms and conditions prescribed by the legislature of Tennessee, upon compliance with which alone they were authorized to do business in that state. The Supreme Court of the United States, therefore, in the *Bedford Case* had no trouble in finding the contract a New York contract, because they simply followed the supreme court of Tennessee. That, therefore, was not the point of decision. The respect in which it reversed the supreme court of Tennessee was merely in its holding that the borrower did not have a vested right to the loan nor the association a legal right (see 99 Tenn. 348, 41 S. W. 1054) to have it consummated, even though the contract had been completed prior to the passage of the act of March 26, 1891. One other thing is to be distinctly noted, that the Supreme Court of the United States does not approve all that is said by Judge Hammond in 88 Fed. 7. If we pass by some of the rather heated expressions in that opinion, as, for instance, those in which he speaks of the "vaunted police power of a state," and those in which, speaking of the public policy declared by the legislature of the state of Tennessee, he says that "possibly the oft-reiterated charge that the real purpose of the legislation was to make fees for the registration officers in the different counties may furnish a clue to the kind of public policy which is the foundation of the legislation,"—expressions thrown off, unadvisedly, *currente calamo*, we will see that Judge Hammond himself, at page 20, 88 Fed., states the proposition, in harmony with *Shannon's Case*, as follows: "Foreign corporations that desire such domestication must comply with the provisions of these statutes; and if they carry on their business in the same manner that domestic corporations do, and make their contracts to be performed within the state of Tennessee without compliance with these acts, then they are within the pains and penalties of the statutes. But if they confine their business to their own home places, make their contracts there, to be performed there, as was done in this case, they are not within the pains and penalties of the acts, and such contracts are not affected by them. As to such contracts, it is not within the power of the state to discharge or suspend their obligations." If the learned judge had con-

signed his decision to what he here, and at page 13, says correctly was the question for decision, to wit, whether the acts of the Tennessee legislature could suspend or discharge the obligation of this contract made before their passage, he would have relieved us of the necessity of reviewing his opinion on two or three points, which we shall now note.

First. He holds that the local boards are agents of the borrower; the direct contrary of this was held in the unanswerable opinion of Justice Brown in *Supreme Lodge, K. of P. v. Withers*, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611, followed by us in *Murphy v. Independent Order of S. & D. of J. of A.* 77 Miss. 830, 50 L. R. A. 111, 27 So. 624, and *Shannon's Case*, 78 Miss. 975, 30 So. 51. The obvious fallacy of the reasoning of the learned judge is that he treats the mere specious paper recital in the contract that the local boards are the agents of the borrowers, as conclusive of that fact; when plainly such recital furnishes nothing but a mere presumption that that is true. It is a mere presumption, and subject, like all such presumptions, to be overcome by proof to the contrary. And where, as in *Shannon's Case*, the testimony of the witnesses shows clearly that the local boards were scattered all over the state, and that it had been the practice for years for these local boards to receive all payments, and solicit loans, all this solicitation and payment of money taking place in this state, these boards all the while acting in everything they did under the orders of the company, and for the company, it is an affront to common sense to deny what is thus made plain, that both parties meant and understood those boards to be the agents of the company, and the money to be payable in Mississippi. Whether one is the agent of another depends, not on any mere paper recital,—which may easily be worded to hide the real purpose,—but on his acts,—what he actually does. If his actual conduct, his actual doings every day for years, shows he is acting as agent for the company, then courts would be weak, indeed, which should hold, against these facts, that he was agent for the borrower simply because there was a fraudulent paper recital to that effect. And all these observations apply with equal force to the mere recital that the notes were to be payable in New York. What we have said in the *Shannon Case* on this subject we reaffirm, and refer again here to the authorities from other states on this point, there cited. It is doubtless an extremely easy method of escaping the labor of investigation to say that local boards are the agents of the borrower, and the moneys are payable in New York, simply because the paper recital says so. But courts discharge their whole duty only when they look deeper than prepared recitals, to the actual facts of every case. Suppose it were true, in a given case, that the intention to pay in the foreign state was really true as recited at the inception of the contract, is it possible that it can be contended that it is not in the pow-

er of the parties to discharge that feature of the original contract by a long course of dealing to the contrary? How much stronger is the case when the original recitation was made to evade the positive statute law of a state, and manifestly for no other purpose,—the whole course of dealing from the inception of the contract demonstrating this beyond doubt?

Second. He says on page 16, 88 Fed.: "It is decided in *Allgeyer's Case* that it can be enforced if the contract is made through the agency of the mails." With all deference, we hold that nothing of the sort was decided in *Allgeyer's Case*. On the contrary, Mr. Justice Peckham in that opinion (165 U. S. 587, 41 L. ed. 832, 17 Sup. Ct. Rep. 430), says: "In the case before us the contract was made beyond the territory of the state of Louisiana, and the only thing that the facts show was done within that state was the mailing of a letter of notification, as above mentioned, which was done after the principal contract had been made." Again, at page 588, 165 U. S., page 835, 41 L. ed., and page 431, 17 Sup. Ct. Rep., he says: "We have, then, a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the state of Louisiana, being made and to be performed within the state of New York, where the premiums were to be paid and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the state of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the state. It was a mere notification that the contract already in existence would attach to that particular property." Again, he says at page 592, 165 U. S., page 836, 41 L. ed., and page 432, 17 Sup. Ct. Rep.: "The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract, which the state had no right or jurisdiction to prevent its citizens from making outside the limits of the state." The learned judge—whom we hold in the highest esteem—has manifestly misconceived *Allgeyer's Case*. Another misconception of his is this: He says at page 16, 88 Fed.: "I suppose it would be agreed that if the defendant had made the same contract through the agency of the express company, that it would not have been illegal; or if he had put a messenger on the cars, and sent him with a power of attorney to the city of New York, it would not have been illegal. Now, why is it any more illegal to negotiate through persons in Tennessee who are willing to take the burden of attending to the details, and transmitting their correspondence through the mails?" This is answered completely in the language of Mr. Justice White in *Hooper v. California*, 155 U. S. 658, 39 L. ed. 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 211: "It is said that the right of a citizen to contract for insurance for himself is guaranteed by the 14th Amendment, and that, therefore, he cannot be deprived by the state of the ca-

capacity to so contract through an agent. The 14th Amendment, however, does not guarantee the citizen the right to make within his state, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the state. The proposition that, because a citizen might make such a contract for himself beyond the confines of his state, therefore he might authorize an agent to violate in his behalf the laws of his state, within her own limits, involves a clear *non sequitur*, and ignores the vital distinction between acts done within and acts done beyond a state's jurisdiction." This language is quoted and reaffirmed in *Allgeyer's Case* by Justice Peckham at page 588, 165 U. S., page 835, 41 L. ed., and page 431, 17 Sup. Ct. Rep. The learned judge in 88 Fed. confuses the case of a single isolated borrowing—as *Allgeyer's Case*—with "doing business" in the state,—a very different thing indeed. The dissenting opinion in *Hooper's Case* shows at page 661, 155 U. S., page 302, 39 L. ed., page 623, 5 Inters. Com. Rep., and page 212, 15 Sup. Ct. Rep., this very difference, the dissenting justices saying: "This single act of the company cannot be held to prove that it proposed to transact business in that state, or that it contemplated the issuing of any other policy to a resident of California. . . . Indeed, the prosecution in the present case manifestly had in mind the difference between a single act of insuring property and 'proposing to transact insurance business by agent or agents.'" Again, at the bottom of the page it is pointed out "as an abridgment of the privileges, not of a foreign corporation, but of individual citizens of other states," etc. We are not dealing in this case with a single individual citizen borrowing from appellant having made his contract out of the state in New York, and giving them notice, collaterally by mail or not; we are dealing with the case of a foreign corporation transacting an immense business in the state, through a large number of local boards of control,—its own agents manifestly,—such foreign corporation having thus localized its business in this state, and having—precisely as was done in Oregon, *Stanley's Case*, 38 Or. 340, 58 L. R. A. —, 63 Pac. 489,—become domesticated here, as to that business. If on facts like these, under statutes such as we have on usury, and the laws taxing "each local board" or "branch" or "agency" of a foreign building and loan association, the state has no power to declare this contract violative of our statutes and public policy, then, indeed, is the boasted authority of a state to prevent infraction of its positive statute law and its public policy by a foreign corporation a meaningless platitude,—a veritable mockery. But we find and quote, to give it our most unqualified indorsement, a most able statement of this view in the Supreme Court of the United States in *Hooper v. California*, 155 U. S. 658, 39 L. ed. 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 211, where the court, through Mr. Justice White, says: "If the contention of the plaintiff in error

were admitted, the established authority of the state to prevent a foreign corporation from carrying on business within its limits, either absolutely or except upon certain conditions, would be destroyed. It would be only necessary for such a corporation to have an understanding with a resident that in the effecting of contracts between itself and other residents of the state, he should be considered the agent of the insured persons, and not of the company. This would make the exercise of a substantial and valuable power by a state government depend, not on the actual facts of the transactions over which it lawfully seeks to extend its control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it. Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable." There is no such vagueness about the phrase "doing business within the state," or "negotiating business within the state,"—no "such ambiguity or elasticity in its quality,"—as seems to be apprehended by the learned judge in 88 Fed., at page 17, we humbly submit. The United States Supreme Court has made the meaning of that phrase, to our thinking, clear as light. This appellant was "doing business in this state" within the definition of that phrase by the Federal Supreme Court, and doing it through its own agents,—its local boards,—as held by the Federal Supreme Court in *Supreme Lodge K. of P. v. Withers*, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611. We refer again here to the citation from *Stanley's Case* in the opening of this opinion, as to what constitutes "doing business in a state."

We have thus, at some length, noticed the *Bedford Case* as set out in 88 Fed. 7, in 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597, and also *Allgeyer's Case*, with the view of satisfying the thoroughly industrious and very able counsel of the appellant. It may be a vain effort to satisfy one who seems to doubt so strongly, but so high is the regard in which we hold him, that we have undertaken the task in the hope that a more patient and thorough examination of this case, and the others to which we have referred in this, and in the *Cases of Shannon and Wilson*, will enable him to concur in the correctness of the conclusion at which we have arrived, on our statutes, and the facts in our cases.

It is only necessary to add that the court, properly, under our statutes and practice, struck from the files the amended notices and pleas, the object of which was to inject into the case, nearly two years after the cause had been at issue, and ready for hearing, a Federal question. It is clearly shown that the appellant, after its motion to remove the cause to the Federal court had been overruled July 29, 1899, filed the plea of general issue, with elaborate notice, on September 27, 1899; that afterwards, without having first obtained leave of the court, it filed, on April 20, 1901, some eighteen months after the cause was at issue, an

amended notice—a wholly different notice—under its plea of the general issue; and that later, on August 6, 1901, again without having obtained leave to do so, it filed an amendment to its pleas, and an amended—so called—notice, wholly different from its first notice, nearly two years after the cause had been at issue and ready for trial. This effort, by these amendments to the pleas and notice, was simply an after-thought, an effort, at that late stage, to inject a Federal question into the record. Appellant also asked an instruction, and filed a series of reasons why the instruction should be granted. It was an extraordinary procedure to file with a requested instruction a page or two of written reasons why it should be granted. The purpose was obvious. It was another ingenious, but unsuccessful, effort to inject the Federal question into the record. If the court had allowed the amended notice and pleas to be filed, which presented nothing on the merits, but simply the alleged Federal question, then there would have been an issue involving the Federal question, to which an instruction would have been appropriate. But the court had very properly, in accordance with our statutes and practice, refused leave to file the amended pleas and notices, and stricken them from the files, on the obvious ground that appellant had presented them entirely too late,—nearly two years after the cause had been fully at issue and waiting for trial. Such delay was gross laches, and the court properly refused the leave to file them.

Affirmed on direct appeal and reversed on cross appeal.

Affirmed by Supreme Court of United States April 4, 1904.

Charles R. SHANNON, Appt.,
v.

GEORGIA STATE BUILDING & LOAN
ASSOCIATION.

(78 Miss. 955.)

1. An assignee of property subject to a usurious mortgage may recover from the mortgagee the whole usurious interest paid by himself and his assignor.
2. A contract with a building and loan association for a loan, which provides for a fixed premium which, added to the interest reserved, exceeds the legal rate, is usurious.
3. Whether or not a loan by a foreign building and loan association to a resident of the state, secured by mortgage on land within the state, is usurious, will be determined by the local laws, notwithstanding the notes are payable at the domicile of the corporation, if it has localized its business by establishing boards throughout the state to which payments on loans are to be made.
4. A foreign building and loan association which localizes its business in a state cannot complain of a provision of its laws making foreign associations subject to the usury laws, but exempting domestic associations therefrom.

(March 11, 1901.)

NOTE.—See the preceding case and footnotes thereto.

APPPEAL by plaintiff from a judgment of the Circuit Court for Jones County in favor of defendant in an action brought to recover usurious interest alleged to have been paid to defendant. *Reversed.*

Plaintiff's mother contracted with defendant, through its local agency at Ellisville, for a loan, to secure which she executed a deed of trust on real estate in Jones county. Under the by-laws of the association she was required to pay interest at the rate of 6 per cent per annum, and a fixed premium at 6 per cent per annum on the amount of the loan, payable in monthly instalments. The notes were made payable in Georgia, but the by-laws permitted payment to be made to the local agent in Mississippi. Subsequently Mrs. Shannon conveyed the property to her son, and he assumed the obligation to defendant. He paid off the indebtedness, and instituted this action to recover the amount of interest which had been paid by himself and his mother, on the ground that it was usurious.

Further facts appear in the opinion.

Messrs. Shannon & Street, for appellant:

"Premium" is but another name for interest; hence it is clear that appellee has charged and collected 12 per cent per annum interest on a loan made in this state. Having violated the laws of this state by contracting for an illegal and usurious rate of interest, and not being included among the exceptions of § 2348 of the Code of 1892, appellee must suffer the penalty.

Sokoloski v. New South Bldg. & L. Asso. 77 Miss. 155, 26 So. 361; *Bond v. Jones*, 8 Smedes & M. 368; *Chaffe v. Wilson*, 59 Miss. 42.

Appellant, a substituted debtor, could take advantage of the usurious contract.

M'Alister v. Jerman, 32 Miss. 142; *Chaffe v. Wilson*, 59 Miss. 42; *Boyd v. Warmack*, 62 Miss. 536.

Messrs. Frank Johnston and Stirling & Harris, also for appellant:

Primarily a contract is governed by the laws of the state where it is made; but, where it is to be performed in another state, it may be governed by the laws of the place of performance. This is merely a matter of presumption, arising out of the supposed intentions of the parties in respect to what law was contemplated by them in making the contract. There is nothing conclusive about these presumptions, and they must yield to the facts and circumstances of a particular case, which indicate the real purpose and intent of the parties.

Brown Bros. v. Freeland, 34 Miss. 181, 69 Am. Dec. 389; *Commercial Bank v. Auzé*, 74 Miss. 609, 21 So. 754.

Contracts of a foreign building and loan association doing a local business in this state through local agents, and making contracts in this state, are governed by the usury laws of this state.

Sokoloski v. New South Bldg. & L. Asso. 77 Miss. 155, 26 So. 361; *Crofton v. New South Bldg. & L. Asso.* 77 Miss. 166, 26 So. 362; *Building & L. Asso. v. Griffin*, 90 Tex. 480, 39 S. W. 656; *Perkins v. Garner*, 20 57 L. R. A.

Tex. Civ. App. 519, 50 S. W. 166; *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 882, 21 S. E. 924.

Where a money-lending foreign corporation establishes and carries on a local business in a state through local agents, its contracts are governed by the usury laws of the state; and those laws cannot be evaded or abrogated by any contract stipulation whatever.

Building & L. Asso. v. Griffin, 90 Tex. 480, 39 S. W. 656; *Perkins v. Garner*, 20 Tex. Civ. App. 519, 50 S. W. 166; *Martin v. Johnson*, 84 Ga. 481, 8 L. R. A. 170, 10 S. E. 1092; *Fletcher v. New York L. Ins. Co.* 4 McCrary, 440, 13 Fed. 526, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *Wall v. Equitable Life Assur. Soc.* 32 Fed. 273; *Western Assur. Co. v. Phelps*, 77 Miss. 625, 27 So. 745; *McCauley v. Workingman's Bldg. & Sav. Asso.* 97 Tenn. 421, 35 L. R. A. 244, 37 S. W. 212; *Sokoloski v. New South Bldg. & L. Asso.* 77 Miss. 155, 26 So. 361; *Crofton v. New South Bldg. & L. Asso.* 77 Miss. 166, 26 So. 362.

Messrs. Williamson, Wells, & Croom and Hardy & Howell, for appellee:

Usury is a personal plea, and appellant, being in no sense privy to the contract, cannot avail himself of it,—especially to the extent of suing to recover interest paid on the loan by the party privy to it.

Moses Bros. v. Home Bldg. & L. Asso. 100 Ala. 465, 14 So. 412; *Conover v. Hobart*, 24 N. J. Eq. 120.

Appellant, in August, 1899, withdrew the shares, which he had a right to do under the by-laws, and received from the association \$172, the value thereof. This settlement was made voluntarily, with full knowledge and notice, without any concealment or mistake of fact.

Appellant is estopped from claiming or suing for usury.

Natchez Bldg. & L. Asso. v. Shields, 71 Miss. 630, 15 So. 793; *Building & L. Asso. v. Leonard*, 74 Miss. 810, 21 So. 53.

Accord and satisfaction is a complete defense to appellant's contention in this case.

Looby v. West Troy, 24 Hun, 78; *Pom. Code Remedies*, 3d ed. § 665; *Berdell v. Bissell*, 6 Colo. 162.

This contract is not usurious under the laws of Georgia, where the association is domiciled and transacts all of its business and makes all its contracts.

Reynolds v. Georgia State Bldg. & L. Asso. 102 Ga. 126, 29 S. E. 187; *Ga. Acts* 1890-91, §§ 5-8, p. 176; *Hawkins v. Americus Nat. Bldg. & L. Asso.* 96 Ga. 206, 22 S. E. 711; *Goodrich v. Atlanta Nat. Bldg. & L. Asso.* 96 Ga. 803, 22 S. E. 585; 2 Ga. Code 1495, p. 218, § 2401.

This is a Georgia contract.

Emanuel v. White, 34 Miss. 56, 69 Am. Dec. 385; *Miller v. Mayfield*, 37 Miss. 688; *Fellows v. Harris*, 12 Smedes & M. 462; *Martin v. Martin*, P. & Co. 1 Smedes & M. 176; *Henry v. Halsey*, 5 Smedes & M. 573; *Brown v. Nevitt*, 27 Miss. 801; *Brown Bros. v. Freeland*, 34 Miss. 181, 69 Am. Dec. 389; *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. Rep. 319; *Shacklett v. Polk*, 51

Miss. 378; Allen v. Bratton, 47 Miss. 119; *Murdock v. Columbus Ins. & Bkg. Co.* 59 Miss. 152; *Grangers' L. Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446; *American Freehold Land & Mortg. Co. v. Jefferson*, 69 Miss. 770, 12 So. 464.

Whitfield, Ch. J., delivered the opinion of the court:

It is thoroughly settled in this state, under facts like those in this record, that the appellant can recover the whole of the interest. *M'Alister v. Jerman*, 32 Miss. 142; *Chaffe v. Wilson*, 59 Miss. 42. The appellant stood as a substituted debtor, and had all the rights the original debtor had. The premium in this case was fixed, and the contract was therefore usurious. See the case of *Sokoloski v. New South Bldg. & L. Asso.* 77 Miss. 155-166, 26 So. 361.

The chief point of contention is whether this is a Georgia or a Mississippi contract. It is true, the notes were payable in Georgia; but the mortgage was on land in Mississippi, and the debtor lived in Mississippi, where alone the mortgage could have been enforced. All the payments through a series of years were actually made in Mississippi, instead of Georgia, to the local treasurer here, and it was manifest it was intended they should be made here. This foreign corporation had the power to organize local boards throughout Georgia and other states. It did organize a local board, thoroughly officered, at Ellisville, in this state; and to the local secretary and treasurer of this board all payments were made by the appellant and his vendor, and by other members of this association, through a series of years. It is obvious that this foreign corporation had thus localized its Mississippi business within the state of Mississippi. It is not the case of a nonresident money lender or a foreign corporation in a few isolated cases dealing with our citizens, and taking notes payable in the state of the domicile of such person or corporation. It is the case of a localization within this state of a large business done by a foreign corporation on the faith of mortgages on land in this state, the payments to be made to the secretary and treasurer of their respective local boards, scattered throughout the state. Whenever, under circumstances such as these, the foreign corporation thus localizing its business within this state has the payments made to the secretary or treasurer of a local board, the real intention of the parties is that the payments shall be made in this state, and the only purpose of reciting the contrary in the notes is to evade the usury laws of this state. The contract is a Mississippi contract, according to the real facts and the real intention of the parties. Courts look through all disguises to the real case made by the actual facts. This proposition is abundantly supported by the authorities. In the precisely parallel case of *Building & L. Asso. v. Griffin*, 90 Tex. 488, 39 S. W. 659, the court says: "It therefore became domiciled in the state, the same as an individual would who came here for the pur-

pose of doing a like business, and yet retained his citizenship in the state from which he came. The borrower lived in Texas. All of the property that he owned, so far as we know, was situated in this state. At least, there is nothing to indicate that he owned any property in the territory of Dakota. To secure the payment of the debt, a deed of trust was taken upon the property situated in this state. Upon these facts, the question is to be determined whether or not the contract, under the evidence and surrounding circumstances, was really intended to be performed in the territory of Dakota or in the state of Texas. The general rule of law contended for by the loan company, that a contract which is to be performed in a state other than that in which it is made may reserve interest according to the laws of either state, is too well settled to require discussion or the citation of authority; but the law looks to the substance of the contract, and will not tolerate any contrivance by which it is intended to evade the laws of a state in which the contract is made or sought to be enforced. The fact that the contract expresses that the money borrowed is to be paid in the territory of Dakota is met by the real, substantial provisions for its enforcement, and the circumstances under which the business was transacted, with such overwhelming force, that we are brought to the conclusion that the contract, in so far as it provided by its terms for the payment of the money in the territory of Dakota, was simply a device to evade the laws of this state, and that these facts are so manifest from the face of the papers themselves that it ceases to be a question of fact, but becomes a matter of law, to be determined from the undisputed evidence that is thus furnished. The contract having been made with a view to its enforcement in the state of Texas, and not in the territory of Dakota, the agreement expressed in it that it should be paid in the territory of Dakota was intended to enable the loan company, by authority of the laws of this state, to do business in Texas, and set our laws at defiance with impunity, and it cannot be enforced by the courts of this state. *Tyler, Usury*, p. 83; *Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 540; *Falls v. United States Sav. Loan & Bldg. Co.* 97 Ala. 417, 24 L. R. A. 174, 13 So. 25; *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 882, 21 S. E. 924; *Martin v. Johnson*, 84 Ga. 481, 8 L. R. A. 170, 10 S. E. 1092; *Fowler v. Bell*, 90 Tex. 150, 39 L. R. A. 254, 37 S. W. 1058. In *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 882, 21 S. E. 924, the court says, at page 887, 116 N. C., and page 926, 21 S. E.: "It is important that foreign capital invested within our borders shall have, to the very utmost, its just dues, and that it shall find our courts ready now, as they have always been, to protect its interest and enforce all its lawful rights. But it is important, also, that the settled policy of the state should be upheld by its courts, and that schemes which to them seem manifestly adopted merely to evade its usury laws

should not be allowed to bring about a virtual abrogation of those statutes. If a foreign bank or other lender of money may establish local branches or offices in this state, and through its agents solicit and take application for loans on mortgages of land here, to be sent to the home office, to be passed upon and allowed there, and if, because of such arrangement, and the insertion of a statement, put in the note or mortgage, that the contract is 'solvable' in the foreign jurisdiction, and is made 'with reference to its laws,' the courts of this state are required to enforce such contracts, and decree a foreclosure of the mortgage and a sale of the land, that the foreign usurer may have his usury, then, surely, will it have come to pass that it is no longer true that there is no 'cover or device' by which the wholesome restraints put upon the money lenders by our statutes may be escaped. Upon this subject there is in *Martin v. Johnson*, 84 Ga. 481, 8 L. R. A. 170, 10 S. E. 1092, a most emphatic declaration from the highest court of the state that is the domicile of the defendant corporation. A loan of money had been made by a citizen of Massachusetts, through an agent in Georgia, to a citizen of the latter state, secured by mortgage on land there, but payable in the former state. It was contended that the rights of the mortgage were not to be governed by the laws of Georgia in respect to usury because the note was payable in Massachusetts. The court said: 'If this court should hold that a note made in this state, but payable in the state of Massachusetts, for money advanced by the agent of a person who resides in Massachusetts, could be collected, notwithstanding it contained 16 per cent usurious and unlawful interest, then the law of this state as to usury would be inoperative and useless; the money lenders of those states that have no usury laws, but which allow to be collected any rate of interest contracted for, could flood this state with their agents, and by the loan of money exact the highest rate of interest, even 100 per cent.' It seems, therefore, that the principle for which the defendant corporation contends is denied in the courts of its own domicile, that a foreign money lender, loaning money in Georgia on mortgage on Georgia land, must be content, in a foreclosure proceeding, to have the amount due determined by Georgia law. The reasons that support the rule there are valid here. The rules of comity require us to allow foreign corporations a standing in our courts to enforce the valid contracts they may have made with our citizens, and all such liens upon property situated within this state as they have lawfully acquired. But that comity does not require that we should allow foreign corporations to enforce contracts here, if such enforcement would be in conflict with our laws, and, being thus in conflict, the enforcement thereof would work against our own citizens, and give to the foreigner an advantage that the resident has not. *Walter v. Whitlock*, 9 Fla. 86, 78 Am. Dec. 607. Much less does it require that we

should allow a Georgia corporation to enforce a mortgage loan which is illegal and void by our laws (*Ward v. Sugg*, 113 N. C. 480, 24 L. R. A. 280, 18 S. E. 717), while in that state the rule is as stated in *Martin v. Johnson*, 84 Ga. 481, 8 L. R. A. 170, 10 S. E. 1092. It is well settled, so well settled that authorities need not be cited, that a purely personal contract made in one place, to be executed in another, is to be governed by the laws of the place of performance. This general rule is subject to the qualification that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. *Tyler, Usury*, p. 83. Now, it seems very manifest to us, considering all the facts and circumstances, that this Georgia corporation required the plaintiff, a citizen and resident of this state, to declare, in the obligation given by him to it for the money loaned him, that the contract was solvable in that state, and was made with reference to its laws, not because it was contemplated by either of the parties that the money would be paid there, or that the parties would enforce their respective rights under the contract in the courts of that state, but because this money lender desired to escape the restraints of the laws of this state, and, by this formal declaration inserted in the contract, compel the courts of this state, in a suit for the foreclosure of the mortgage, to adjust the rights of the parties according to the laws of Georgia and the decisions of its courts, and in disregard of the laws of this state and the decisions of this court." In *Fletcher v. New York L. Ins. Co.* 4 McCrary, 440, 13 Fed. 528, Judge Treat says: "The defendant company was doing business in Missouri, with the privileges granted to it here, when said insurance was effected. It may be that the formal acceptance of the proposed contract was, by the letter of the contract, to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri, for salutary reasons, permit foreign corporations to do business in the state on prescribed conditions. If, despite such conditions, they can, by the insertion of clauses in their policy, withdraw themselves from the limitations of the Missouri statutes, while obtaining all the advantages of its license, then a foreign corporation can, by special contract, upset the statutes of the state, and become exempt from the positive requirements of the law. Such a proposition is not to be countenanced. The defendant corporation chose to embark in business within this state under the terms and conditions named in the statute. It could not by paper contrivances, however specious, withdraw itself from the operation of the laws by the force of which it could alone do business within the state. To hold otherwise would be subversive of the right of a state to decide on what terms, by comity, a foreign corporation should be admitted to do business, or be recognized therefor, within the state jurisdiction. Each state can decide for itself whether a foreign

corporation shall be recognized by it, and on what terms. Primarily, a corporation has no existence beyond the territorial limits of the state creating it, and, when it undertakes business beyond it, does so only by comity. The defendant corporation, having been permitted to do business in Missouri under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses in its forms of application, etc., withdraw itself from the obligatory force of the statute. The contract of insurance, therefore, is a Missouri contract, and subject to the local law."

This last utterance is in exact accord with the holding of this court in *Western Assur. Co. v. Phelps*, 77 Miss. 625, 27 So. 745. See also *Southern Bldg. & L. Assn. v. Atkinson*, 20 Tex. Civ. App. 516, 50 S. W. 170, and *Neal v. New Orleans Loan, Bldg. & Sav. Assn.* 100 Tenn. 607, 46 S. W. 755. See, especially, the very recent case of *Crippen v. Loughton*, 69 N. H. 540, 46 L. R. A. 467, 44 Atl. 538. And it is immaterial whether the foreign corporation is doing business under license here, or has, without such license, localized its business and domiciled itself here as to such business. And the act of 1890, p. 10, places "each branch office" and "each agency" on the same footing exactly, treating each as "a separate and distinct building and loan association," and taxes each as such. The general doctrine is, of course, well settled that the law of a place where the contract is to be performed governs the contract, and the presumption that this contract was to be performed according to the laws of Georgia, simply because the notes were payable in Georgia, is, at least, nothing but a mere presumption to that effect, subject to be overcome by proof that in truth and in fact they intended the money to be paid in Mississippi. When all there is, in a case like this, to show that the intention was to perform the contract in a foreign state, is a mere specious paper recital in the notes, and over against this, and contrary to this, are all the other facts in the case, and the whole course of dealing between the parties, it would be an abdication of common sense on the part of any court to find the real intention of the parties in the paper recital, instead of in the real facts of the case. It must be remembered that the state has the power to prescribe the terms on which foreign corporations may do business. It is declared in § 849 of the Code of 1892 (last clause): "Such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy." This is the plain mandate of our law, which must be rigidly enforced by the courts. And the Code elsewhere provides that (§ 2348) domestic building and loan associations are excluded from the operation of the usury laws, but foreign building and loan associations are subject to them; and to enforce this public policy thus declared by the statute is not to give extra-

57 L. R. A.

territorial operation to our statutes. On the contrary, this corporation has come into the state, and localized its business here through local boards scattered all over the state, and must submit such business thus localized to the operation of the laws of the state. To hold otherwise would operate the grossest injustice to our citizens, and would virtually abrogate our statutes against usury. It may be further remarked that we announce, as to this foreign building and loan association, the identical doctrine which the state of Georgia, through its supreme court, has announced (*Martin v. Johnson*, 84 Ga. 481, 8 L. R. A. 170, 10 S. E. 1092), in an exactly similar case. We append, for convenience, a few of the authorities supporting our views, whose reasoning we approve, so far as relates to the question under discussion: *United States Sav. & L. Co. v. Scott*, 98 Ky. 695, 34 S. W. 235, decided in 1896, the court saying: "A foreign building and loan association engaged in doing business in Kentucky will be permitted to charge no higher rate of interest than is chargeable under the laws of this state; and while, by the laws of comity, the charter of such a corporation will be recognized here as the law of its existence, it is the charter alone which is recognized, and not the general legislation of the country of its domicile with reference thereto, or the construction of its charter provisions by the foreign courts. Moreover, when such a corporation employs the usual agencies to solicit and transact business in this state, and contracts for the payment of premiums and interest in excess of the rate authorized here, the transaction will be denounced as an attempted evasion of our laws, whatever may be the nominal rate specified or artifice adopted; and this though it be specifically provided that the contract is made with reference to the laws of the foreign state. Such a provision only makes the intent to evade the more manifest." *Pryse v. People's Bldg. L. & Sav. Assn.* 19 Ky. L. Rep. 752, 41 S. W. 574, decided in 1897 (these two being Kentucky cases); *National Loan & Invest. Co. v. Stone* (Tex. Civ. App.) 46 S. W. 67, decided in 1898 (a Texas case). It was held therein that it was immaterial whether the association had obtained a permit or license to do business in Texas, if in fact it had localized its business there. In such latter case the contract was a Texas contract, as well as in the former. *Harmon v. Hart* (Tenn. Ch. App.) 53 S. W. 310 (a Tennessee case, decided in 1899); *Jackson v. American Mortg. Co.* 88 Ga. 756, 15 S. E. 812; *Thompson v. Edwards*, 85 Ind. 414; 4 Am. & Eng. Enc. Law, 2d ed., p. 1072, note 5. *Crippen v. Loughton*, 69 N. H. 540, 46 L. R. A. 470, 44 Atl. 541. 542, where the court says: "In the case of contracts the common law enforces the contract made by the parties, but not the *lex loci*, except in so far as they have made it a part of the contract. The doctrine that contracts are to be interpreted according to the law of the place where they are made or to be performed is merely a rule for finding the intention of the parties. *Peninsu-*

lar & O. Steam Nav. Co. v. Shand, 3 Moore, P. C. N. S. 272; *Anstruther v. Adair*, 2 Myl. & K. 272: 'A different decision would totally defeat the intention of the contracting parties.' *Di Sora v. Phillips*, 10 H. L. Cas. 624, 638, 639. The only purpose of the proof of the foreign law is to determine the meaning of the language used by the parties,—for the same reason, precisely, that evidence is heard of the signification of technical terms. *Prentiss v. Savage*, 13 Mass. 20, 23; *Koster v. Merritt*, 32 Conn. 246; *Dyke v. Erie R. Co.* 45 N. Y. 113, 118, 6 Am. Rep. 43. The foreign law, as such, and *ex proprio vigore*, has no effect. Effect is given to the agreement of the parties only. The court looks into the *lex loci* so far, and only so far, as may be necessary to determine what the contract is, and whether it shall be enforced, if at all, according to the intention of the parties. This is not a matter of courtesy or favor, either to the country where the contract was made or to the parties. It is the right of the parties. It is as if the foreign law were, in terms, expressed in the contract. The principle 'loosely called comity' (*Schibasy v. Westenhole*, L. R. 6 Q. B. 155, 159) 'is not of courts, but of nations.' Story, Conf. L. §§ 37, 38; *Bank of Augusta v. Earle*, 13 Pet. 519, 589, 10 L. ed. 274, 308. . . . The question of the enforcement of the laws of a foreign state is not a question of comity to that state, but of the power of the courts of the forum. The organic or statute or common law of no state in the Union has conferred upon its courts authority to put into active operative effect, efficient *per se*, the statutes of another state. There is a wide difference between the putting a foreign statute in active operation, and treating a transaction of which the court has jurisdiction as it is modified, affected, or characterized by the law that operated upon it where it took place. To enforce a liability created solely by the statute of a foreign land is to give that statute precisely the same force and effect as if it were a statute of the forum." *Falls v. United States Sav. Loan & Bldg. Co.* 97 Ala. 417, 24 L. R. A. 174, 13 So. 25; *Phoenix Ins. Co. v. Com.* 5 Bush, 68, 96 Am. Dec. 331.

In the cases in 46 S. W. and 34 S. W., *supra*, there was no local board, as in this and the *Sokoloski Cases*, but the foreign corporation had local offices, and local agents, and had thus localized its business; and the same rule above announced was applied,—a point not here presented. The principle is much like that of *Jahier v. Rascoe*, 62 Miss. 699; *Rorer*, Interstate Law, p. 48. It seems that in 1898, carrying out the doctrine of these cases, where foreign corporations localized their business in other states, the state of South Carolina actually passed a law providing that "all contracts secured by mortgages of real estate situated within this state shall be subject to and construed by the laws of this state, regulating the rate of interest allowed, and in all other respects, without regard to the place named for the performance of the same." 22 S. C. Stat. at L. p. 747. And 57 L. R. A.

the South Carolina supreme court, in *Tobin v. McNab*, 53 S. C., at page 76, 30 S. E. 829, pronounces this a "wise law." Foreign corporations wishing to do business with our citizens, and localizing that business within our state through local boards, must comply with the laws of this state. They cannot, under such circumstances, enforce here stipulations in contracts allowed by the law of the state which created them, if these stipulations violate our laws or our public policy. Such laws of such foreign states can have, *ex proprio vigore*, no extra-territorial effect; and it is not competent for a foreign corporation whose business has been localized in this state, or the borrower, or both, to abrogate by attempted contract stipulations, whose purpose it is to evade our laws against usury, the laws of this state on that subject. This holding in no way interferes with the right of a foreign corporation whose business has not been localized here to make contracts with borrowers to be governed by the laws of the state of their domicile, if there be no purpose therein to evade the usury laws of this state. Such liberty of contracting, exercised in good faith, is not herein interfered with. The authorities cited to that point by counsel for appellee are not pertinent to cases like the one before us. All the cases are admirably collected in a note to *Bank of Newport v. Cook* (Ark.) 46 Am. St. Rep. 171. In that note the learned editor points out on page 202 the distinction to be observed, saying: "The proper answer to this argument is that mere shams and evasions are not permitted to counteract and annul the law, and, where it appears that the purpose of the parties in making the obligation payable in another state was to evade the law against usury of the state in which it was executed, it will be regarded as infected with usury. *Pratt v. Adams*, 7 Paige, 615; *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 20 L. ed. 385; *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61."

Our decision is rested upon the two distinct grounds: First, that where a foreign money-lending corporation has localized its business within this state through local boards, doing here regularly and continuously for years the business of the corporation, it has thus voluntarily domesticated itself within this state, and subjected its business and contracts to the operation of our laws; and, second, that where, in such case, all the facts, fairly weighed, show that the only purpose of a mere stipulation in the notes or mortgages for payment in the foreign state must have been to evade our laws on the subject of usury, no device or disguise or contrivance will prevent the courts from stripping off the mask, and pronouncing the judgment of the law on the real case made by the actual facts.

The proposition that the local secretary and treasurer is the agent, not of the lending corporation whose secretary and treasurer he was, but of the borrowing debtor, is utterly unfounded. *Murphy v. Independent Order of S. & D. of J. of A.* 77 Miss. 830, 50 L. R. A. 111, 27 So. 624. The

facts of the case make *Natches Bldg. & L. Asso. v. Shields*, 71 Miss. 630, 15 So. 793, and *Building & L. Asso. v. Leonard*, 74 Miss. 810, 21 So. 53, wholly inapplicable.

It is noteworthy that no dividends or profits are allowed by the by-laws of this

association where the stock is surrendered before maturity. The appellant, so far from deriving any profits, actually lost \$19.50.

The judgment is reversed, and cause remanded.

MICHIGAN SUPREME COURT.

Re Edward ASCHER.

(.....Mich.....)

One accused of a capital offense has not been in jeopardy which will bar a subsequent trial, where, after the jury has been impaneled and the trial begun, the judge discharges them after ascertaining by independent investigation that some of them are so prejudiced in favor of the accused as to be incompetent, and have endeavored to prejudice other jurors, belittled the state's evidence, procured the intoxication of the bailiff, and obtained communication with persons not jurors.

(May 19, 1902.)

PETITION for a writ of habeas corpus to obtain petitioner's discharge from the custody of the sheriff of Wayne County to which he had been committed pending trial of an indictment charging him with murder. *Denied.*

The facts are stated in the opinion.

Mr. George F. Monaghan for petitioner.

Mr. Henry A. Mandell, with *Mr. Ormond F. Hunt*, for respondent:

Habeas corpus is not the proper remedy for taking advantage of the claim of a former conviction or former acquittal.

Wright v. State, 7 Ind. 324; *Ex parte Ruthven*, 17 Mo. 541; *Pitner v. State*, 44 Tex. 578; *Perry v. State*, 41 Tex. 488; *Hurd, Habeas Corpus*, pp. 335-344; *Com. ex rel. Norton v. Deacon*, 8 Serg. & R. 71; *People v. Ruloff*, 3 Park. Crim. Rep. 126; *Rea v. Acton*, 2 Strange, 851; *Steiner v. Norton*, 6 Wash. 23, 32 Pac. 1063; *Ex parte Maxwell*, 11 Nev. 428; *Re Maughan*, 6 Utah, 167, 21 Pac. 1088; *State ex rel. Williams v. Klock*, 45 La. Ann. 316, 12 So. 307; *Re Bogart*, 2 Sawy. 396, Fed. Cas. No. 1,596; *Ex parte Bigelow*, 113 U. S. 328, 28 L. ed. 1005, 5 Sup. Ct. Rep. 542; *Whitten v. Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; 1 Bishop, Crim. Proc. § 821; Wharton, Crim. Pl. & Pr. 9th ed. p. 480; 9 Enc. Pl. & Pr. p. 632; *Re Lewis*, 124 Mich. 199, 82 N. W. 816; *Taylor v. Judge*, McGrath's Mich. Mand. Cas. 270; *People v. Taylor*, 117 Mich. 583, 76 N. W. 158; *People v. Thompson*, 108 Mich. 583, 66 N. W. 478.

NOTE.—As to what constitutes former jeopardy, see also, in this series, *Com. v. Fitzpatrick* (Pa.) 1 L. R. A. 451, and *note*; *State ex rel. Beedle v. Schoonover* (Ind.) 21 L. R. A. 767; *State ex rel. Duensing v. Roby* (Ind.) 33 L. R. A. 213; *State v. Richardson* (S. C.) 35 L. R. A. 238; *Cooper v. Com.* (Ky.) 45 L. R. A. 57 L. R. A.

It was within the power of the trial court to discharge the jury in this case before verdict, without the defendant's consent, on the ground that, from the facts and circumstances as they appeared, there existed a legal necessity for such act.

Northville v. Westfall, 75 Mich. 603, 42 N. W. 1068.

The common-law principle of a legal jeopardy prevails in Michigan.

People v. Harding, 53 Mich. 481, 19 N. W. 155; *Northville v. Westfall*, 75 Mich. 603, 42 N. W. 1068.

The law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

United States v. Perez, 9 Wheat. 579, 6 L. ed. 165; *People v. Harding*, 53 Mich. 481, 19 N. W. 155; *United States v. Morris*, 1 Curt. C. C. 23, Fed. Cas. No. 15,815; *Simmons v. United States*, 142 U. S. 148, 35 L. ed. 968, 12 Sup. Ct. Rep. 171; *Thompson v. United States*, 155 U. S. 271, 39 L. ed. 146, 15 Sup. Ct. Rep. 73; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; *Gardes v. United States*, 30 C. C. A. 596, 58 U. S. App. 219, 87 Fed. 172; *People v. Jones*, 48 Mich. 554, 12 N. W. 848; *People v. Taylor*, 117 Mich. 583, 76 N. W. 158; *People v. White*, 68 Mich. 650, 37 N. W. 34.

If misconduct on the part of the jury, or members thereof, is discovered before the verdict, it is proper to discharge the jury on that account.

17 Am. & Eng. Enc. Law, 2d ed. p. 1254; *Simmons v. United States*, 142 U. S. 148, 35 L. ed. 968, 12 Sup. Ct. Rep. 171; *Tervin v. State*, 37 Fla. 396, 20 So. 551; *Grable v. State*, 2 G. Greene, 559; *State v. Jefferson*, 66 N. C. 309; *State v. Wiseman*, 68 N. C. 203; *Com. v. McCormick*, 130 Mass. 61, 39 Am. Rep. 423; *Com. v. Cody*, 165 Mass. 133, 42 N. E. 575; *People v. Goodwin*, 18 Johns. 188, 9 Am. Dec. 203; *United States v. Coolidge*, 2 Gall. 364, Fed. Cas. No. 14,858; *Shepherd v. People*, 25 N. Y. 406; *State v. Emery*, 59 Vt. 84, 7 Atl. 129; *State v. Madoil*, 12 Fla. 151; *State v. Allen*, 46

216; *State v. Hager* (Kan.) 48 L. R. A. 254; and *State v. Rook* (Kan.) 49 L. R. A. 186.

As to putting a person twice in jeopardy by imposing heavier penalties in case of habitual criminals, see cases in *note* to *Re Miller* (Mich.) 34 L. R. A. on page 400.

Conn. 531; *State v. Sherbourne*, Dudley (Ga.) 28; *Hilbert v. Com.* 21 Ky. L. Rep. 537, 51 S. W. 817; *State v. Washington*, 89 N. C. 535, 45 Am. Rep. 700; *State v. Bell*, 81 N. C. 591.

The discharge of a jury in a capital or other case after a trial has commenced cannot be pleaded as a matter of *autrefois acquit*, being a matter of judicial discretion.

United States v. Perez, 9 Wheat. 579, 6 L. ed. 165; *State v. Woodruff*, 2 Day, 504, 2 Am. Dec. 122; *Com. v. Olds*, 5 Litt. (Ky.) 137; *Com. v. Purchase*, 2 Pick. 521, 13 Am. Dec. 452; *People v. Goodwin*, 18 Johns. 187, 9 Am. Dec. 203.

The question of what is legal necessity is for the trial court.

People v. Harding, 53 Mich. 481, 19 N. W. 155; *People v. Reagle*, 60 Barb. 527; *United States v. Morris*, 1 Curt. C. C. 23, Fed. Cas. No. 15,815; Proffatt, Trial by Jury, ¶ 490; 1 Am. L. Reg. N. S. p. 524; *Winsor v. Queen*, L. R. 1 Q. B. 395; 17 Am. & Eng. Enc. Law, 2d ed. pp. 1252, 1259; *State v. Allen*, 59 Kan. 758, 54 Pac. 1060.

Moore, J., delivered the opinion of the court:

The petitioner is now detained by the sheriff of the county of Wayne, pending an indictment charging him with the murder of Valmore C. Nichols. The petition filed in this cause for his discharge shows that said charge is still pending and undetermined in the recorder's court of the city of Detroit. Petitioner claims he has once been in jeopardy, within the meaning of the Constitution of the state and of the United States, and cannot again be tried, but is entitled to his discharge.

After the jury was obtained and a portion of the witnesses for the People were sworn, information came to the trial judge in relation to some of the jurors and the officers having charge of the jury, which led him to make an investigation. In his return to the writ of certiorari the trial judge returned that this investigation was made by him with no one present except the court stenographer and the person he was then examining. "The investigation and inquiries so made are supplemented by my observation of the conduct of juror Henry G. Poupard in open court in his seat in the jury box during the progress of this trial, the flagrancy of which led me to make a statement to him in the presence of all the jurors herein in the court room upon the adjournment of court at noon upon Tuesday, the 12th day of November, 1901. The said investigation and inquiries were made for the purpose of determining whether or not the jurors herein, or any of them, were, when impaneled herein, unbiased and unprejudiced jurors, and otherwise qualified to sit herein; and also for the purpose of determining whether or not, since the impaneling of the jurors herein, the said jurors or any of them, have, by their conduct or statements, so conducted themselves as to interfere with the due and orderly administra-

tion of justice to that extent where the rights of the people or the defendant herein were imperiled or endangered. The further purpose of such investigation and inquiries was to ascertain whether or not the officers, or any of them, in charge of the jurors, herein, had been guilty of any misconduct, and, if so, whether such misconduct would, in the event of a conviction herein, be such as to nullify the proceedings had. From such investigation, inquiries, and from the personal observation of the court, I do specifically find and determine the facts to be: That juror Henry G. Poupard, upon his *voir dire* examination herein, purposely and wilfully concealed a material fact when asked about it. Upon his *voir dire* examination said juror, Henry G. Poupard, stated that he did not know any member of the family of this defendant, other than Mr. Simon Ascher. His voluntary statement to me under oath upon Thursday, the 14th day of November, 1901, is that while engaged as a saloon keeper in the city of Detroit he had business dealings with Louis Ascher, the brother of said defendant, and that said dealings covered a considerable period of time, and that he now is a debtor of the said Louis Ascher in a small sum of money as the result of said dealings. In the light of the subsequent conduct and statements made by the said juror, Henry G. Poupard, during the progress of this trial, as ascertained by me from the said investigation and inquiries, and from personal observation of him, I am led to the conclusion and do conclusively find, that at the time he was impaneled herein he was not an impartial and unbiased juror, and I do conclusively find that, in order to be accepted as a juror herein, he fraudulently and wilfully concealed from the court and counsel his bias and prejudice, which so existed both at the time and before he was sworn and impaneled herein as a juror. I further find and determine that, from the inception of this trial, the said juror, Henry G. Poupard, has frequently, by his statements and by his manner in making such statements, expressed to his colleagues disbelief in the testimony given by the witnesses herein; that he has expressed his belief in the innocence of the said defendant to his fellow jurors; that he has said, in the presence of some of his fellow jurors, that the officials were persecuting the defendant herein, and that the police officers in this case were endeavoring to procure a conviction of defendant herein, whether guilty or innocent; that he has repeatedly endeavored to influence some of his colleagues by criticising, ridiculing, and belittling the testimony of the witnesses sworn herein. I further specifically find and determine that upon the night of Saturday, the 9th day of November, 1901, at the Hotel Normandie, in this city, the said Henry G. Poupard was guilty of gross misconduct in purchasing and furnishing to some of his fellow jurors herein an excessive quantity of intoxicating liquor, and in then and there procuring the intoxication of Patrolman Daniel O'Keefe, who was then

in charge of the said jurors. I further specifically find and determine that upon the night of Saturday, the 9th day of November, 1901, at said Hotel Normandie, the said juror, Henry G. Poupard, did hold communications with Charles Lewis and Edward W. Harmeyer, who were not jurors herein, without receiving permission from the court, and that such communications were had in the presence of no officers in charge of the jurors herein. I find and determine that at the inception of this case, and before the taking of testimony had begun, the said juror, Henry G. Poupard, was biased and prejudiced against the people, and in favor of the defendant herein, to such an extent as to disqualify him serving as a juror herein; that his conduct and statements following the taking of testimony grew out of the bias so held by him; and that he has made a studied and persistent effort to create a like bias in the minds of the other jurors herein. I find and determine that juror John E. Sauer, throughout this trial, and from its inception, has exhibited a strong and studied bias and prejudice; that at no time since he was impaneled herein has he been an impartial juror. I further find and determine that he has studiously shown his bias and prejudice for the purpose of influencing other jurors herein, and that he has ridiculed and belittled the testimony of witnesses sworn herein in the presence of his fellow jurors. I further find and determine that for the purpose of discrediting the testimony of one of the witnesses herein the said John E. Sauer willfully misstated the reasons for the reversal of this case by the supreme court of this state. I further conclusively find and determine that upon the night of Saturday, the 9th day of November, 1901, at the Hotel Normandie, the said John E. Sauer was guilty of gross misconduct in being a party toward the procurement of the intoxication of Patrolman Daniel O'Keefe, and that his misconduct in that regard was of such a character as would, in the event of the conviction of the defendant herein, nullify the proceedings here had and require a new trial of the issue herein involved. I further find and determine that upon the night of Saturday, the 9th day of November, 1901, while in charge alone of the jurors herein at the Hotel Normandie, in this city, Patrolman Daniel O'Keefe became and was intoxicated, and that his intoxication incapacitated him from discharging the duty then and there devolving upon him, and that by reason of such intoxication unauthorized communication was had by juror Henry G. Poupard with Charles Lewis and Edward W. Harmeyer, they not being jurors herein, and that there was then and there opportunity given the jurors herein for other unauthorized and improper communications with persons with whom communication was then and there improper. I further find and determine that in my opinion the misconduct of the said officer was of such a character that, in the event of a conviction of the defendant herein, the facts being dis-

closed to the court, a new trial of this cause would be required. From the foregoing findings of fact I have concluded that it is within my power, and that it is my imperative duty, to discharge the jury herein impaneled from further consideration of this case, and formally do declare this trial to be a mistrial."

The findings of fact were duly entered upon the court journal. In the presence of counsel for the respondent and the respondent himself, the court then made an order in which the findings of fact were recited, and that the trial was a mistrial, and discharging the jury from further consideration of the case, and remanding the respondent to the custody of the sheriff pending a new trial. Counsel for the respondent moved the court for his discharge, which motion was overruled, and this proceeding is brought.

It is claimed the question is one of greater importance than the personal rights of the respondent, and involves the integrity of the right of trial by jury. It is said that no person shall be placed twice in jeopardy for the same offense. Nor shall he be deprived of life, liberty, or property without due process of law. U. S. Const. Amend. art. 5. No one will question this right of a person accused of crime. The trouble arises in determining when one is placed twice in jeopardy.

It is claimed the proceedings heretofore had in this case show the respondent has been placed in jeopardy, and that he should now be discharged, citing Cooley, Const. Lim. 327; *People v. Harding*, 53 Mich. 485, 19 N. W. 155, 53 Mich. 48, 51 Am. Rep. 95, 18 N. W. 555; *People v. Taylor*, 117 Mich. 585, 76 N. W. 158. The courts of the English-speaking people have for centuries been exceedingly jealous of the right of persons accused of crime to a fair and impartial trial. This has been provided for, not only by the action of the courts, but, in this country, by making provisions in the written constitutions intended to bring about this result. Section 29, art. 6, of the Constitution of Michigan provides: "No person after acquittal upon the merits, shall be tried for the same offense." While this language differs from that used in the United States Constitution, the law of jeopardy is doubtless the same under both provisions. *Northville v. Westfall*, 75 Mich. 603, 42 N. W. 1068.

At one time, the doctrine of placing the accused in jeopardy but once was invoked as a bar to a second trial where a jury had disagreed, or a member of the panel had been taken so ill the trial could not proceed, or had died, but such a claim would no longer be made. In *People v. Harding*, 53 Mich. 481, 19 N. W. 155, where the jury had disagreed, it was contended the respondent had been placed in jeopardy, and, as the record did not show it had been judicially determined the jury was unable to agree, nor any necessity for their discharge, that the respondent could not again be put upon trial. In disposing of the case Justice

Cooley said: "This case is therefore to be determined on common-law rules; and the respondent relies upon *People v. Jones*, 48 Mich. 554, 12 N. W. 848, as ruling it. That case is not very fully reported. The record showed that the respondent was put on trial before a jury duly impaneled and sworn; that the prosecution went into the proofs and rested; that thereupon the jury was discharged, and a new information filed against the respondent for the same offense, upon which he was tried and convicted. The proceedings on the first information were pleaded as a bar to the second, and this court sustained the bar. No reason appeared for discharging the jury, and the discharge stood upon the record as an act of the court, not shown to have been assented to or compelled by any necessity. On each of the trials appearing in the record before us, the jury reported to the court an inability to agree, and were immediately discharged by its order. It is conceded on behalf of respondent that, when it is found impossible for the jury to agree, the judge may lawfully discharge them for that reason, and the discharge is not an acquittal; but it is contended that the record must show that the judge found that a necessity for the discharge existed; and upon the validity of this contention the case must turn. There is no doubt the report of the jury that they cannot agree is the proper evidence upon which the judge should act in determining upon the impossibility of their reaching a verdict. But he may not be satisfied with their first report, and has a right to keep them together for further consultation as long as, in his opinion, there is reasonable ground for believing they may finally agree. The whole subject, however, is referred to his judgment; and when he decides, no one can question his conclusion. And if in this case he had directed an entry upon the journal of the court that, being satisfied the jury could not agree, he directed their discharge, no question could be made of the right to proceed to a new trial. But while it would be very proper to make such an entry, it has never been the practice in this state to do so. The fact that the judge, on receiving the report of the jury of their inability to agree, directs their discharge, is understood to be an assent on his part to their own conclusion, and a determination by him that the necessity for their discharge without a verdict has arisen. And we think this a proper view to take of his action. Any other would be technical, and tend in many cases to defeat justice." In *People v. Taylor*, 117 Mich. 583, 76 N. W. 158, the respondent having been once acquitted, it was held he could not be put upon trial again, but in disposing of the case Justice Hooker used the following language: "This case should be distinguished from a class of cases where, after a jury is impaneled and charged with the defendant and his case, some intervening necessity compels the discharge of the jury, *e. g.*, the death or sickness of a juror, the ending of the term, a disagreement, etc., and possibly

a continuance, granted upon the motion of the defendant. The case of *Stewart v. State*, 15 Ohio St. 155, is such a case. After the jury was sworn it was discovered that one of the jurors had been on the grand jury which found the indictment in the case. The defendant's counsel objected to proceeding to trial with the jury thus impaneled, but declined to waive any of the defendant's rights. The jury was discharged, and a conviction by another jury was sustained. Such a case was *People v. Gardner*, 62 Mich. 312, 29 N. W. 19. There a question arose over the regularity of the jury, and a new one was called upon the defendant's objection to the first. It was said by Mr. Justice Champlin that 'he has no right to complain that his objection was sustained, and the discharge of the jury with his consent cannot be set up as an acquittal.'" See *People v. White*, 68 Mich. 648, 37 N. W. 34.

These cases clearly recognize the doctrine that occasions may arise after the trial is entered upon, making it necessary to stop the trial and discharge the jury, without it necessarily following that respondent has been so placed in jeopardy that he cannot again be put upon trial. While the precise question involved in this case has not been before this court, it is not a new question. In *United States v. Morris*, 1 Curt. C. C. 23, Fed. Cas. No. 15,815, after the trial was entered upon, a jury was discharged under circumstances very similar to the case at bar. In holding that the respondent might again be put upon trial the court said: "The rule of the common law, as shown by the authorities cited by the defendant's counsel, is that neither party has a right of challenge, after the juror is sworn, for cause then existing. But it by no means follows that it is not in the power of the court, at the suggestion of one of the parties, or upon its own motion, to interpose and withdraw from the panel a juror utterly unfit, in the apprehension of every honest man, to remain there. Suppose a prisoner on trial for his life should inform the court that a juror had been bribed to convict him,—that the fact was unknown to him when the juror was sworn, and that he had just obtained plenary evidence of it, which he was ready to lay before the court. Is the court compelled to go on with the trial? Suppose the judge, during the trial, obtains by accident personal knowledge that one of the jurors is determined to acquit or convict without any regard to the law or the evidence. Is he bound to hold his peace? In my judgment such a doctrine would be as wide of the common law as it would be of common sense and common honesty. The truth is that this rule, like a great many other rules, is for the orderly conduct of business. There must be some prescribed order for the parties to make their challenges, as well as to do almost everything else in the course of a trial. As matter of right, neither party can deviate from this order. And it is the duty of the court to enforce these rules, which are for the gen-

eral good, even if they occasion inconvenience and loss in particular cases. But there goes along with all of them the great principle that, being designed to promote the ends of justice, they shall not be used utterly to subvert and defeat it; being intended as a fence against disorder, they shall not be turned into a snare. They do not tie the hands of the court, so that when, in the sound discretion of the court, the public justice plainly requires its interposition, it may not interpose; and it would be as inconsistent with authority as with the great interests of the community to hold the court restrained. A very eminent English judge has treated this rule concerning challenges just as I believe it should be treated. Chief Justice Abbott says: 'I have no doubt that if, from inadvertence or any other cause, the prisoner or his counsel should have omitted to make the challenge at the proper moment, the strictness of the rule which confines him to make the challenge before the officer begins to administer the oath would not be insisted on by the attorney general, or, if insisted on by him, would not be allowed by the court.' [*The Derby Case*, Joy, Confessions, 220.] That is, like other rules of procedure in trials, it is in the power of the court to dispense with it when justice requires. But the interposition of the court may be placed on even higher ground, supported by authority which in this court is decisive. In *United States v. Perez*, 9 Wheat. 579, 6 L. ed. 165, the question came before the Supreme Court whether it was in the power of the circuit court to discharge a jury in a capital case and afterwards put the prisoner on trial by another jury. The distinction between capital cases and misdemeanor, under the provision of the Constitution of the United States, cited by the defendant's counsel, is very plain; yet, speaking even of capital cases, the court says: 'We think that in all cases of this nature the law has invested courts of justice with authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances which would render it proper to interfere.' That a court would interfere far more readily in a case of misdemeanor there can be no doubt, and it is so asserted in terms by Story, J., in *United States v. Coolidge*, 2 Gall. 364, Fed. Cas. No. 14,858. In *United States v. Shoemaker*, 2 McLean, 114, Fed. Cas. No. 16,279, and *United States v. Gibert*, 2 Summ. 19, Fed. Cas. No. 15,204, it will be found that Justices Washington, Story, and McLean have all acted in their circuits upon these principles. Now, if the court has such a discretion, and if, as the Supreme Court says, it is to be exercised even in capital cases, where the ends of public justice would otherwise be defeated, what case can be imagined more fit for its interposition than one where the

court finds that a juror is so biased, either against the prisoner or the government, that he is unfit to sit in the cause? The truth is that it is an entire mistake to confound this discretionary authority of the court, to protect one part of the tribunal from corruption or prejudice, with the right of challenge allowed to a party. And it is, at least, equally a mistake to suppose that, in a court of justice, either party can have a vested right to a corrupt or prejudiced juror, who is not fit to sit in judgment in the case. I hazard nothing in saying that no such right is known to the common law." The case of *Simmons v. United States*, 142 U. S. 148, 35 L. ed. 968, 12 Sup. Ct. Rep. 171, was a case very similar to this. The opinion is by Justice Gray, who said: "The general rule of law upon the power of the court to discharge the jury in a criminal case before verdict was laid down by this court more than sixty years ago, in a case presenting the question whether a man charged with a capital crime was entitled to be discharged because the jury, being unable to agree, had been discharged, without his consent, from giving any verdict upon the indictment. The court, speaking by Mr. Justice Story, said: 'We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think that, in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office.' *United States v. Perez*, 9 Wheat. 579, 6 L. ed. 165. A recent decision of the court of Queen's bench, made upon a full review of the English authorities, and affirmed in the exchequer chamber, is to the same effect. *Winsor v. Queen*, L. R. 1 Q. B. 289, 390, 6 Best & S. 143, and 7 Best & S. 490. . . . There can be no condition of things in which the necessity for the exercise of this power is more manifest, in order to prevent the defeat of the ends of public justice, than when it is made to appear to the court that, either by reason of facts existing when the jurors were sworn, but not then dis-

closed or known to the court, or by reason of outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the government and the accused. As was well said by Mr. Justice Curtis in a case very like that now before us: 'It is an entire mistake to confound this discretionary authority of the court to protect one part of the tribunal from corruption or prejudice with the right of challenge allowed to a party. And it is, at least, equally a mistake to suppose that, in a court of justice, either party can have a vested right to a corrupt or prejudiced juror, who is not fit to sit in judgment in the case.' *United States v. Morris*, 1 Curt. C. C. 23, 37, Fed. Cas. No. 15,815. Pending the first trial of the present case, there was brought to the notice of the counsel on both sides, and of the court, evidence on oath tending to show that one of the jurors had sworn falsely on his *voir dire* that he had no acquaintance with the defendant; and it was undisputed that a letter since written and published in the newspapers by the defendant's counsel, commenting upon that evidence, had been read by that juror and by others of the jury. It needs no argument to prove that the judge, upon receiving such information, was fully justified in concluding that such a publication, under the peculiar circumstances attending it, made it impossible for that jury, in considering the case, to act with the independence and freedom on the part of each juror requisite to a fair trial of the issue between the parties. The judge having come to that conclusion, it was clearly within his authority to order the jury to be discharged, and to put the defendant on trial by another jury; and the defendant was not thereby twice put in jeopardy, within the meaning of the 5th Amendment to the Constitution of the United States."

Both of these cases were cited with ap-

proval in *Thompson v. United States*, 155 U. S. 271, 39 L. ed. 146, 15 Sup. Ct. Rep. 73.

In our effort to see that the rights of persons accused of crime are protected, we should not overlook the fact that the people also have interests that should be safeguarded. It is a right of which the accused cannot be deprived to have his case tried by an impartial jury. The people have an equal right to have their case tried by a jury no member of which has obtained a place thereon for the purpose of preventing a righteous verdict. If during the progress of the trial the trial judge learns, or it is satisfactorily made to appear to him, that one or more jurors had obtained places on the jury intending to convict the accused whatever the evidence, can there be any doubt that it is not only his right, but his duty, to say there has been a mistrial? Can there be any doubt of the converse of this proposition? The accused has a right to a trial by a fair and impartial jury, but he has no vested right to a trial by a jury some member of which is not impartial, but who obtained his place thereon for the purpose of acquitting the accused whatever might be the evidence. The trial judge would not be justified in discharging a jury and declaring a mistrial for slight cause, but if the facts exist, as found by the trial judge after a careful investigation made by him, it would be a reflection upon the administration of justice to say the trial must proceed. The conduct of the two jurors and of the court officer indicate a very strong probability that improper influences were at work which might affect the verdict of the jury, and justified the conclusions of the trial judge.

The other questions argued by counsel have been considered, but we do not deem it necessary to discuss them. *The application for the discharge of the respondent is denied.*

Long, J., did not sit. The other Justices concurred.

NEBRASKA SUPREME COURT.

TECUMSEH NATIONAL BANK

v.

CHAMBERLAIN BANKING HOUSE *et al.*,
Appts.

(.....Neb.....)

*1. A bank examiner who takes charge of the assets of a national

*Headnotes by SEDGWICK, C.

NORM.—For a case holding that a bank is not bound by unauthorized statements of cashier made for the purpose of inducing a person to become surety on the bond of a teller, see, in this series, *Lieberman v. First Nat. Bank* (Del.) 48 L. R. A. 514.

As to liability of bank for false statement by cashier as to amount insurance company

bank under the directions of the controller is not the agent for the bank in such negotiation as the bank may be permitted to enter into with a view to the resumption of business.

2. When a defaulting officer of such bank, for the purpose of replenishing the assets of the bank to enable it to resume business, is allowed to furnish collateral securities for his indorsements upon paper previously sold by him to the bank,

has on deposit, see *Hindman v. First Nat. Bank* (C. C. App. 6th C.) 48 L. R. A. 210, *ante*, 108.

As to liability of directors for false statements in report to person buying stock in reliance thereon, see *Gerner v. Mosher* (Neb.) 46 L. R. A. 244.

representations made by such examiner as to the liabilities of such officer to the bank and the value and condition of the securities already furnished by him are not binding upon the bank; and one who furnishes collateral securities to such defaulting officer to be so used by him cannot rely upon such representations of the examiner as a defense in an action by the bank to foreclose its lien upon such securities.

3. Such bank, being represented by a majority of its board of directors, who are not in default, may, with the consent of the comptroller, accept such collateral securities from such defaulting officer; and in obtaining securities from a third person, to be used by him for that purpose, such defaulting officer will not be regarded as the agent of the bank. His representations as to his liability to the bank, and the value and condition of the securities already furnished by him, will not be binding upon the bank, so as to enable the person furnishing such securities at his request, with knowledge of the purpose for which he intends to use the same, to rely upon such representations as a defense in a subsequent action by the bank to foreclose its lien upon such securities.

4. The contract of a defaulting bank officer to furnish collateral security for his indorsement upon paper previously sold to the bank by him so as to replenish the assets of the bank and enable it to resume business is not illegal, and after such securities have been furnished, and the bank has resumed business, the person furnishing such securities at the request of such defaulting officer with knowledge of the use to be made thereof by him cannot be heard to say that there was no consideration for furnishing the same.

5. When a principal is represented by a duly authorized agent, and some third person who may also be benefited by the transaction assumes, without the knowledge or consent of the principal or his agent, to make representations and statements to promote the transaction, the principal will not be bound thereby, although he accepts the benefits of the transaction negotiated by his agent.

(December 4, 1901.)

APPEAL by defendants from a judgment of the District Court for Johnson County in favor of plaintiff in an action brought to foreclose a lien on assigned bank stock. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. J. W. Deweese, M. B. C. True, Isham Reavis, and Robert Ryan, for appellants:

Whether or not the parties were acting as authorized agents of the bank is immaterial, in view of the fact that now the bank seeks to avail itself of the fruits of these misrepresentations. Under such circumstances, it ratifies the acts of its hitherto unauthorized agents, and they become as binding as though the authority had antecedently existed.

Johnston v. Milwaukee & W. Invest. Co. 49 Neb. 68, 68 N. W. 383; *Hughes v. Insurance Co. of N. A.* 40 Neb. 627, 59 N. W. 112; 57 L. R. A.

Farmers' & M. Bank v. Farmers' & M. Nat. Bank, 49 Neb. 379, 68 N. W. 488; *Martin v. Humphrey*, 58 Neb. 414, 78 N. W. 715.

Griffith as bank examiner was in actual control of the property of the bank. He advised with the directors and stockholders as to the means for putting the bank into operation again, and acted with them in the adjustment of its affairs. All this was within the general scope, if not the strict letter, of his duties,—his duties were to conserve the interests of the bank. The bank has accepted the fruits of his activity, with full knowledge, now, of his efforts, and, by this action, it must be held to have ratified what he did.

Russell & Holmes were, both by law and by subsisting contract, bound to make good their obligations expressed in their indorsements, or to secure them; hence, a promise to extend the time in which to do it could be no consideration for doing it.

Esterly Harvesting Mach. Co. v. Pringle, 41 Neb. 265, 59 N. W. 804; *Baldwin Invest. Co. v. Bailey*, 45 Neb. 580, 63 N. W. 847.

As the delivery of the stock could not be a consideration for the promise to extend, so the promise to extend could not be a consideration for the delivery of the stock.

The bank cannot now plead the promise to extend as consideration for the delivery of the stock, even if a promise to extend was actually given.

There was no power on the part of the bank to agree to an extension of time of payment of the notes when the stock was assigned by Mrs. Chamberlain. There was no attempt to make such extension; and, as the collateral was pledged, as appellee claims, to secure notes already in existence according to their terms, there was no consideration for the assignment of the certificate of stock.

Kansas Mfg. Co. v. Gandy, 11 Neb. 448, 38 Am. Rep. 370, 9 N. W. 569; *Wearse v. Peirce*, 24 Pick. 141; *Conwell v. Clifford*, 45 Ind. 392; *Smith v. Newton*, 38 Ill. 230; *Waterbury v. Andrews*, 67 Mich. 281, 34 N. W. 575; *Kennedy v. Goodman*, 14 Neb. 585, 16 N. W. 834; *Barnes v. Van Keuren*, 31 Neb. 165, 47 N. W. 848; *Steen v. Stretch*, 50 Neb. 572, 70 N. W. 48; *Starr v. Earle*, 43 Ind. 478; *Jones v. Ritter*, 32 Tex. 717; *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 289, 45 Am. Rep. 204; *Green v. Thornton*, 49 N. C. (4 Jones L.) 230; *Ware v. Adams*, 24 Me. 177; *Mecorney v. Stanley*, 8 Cush. 85; *Shupe v. Galbraith*, 32 Pa. 10.

The indebtedness of Russell & Holmes to the bank was contracted while the one was president and the other a director of the bank, the indebtedness being largely in excess of the amount allowed by law, and the contracting of which was illegal and forbidden by the law governing the bank. These facts tainted with illegality the transaction by which the stock of Mrs. Chamberlain was pledged as security, even if there had been no misrepresentation of facts, or fraud perpetrated directly upon her.

Workingmen's Bkg. Co. v. Rautenberg, 103 Ill. 460, 42 Am. Rep. 26; *Denison v.*

Gibson, 24 Mich. 194; *Rawdon v. Blatchford*, 1 Sandf. Ch. 344.

On petition for rehearing.

Mrs. Chamberlain could only be estopped by facts within her knowledge.

Nash v. Baker, 40 Neb. 294, 58 N. W. 706.

A consideration sufficient to support a contract must be either a benefit accruing to the promisor, or a loss or a disadvantage sustained by the promisee.

Chitty, Contr. 28; *Tompkins v. Philips*, 12 Ga. 52; *Powell v. Brown*, 3 Johns. 104; *Molyneux v. Collier*, 17 Ga. 46; *Judd v. Martin*, 97 Ind. 173; *Story*, Contr. § 548; *Overstreet v. Philips*, 1 Litt. (Ky.) 120; *Carr v. Card*, 34 Mo. 513; *Day v. Gardner*, 42 N. J. Eq. 199, 7 Atl. 365; *Dorwin v. Smith*, 35 Vt. 69; *Gordon v. Dalby*, 30 Iowa, 228; *Clark v. Sigourney*, 17 Conn. 518; *Lane v. Scott*, 57 Tex. 372; *Hughes v. Sprague*, 4 Ill. App. 301; *Ford v. Crenshaw*, 1 Litt. (Ky.) 68; *Conover v. Stillwell*, 34 N. J. L. 54.

The detriment to the promisee which will suffice as a consideration must be a detriment on entering into the contract,—not from the breach of it.

Ridgway v. Grace, 2 Misc. 293, 21 N. Y. Supp. 934.

Plaintiff was bound by the representations of Mr. Griffith, even though he was bank examiner.

Mr. S. P. Davidson, for appellee:

The agreement of the plaintiff bank to give Russell & Holmes a reasonable time in which to collect the paper discounted for them by plaintiff is a sufficient consideration for the assignment and transfer to it by defendant Edith Russell Chamberlain of the certificate of stock in defendant corporation.

Calkins v. Chandler, 36 Mich. 322, 24 Am. Rep. 593; *Sidwell v. Evans*, 1 Penr. & W. 383, 21 Am. Dec. 387; *King v. Upton*, 4 Me. 387, 16 Am. Rep. 266; *Elting v. Vanderlyn*, 4 Johns. 237; *Rogers v. Empkie Hardware Co.* 24 Neb. 653, 39 N. W. 844; *Mathews v. Seaver*, 34 Neb. 595, 52 N. W. 283.

The extension of the time of payment of her husband's past-due indebtedness is a sufficient consideration to support a wife's contract as his surety for such debt.

Smith v. Spaulding, 40 Neb. 339, 58 N. W. 952; *Griffin v. Chase*, 36 Neb. 328, 54 N. W. 572; *Ede v. Johnson*, 15 Cal. 53; *Herman*, Chat. Mortg. §§8, 36; *Manns v. Brookville Nat. Bank*, 73 Ind. 243; *Colebrook*, Collateral Securities, § 304; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448; *Stuht v. Sweezy*, 48 Neb. 767, 67 N. W. 748; *Chaffee v. Atlas Lumber Co.* 43 Neb. 225, 61 N. W. 637.

A guaranty of a third person for the payment of a debt of a director of a bank in excess of the sum allowed by law is not illegal and void.

Morawetz, Priv. Corp. § 464; *Ang. & A. Priv. Corp.* § 264; *Parish v. Wheeler*, 22 N. Y. 494; *Smith v. Bank of the State*, 18 Ind. 327; *Bank of Middlebury v. Bingham*, 33 Vt. 621; *Elder v. First Nat. Bank*, 12 Kan. 57 L. R. A.

238; *Richmond Bank v. Robinson*, 42 Me. 589; *O'Hare v. Second Nat. Bank*, 77 Pa. 96; *Littlewort v. Davis*, 50 Miss. 408; *Stephens v. Monongahela Nat. Bank*, 88 Pa. 157; *First Nat. Bank v. Garlinghouse*, 22 Ohio St. 502, 10 Am. Rep. 751; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648; *Whitney v. Wyman*, 101 U. S. 397, 25 L. ed. 1052; *Bates v. Bank of Alabama*, 2 Ala. 462; *Bond v. Central Bank*, 2 Ga. 92.

A corporation is not chargeable with the knowledge, nor bound by the acts, of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction.

Koehler v. Dodge, 31 Neb. 329, 47 N. W. 913; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123, 58 N. W. 734; *Barnes v. Trenton Gaslight Co.* 27 N. J. Eq. 33; *First Nat. Bank v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262; *Custer v. Tompkins County Bank*, 9 Pa. 27; *Winchester v. Baltimore & S. R. Co.* 4 Md. 231; *Wickersham v. Chicago Zinc Co.* 18 Kan. 481, 26 Am. Rep. 784; *La Farge F. Ins. Co. v. Bell*, 22 Barb. 54; *Washington Bank v. Lewis*, 22 Pick. 24.

The liability of the guarantor becomes fixed at the time of guaranty of payment, and does not depend upon proceeding against the principal maker. Where the maker is insolvent suit against him is unnecessary to charge even a guarantor of collection.

Colebrooke, Collateral Securities, § 261; *Bloom v. Warder*, 13 Neb. 476, 14 N. W. 395.

Sedgwick, C., filed the following opinion:

On the 16th day of October, 1891, the comptroller of the currency, through the bank examiner, closed the doors of the Tecumseh National Bank, and took possession of its assets. The embarrassment of the bank was caused by excessive loans to Russell & Holmes, and by discounting a large amount of commercial paper upon which they were indorsers. The firm of Russell & Holmes was composed of James D. Russell, who was a director in the bank, and Charles A. Holmes, who was also a director and was president of the bank. They also held a majority of the stock of the bank. After the examiner had taken charge of the bank, an effort was made to reopen the bank for business, and the comptroller proposed to allow such action to be taken if Russell & Holmes would pay in cash their direct indebtedness to the bank, so as to reduce it to \$5,000, the limit allowed by law; and would also satisfactorily secure their indirect liability as indorsers. Russell & Holmes appear to have still retained the confidence of the people to a considerable extent, and succeeded in obtaining accommodation notes from the farmers and others of their business acquaintances sufficient to enable them to pay to the examiner the amount required to be paid upon their direct indebtedness; and also put up various collateral securities

for their liability as indorsers, and among such collaterals the banking stock in question in this suit, which is 72 shares of \$100 each of the capital stock of the Chamberlain Banking House of Tecumseh. Charles M. Chamberlain was at the time cashier of the Chamberlain Banking House, defendant, and the defendant Edith R. Chamberlain is his wife. She is also the daughter of James D. Russell, of the firm of Russell & Holmes. Soon after the bank was closed by the examiner, she was induced to and did assign this stock to the Tecumseh National Bank, and delivered it to her father, who deposited it with the bank as collateral to the indebtedness and liability of Russell & Holmes and the individual members of that firm. The securities being approved by the comptroller, the bank resumed business, but the liabilities of Russell & Holmes to the bank have not been satisfied. This action was brought in the district court of Johnson county to foreclose the lien of the plaintiff bank upon said bank stock so assigned. Upon the trial of the cause in the district court there were findings and a decree in favor of the plaintiff bank, and the defendants Edith R. Chamberlain and the Chamberlain Banking House have brought the case to this court by appeal.

1. It is contended by the plaintiffs in error that the transfer of the stock is voidable, because Edith R. Chamberlain was induced to assign the same by the misrepresentations of the officers and directors of the bank and the national bank examiner. The trial court made the following finding of fact: "To obtain the assignment and transfer of said certificate by his daughter, James D. Russell said to her that everything had been straightened up at the bank; that she would not lose the stock; that they simply wanted it for a short time in order to enable Mr. Griffith to make a better showing to the comptroller at Washington; that the paper it was to secure had been passed on by the directors, and said to be good, but that, in any event, in case the paper was not good, there was other collateral,—\$30,000 of his and Mr. Holmes's life insurance; also stock in the banks at Sterling, Elk Creek, and Johnson, and stock in the stone quarry company,—so hers would not be touched. Similar statements were made by the examiner to her husband, to her brother-in-law, and in the presence of the witness Mr. Rood, each of whom reported to her what the examiner had said. Edith Russell Chamberlain relied on what her father said to her and on what her husband, her brother-in-law, and Mr. Rood reported to her was said by Mr. Griffith, the examiner, and was thereby induced to make said assignment and transfer of said stock." And the following conclusions of law: "Although James D. Russell was a director of plaintiff bank at the time he made the statements to his daughter, Edith Russell Chamberlain, on which she relied, and which induced her to assign and transfer her said stock, yet he was then acting for himself alone, and not for or on behalf of the plain-

tiff. His statements, however false and fraudulent they may have been, were not the statements of the plaintiff, nor made on its behalf, and were not binding on plaintiff. John M. Griffith, national bank examiner, had no authority to make representations of any kind which could in law bind the plaintiff bank. His powers are defined by the national statutes. Each person dealing with him is bound to know the extent of his authority. His statements to Charles M. Chamberlain, to Clarence K. Chamberlain, and in the presence of Rood, which they reported to defendant Edith Russell Chamberlain, were not binding upon plaintiff bank, were not such as he had power to make, and were not such as, though false, would give defendant a standing in equity to avoid the said transfer of her said stock to plaintiff." It is insisted that this finding of fact is not supported by the evidence, and it is argued that, because Russell's interest would be subverted by the bank's resumption of business, therefore, in the absence of evidence on that point, it cannot be presumed that Russell did not represent his bank interest as well as his individual interest. But we think that this position is not well taken. The evidence shows that Russell had borrowed a large amount of money from the bank, and incurred large obligations to the bank by his indorsements, with Holmes, of commercial paper transferred to the bank. It is true that Russell and Holmes were directors of the bank, and as such officers had, with the other three directors, control of the affairs of the bank; but they also had personal individual business with the bank, and in their personal transactions with the bank they could not represent the bank, nor participate in such representation. When they incurred obligations to the bank, or furnished further securities for existing obligations, they represented only themselves. Someone else acted for the bank. All of the difficulties of the bank arose out of the inability of Russell & Holmes to square themselves with the bank. This they undertook to do. They did not have sufficient funds of their own. It was necessary to call upon their friends. Mr. Russell, after he had exhausted all other resources, went to his daughter. He asked her to help him, not the bank. She was requested to place her stock so that Mr. Russell could use it as he used his own resources; that is, to regain his standing in the bank, and continue the bank in business. The circumstance that the assignment was direct to the bank, instead of to Russell and by him to the bank, has no significance. She trusted her father with her bank stock, to be used by him as his own, and for his own purposes. Mrs. Chamberlain and her advisers knew that Russell was acting for himself in procuring her stock. No doubt, in obtaining this security, he served his "bank interest" as well as his "individual interest;" but he represented his individual interest, and the bank in this transaction was represented by the other three directors, and not by Russell, as the dealing was directly between

Russell and the bank. His position in this transaction is not left in doubt by the evidence. It is, of course, true that, after the bank examiner had closed the doors of the bank and taken possession of its assets, the officers of the bank could not transact its ordinary business, and any attempt by them to do so without the consent of the comptroller would be nugatory; but, on the other hand, it is undoubtedly true that under the law the comptroller was clothed with discretionary power to allow the bank to resume business if proper provisions were made to restore its assets, and enable it to comply with the requirements of the national banking law. When the bank, through its three disinterested directors, undertook to do this, the comptroller, through the examiner, consented, and informed the parties that, if they could make such arrangements as to restore the financial condition of the bank, the examiner would return the control of the assets to the bank officers. When the officers of the bank undertook, with that understanding, to make such arrangements, it was understood by all parties that any contracts that they attempted to enter into to that end were subject to the condition that they should succeed in restoring the assets of the bank, and be thereby enabled to receive full control of the affairs and business of the bank from the comptroller; that is, the bank examiner did not undertake to conduct the negotiations, but allowed the parties to go ahead, and make their own contracts, bearing in mind that they would be of no force and could not be carried out until the assets of the bank were restored. The contracts and arrangements were thereupon made between the parties upon that condition. It was outside of the duties of the examiner, and outside of the authority conferred upon him, to negotiate for the replenishing of the assets of the bank. From that time, in regard to these negotiations, the comptroller, through the examiner, acted rather as a disinterested arbitrator between the officers of the bank, who were desirous of opening its doors, and the creditors of the bank, for the protection of whose interests he had intervened, than as the agent of either party. Any information that he might give to either party interested would be entirely voluntary on his part. When the friends of Mrs. Chamberlain went to the examiner for information, they did so at their own risk, and cannot hold the bank responsible for his statements. It is very clear that Mr. Griffith was not the agent of the bank in the transaction in question. "He had no authority, as such [examiner], to act for the bank in any manner, and could not bind it by any act done or undertaken in its behalf. He represented a department of the government which supervises and controls the banks as to whether in certain cases they shall do business at all or not; but it does none for them, other than to wind up their affairs for their creditors. The examiner makes report to that department to furnish a basis for action with reference to the continuance

of the banks in business. His reports might be favorable or otherwise, as any advice he should give might be followed. He doubtless acted for the best interests of the creditors of the bank in giving this advice, but what was done in following it had no more effect than as if it had been done without it." *Witters v. Soules*, 32 Fed. 764. The appointment of a receiver does not work a dissolution of the corporation. *First Nat. Bank v. National Pahquioque Bank*, 14 Wall. 383, 20 L. ed. 840. The authority of its officers is not destroyed, but partially suspended; and the result of the proceedings may be that the corporation is dissolved, or its powers fully restored, and this will depend upon conditions as they may be developed, or may be brought about, by prompt action on the part of those interested in the bank. In the meantime the examiner, from the time he takes possession, has certain designated powers and duties. He must take possession of the books, records, and assets of every description of the association, and may collect the debts due and claims belonging to it, but he is given no general powers to act for the corporation. When he stated to Mr. Chamberlain's advisers that he wanted the liabilities of Russell & Holmes provided for, and that arrangements were being made to induce the comptroller to authorize the bank to resume business, and that he wanted to make as good showing to the comptroller to that end as possible, he was acting in the line of his duty, and no one could possibly be deceived in regard to his position in the matter. And when he further stated to Mrs. Chamberlain's advisers that everything had been straightened up at the bank, that she would not lose the stock, that the paper it was to secure had been passed upon by the directors and said to be good, and other representations in regard to the condition and value of the securities that had been turned over to the bank by Russell & Holmes, Mrs. Chamberlain's advisers must have known the capacity in which he was acting, and that he had no authority to bind the bank by statements of that character, and had no knowledge in regard to the condition and value of the securities, except that they had been passed upon by the directors; and they were bound to know, and must certainly, under the circumstances, in fact have known, that Mrs. Chamberlain, if she furnished these securities, was furnishing them to Mr. Russell, that her contract was entirely with him, and that the transactions were had for the purpose of enabling Russell & Holmes to so far make good their default with the bank as to make it proper and safe on the part of the comptroller to authorize the bank to resume business.

2. The suggestion that the contract of Russell & Holmes with the bank was illegal, and therefore the guaranty of Mrs. Chamberlain void, is without merit. The authority of *Workington's Bkg. Co. v. Rautenberg*, 103 Ill. 460, 42 Am. Rep. 26, has been questioned, and, if it is to be regarded as a correct exposition of the law, it is not

in point here. In that case, after an officer of the bank had already borrowed beyond the legal limit, the bank made him a further loan. The surety on this loan was held not liable. The court held that the note given by him to the bank for the further loan was illegal and void, and any guaranty of its payment by a third person equally void; but the rule, so far as we are aware, has never been extended to a case like the one at bar. In the case of *Denison v. Gibson*, 24 Mich. 194, Gibson sold his bank stock to Mrs. Denison's husband and others, and Mrs. Denison pledged her separate property as security upon the deferred payments to Gibson, and it was held "that the agreement of the surety is not binding where the bargain between the primary parties, out of which it springs, is contaminated by positive illegalities." No such condition exists in this case. It was not illegal for Russell & Holmes to restore to the bank what they had unlawfully drawn therefrom, and their agreement with the bank which involved the use of Mrs. Chamberlain's securities did not contemplate that they should withdraw funds from the bank, but rather that they should restore funds already borrowed. No doubt it was in the interest of every stockholder, including Russell & Holmes, to have the liabilities of Russell & Holmes to the bank provided for; and it was also in the line of the examiner's duties to encourage this. The suggestion that these securities were given the bank to secure an existing indebtedness, and that the contract containing the original indebtedness was illegal, is also without foundation. The evidence does not show that the liabilities of Russell & Holmes were incurred in pursuance of an illegal contract between themselves and the bank, but rather that it was created by the misconduct of Russell & Holmes, and without the consent of the bank.

3. It is argued that, as "Russell & Holmes were both by law and by subsisting contract bound to make good their obligations expressed by their indorsement, or to secure them, hence the promise to extend the time to do so could be no consideration for doing it." But the agreement was that Russell & Holmes should give further securities for their liability to the bank, and upon doing so their relations with the bank should be restored, and they receive the benefits that would obviously accrue through such restored relations. They manifestly would derive advantages, under these arrangements, from furnishing additional security. Their agreement to give such security was executed, and the assets of the bank passed from the hands of the comp-

57 L. R. A.

troller, and other changes in the interest of the stockholders and creditors of the bank were made as contemplated in their agreement, and they cannot now be heard to say that there was no consideration for furnishing this security.

4. It is also argued that, if a principal avails himself of the fruits of the unauthorized acts of his agent, he thereby authorizes these acts, and they become binding upon the principal. But this rule of law has no application here. The unauthorized acts relied upon were not the acts of the agent of the bank, nor of anyone who assumed to act for the bank in the transaction in question. As we have already seen, the bank was acting through the three directors not personally interested in the transaction, and not through Russell & Holmes or the bank examiner. If an agent is employed to transact the business of his principal, and in doing so goes beyond his authority, the principal who employs him and who accepts the results of his employment must accept also the obligations assumed by his unauthorized acts. But where a principal is represented by a duly authorized agent, and some third person, who may also be benefited by the transaction, assumes, without the knowledge or consent of the principal, to make representations and statements, the principal will not be bound by such statements. *Spurgin v. Traub*, 65 Ill. 170. In this case the three disinterested directors were the proper parties to represent the bank, and assumed to do so, and acted for the bank in making the arrangements with Russell & Holmes. They made no representation to Mrs. Chamberlain, and they were not aware that either Mr. Russell or the bank examiner had made the representations in question. The bank, through these directors, received these securities from Mr. Russell, and there is no evidence indicating that there was any collusion between the officers who transacted this business on the part of the bank and Russell & Holmes or the bank examiner. The bank, therefore, is not chargeable with the representations made by them.

It is therefore recommended that the decree of the district court be affirmed.

Oldham and Pound, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

Two successive petitions for rehearing denied.

NORTH CAROLINA SUPREME COURT.

Samuel S. COLEY

v.

NORTH CAROLINA RAILROAD COMPANY, Appt.

(128 N. C. 534, 129 N. C. 407.)

1. Using a switching engine without a hand-hold on the tender does not constitute an assumption of the risk of such defect by the employee, where the statute makes railroad companies liable for injuries to employees from "any defect in the machinery, ways, or appliances," and makes void any agreement to waive the benefit of the statute.
2. The jury must decide whether or not a railroad employee is negligent in using a drainpipe upon a tender for a grab iron to assist him in climbing onto the tender, in the absence of such iron.
3. The damages for a personal injury

caused by negligence may be the "present cash value" of the injury to the injured person, taking into consideration pain and mental suffering, and not allowing anything as a punishment, or punitive damages.

On Rehearing.

4. The legislature may lawfully charge railroad companies with liability to employees for injuries caused by defects in machinery, ways, or appliances, and forbid the waiving of this liability by contract.
5. The defense of contributory negligence is not destroyed by a statute making railroad companies liable to employees for injuries caused by defects in machinery, ways, or appliances, and forbidding the waiving of this liability by contract.

(Montgomery and Cook, JJ., dissent.)

(June 7, 1901.)

NOTE.—Statutory liability of employers for defects in the condition of their plant.

- I. Introductory remarks, 817.
- II. Effect of these statutory provisions as to defects; generally, 818.
- III. Master not liable unless the defect alleged was the proximate cause of the injury, 818.
- IV. What instrumentalities are covered by the terms "ways," etc.
 - a. Two or more descriptive terms used in combination, 819.
 - b. "Ways," 820.
 - c. "Works," 820.
 - d. "Machinery," 821.
 - e. "Plant," 821.
- V. Significance of the qualifying phrase, "connected with or used in the business of the employer."
 - a. Instrumentalities temporarily used by servants in the transaction of the business, 821.
 - b. Structures, etc., in course of erection or demolition, 826.
 - c. Instrumentalities not yet brought into use, or disused, 827.
- VI. What constitutes a defect, 827.
- VII. Specific examples of defects.
 - a. Defects in the condition of the ways, 830.
 - b. Defects in the condition of the works, 830.
 - c. Defects in the condition of the machinery, 830.
 - d. Defects in the condition of the plant, 831.
- VIII. Conditions not amounting to defects, 832.
- IX. Defective system, employer liable for, 835.
- X. Not discovered or remedied owing to negligence, etc.
 - a. Generally, 836.
 - b. Not discovered, 837.
 - c. Not remedied, 838.
 - d. Persons intrusted with the duty, etc., 838.
- XI. Abnormal conditions resulting from the use of the appliances furnished by the master, how far regarded as defects, 839.

XII. Defects in temporary appliances constructed by the servants themselves, not deemed to be chargeable to the employer, 841.

XIII. Duty of servant to report defects.

- a. Statutory and common-law doctrines compared, 842.
- b. Position of a servant who fails to report a defect, 843.
- c. Position of a servant who has reported a defect, 844.

I. Introductory remarks.

In this annotation it is proposed to review the decisions respecting the provisions in the English employers' liability act, and the various statutes, colonial and American, in which its phraseology has been more or less closely copied on the subject of employers' liability for defects in their plant.

Statutes similar to the English act have been adopted in Ontario, British Columbia, Manitoba, Newfoundland, New South Wales, Victoria, Queensland, South Australia, Massachusetts, Alabama, Colorado, Indiana, and New York.

These provisions of the English act are § 1, subsec. 1, and § 2, subsecs. 1, 3, which correspond, respectively, to § 3, cl. 1, and § 6, cl. 1, 3, of the Ontario act. They run as follows, the additions made in the Canadian statute to that of the mother country being indicated by the words inclosed in brackets, except as otherwise stated:

Where [after the commencement of this act] personal injury is caused to a workman, (1) by reason of any defect in the condition [or arrangement] of the ways, works, machinery [buildings or premises], or plant connected with, intended for, or used in, the business of the employer, . . . the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work.

Sec. 2. A workman [or his legal representatives, or any person entitled in case of his death] shall not be entitled, under this act, to any right of compensation or remedy against the employer in any of the following cases, that is to say: (1) Under subsection 1 of sec-

APPPEAL by defendant from a judgment of the Superior Court for Wake County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinions.

Messrs. A. B. Andrews, Jr., and F. H. Busbee, for appellant:

Plaintiff voluntarily accepted the risk of employment, arising out of the construction of the engine.

Crutchfield v. Richmond & D. R. Co. 78 N. C. 300; *Johnson v. Richmond & D. R. Co.* 81 N. C. 454; *Cowles v. Richmond & D. R. Co.* 84 N. C. 312, 37 Am. Rep. 620; *Hudson v. Charleston, C. & C. R. Co.* 104 N. C. 501, 10 S. E. 669; *Pleasant v. Raleigh & A. Air-Line R. Co.* 95 N. C. 195; *Wabash R. Co. v. Ray*, 152 Ind. 392, 51 N. E. 920; *Guedel-*

hofer v. Ernating, 23 Ind. App. 188, 55 N. E. 113.

When the servant has equal facilities with the master for ascertaining the danger incident to the labor in which he is engaged, he takes the risk upon himself.

Missouri, K & T. R. Co. v. Spellman (Tex. Civ. App.) 34 S. W. 298; *Galveston, H. & S. A. R. Co. v. Lempe*, 59 Tex. 19.

If the plaintiff's work was rendered more hazardous than it otherwise would have been, no liability can be predicated of such negligence. All those things were perfectly obvious to him; and if a servant chooses to enter into an employment involving danger of personal injury which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence of which is known to him, or which are plain and obvious.

tion 1 [that is clause 1, of section 3 of the Ontario act], unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and [the Ontario act omits the words italicized] intrusted by him with the duty of seeing that the condition or arrangement of the ways, works, machinery [building or premises], or plant were in proper condition. (3) In any case where the workman knew of the defect or negligence which caused his injury, and failed [without reasonable excuse] within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of his employer, unless he was aware that the employer or such superior already knew of the said defect or negligence. [Provided, however, that such workman shall not, by reason only of his continuing in the employment of the employer with knowledge of the defect, negligence, act, or omission, which caused his injury, be deemed to have voluntarily incurred the risk of the injury.]

The provisions of the other statutes on this subject will appear below in the statement of the decisions construing them.

II. Effect of these statutory provisions as to defects; generally.

The effect of these provisions, as a whole, is to give, under the circumstances specified, a statutory sanction to a doctrine which, so far as the common law is concerned, has been greatly restricted in England and the English colonies by the well-known case of *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, as to the precise effect of which, see a note to *O'Neill v. Great Northern R. Co.* (1900; Minn.) 51 L. R. A. 572, but which has been fully developed and is applied in all the American states,—the doctrine, namely, that the master is absolutely responsible for the proper discharge of certain duties, whether he undertakes to perform them in person, or employs an agent to perform them in his stead. In other words, the injured servant is given a right to recover damages in the cases enumerated, although the abnormal conditions which caused his injury may have been created or suffered to continue through the negligence of a fellow servant. See remarks in *Ashley v. Hart* (1888) 147 Mass. 573, 1 L. R. A. 355, 18 N. E. 416.

Hence, in order to establish the allegations of a complaint framed on the theory that the 57 L. R. A.

master is liable under this section, it is not necessary to show that he was himself negligent.

Lynch v. Allyn (1893) 160 Mass. 248, 35 N. E. 550, where the action was for personal injuries occasioned to the plaintiff by the falling upon him of a bank of earth which he was engaged in undermining by direction of defendant's superintendent, held that the defendant was not entitled to a ruling that "the plaintiff cannot recover under the second count of his declaration, as there was no evidence that there was any negligence on the part of the defendant."

So far as regards the character of the actual physical conditions which warrant the inference of culpability on the part of the immediate actor, whether he be the master himself or an employee, the evidential prerequisites to establishing a right to indemnity are essentially the same under the statutes as at common law. See *infra*, VIII. and X.

III. Master not liable unless the defect alleged was the proximate cause of the injury.

Upon the general principles of the law of negligence, as well as by the express terms of the statutes, the injured servant cannot maintain an action unless he shows that the defect alleged was the proximate cause of his injury. *Southern R. Co. v. Guyton* (1898) 122 Ala. 231, 25 So. 34.

Thus, he cannot recover if his injuries were due to an occurrence which was a mere accident. *McManus v. Hay* (1882) 9 Sc. Sess. Cas. 4th Series, 425.

A freight brakeman cannot recover for personal injuries alleged to have been caused by defects in a brake which he was trying to let loose, causing the brake to stick or be retarded in its revolutions, and throwing him from the top of a box car, in the absence of proof that the brake was defective, or that his falling was not due to his slipping, or to some other cause wholly unconnected with any defect in the brake. *Louisville & N. E. Co. v. Binlon* (1892) 98 Ala. 570, 14 So. 619.

In *Hamilton v. Groesbeck* (1891) 18 Ont. App. Rep. 437, *Affirming* (1889) 19 Ont. Rep. 76, the court of appeal held the action not maintainable, for the reason that the proximate cause of the injury was not the unguarded condition of the saw by which the plaintiff was hurt, but the fact that he tripped over a pile of staves.

The servant cannot recover if the negligence of a fellow servant in the use of the defective

Young v. Boston & M. R. Co. 69 N. H. 356, 41 Atl. 268; *Reiter v. Winona & St. P. R. Co.* 72 Minn. 225, 75 N. W. 219; *Allen v. Boston & M. R. Co.* 69 N. H. 271, 39 Atl. 978; *Disano v. New England Steam Brick Co.* 20 R. I. 452, 40 Atl. 7; *Norfolk & W. R. Co. v. Jackson*, 85 Va. 489, 8 S. E. 370; *Wabash R. Co. v. Ray*, 152 Ind. 392, 51 N. E. 920; *Texas & P. R. Co. v. Rogers*, 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378; *Wood, Railway Law*, §§ 379, 386; *Shackleton v. Manistee & N. E. R. Co.* 107 Mich. 16, 64 N. W. 728; *Quinn v. New York, N. H. & H. R. Co.* 175 Mass. 150, 55 N. E. 891; *Turner v. Goldsboro Lumber Co.* 119 N. C. 400, 26 S. E. 23; *Pierce, Railroads*, p. 379; *Wood, Mast. & S. p. 749*; *Ft. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 Mich. 133; *Whitaker's Smith, Neg.* 133; *Bishop, Non-Contract Law*, § 677.

appliance was the actual, efficient cause of the injury.

The fact that a defect existed, and that the plaintiff had to be assigned to the work of remedying it, is not the proximate cause of an injury received by him in consequence of a fellow servant's negligently setting machinery in motion while he was engaged in the work. *Mackay v. Watson* (1897) 23 Sc. Sess. Cas. 4th Series, 383.

Nor can he recover if the defect in question would not have caused any injury if he had not himself been guilty of negligence in dealing with the defective appliance.

A defect in the machinery is not the cause of an injury received by a workman in consequence of his using it in an unsafe manner when he knew how to use it with safety to himself. *Martin v. Connah's Quay Alkali Co.* (1885) 33 Week. Rep. 216, where the plaintiff knew that a car brake was bent, and did not see that it was in its proper position before signaling to the engineer to move the car. See also *Milligan v. M'Alpine* (1888) 4 Sc. Sess. Cas. 4th Series, 789.

The contributory negligence of the plaintiff, not the negligence of the master, is the proximate cause of the injury, where a miner, knowing of the need of props, continues working, and is injured by the fall of the roof. *Pittsburgh & W. Coal Co. v. Estlevenard* (1895) 53 Ohio St. 43, 40 N. E. 725.

But proof that a defect, for the existence of which the master was responsible, was the sole proximate cause of the injury, is not a condition precedent to recovery. It is only requisite to show that it was one of the efficient causes.

A plaintiff is entitled to a verdict in his favor, where the jury find that the injury was caused by a defect in the plant, and also by the negligence of a fellow servant. *Bean v. Harper* (1892) 18 Vict. L. Rep. 388.

Compare common-law cases, to the same effect, in *note to Lafayette Bridge Co. v. Olsen* (1901; C. C. App. 7th Ct.) 54 L. R. A. pp. 167 *et seq.*

IV. What instrumentalities are covered by the terms "ways," etc.

It will be observed that the words used to designate the instrumentalities for the defects of which the master is made responsible are not precisely the same in the statutes now under discussion. In all of them the terms "ways," "works," and "machinery" are found. But the expression "plant," which occurs in the English act, as well as in those of the vari-

ous British colonies and of Alabama, is omitted in the statutes of Massachusetts, Colorado, and New York. In the Indiana act the list of instrumentalities enumerated in the English act is enlarged by the addition of the word "tools." That these variations of phraseology imply corresponding differences in the total extent of the master's liability cannot be affirmed in view of the decisions as they stand, though possibly some case may hereafter arise in which they may be found material.

District of Columbia v. McElligott, 117 U. S. 621, 29 L. ed. 946, 6 Sup. Ct. Rep. 884; 2 Thomp. Neg. ed. 1880, § 1008; 3 Wood, *Railway Law*, § 370; *Cowles v. Richmond & D. R. Co.* 84 N. C. 309, 37 Am. Rep. 620; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612.

That the risk was not voluntarily undertaken, because plaintiff was influenced by a fear of losing his employment, does not change the rule.

Leary v. Boston & A. R. Co. 139 Mass.

ous British colonies and of Alabama, is omitted in the statutes of Massachusetts, Colorado, and New York. In the Indiana act the list of instrumentalities enumerated in the English act is enlarged by the addition of the word "tools." That these variations of phraseology imply corresponding differences in the total extent of the master's liability cannot be affirmed in view of the decisions as they stand, though possibly some case may hereafter arise in which they may be found material.

a. Two or more descriptive terms used in combination.

In the cases where the court, in affirming or denying the defendant's liability, has coupled together two or more of the instrumentalities specified in the statute under review, it is impossible to say with certainty to which designation it was intended to refer the instrumentality which caused the injury.

A defect in the "ways, works, machinery, or plant," enumerated in the Alabama statute, has been held to exist where the supply pipe of a water tank extended over a railroad track, so as to knock a brakeman off the top of a freight car. *East Tennessee, V. & G. R. Co. v. Thompson* (1891) 94 Ala. 636, 10 So. 280.

In an Alabama case it has been held that a rope used for lowering timber in the construction of a trestle along a railroad track, by means of which heavy timbers are put into their places, is, in no sense, a part of the ways, works, machinery, or plant of a railroad company. *Southern R. Co. v. Moore* (1900) 128 Ala. 434, 20 So. 659. The court seems to have assumed that the authority of the two Alabama cases cited in IV. d, *infra*, declaring such an appliance not to be "machinery," is conclusive against the right of the servant to maintain the action. But there is no apparent reason why the rope in question should not be regarded as a part of the "plant."

The shorter formula—"ways, works, and machinery"—which occurs in the Massachusetts statute has been held to cover the following appliances:

A truck used by a railroad company as a part of the appliances of the repair shop, consisting of axles, wheels, and a frame, all fastened together and fitted to the tracks. *Gunn v. New York, N. H. & H. R. Co.* (1898) 171 Mass. 417, 50 N. E. 1031.

A temporary staging erected by the side of a woodpile, to enable the workmen to place wood thereon and pile it higher, and which is taken down and put up from time to time in different places and intended to be used from

580, 52 Am. Rep. 733, 2 N. E. 115; *Southern Kansas R. Co. v. Moore*, 49 Kan. 616, 31 Pac. 138.

The statute goes no further than to remove the defense that the injury was sustained by the negligence of a fellow servant.

Hancock v. Norfolk & W. R. Co. 124 N. C. 222, 32 S. E. 679.

The act of 1897 does not abrogate the defense of contributory negligence.

Southern R. Co. v. Harbin, 110 Ga. 808, 36 S. E. 218; *O'Maley v. South Boston Gas-light Co.* 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119; *Davis v. Forbes*, 171 Mass. 548, 47 L. R. A. 170, 51 N. E. 20; *Knisley v. Pratt*, 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986.

Defendant is not liable if the plaintiff's own negligence contributed to the injury.

four days to a week at a time in each place, is a part of the owner's ways, works, and machinery while in use at a particular place. *Prendible v. Connecticut River Mfg. Co.* (1893) 160 Mass. 131, 35 N. E. 675. (Held to be competent for the jury to find this.)

A temporary derrick at a stone yard, erected to move stones from cars to where stone cutters, who have nothing to do with setting it up, can use them, is a part of the "ways, works, and machinery" connected with the yard. *McMahon v. McHale* (1899) 174 Mass. 320, 54 N. E. 854. This is considered to be a part of the fitting of the stone yard, rather than an appliance to be put together and set up and moved from place to place by the workmen who are using it. See *infra*, XI.

Loaded freight cars received from other lines form a part of the "works and machinery" of the receiving company. *Bowers v. Connecticut River R. Co.* (1894) 162 Mass. 312, 38 N. E. 508. See also *infra*, V.

b. "Ways."

In its ordinary sense, this term may be regarded as embracing any part of the master's premises over which the servants pass, on foot or otherwise, from one point to another.

The course which a workman would, under ordinary circumstances, take in order to go from one part of a shop where part of the business is done, to another part where business is done when his duties require it, is a "way." Per Lord Esher. *Willett v. Watt* [1892] 2 Q. B. 92, 61 L. J. Q. B. N. S. 540, 66 L. T. N. S. 818, 40 Week. Rep. 497, 56 J. P. 772.

Compare the statement that the word applies to such places as a workman or servant is called upon to pass over in the performance of his duty, in *Caldwell v. Mills* (1893) 24 Ont. Rep. 462, holding that a plank put down to serve as a fulcrum for a lever, if it is placed in such a position that servants have to pass over it in the course of their duties, is a "way."

For specific instances of "defects" in what are conceded to be "ways," see *infra*, VII. a.

To constitute a way, within the purview of the act, it is not necessary that it should be marked out by metes and bounds, or by habitual user.

In *Willett v. Watt* [1892] 2 Q. B. 92, 99, 61 L. J. Q. B. N. S. 540, 66 L. T. N. S. 818, 40 Week. Rep. 497, 56 J. P. 772, Fry, L. J., said: "In determining what is a 'way' we should, I think, look to the fact that workmen have to go through places where sometimes there is an open space, while at other times what was an open space is covered with stores 57 L. R. A.

Davis v. Forbes, 171 Mass. 548, 47 L. R. A. 170, 51 N. E. 20.

When but one construction can reasonably be drawn from the plaintiff's testimony or the admitted facts, we cannot see why it did not become a question of law,—as much so as if the facts stated in the evidence had been agreed to as the facts in the case. If this is so, it certainly became a question of law.

Miller v. Wilmington & P. R. Co. 128 N. C. 26, 38 S. E. 29; *Neal v. Carolina C. R. Co.* 128 N. C. 640, 49 L. R. A. 684, 36 S. E. 117; *Pleasants v. Raleigh & A. Air-Line R. Co.* 95 N. C. 195; *Smith v. Richmond & D. R. Co.* 99 N. C. 241, 5 S. E. 896.

When there is a safe and an unsafe way to perform any act, and a person selects the unsafe way, he cannot recover for any injury sustained.

or other things used in the business. We should consider, further, the case of an open yard where the whole or only a small part might be used at any time, according as there were a great many or only a few workmen going through it. I think that these and other considerations show that we should answer in the negative the question whether metes and bounds are necessary to a way under the statute. There are many ways which persons have a right to use that are not defined by any physical boundary, and to hold that such a boundary is necessary would be to withdraw from the protection given by the statute a large number of places used by workmen in which the mischief at which the statute was aimed might arise. For the purpose of this case, I should say that wherever there is a large space connected with or used in the business of the employer, over which the workmen pass in the course of their employment, when that space is for the time being vacant, and is so used, it is a way within the meaning of the statute."

In a more special sense, the term signifies the line or course along which a thing which is being worked on or with is caused to move.

The most familiar instance of such a way is a railway track. See *Kansas City, M. & B. R. Co. v. Burton* (1892) 97 Ala. 240, 12 So. 88; *Louisville & N. R. Co. v. Bouldin* (1895) 110 Ala. 185, 20 So. 325; *McQuade v. Dixon* (1887) 14 Sc. Sess. Cas. 4th Series, 1039.

A roadway of iron plates, along which loads are conveyed on a car, was held to be a way, in *McGiffin v. Palmer's Shipbuilding & Iron Co.* (1882) L. R. 10 Q. B. Div. 5, 52 L. J. Q. B. N. S. 25, 47 L. T. N. S. 346, 31 Week. Rep. 118, 47 J. P. 70.

Doubtless the term would also be held to include the ways in a ship-building yard, or the skids used for the transfer of heavy articles, such as logs, barrels, etc., or the posts between which the hammer of a pile-driver moves up and down.

The ways with which the cases deal are usually horizontal or sloping. But presumably the term also covers such instrumentalities as the vertical shaft of a mine or of an elevator.

In *Pegram v. Dixon* (1886) 55 L. J. Q. B. N. S. 447, 51 J. P. 198, 2 Times L. R. 603, it was apparently assumed that a lift-well in a building under construction becomes a way when workmen place ladders in it for the purpose of obtaining access to the upper floors.

c. "Works."

See also *infra*, V. b. c.

In one well-known case this word seems to

Taylor v. Richmond & D. R. Co. 109 N. C. 233, 13 S. E. 736; *Southern R. Co. v. Harbin*, 110 Ga. 808, 36 S. E. 218; *Quirouet v. Alabama G. S. R. Co.* 111 Ga. 315, 36 S. E. 599; *Lothrop v. Fitchburg R. Co.* 150 Mass. 423, 23 N. E. 227; *Kilpatrick v. Grand Trunk R. Co.* 72 Vt. 263, 47 Atl. 827; *New York, L. E. & W. R. Co. v. Lyons*, 119 Pa. 324, 13 Atl. 205; *Mansfield Coal & Coke Co. v. McEnery*, 91 Pa. 185, 36 Am. Rep. 662.

Mcassrs. T. M. Argo and W. H. Day for appellee.

Furchee, Ch. J., delivered the opinion of the court:

This is an action for injuries by the defendant road. In the "case" it is stated: That the defendant North Carolina Railroad had been leased to the Southern before

the injury complained of was received, and that the Southern was in possession and operating the same at that time. But, as no point was made as to this fact on the trial of the case nor on appeal, we will give it no further attention. The plaintiff was an experienced railroad man, having been engaged in railroad work for more than twenty years, and had been in the employ of the defendant for the last four years; and on the 14th of June, 1898, while in the employment of the defendant as conductor of the shifting engine at Goldsboro, he received the injury complained of. That prior to and until the 20th of May, 1898, he had used a regular shifting engine with a sloping or turtle-top tender, but on that day the defendant took this engine and tender from Goldsboro, and replaced it with an old road engine and tender, unsuited for use as a

be regarded as connotative of the same idea as "system."

In *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. 683, 65 L. T. N. S. 487, 40 Week. Rep. 392, 55 J. P. 660, Lord Watson, in commenting on the finding of the jury that the manner in which the apparatus in question was used betokened negligence, first referred to the method adopted as being a "defective system," and, in a later passage of his opinion, remarked that the evidence brought the case within the operation of the rule, that a dangerous arrangement of machinery and tackle constitutes a "defect" in the condition of the works.

d. "Machinery."

The term "machine" has been defined as "every mechanical device or combination of mechanical powers and devices to perform some function, and produce a certain effect or result." *Corning v. Burden* (1853) 15 How. 287, 14 L. ed. 690 (patent case).

Such a definition obviously excludes such an appliance as a hammer disconnected from other mechanical appliances and operated only by muscular strength. *Georgia P. R. Co. v. Brooks* (1887) 84 Ala. 138, 4 So. 289 (employee injured by scale flying from an iron rail struck by a hammer wielded by a fellow servant).

It would seem that, if the rail was in such a condition as to render such an accident probable, the defendant should have been held liable as for a defect in the "plant," or in the "works."

This word does not include a steel bar used to align the track on a railway bridge. *Clements v. Alabama G. S. R. Co.* (1900) 127 Ala. 168, 28 So. 643. The reason assigned was that the bar was "disconnected from any other mechanical appliances, and operated by muscular strength directly applied." Apparently the action might have been maintained in both these cases if the pleader had alleged defects in the "plant."

For specific examples of appliances viewed as "machinery," the point actually involved being whether there was a defect, see *infra*, VII. c.

e. "Plant."

See also *infra*, V.

This term includes "whatever apparatus is used by a business man for carrying on his business,—not h's stock in trade which he buys or makes for sale, but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business." 57 L. R. A.

Yarmouth v. France (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, per Lord Esher, who thus disposed of the contention that a horse was not a part of the "plant:" "It is suggested that nothing that is animate can be plant; that is, that living creatures can in no sense be considered plant. Why not? In many businesses horses and carts, wagons, or drays, seem to me to form the most material part of the plant; they are the materials or instruments which the employer must use for the purpose of carrying on his business, and without which he could not carry it on at all. The principal part of the business of a wharfinger is conveying goods from the wharf to the houses or shops or warehouses of the consignees; and for this purpose he must use horses and carts or wagons. They are all necessary for the carrying on of the business. It cannot for a moment be contended that the carts and wagons are not 'plant.' Can it be said that the horses, without which the carts and wagons would be useless, are not?"

To same effect, see *Harston v. Edinburgh Co.* (1887) 14 Sc. Sess. Cas. 4th Series, 621; *Fraser v. Hood* (1887) 15 Sc. Sess. Cas. 4th Series, 178.

For examples of instrumentalities assumed to come within this definition, see *infra*, VII. d.

V. *Significance of the qualifying phrase, "connected with or used in the business of the employer."*

a. *Instrumentalities temporarily used by servants in the transaction of the business.*

The mere fact that the employer did not own the defective instrumentality which caused the injury will not protect him, if, as a matter of fact, it was being used in his business at the time of the accident. *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128; *Engel v. New York, P. & B. R. Co.* (1893) 160 Mass. 260, 22 L. R. A. 283, 35 N. E. 547; *Louisville & N. R. Co. v. Davis* (1890) 91 Ala. 487, 8 So. 552.

Whether there was such a use within the meaning of the statutes, is determined with reference to various considerations. In some cases the essential question is whether or not he himself or his agent had, at the time when the injury was received, adopted the instrumentality as a part of the plant by means of which the employee was expected to perform his duties. If such adoption is shown, he is considered to have assumed, as regards this temporary addition to his plant, a liability

shifting engine and tender. That his work as switch engineer necessitated his riding on the rear end of the tender much of his time. That he could not successfully do the work of switch engineer without so riding. That, besides the tender of the last engine furnished being unsuited for his work, it had no hand-holds or "grab irons" to enable him to raise himself upon its platform with safety, which it was necessary for him to do to enable him to signal the engineer. That he saw and knew this tender had no hand-holds or grab irons when he received it on the 20th of May, and he knew that it was dangerous to use it without them, but that he used it, and continued to use it, without such grab irons, until the 14th of June, when he received the injury complained of. That to supply the place of the grab irons, or, rather, because there were no grab irons, he

used the drainpipes from the top of the tender. These were tubes or hollow cylinders leading from the top of the tender to take off the overflowing water, and were never intended to be used as hand-holds. The plaintiff says that he had frequently used them as hand-holds before the day of the injury, though he had used the one on the other side of the tender most. That on the day of the injury he had driven down to some lumber cars, and attached the shifting engine to them, and gave the signal to the engineer to move out. To do this the engine would have to move backward, and when he gave the signal to move he undertook to get on the platform of the tender, and, for the want of grab irons, he took hold of the drainpipe, which gave way (pulled out or broke off), and he fell to the ground, and was run over by one of the wheels of

which, it would seem, is of precisely the same character and extent as that to which he is subject, as regards his own property.

Lack of ventilation of the hold of a vessel belonging to a navigation company, in which coal is shipped by contractors to supply coal to a railway at another port, where such contractors have to unload the coal, in consequence of which one of their employees is injured by an explosion of gas accumulating in the hold, is a defect in the plant of such contractors. *Carter v. Clarke* (1898) 78 L. T. N. S. 76, 14 Times L. R. 172.

It has been laid down, without qualification, that a defect in a cart hired temporarily to carry a load is not a defect in the plant. *Allmarch v. Walker* (1885) 78 L. T. Jour. 391. But this ruling seems to be inconsistent with the one last cited, and to be unjustifiable in general principles. The report is so meager that it is impossible to say precisely what the standpoint of the court may have been.

Manifestly, no adoption within the meaning of the above doctrine, can be inferred, where the employee or his fellow workmen took and made use of the defective instrumentality without any authority, either express or implied, from the employer himself or his agent. Under such circumstances no liability can be predicated from the fact that there was a defect, and that a proper inspection would have disclosed it.

It has been held that where a servant, while at work on a new building owned by his employer, was injured by reason of the defective condition of planks laid on the top of walls 5 feet from the ground by some of his fellow workmen, he cannot recover, as such planks, used merely for temporary purposes, cannot be considered as ways or works within the meaning of the statute. *Morris v. Walworth Mfg. Co.* (1902; Mass.) 63 N. E. 910.

A verdict for an employee was set aside where the injury was caused by the giving way of a ladder which the workmen themselves had taken and used simply because they found it lying on the premises where they were sent to work, and which had not been borrowed, so as to become a part of the plant, by any person having authority to make it a part of such plant. *Jones v. Burford* (1884) 1 Times L. R. 137.

A complaint of which the gravamen is that the plant was defective is not sustained by evidence showing that the plaintiff, a painter in the employ of a firm of contractors doing work on a government building, asked his foreman for a ladder; and that, being referred by

the foreman to the government official in charge of the work, he was told that he might have a ladder belonging to the government; and that the ladder which he thus obtained proved to be so defective that it broke under him. *Perry v. Brass* (1889) 5 Times L. R. 253. The court relied mainly on the fact that the ladder did not belong to the defendants, but *Denman, J.*, also laid stress on the fact that their foreman knew nothing about it. The correctness of this decision under the particular facts in evidence seems somewhat dubious, as it may fairly be argued that the permission of a foreman to use whatever appliance a designated person may supply should have the effect of making the appliance actually selected a part of the plant.

The essential basis of other decisions is that the words of the provision now under discussion imply that "the defect must be one which the employer has a right to remedy if he does discover it, and of a kind which it is possible to charge a servant with the duty of setting right." *Engel v. New York, P. & B. R. Co.* (1893) 160 Mass. 260, 22 L. R. A. 283, 35 N. E. 547, holding that a railroad track owned, maintained, and repaired by a manufacturing company, and used by a railroad company only under a license or invitation to deliver freight under a contract, is not a part of the railroad company's "ways." In delivering the opinion of the majority of the court, *Holmes, J.*, said: "We think that neither the language of the statute, nor good sense, would permit us to hold an employer liable under the act for defects which he cannot help, in a place out of his control, to which his employees once in a while may be called for a few minutes."

A railroad company that only goes upon the track of another under a license to take cars therefrom, and has no control over it, is not liable for an injury to an employee caused by its defective character. *Trask v. Old Colony R. Co.* (1892) 156 Mass. 298, 31 N. E. 6.

An employee of a gas company, hired to remove gas pipe from a trench dug by authority of the city, has no right to expect his employer to shore the sides of the trench or to make it safer than it was, for he must be taken to know that his employer had no control over it. *Hughes v. Malden & M. Gaslight Co.* (1897) 168 Mass. 393, 47 N. E. 125.

The location of the tracks of a street-car company being determined by the municipal authorities, it cannot be charged with failure to provide a safe place for its conductor for the reason that there is a tree close to the side of

the tender. His arm was crushed so badly that it was necessary to amputate it, and he was badly injured otherwise. And he contends that it was no fault of his that he was injured, but that it was caused by the fault and negligence of the defendant in not furnishing him a tender with grab irons, with which to do his work. While, on the other hand, the defendant does not deny but what it was guilty of negligence in not furnishing a tender with grab irons, it contends that this was a patent defect, seen and known by the plaintiff on the 20th of May, when he received this engine and tender; and, by his continuing to use the same from that time to the time of the injury, that was a waiver of any objection on that account, and an "assumption of the risk" of any damage that might result from such defect. The defendant also contends that the

plaintiff was guilty of negligence which contributed to, and was the proximate cause of, his injury, and that he cannot recover on that account. The defendant also contends that there are errors in the judge's charge to the jury, in charging what he should not have charged, and by refusing to give special requests of the defendant that he should have given. The defendant also contends that the judge erred in his instructions to the jury as to the measure of damages, as pointed out in its assignment of errors, as that was the earliest opportunity it had of doing so.

While this case was ably and carefully tried, it is apparent from the record, the prayers for instruction, and the argument of counsel on both sides, that the main contention below, as it was in this court, was as to whether the plaintiff had "assumed

the car, unless it is shown that the company had a right to remove the tree. *Hall v. Wakefield & S. Street R. Co.* (1901) 178 Mass. 98, 59 N. E. 668.

The want of a fence at the top of a declivity at one side of a public street used by the employer as an approach to his place of business is not a defect for which he can be held liable. *Stride v. Diamond Glass Co.* (1895) 26 Ont. Rep. 270, *Following Engel v. New York, P. & B. R. Co.* (1893) 160 Mass. 260, 22 L. R. A. 283, 35 N. E. 547.

Discussing the question whether the defective condition of a public street, which was used by the employer in connection with his business, was a defect in a "way used in the business," within the meaning of the Ontario employers' liability act, § 3, subsec. 1, *Boyd, Ch.*, said: "Light is thrown upon the scope of these words by § 6, subsec. 1, which provides that the workman shall not be able to recover unless the defect arose from, or had not been remedied owing to, the negligence of the employer. That means some defect on his premises, or on a place over which he had control, that could be made right by the employer. Such is not the case in regard to a public street upon which the employer had no right to construct a fence or barrier, as is here suggested. One part of the street is higher than the other, but it is the business of the corporation of the city to deal with the alleged defect in the interests of the public, or be exposed to action by injured persons."

A coalmaster is not liable to a servant for injuries caused by defects in wagons sent by a railway company to be loaded with coal for carriage, and left at the pit in charge of his servants. Such wagons are not a part of the coalmaster's plant, and, even if they are, he is not, under such circumstances, under the duty of inspecting them before allowing the servants to use them. *Robinson v. Watson* (1892) 20 Sc. Sess. Cas. 4th Series, 144.

An auctioneer selling goods on the premises of a stranger is not responsible to his servants for the sufficiency of the appliances for bringing forward and removing the goods which are to be sold. *Nelson v. Scott* (1892) 19 Sc. Sess. Cas. 4th Series, 425.

A corollary of this doctrine is that, unless there is something to put him on inquiry, a master is not under any active duty of inspection with regard to an instrumentality not under his control.

The failure of a gas company to ask how long a trench dug by the city has been dug, and to tell its employee the length of time, 57 L. R. A.

before sending such employee into the same to remove gas pipe therefrom, does not render it liable for an injury to the employee caused by the caving in of the trench. *Hughes v. Malden & M. Gaslight Co.* (1897) 168 Mass. 395, 47 N. E. 125. The plaintiff, said the court, "had a right to expect that if the defendant knew of any danger which the plaintiff did not know and ought not to be assumed to know, it would inform him. But no such knowledge on the part of the defendant was shown. It does not appear to have known anything except what was visible to the eye, or to have been able or bound to infer from what was visible anything which the plaintiff with his experience was not equally able to infer. What more could it have done? There is no reason to suppose that inspection would have disclosed anything beyond the visible facts, and therefore it is not necessary to consider whether the duty of inspection existing with regard to cars received from connecting lines to be forwarded on a railroad would be held to exist in such a case as this."

In the absence of any allegation of particular circumstances which would impose upon the master the duty of inspecting the fittings of a ship on which a stevedore or other person has contracted to do work, his servant cannot maintain an action against him for an injury caused by defects in those fittings. *Simpson v. Paton* (1896) 23 Sc. Sess. Cas. 4th Series, 590; *McLachlan v. S. S. Peveril Co.* (1896) 23 Sc. Sess. Cas. 4th Series, 753 (complaint, based on existence of duty to inspect, held to be demurrable). Lord Young dissented on the ground that the stevedore was not wholly exempt from the duty of supervision, and declined to assent to the proposition that there would be no liability if things were wrong, and by proper supervision, without requiring anything out of the way on his part, he would have discovered that they were in that condition.

See also *Robinson v. Watson* (1892) 20 Sc. Sess. Cas. 4th Series, 144, *supra*.

The cases involving the liability of a railroad company for defects in a car received from another road have been made to turn upon the question whether they were loaded or empty.

Loaded cars, it is said, form a part of the works and machinery of the receiving company, inasmuch as the company is not bound to use them in its train if on inspection they are found to be unsafe. *Bowers v. Connecticut River R. Co.* (1894) 162 Mass. 312, 38 N. E. 508, settling this point, which was left undecided in the case next cited.

But an isolated empty car on its way to be

the risk" of the defective tender in not having the grab irons; and this question has given us a great deal of trouble, as we had such a line of cases, commencing at least as far back as *Crutchfield v. Richmond & D. R. Co.* 78 N. C. 300; *Johnson v. Richmond & D. R. Co.* 81 N. C. 454; *Cowles v. Richmond & D. R. Co.* 84 N. C. 312, 37 Am. Rep. 620; *Hudson v. Charleston, C. & C. R. Co.* 104 N. C. 501, 10 S. E. 669; *Pleasants v. Raleigh & A. Air-Line R. Co.* 95 N. C. 195; and other cases in our own Reports, besides many cases from other courts that seem to sustain the contention of the defendant; while there are more recent decisions in our own court, though not directly in point, that seem to sustain a different rule,—such as *Greenlee v. Southern R. Co.* 122 N. C. 977, 41 L. R. A. 399, 30 S. E. 115; *Trowler v. Southern R. Co.* 124 N. C. 189,

44 L. R. A. 313, 32 S. E. 550, and *Lloyd v. Hanes*, 126 N. C. 361, 35 S. E. 611. But, after all, it seems that this important contention as to the "assumption of risk" is disposed of by chap. 56, Private Laws 1897, which was not called to our attention in the arguments or briefs, and which reads as follows:

"Sec. 1. That any servant or employee of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death, in the course of his service or employment with said company, by the negligence, carelessness, or incompetency of any other servant, employee, or agent of the company, or by any defect in the machinery, ways, or appliances of the company,

returned to its owner is a part of the ways, works, or machinery connected with or used in the business of a railroad company which received it loaded. *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128. The court said: "By the terms 'ways, works, or machinery connected with or used in the business of the employer,' we understand something in the place, or means, appliances, or instrumentalities provided by the employer, for doing or carrying on the work which is to be done. The use of other words may not make the meaning clearer, but it would seem that there must be a defect in something which can, in some sense, be said to be provided by the employer."

It is, however, not apparent why the right of rejection, which undoubtedly exists in this instance as well as in the former, should not create a similar obligation. The distinction taken and its rationale are, it is submitted, unsatisfactory. In Massachusetts it is no longer of importance, since the passage of the amendatory act of 1893, chap. 359, declaring that the mere fact of a car being in the possession of a railroad company makes it a part of its "ways, works, or machinery."

In one case the principle is applied that a "defect," within the meaning of these statutes, exists where the physical conditions resulting from a use to which the servant's employer permits a stranger to put his premises are of such a nature that negligence would have been a warrantable inference if they had been created by the act of the employer himself or his agent. *New York, N. H. & H. R. Co. v. O'Leary* (1899) 35 C. C. A. 562, 93 Fed. 737, where a railway company which permitted a guy to be stretched by a third person across its tracks, at a point where the volume of business required great diligence and care as to the condition of the track, was held liable for an injury to an employee, caused by failure to see that the guy was placed at a particular height to avoid such injury (construing the Massachusetts statute).

As the decisions holding that the master is not liable for an injury due to a defect in an instrumentality belonging to another person may be regarded as being essentially merely declarations that the wrong party is being sued, there would, at first sight, seem to be no serious practical objection to such applications of the general principle that responsibility is a juridical incident of the power of control, and does not exist apart from such power. But the extremely nebulous condition of the law defining the nature and extent of a stranger's lia-

bility to the servants of one with whom he has business relations involving the use of, or contact with, his property (see note to *Cleveland, C. C. & St. L. R. Co. v. Berry* [1899: Ind.] 46 L. R. A. 38) renders it wholly unwarrantable to assume that in all the cases in which the defendant will be absolved for the reason that he had no control over the defective instrumentality, the plaintiff will be able to maintain an action against the actual owner of that instrumentality. It is manifest, therefore, that the employment of this test to determine the applicability of these statutes will sometimes result in leaving the injured servant entirely remediless.

Under these circumstances, the doctrine that the possession or nonpossession of the power of control is the main differentiating factor in cases in which the existence or absence of authority to use the defective instrumentality is not involved, as one of the determinant elements, deserves to be somewhat closely scrutinized.

It is submitted that the clause in question may, upon a perfectly reasonable construction, be made to comprehend instrumentalities over which the employer has no control. The opposite contention would doubtless be irresistible if the failure to "remedy" defects were mentioned as the sole ground of liability. But the declaration of an alternative liability for the negligent failure to "discover" defects seems to be hardly susceptible of any other interpretation than that it was intended to extend the employer's responsibility beyond the cases in which the right to apply a remedy may be predicated. Such a declaration may fairly be regarded as a recognition of the principle that the application of a remedy is neither the only duty which the law implies, nor the only method by which the master can free himself from the imputation of negligence. On the one hand, where it is in his power to apply a remedy to the defect thus actually or constructively known to him, it may conceivably be, and in fact frequently is, his duty to warn his servants as to the existence of the defect, or to discontinue the use of the defective instrumentality until it has been restored to a safe condition. On the other hand, where it is not in his power to apply a remedy, the duties of warning or discontinuance become imperative, and by performing them he fully discharges his obligations to his servants. It is clear, therefore, that there are certain obligations to which he is subject in respect to instrumentalities which are out of his control, and that the negligence which consists in the

shall be entitled to maintain an action against such company.

"Sec. 2. That any contract or agreement, expressed or implied, made by any employee of said company to waive the benefit of the aforesaid section, shall be null and void."

Commencing with the often-cited case of *Priestley v. Fowler*, 3 Mees. & W. 1, what is known as the "fellow servant law" had been developed until it seems to have become to be a hardship on the employees of railroads, where there were so many employees whose rights depend on the action of some other employee; and Acts 1897, chap. 56, was passed to relieve such employees from what appeared to be a hardship, and oppressive upon them. And, while there had not been uniformity in the different jurisdictions as to what is called the "assumption of risk," it seemed to be well settled by the decisions

of this court (see cases cited above) that, where an employee entered into the service of a railroad company using defective machinery, knowing of such defects, or where he continued in the employment, after having such knowledge, without notifying his superiors, and protesting against its continuance, such employee would have been held to have waived such objection, and to have assumed the risk arising from the use of such defective machinery. This, it seems, was considered by the legislature a hardship, and oppressive, as the competition was so great for such employment that employees were deterred from making such complaints lest they might lose their places. So it seems that the legislature undertook to relieve the employees of this trouble, as it deemed it to be a hardship. So the legislature, after providing relief against acts of

failure to discover a defect cannot be dissociated from the negligence which consists in the breach of those obligations, for the reason that they arise as soon as the defect is known, and that it is presumed to be known wherever it would have been known if due care had been exercised.

It is submitted, therefore, that the balance of probability is in favor of the inference that the legislature intended to create a responsibility for injuries due to instrumentalities not controlled by the master, provided they are "connected with his business," and that, upon the true construction of the statute, the absence of the power of control merely affects the extent of that responsibility.

Some of the unsatisfactory consequences of the doctrine that the statute does not apply to cases where there is no power of control are pointed out in the dissenting opinion of Knowlton, J., in *Engel v. New York, P. & B. R. Co.* (1893) 160 Mass. 260, 22 L. R. A. 283, 35 N. E. 547: "The employee finds a track of this kind used like other side tracks belonging to the corporation, adapted to the convenient transaction of its freighting business. Ordinarily he has no means of knowing whether the track is owned and maintained by the railroad corporation or by the manufacturer whose freight is brought over it. All he can see or know is that it is connected with and used in the business of the corporation in delivering freight. Whether an additional price is paid for the transportation of its cars or of the cars of other railroads over that track, he does not know, nor is it important for him to know. It is a place specially fitted for the work of his employer, on which his employer sets him at work, and in which the employer presumably has rights for the time being. It ought to make no difference, under the statute, how the employer procures the ways, works, or machinery connected with and used in his business, or by what kind of title he holds them. So long as they are connected with his business and used in it, it is his duty to have them safe, so that his employees may not be unnecessarily exposed to danger. If another owns and furnishes them, and agrees to keep them safe, it is his duty, as between him and his employee, to see that the owner properly does what he agrees to do. It is the general rule of the common law that a railroad corporation is liable for an injury to a passenger, or for loss of freight arising from a defect in a track of another corporation over which it runs its cars, as if it owned the track. As between the two corporations, the only duty

to maintain the track in repair under their contract may be upon the owner of the road, but, as between the first-mentioned corporation and a passenger or owner of freight, it is the duty of the carrier to have the track safe, whether it owns it or hires it. . . . The duty of a railroad corporation to furnish for its employees safe tracks, cars, locomotive engines, and other machinery, tools, and appliances with which its business is to be carried on, is similar in kind to its duty to passengers in these respects, although the degree of care required is less. In either case, its duty is the same when the tracks, cars, and engines are hired, or used under a license from others, as when they are owned by the employer. . . . The doctrine contended for by the defendant, as I understand it, comes to this: If a manufacturer, instead of owning the ways, works, and machinery necessary to be used in his business, arranges with another person who owns a manufacturing establishment to furnish it for his use and to keep it constantly in good condition, and if one of his employees is instantly killed by a defect negligently suffered to be in the ways, works, or machinery which he is using under this arrangement, he will not be liable under the statute, because the ways, works, and machinery are not his. The owner will not be liable under the statute for he is a stranger to the manufacturing business carried on there, and the person killed is not his employee. Neither the employer nor the owner of the establishment will be liable at the common law, for the common law permits no recovery for a death resulting from negligence. The widow and children of the deceased employee will therefore be left remediless. It seems to me that such a construction of the statute tends to defeat the purpose of the legislature."

One Ontario case in which the master was held not to be liable, under the statute, for the want of a fence on a public street which was used as an approach to the master's place of business (see *Stride v. Diamond Glass Co.* [1895] 26 Ont. Rep. 270, *supra*) seems to have been improperly referred to the analogy of other cases cited in this section. The true ground upon which a servant is precluded from maintaining an action against his master under the circumstances there in evidence is that alluded to in the opinion; *viz.*, so far as regards his right of recovery for injuries which are due simply to the manner in which streets are laid out, graded, and protected, he is in the same position as any other member of the public. His remedy, if any, must be sought from the

"fellow servants," enacted as follows: "Or by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against said company." And by the 2d section of said act it is provided "that any contract or agreement, expressed or implied, made by any employee of said company to waive the benefit of the aforesaid section, shall be null and void." The court has construed this act, holding it to be constitutional, and giving effect to it so far as it applied to fellow servants. *Hancock v. Norfolk & W. R. Co.* 124 N. C. 222, 32 S. E. 679. And we see no reason why we should not do so as to the "assumption of risk." It is agreed that assumption of risk is contractual, either by express terms or by implication; and disputes usually were as to whether the plaintiff contracted by implication or as

sumption for dangers not existing at the date of employment. And it would seem by this act that the legislature intended to put an end to such contentions by saying in the 1st section that he shall have a right of action for injuries caused by such defective machinery, and by providing in the 2d section that he cannot waive this right by contract, expressed or implied. This legislation (Acts 1897, chap. 56) seems to be in the same spirit and in harmony with Acts Cong. 1893, chap. 196 (27 Stat. at L. 531). In that statute it is enacted in § 4 that all railroad companies engaged in interstate commerce shall have grab irons upon their cars, etc.; and in § 8 the right of action is given to any employee injured for the want of any of the appliances mentioned in said act,—grab irons being one of those mentioned. And then said section provides

municipal body which is responsible for the creation and continuance of those conditions.

b. Structures, etc., in course of erection or demolition.

According to the most recent of the English authorities, these statutes should be so construed as to enable a servant of a contractor to recover for injuries due to abnormally dangerous conditions in the substance of a building which is in course of erection or demolition. The broad principle relied upon is that premises which are in the possession of a person for the purposes of his business are to be regarded as the "works" of such person so long as he is carrying on this business there. *Brannigan v. Robinson* [1892] 1 Q. B. 344, 61 L. J. Q. B. N. S. 202, 66 L. T. N. S. 647, 56 J. P. 328 (house was being pulled down).

The doctrine of this case is in harmony with two other decisions, though this particular point was not directly raised.

In *Moore v. Gimson* (1889) 58 L. J. Q. B. N. S. 169, 5 Times L. R. 177, an insecure wall left standing on premises where there had been a fire seems to be regarded as a part of the works of a party who took a contract for the reinstatement of the building destroyed. The case was decided against the plaintiff on the ground that there was no knowledge, actual or constructive, of the conditions.

Compare *Booker v. Higgs* (1887) 3 Times L. R. 618, where a wall fell on the servant of a person who, as incident to certain work on the premises, was making a hole through it.

Similarly, it has been held in Ontario that a railway used by contractors engaged in constructing an extension of the line is a part of their plant while the work is going on. *Rombough v. Balch* (1900) 27 Ont. App. Rep. 32.

The contention that the case of *Howe v. Finch* (1886) L. R. 17 Q. B. Div. 187, 34 Week. Rep. 593, 51 J. P. 276 (see following subdivision), was a controlling precedent against the plaintiff was easily disposed of on the ground that the employer, who was sued there, was the owner, not the builder, of the premises. But, singularly enough, no reference was made to the cases cited in the subjoined note, which are not distinguishable on this ground, and are directly opposed to the conclusion arrived at. The conflict of authority thus disclosed can now be adjusted in England only by a decision of the court of appeal.

In one case it was held that no action lay for an injury caused by the negligence of a co-servant in throwing rubbish down a lift well 57 L. R. A.

of a building under construction, through which, by means of ladders, the workmen were obliged to obtain access to the upper floors, this result not being affected by the fact that the master had not taken precautions to prevent such accident by warning the workmen to cease throwing things down, when it became necessary to use the well as a passage for the workmen. *Pegram v. Dixon* (1886) 55 L. J. Q. B. N. S. 447, 51 J. P. 198, 2 Times L. R. 603.

In another, a contractor was held not to be liable for maintaining an unusually large well hole in the staircase of a building under construction, through which a brick fell on the plaintiff from an upper story. *Conway v. Clemence* (1885) 2 Times L. R. 80.

In another, a contractor for the brickwork in an unfinished house was held not liable for injuries caused by the collapse of a staircase erected shortly before by another contractor as the permanent staircase of the house, as he was entitled to rely on the sufficiency of the structure without examination. *McInulty v. Primrose* (1897) 24 Sc. Sess. Cas. 4th Series, 442.

In Massachusetts the servant's right to maintain an action under such circumstances has been uniformly denied.

Contractors, by setting a servant to work on the premises of a third person, where there are movable steps leading into a cellar, while going down which the servant was injured, cannot be said to adopt the steps as a way used in their business. *Regan v. Donovan* (1893) 159 Mass. 1, 33 N. E. 702 (effect of case, as stated in *Lynch v. Allyn* (1893) 160 Mass. 248, 35 N. E. 550—injury caused by the steps falling).

So, a servant of a contractor engaged in grading the land of a third person cannot recover on the theory that the liability of a bank of earth to fall, when undermined, unless it is properly shored up, is a "defect" within the statute, the descriptive words being applicable to "ways, etc., of a permanent character, such as are connected with, or used in, an employer's business." *Lynch v. Allyn* (1893) 160 Mass. 248, 35 N. E. 550.

So, it is held that a building in process of construction is not "ways, works, or machinery connected with or used in the business" of a subcontractor helping to build it, so as to render a hole cut in the floor by another subcontractor a defect in "ways, works, and machinery." *Belque v. Hosmer* (1897) 169 Mass. 541, 48 N. E. 338.

So, a plumber is not liable to an employee injured by the fall of ladders and stagings leading from one floor to another of a building

that no employee, by remaining in the employment of such company, shall be deemed to have assumed such risk by remaining in the employment of such railroad company. This is the statute upon which *Greenlee's* and *Trowler's Cases* are based. And while we do not base our opinion in this case upon this legislation of Congress, but on the statute of 1897, still we think that this legislation of our state, and the construction we are placing upon it, are supported and strengthened by the act of Congress and the construction put upon it by this and other courts. In 1880 the English Parliament passed what is called the "employer's act," in which the doctrine of fellow servants theretofore existing in England was very much the same as in this state, and was disposed of very much as it was here by the act of 1897. The English act contains a

section which provides that an employee shall not maintain an action against his master for injuries received from defective machinery, "ways," etc., unless he gives notice of such defects to the master, or some one superior to him, unless the master already knows of the defect. In the case of *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685, it was shown that the plaintiff was injured by reason of defects known to the master, and it was contended by reason of these negative expressions used in the statute they absolved the plaintiff from the doctrine of assumption of risk. And one member of the court (Lord Esher) held with this contention of the plaintiff, though the other two members of the court overruled him in this view of the case. But the same question was again presented in *Smith v. Baker* [1891] A. C. p. 325, where the

in process of construction, where he neither constructed, managed, nor controlled such ladders and stagings. *Riley v. Tucker* (1901) 179 Mass. 190, 60 N. E. 484.

In *Lynch v. Allyn* (1893) 160 Mass. 248, 85 N. E. 550, the court remarked that there is a conflict between *Brannigan v. Robinson* [1892] 1 Q. B. 344, 61 L. J. Q. B. N. S. 202, 66 L. T. N. S. 647, 56 J. P. 328, and *Howe v. Finch* (1886) L. R. 17 Q. B. Div. 187, 34 Week. Rep. 593, 51 J. P. 276. But this is not necessarily so. It is quite possible, without any inconsistency, to take the view that a wall is a part of the works of the person who has it under his control for the purpose of erecting it, and at the same time not a portion of the works of the person who intends to use it in his business when it is completed. It would be going too far to say that an instrumentality can never be a part of the works of two separate employers at the same time, but the mere statement of the situation presented by cases of this type shows that the user by the owner of the structure and the user by the contractor for its erection are successive and mutually exclusive. It is therefore possible, to say the least, that the legal quality of the structure may be different, according as regard be had to the servants of the owner or to the servants of the contractor.

c. Instrumentalities not yet brought into use, or disused.

The words of the statute are declared to be applicable only to ways, etc., which are "existing and completed," and not to those which are partly finished and not yet used for the purposes of the employer's business. *Howe v. Finch* (1886) L. R. 17 Q. B. Div. 187, 34 Week. Rep. 593, 51 J. P. 276 (where a wall in course of erection fell on a plumber in the defendant's employ).

No action lies for defects in a machine which has been discarded as unfit for use, and is, at the time it causes the injury, being removed from the premises. *Thompson v. City Glass Co.* (1901) 17 Times L. R. 594 (a portion of the machine fell on the plaintiff). This case was deemed to be the converse of *Howe v. Finch* (1886) L. R. 17 Q. B. Div. 187, 34 Week. Rep. 593, 51 J. P. 276.

The present writer ventures to express the opinion that all the cases cited in the last two subdivisions, except *Brannigan v. Robinson* [1892] 1 Q. B. 344, 61 L. J. Q. B. N. S. 202, 66 L. T. N. S. 647, 56 J. P. 328, are based upon a narrow and technical construction of the statutes, and that the circumstances under

which the right of recovery was denied were fairly within the spirit, if not the letter, of the language used by the legislatures.

VI. What constitutes a defect.

Whenever an instrumentality is "not in a proper condition for the purpose for which it was applied," there is a "defect" in its condition within the meaning of the act. Lord Coleridge in *Heske v. Samuelson* (1883) L. R. 12 Q. B. Div. 30, 53 L. J. Q. B. N. S. 45, 49 L. T. N. S. 474; Approved in *Cripps v. Judge* (1884) L. R. 13 Q. B. Div. 583, 53 L. J. Q. B. N. S. 517, 51 L. T. N. S. 182, 33 Week. Rep. 35, 49 J. P. 100.

Lindley, L. J., in *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 251, said: "I take defect to include anything which renders the plant, etc., unfit for the use for which it is intended, when used in a reasonable way and with reasonable care."

This word "defect" implies an inherent defect, a deficiency in something essential to the proper use of the apparatus for the purpose for which it is to be used. *Hamilton v. Groesbeck* (1889) 19 Ont. Rep. 76.

Compare also the passage from the majority opinion in *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, as quoted *infra*.

"A defect in the condition of the way, or works, or machinery, or plant, . . . means, I should be inclined to say, such a state of things that the power and quality of the subject to which the word 'condition' is applied are for the time being altered in such a manner as to interfere with their use. For instance, if the way is made to be muddy by water, or if it is made slippery by ice, in either of these cases, I should say that the way itself is not defective, but the condition of the way, by reason of the water which is incorporated with it, or from its being in a freezing state, is affected." *McGiffin v. Palmer's Shipbuilding & Iron Co.* (1882) L. R. 10 Q. B. Div. 9, 52 L. J. Q. B. N. S. 25, 47 L. T. N. S. 346, 31 Week. Rep. 118, 47 J. P. 70.

If the whole arrangement of a machine is defective for the purpose for which it is applied, there is a defect so as to bring it within the act, although each part may be sufficient. *Cripps v. Judge* (1884) L. R. 13 Q. B. Div. 583, 53 L. J. Q. B. N. S. 517, 51 L. T. N. S. 182, 33 Week. Rep. 35, 49 J. P. 100, per Brett, M. R.

The words "defect in the arrangement," used only in the acts of Ontario and British Columbia, mean the element of danger arising

court was again divided, but where a majority of the lords, who put their opinion upon the statute of 1880, agreed with Lord Esher that the statute did destroy or do away with the implied assumption of risk. We refer to the English statute and those cases from the English courts for the purpose of showing that, while the English courts may not have expressly decided that the English statute did away with the doctrine of assumption of risk, there was a strong tendency of the courts to hold that way. And in the case of *Smith v. Baker* a majority of the lords who put their opinions upon that statute so held; and, if there could be reason for such a construction upon a statute which did not in terms declare such object, but where the legislative disposed of very much as it was here by the act of 1897. The English act contains a

could we escape such a construction where the legislative intent is manifested in express terms, and in the most emphatic manner? We are therefore of the opinion that, whatever might have been the proper rule in this state as to whether the plaintiff assumed the risk of operating this defective tender by remaining in the employment of the defendant, the statute of 1897 (chap. 56) has solved that question, and relieved the plaintiff from the burden of assuming the risk of such defect, if it was on him before.

In putting this construction upon the act of 1897, it must not be understood that the plaintiff is relieved by this act, or the construction we have put upon it, from the responsibility of his own negligence. But, as we have said, the principal "battle" in this case was as to the assumption of risk, and

from the position and collocation of machinery in itself perfectly sound and well fitted for the purpose for which it is to be used. *McCloherly v. Gale Mfg. Co.* (1892) 19 Ont. App. Rep. 117, 121, per Osler, J. A.

It follows, therefore, that, whenever there is such unsuitableness for the work intended to be done and actually done, the liability contemplated by the statute arises, although the appliance is perfect of its kind and in good repair and suitable for other kinds of work. In such a case the employer is in fault because he has furnished appliances for a use for which they are unsuitable, and, in effect, is so ordering and carrying on his work that, without fault of the ordinary workman, the natural consequence will be that the appliance will be used for purposes for which it is unsuitable. *Geloneck v. Dean Steam Pump Co.* (1896) 165 Mass. 202, 43 N. E. 85.

Whether an appliance was properly constructed in reference to the use for which it was intended, is usually a question for the jury. *Prenoble v. Connecticut River Mfg. Co.* (1893) 160 Mass. 131, 35 N. E. 675.

A defect importing negligence on the master's part may properly be found to exist where the appliance in question was so constructed or arranged that it was likely to cause undue hazard to a person exercising that degree of care which might be expected, whether regard be had to the special circumstances under which the appliance was to be put into operation, or to the age, skill, and experience of the particular employee who was to operate it.

A sliding door intended to be closed in case of fire is defective unless it can be manipulated with reasonable safety by persons who would naturally be acting as hurriedly as would be the case under such circumstances. *Johnson v. Mitchell* (1885) 22 Sc. L. R. 698.

This seems to be the actual scope which should be ascribed to the decision in *Morgan v. Hutchins* (1890) 59 L. J. Q. B. N. S. 197, 38 Week. Rep. 412, in order to prevent its clashing with *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 581, 36 Week. Rep. 876, 53 J. P. 38, *infra*, VIII. to which according to the statement of the court, there was no intention of running counter. A child was there held entitled to maintain an action for injury caused by uncovered machinery. The broad ground was taken that the statute applies where a machine is "defective with regard to the safety of the workmen," even though it is effective for the purpose for which it is used. The Master of the Rolls, who, since the decision in *Walsh v. Whiteley* 57 L. R. A.

(1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, had been created Lord Esher, said: "The argument in the present case is that there is no defect in machinery if the machine in question is in itself a proper one for the work it is to perform. It must be carried to this length,—that if the machine contains a secret defect which causes danger to the workman, but which does not affect the purposes for which it is to be used, then this is not a defect within the meaning of the act. Now this leather-pressing machine cannot be worked without workmen; without labor it is useless as a machine. Surely this fact of itself is something that has to do with the condition of the machine. If its condition be such that the workman cannot do his part with safety, is that, or is it not, a defect in the condition of a machine the working of which is a necessary performance? It seems to me that unless we hold the defect complained of here to be one within the subsection in question, the act might as well have never been passed."

The fact that the instrumentality which caused the injury was less safe than one which was used by a large proportion, or by the majority, of other employers in the same business, is probably regarded by all courts as an element which entitles the servant to go to the jury on the question whether it was defective. As where a common round stick without any holes in it was furnished to be used as a lever for tipping a large ladle of molten metal, the evidence being that it was not safe, and that another kind of device was customary in large foundries like that of the defendant. *Flaherty v. Norwood Engineering R. Co.* (1898) 172 Mass. 134, 51 N. E. 463.

Whether a piece of iron piping is a proper material to use as a buffer to protect the head of a bolt which is being driven, is a question for the jury, where the evidence is that for several years copper hammers have been made for such work, and that piping is the least desirable of the metals used, because it is so brittle that chips are apt to fly off from it and injure the person holding it. *Littlefield v. Edward P. Allis Co.* (1900) 177 Mass. 151, 53 N. E. 692.

As to the effect of evidence that the employer had satisfied the standard fixed by common usage, see *infra*, VIII.

In Ontario it is held that the effect of the provisions in the factories acts, by which the failure to take certain specified precautions is made a penal offense, is that, although an injury due to noncompliance with one of those

it was ably conducted on both sides, barring the statute of 1897, and was ably conducted by the learned judge who presided at the trial. The greater part of the record, consisting of prayers for instruction and the judge's charge, is predicated upon the first issue,—the assumption of risk,—which are eliminated by the view we have taken of the case. This being so, there is but little more for us to do. The prayers of the defendant mainly, if not all of them, are addressed to the assumption of risk, and it is not necessary for us to discuss them after taking this view of the act of 1897.

The defendant's fifth prayer for instructions was addressed to the plaintiff's using the drainpipe as a grab iron. This prayer, it seems, the court gave, but added the following: "The drainpipe was not put there for a grab iron, and there is no negligence

imputable to the defendant by reason of the weak condition of the drainpipe; but the question is left for the jury to say, upon the second issue, whether or not the plaintiff was negligent in taking hold of it, and whether he acted as a prudent man in taking hold of it. That question is left with the jury upon the second issue." This addition is assigned as error, but we see none. The prayer must have been addressed to the second issue, though it does not so state, and we see no error in referring the question to the jury. As we understand, the question of prudence, and the ideal prudent man, are always a matter for the jury. This seems to have been the ground of the exception that the court did not decide the question, instead of referring it to the jury.

There is one other exception that we think necessary to notice, and that is the

provisions does not constitute a cause of action under the statute itself, such noncompliance is evidence which it is competent to consider as tending to show negligence on the defendant's part, in an action brought under the workmen's compensation act. *O'Connor v. Hamilton Bridge Co.* (1894) 25 Ont. Rep. 12, Affirmed in 21 Ont. App. Rep. 596 (1895) 24 Can. S. C. 598; *Thompson v. Wright* (1892) 22 Ont. Rep. 127; *Rodgers v. Hamilton Cotton Co.* (1893) 23 Ont. Rep. 425; *McCloherly v. Gale Mfg. Co.* (1892) 19 Ont. App. Rep. 117; *Godwin v. Newcombe* (1901) 1 Ont. L. Rep. 525.

In all these cases the propriety of declining to interfere with the verdicts of juries based on the theory that the maintenance of unguarded machinery was negligence was recognized.

In *Hamilton v. Groesbeck* (1889) 19 Ont. Rep. 76, the lower court seems to have been of opinion that an unguarded saw was not a defect. If it was intended to lay this down as a matter of law, the doctrine is clearly contrary to that of the decisions just cited. The court of appeal (1891; 18 Ont. App. Rep. 437) declined to consider whether the want of a guard was or was not a defect.

Considering the extreme improbability that any jury will absolve an employer who has been guilty of a breach of the statute, it is manifest that, for practical purposes, the consequence of such a doctrine is to place servants 'n a position not materially different from that which they would hold if the theory had been adopted that damages may be recovered by anyone injured by the violation of a penal act.

The statute is equally applicable, whether the defect is in the original construction of the machine, or arises from its not being kept up to the obligatory standard of safety. See the passage quoted from the majority opinion in *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 87 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, *infra*, VIII.

In *Heske v. Samuelson* (1883) L. R. 12 Q. B. Div. 30, 53 L. J. Q. B. N. S. 45, 49 L. T. N. S. 474, Stephen, J., in commenting on the theory of the county judge that a defect arising from the original construction of a machine was not a defect in the condition of the machinery, said: "The argument for the defendants comes to this,—that if the employer has a machine one part of which is weaker than it ought to be, there is a defect in its condition; but if the whole machine is too weak for the purpose for which it is applied, there is no such defect. Could it be said that if a wind-

lass, fit only for raising a bucket, is used to draw up a number of men, that there is no defect in the condition of the machinery? The condition of the machine must be a condition with relation to the purpose for which it is applied."

The fact that an appliance comes up to the legal standard of safety when it is in its normal condition will not excuse the master if that condition has been so changed as to render it unsafe, and the change is due to the act of an agent who is intrusted with the duty of seeing that it is in proper condition. *Tate v. Latham* [1897] 1 Q. B. 502, 66 L. J. Q. B. N. S. 349, 45 Week. Rep. 400, 75 L. T. N. S. 694, per Lord Esher.

In a leading English case, Lord Watson remarked that he saw "no reason to doubt that an arrangement of machinery and tackle which, although reasonably safe for those engaged in working it, is nevertheless dangerous to workmen employed in another department of the business, constitutes a defect in the condition of the works within the meaning of the subsection." *Smith v. Baker* [1891] A. C. 325, 354, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660.

A servant who is a mere licensee or a trespasser in respect to the locality where he receives the injury complained of cannot, it is manifest, recover damages, even though the conditions which cause the injury may constitute a defect as to other employees. As where a servant who left a dockyard by a path which was not the regular exit, and which the servants were merely permitted to use, fell into a pit. *Pritchard v. Lang* (1889) 5 Times L. R. 639, following *Bolch v. Smith* (1882) 7 Hurlst. & N. 737, 31 L. J. Exch. N. S. 201, 8 Jur. N. S. 197, 10 Week. Rep. 387, as to the general principle.

A double reason for his inability to sue will, of course, exist where the servant's presence at the spot where he was injured was not merely unauthorized, but negligent as well.

An unguarded elevator opening is not "a defect in the condition of the way," as regards a workman required to pass through a passage 12 feet wide, well lighted, and with which he is well acquainted, where it is upon the opposite side of the passage from that upon which such workman should pass, and he turns out of his way to look at repairs in progress upon the elevator. *Headford v. McClary Mfg. Co.* (1894) 21 Ont. App. Rep. 164, Affirmed in (1895) 24 Can. S. C. 291.

measure of damages. As to this, it seems to us that it would have been proper for the court to have explained more fully the rule as to the measure of damages, or the manner of ascertaining them; especially as it seems to us that an improper rule had been insisted upon in the closing argument of the plaintiff's counsel. But we see no intrinsic error in what the court did charge,—that the jury should give the plaintiff "the present cash value" of his injury, taking into consideration pain and mental suffering, not allowing anything as a punishment, or punitive damages. The defendant cites but one authority to sustain its assignment of error as to instructions upon the question of damages,—*Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L. R. A. 257, 23 S. E. 264,—and we do not think it sustains the defendant's conten-

tion. That case is as to a prayer which the court held to be erroneous, but in passing upon the prayer the court suggests almost the exact language used by the court in this case as a proper instruction. It was contended before us in the argument that the jury found their verdict upon the erroneous rule laid down by defendant's counsel, but we have no means, as a court, of knowing that this contention is true. The plaintiff is still living. The verdict does not show that the jury were so governed in finding their verdict. It is far more than the simple calculation of time of expectancy by the plaintiff's yearly earnings. But they were instructed that they might give the plaintiff damages for pain, suffering, etc. This was not error, and we have no means of knowing how much they allowed for this and how much they allowed for his earn-

VII. *Specific examples of defects.*

a. *Defects in the condition of the ways.*

This phrase embraces only those inherent imperfections which render the ways themselves less fit for the use for which they are intended.

Servants injured by the following defects have been held entitled to go to the jury:

A loose plank extending over a hole at a place which the servant has to pass, and so laid as to tip up when he steps on it. *Bromley v. Cavendish Co.* (1886) 2 Times L. R. 881.

The unsafe adjustment of a plank in a temporary staging across which materials are to be carried. *Giles v. Thames Co.* (1885) 1 Times L. R. 469.

A plank 8 inches wide and 30 feet from the ground furnished as a means for a servant to reach and repair a defective steam pipe. *United States Rolling Stock Co. v. Weir* (1892) 96 Ala. 396, 11 So. 436 (complaint averring insufficiency, not demurrable).

A plank of insufficient strength to sustain the weight of the men who have to walk along it. *Caldwell v. Mills* (1893) 24 Ont. Rep. 462.

A defective track on a railway. *Coughlan v. Cambridge* (1896) 166 Mass. 268, 44 N. E. 218.

An open ditch across a track along which the servant had to pull a car. *Gustafsen v. Washburn & M. Mfg. Co.* (1891) 153 Mass. 468, 27 N. E. 179.

An unprotected aperture in a staircase which the workman had to use in the course of his employment. *Wood v. Dorrall* (1886) 2 Times L. R. 550.

The narrowing of a space between the wall of a passageway in a mine and cars passing therein, so as to cause the cars to pass dangerously near to the wall. *McNamara v. Logan* (1893) 100 Ala. 187, 14 So. 175.

The roof to an adit in a mine so defectively timbered as to allow a large stone to fall on a miner. *McMullen v. Newhouse Coal Co.* (1896) 23 Sc. Sess. Cas. 4th Series, 759.

A rock on the roof in a tunnel which is so loose that it may fall at any moment. *Tutwiler Coal, Coke & I. Co. v. Enslen* (1900) 129 Ala. 336, 30 So. 600.

The master's liability is a question for the jury where the evidence is conflicting as to whether a gudgeon pin used to fasten the arms of a derrick to a mast was large enough for safety. *Richmond & D. R. Co. v. Weems* (1893) 97 Ala. 270, 12 So. 186.

That the master is not liable for casual ob-

structions arising from the use of his ways, see *supra*, VI., *infra*, VII.

b. *Defects in the condition of the works.*

The few decisions specifically referable to this rather vague term alone seem to be confined to the cases previously discussed (see *supra*, IV. c), in which the liability of masters for the condition of the premises of another person upon which they have contracted to do something is in question.

A roof which proved too weak to support the snow which was allowed to accumulate on it seems to be treated in a Massachusetts case as a defect in the "works," but the point actually decided was merely that an allegation of defective condition was sustained by proof that the weight of snow was one of the causes of the fall. *Dolan v. Alley* (1891) 153 Mass. 380, 26 N. E. 989.

See also the remark of Lord Watson, quoted in *supra*, VI., for some cases in which the term occurs in conjunction with others descriptive of various kinds of instrumentalities.

c. *Defects in the condition of the machinery.*

The cases cited below indicate sufficiently the kind of abnormal conditions which may properly be found by a jury to fall within this description:

Defective pressure, causing a hydraulic crane to work erratically. *Bacon v. Dawes* (1887) 3 Times L. R. 557.

A band which is constantly slipping off a shaft, thus creating a necessity for a frequent readjustment. *Baxter v. Wyman* (1888) 4 Times L. R. 255.

A belt which is liable to slip off of a pulley. *Ellis v. Pierce* (1898) 172 Mass. 220, 51 N. E. 974.

Defective appliances for controlling the speed of a push car, which collided with the plaintiff, knocking him down a high trestle, stated a cause of action. *Central R. Co. v. Lamb* (1899) 124 Ala. 172, 26 So. 969.

A part of a machine in a paper mill so constructed that the rags, etc., which are fed to it are apt to catch, the result being a frequently recurring necessity to remove them. *Paley v. Garnett* (1885) L. R. 16 Q. B. Div. 52, 34 Week. Rep. 295, 50 J. P. 469.

The absence of a guard to a circular saw provided by the owner of a sawmill, due to its improper removal by the sawyer for his own purposes. *Tate v. Latham* [1897] 1 Q. B. 502, 66 L. J. Q. B. N. S. 349, 45 Week. Rep. 400, 75 L. T. N. S. 694.

ings. There may have been error in the manner in which the jury estimated the damages. But, if there is, we cannot know it, nor does the record, to which we are confined, disclose the error. Upon the view of the case we have taken, *the judgment must be affirmed.*

Cook, J., dissents.

Montgomery, J., dissenting:

I cannot concur in the opinion of the court. It seems that the general assembly, in Private Laws 1897, chap. 56, has deprived the defendant of its plea of assumption of risk. As is said in the opinion of the court, the effect of that legislation in respect to assumption of risk had not been called to the attention of counsel in the cause or to that of the court; but neverthe-

less we find, upon an examination of the statute, that to be its plain construction. But the issue on the "assumption of risk" being eliminated does not prevent the operation of the principle of contributory negligence, and it seems to me that the evidence of the plaintiff himself furnishes such clear and convincing proof that his own negligent act was the direct and proximate cause of his injury that his honor should have told the jury that upon his evidence they should respond "Yes" to the second issue. *Neal v. Carolina C. R. Co.* 126 N. C. 634, 49 L. R. A. 684, 36 S. E. 117. There was a by-law of the company in the following words: "(S) Every employee must exercise the utmost caution to avoid injury to himself or to his fellows, especially in the switching of cars and in all movements of trains, in which work each employee must look after

The want of a fence to protect employees from moving machinery. *Wallace v. Cutler Co.* (1892) 19 Sc. Sess. Cas. 4th series, 915 (denying that this result was affected by the fact that the danger was a palpable one).

A loom in which the shuttles are neither fixed so as not to be constantly flying out, nor protected by proper guards. *Smith v. Harrison* (1889) 5 Times L. R. 406.

Unguarded machinery, which is operated by children. *Morgan v. Hutchins* (1890) 59 L. J. Q. B. N. S. 197, 38 Week. Rep. 412; *Gemmills v. Gourcock Co.* (1861) 23 Sc. Sess. Cas. 2d series, 425 (here embossed cogwheels were maintained in such a position that girls of twelve or thirteen years of age were required, in the course of their duties, to place their hands and dress within some 8 or 9 inches of them when in motion).

Unfenced machinery, in a jurisdiction where a penalty is imposed, by a factories act for not having machinery guarded, may properly be found to import negligence. See *supra*, VI.

In the most recent case in which this doctrine was applied it was held that the absence of a guard is a defect, if the machinery is thereby rendered dangerous to the workman using it, even if the machinery is in itself well constructed and suitable for the purpose for which it was designed. *Godwin v. Newcombe* (1901) 1 Ont. L. Rep. 525.

Evidence that an injury to a weaver in a cotton mill, while assisting an inexperienced hand, by the shuttle flying out of the loom, was caused by a bolt breaking when the shuttle came in contact with it, is fit to go to the jury upon the question of negligence. *Canadian Colored Cotton Mills v. Talbot* (1897) 27 Can. S. C. 198.

At the trial of an action against a railroad corporation for the death of an employee caused by the falling upon him of a locomotive, which had been placed on a truck in the repair shop, it is competent for the jury to find that, although the iron was sound where the wheel of the truck broke, yet, by reason of its long use and the increase in the weight of engines, the truck had become unsuitable for the use to which it was put, and that, if the wheel had been of proper strength, it would have withstood the strain caused by meeting the obstruction on the rail. *Gunn v. New York, N. H. & H. R. Co.* (1898) 171 Mass. 417, 50 N. E. 1031.

d. Defects in the condition of the plant.

As the term "plant" carries the very extensive L. R. A.

sive meaning explained in *supra*, IV. e, the cases involving it cover a great variety of appliances. Some of them might apparently be referred to the instrumentalities discussed in the preceding subdivisions.

The following defects have been held to come under the head of "defects in plant:"

The want of ventilation for the hold of a coal ship, the result being that gas accumulated and exploded when the hatches were removed and the men engaged to unload the coal entered the hold with their lanterns. *Carter v. Clarke* (1898) 14 Times L. R. 172, 78 L. T. N. S. 76.

A horse intended for a particular kind of work, and so vicious as to be unfit for that work. *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281.

A vicious horse. *Fraser v. Hood* (1887) 15 Sc. Sess. Cas. 4th series, 178.

A horse who is constantly falling. *Harston v. Edinburgh Co.* (1887) 14 Sc. Sess. Cas. 4th series, 621.

The want of some means, either to prevent loose bodies from falling upon men working below, or to protect those men from any of those bodies which may fall. *Heske v. Samuelson* (1883) L. R. 12 Q. B. Div. 30, 53 L. J. Q. B. N. S. 45, 49 L. T. N. S. 474 (piece of coal fell from a lift, the sides of which were not fenced, on to an unroofed platform).

A ladder which, by the direction of the defendant, is used to support a scaffold, and, not being strong enough for the purpose, breaks under the weight of a servant. *Cripps v. Judge* (1884) L. R. 13 Q. B. Div. 583, 53 L. J. Q. B. N. S. 517, 51 L. T. N. S. 182, 33 Week. Rep. 35, 49 J. P. 100.

A bolt so weakened by constant strains that it breaks. *Irwin v. Dennystown* (1885) 22 Sc. L. R. 379.

A sliding door to be used in case of fire, having no provision for protecting the hands of an employee from being crushed when it is pulled to. *Johnson v. Mitchell* (1885) 22 Sc. L. R. 698.

An inflammable brattice-cloth allowed to stand in a place where sparks frequently fall on it. *Thomas v. Great Western Co.* (1894) 10 Times L. R. 244.

Car buffers of different heights, overlapping in coupling so as to afford no protection to the person making the coupling, constitute a "defect in the arrangement of the plant," within the Ontario statute. *Bond v. Toronto R. Co.* (1895) 22 Ont. App. Rep. 78, Affirmed without opinion in 24 Can. S. C. 715 (construing

and be responsible for his own safety. Jumping on or off trains or engines in motion, getting between cars in motion to couple or uncouple them, and all similar imprudences, are dangerous, and in violation of duty. All employees are warned that, if they commit these imprudences, it will be at their own peril and risk." The plaintiff knew of that by-law, and with a full knowledge of what he said himself was an obvious defect in the construction of the tender, to wit, the lack of a grab iron, got upon the tender while it and the engine were in motion, and undertook to lift himself from the cross step up to a higher platform by grasping a drainpipe, which he says himself he had never examined, and that, too, with the engine and tender moving backward, his injury being certain if the pipe should give way. A prayer for instruction

by defendant on the point of the plaintiff's using the grab iron for the purpose which he did was directed to the first issue, and refused on that account. But his honor undertook to charge the jury in respect to the contributory negligence of the plaintiff, and failed to call their attention to the plaintiff's neglect to examine the grab iron, which, in my opinion, was the most important point in the negligent course and conduct of the plaintiff. Especially is that failure on the part of his honor an error when it can be seen from the record that his honor, in speaking to the jury about the time and the circumstances of the seizing of the drainpipe by the plaintiff, misconceived entirely the evidence of the plaintiff on an important and vital point, and, as a consequence, failed to instruct the jury properly as to those conditions. His honor

the phrase, "defect in the arrangement of the plant," which occurs in the Ontario act).

A switch not provided with a lock, or securely guarded in any other way. *Rombough v. Balch* (1900) 27 Ont. App. Rep. 32.

An insufficiency in the number of scrapers supplied for cleaning out a brick-pressing machine. *Race v. Harrison* (1893) 10 Times L. R. 92, per Kay, L. J.

The failure to supply a boy with proper materials for the cleaning of machinery. *Thompson v. Wright* (1892) 22 Ont. Rep. 127.

The inadequate manning of cars which are "kicked" on to a side track, the result being that their speed cannot be controlled, and they come into collision with other cars. *Louisville & N. R. Co. v. Davis* (1890) 91 Ala. 487, 8 So. 552.

The lack of ventilation in the hold of a vessel. *Carter v. Clarke* (1898) 78 L. T. N. S. 76, 14 Times L. R. 172.

VIII. Conditions not amounting to defects.

The mere fact that a machine is dangerous to manipulate unless the servant takes certain precautions which any reasonably intelligent man would see to be appropriate under the circumstances will not warrant a finding that the machine is defective within the meaning of the act.

There can be no recovery unless the defect is one which implies negligence on the part of the master, or the agents for whose defaults he is answerable.

In *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, the trial judge left it to the jury to say whether a defect in the condition of the machine was indicated by evidence that the accident would not have happened if the disc of the wheel of a carding machine had been solid, and instructed them that to be defective a machine must be such as a reasonable, careful, experienced man, reasonably careful of the safety of his workmen, would not use. The jury found that there was a defect, but the court of appeal held that the evidence did not warrant this conclusion. The following passage shows the position taken by the majority of the court (Lindley and Lopes, L. JJ.): "To determine the meaning of the words 'defect in the condition of the machinery' we must look, not only at § 1, subsec. 1, but also at § 2, subsec. 1. Reading those sections and subsections together, we think there must be a defect implying negligence in the employer. The negligence of the employer appears to be a necessary element without which 57 L. R. A.

the workman is not to be entitled to any compensation or remedy. It must be a defect in the condition of the machine having regard to the use to which it is to be applied or to the mode in which it is to be used. It may be a defect either in the original construction of the machine, or a defect arising from its not being kept up to the mark; but it is essential that there should be evidence of negligence of the employer, or some person in his service intrusted with the duty of seeing that the machine is in proper condition. It must be a defect in the original construction or subsequent condition of the machine, rendering it unfit for the purposes to which it is applied when used with reasonable care and caution, and a defect arising from the negligence of the employer. What evidence is there of this? Is there any evidence of the machine being defective, even in the abstract? It was perfect in all respects. It was not impaired by use. It had been properly kept up to the mark. The only suggestion is that the wheel which might have been solid had holes in it, and that, if the wheel had been solid, the plaintiff could not have put his thumb where he did, and the accident would not have happened. It is also suggested that the wheel was too close to the table, and that had the wheel and table been further apart the accident would not have happened. There was, however, no evidence worth mentioning of improper construction in this respect. But the plaintiff had used the same kind of machine for thirteen years, and had sustained no injury. It is to our mind clear that he would have suffered no injury on the present occasion if he had used proper care and caution. In these circumstances we can see no evidence of any defect in the condition of the machine, even apart from negligence of the employer. It may be that a solid wheel would have been safer, but it would be placing an intolerable burden on employers to hold that they are to adopt every fresh improvement in machinery. We do not believe that such was the intention of the legislature, nor do we think it was intended to relieve workmen from the exercise of that care and caution without which most machinery is dangerous. But in our opinion the defect in the condition of the machinery must be such as to show negligence on the part of the employer. It seems to us that in this case there is not a particle of evidence of any defect arising from the negligence of the employer. It was a machine generally used,—used by the plaintiff for thirteen years without any complaint or mischief arising, perfect and unimpaired and never thought by the plaintiff

said: "In regard to a violation of a known rule of the company his [plaintiff's] statement was that the rule was that he should not get on the engine in motion. He says that the engine had not started, but did start after he got up; and he contends that the injury did not result from that, but from his taking hold of the drainpipe, and that that was the natural thing for him to do, and he asked the jury to so find. The plaintiff had testified that the engine and tender were in motion when he got upon the step; that it was going at about a mile an hour when he got on, and about 2 or 3 miles an hour when he fell." There is an exception by the defendant to this misrecital of the evidence and its effect. Certainly, if the injury was caused from the plaintiff's taking hold of the drainpipe, that was the proximate cause of the injury, and as his

honor had told the jury that the drainpipe was not made to be taken hold of by the plaintiff, and that they should not consider the drainpipe in any aspect whatever as connected with the defendant's negligence, the plaintiff's use of it for the purpose with which he did use it was an act of negligence so gross that his honor should have instructed them to find the second issue "Yes."

In reference to the rule laid down by his honor as to the measure of damages, I think that it was not sufficiently definite, taken in connection with the rule which counsel of the plaintiff argued to the jury. I know that a trial judge is not expected to controvert every erroneous argument made by counsel in the course of the trial, but after that part of the argument referred to in this case his honor should have in some way

himself to be unsafe. It is said there is evidence of the machine being dangerous. So are most machines; so is even an ordinary sharp knife, unless used with care; but that does not make it defective in its condition, nor does it imply negligence in the employer if an accident happens." The following passage from the dissenting opinion of Lord Esher shows the theory adopted by that eminent judge: "Remembering that this is a statute passed to extend the liability of the employer in favor of the workmen and for their greater safety, I do not think that, in considering what is a defective machine, we can confine that consideration to the question of the purpose for which it is used. The defect contemplated by the act is not in my opinion a defect with reference to the purpose for which the machine is employed, but a defect with reference to the safety of the workmen using it; and that defect may be either in the original construction of the machine or in the use to which the machine is put. Upon the findings of the jury, and the true construction of the enactment, I am of opinion that the case is brought within the statute."

The general language of this decision is somewhat qualified by Morgan v. Hutchins (1890) 59 L. J. Q. B. N. S. 197, 38 Week. Rep. 412, *supra*, VI. There Lord Esher, referring to the earlier case, made the following remarks: "I think it was assumed by the whole court that, if the machine were dangerous to a workman without any fault of his own, it came within the act. The only doubt that existed in the minds of two of the members of the court was whether the defect had arisen from the negligence of the employer."

The general rule has been enunciated, that machinery is not defective which is fit and proper for the purpose for which it is designed, and there is a reasonable mode, known to the injured servant, in which he could have operated it. Noonan v. Dublin Distillery Co. (1893) Ir. L. R. 82 C. L. 399.

In Thomas v. Quartermaine (1886) L. R. 17 Q. B. Div. 417 (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, a boiling vat and a cooling vat were placed in the same room in the defendant's brewery. A passage only 3 feet wide in one part ran between them, the rim of the cooling vat rising 16 inches above the passage. Underneath the boiling vat was a board which the plaintiff had occasion to use. To draw it out he had to give it a jerk, and it came away so suddenly that he fell back into the cooling vat. In the divi-

sional court, Willis, J., said: "I can see no evidence of any defect in the condition of either ways or plant. The way, as a passage or gangway, was safe enough, and, as far as appears, wide enough for any legitimate use that it could be put to as a way. There was no defect in the vat as a vessel to hold liquor to be cooled. The defect, if defect there were, was not in the way, considered as a way, nor in the vat considered as a vat, but in the proximity of the vat to the place where a piece of board was kept, which piece of board stuck by some not in the way, considered as a way, nor in the court of appeal it was considered that the finding of the trial judge, sitting as a jury, that there was a defect in the condition of the works, must be allowed to stand, as there was some evidence to support his conclusion."

Accordingly, under the statute, as at common law, an employer is not bound to provide the very best machinery that can possibly be invented. It is enough if he provides that which is reasonably sufficient for the purpose. Robins v. Cubitt (1881) 46 L. T. N. S. 535, per Lopes, J.

Want of reasonable care is not established by evidence which merely shows that a particular safety-catch of a different pattern from that on the defendant's elevator had been used ten years before by others. Black v. Ontario Wheel Co. (1890) 19 Ont. Rep. 578.

The rule that "an employer is not bound to provide against every possible danger, or to supply in all cases the safest and most approved appliances," was applied in Mitchell v. Patullo (1885) 23 Sc. L. R. 207. There the folding doors of a shed on a farm flapped in a horse's face, so that he backed a wagon, and crushed the plaintiff. It was held that the farmer was not in fault for having failed to provide sliding doors.

A defect in apparatus for hoisting ice is not shown by the fact that a gin-wheel was hung so low that the employee's hand was drawn into it and injured by failure to stop the rope soon enough, where it does not appear that it could have been hung any higher in the building, and proper arrangements were made for stopping the rope if the engineer had observed it. Carbury v. Downing (1891) 154 Mass. 248, 28 N. E. 162. The plaintiff did not suggest that the means employed to stop the engine were not sufficient, or that any other should have been provided, but contended that the means for indicating to the engineer the time for stopping the engine, *viz.*, a mark upon the rope to indicate to the engineer when to stop it, was not sufficient. It was held that the jury could

explained more fully what he meant by the words "the present net money value of such loss incident to his injury." I think there was error.

A petition for rehearing having been filed, *Douglas, J.*, on December 20, 1901, handed down the following response:

This case is now before us on a petition to rehear. It was first argued in this court at the September term, 1900, and was carried over under *advisari*. At the February term, 1901, it was reargued by leave of the court, and determined, the case being reported in 123 N. C. 534, 39 S. E. 43. We have thus had the advantage of three distinct arguments by able and learned counsel, who have also filed elaborate briefs. With such a presentation of the case, and after careful consideration, we feel com-

pelled to adhere to our former decision. We do so upon an entire review of its merits on account of its importance as a precedent, which, we think, takes it out of the strict operation of the rule invoked by the plaintiff and laid down in *Weisel v. Cobb*, 122 N. C. 67, 30 S. E. 312, and cases therein cited. The facts are sufficiently stated in the well-considered opinion of the Chief Justice.

The doctrine of fellow servant is generally said to have had its origin in the case of *Priestley v. Fowler*, 3 Mees. & W. 1, decided in 1837, where the plaintiff had his thigh broken by the breaking down of an overloaded butcher's van, loaded and conducted by a fellow servant. The doctrine, which was rather inferentially laid down in *Priestley's Case*, was for the first time distinctly enunciated in 1841 in *Murray v. South Carolina R. Co.* 1 McMull. L. 385, 36

not properly have found that this was an insecure mode of indicating to the engineer when the ice arrived at the top of the run, and that the engine ought to have been inside the building, where the engineer could see the ice and the upper gin-wheel, and decide in that way when the engine should be stopped.

A servant cannot recover as for a "defect," where he was injured by the fall of a bar which was used for fastening trap-doors in a floor, and which, instead of being secured by a chain or otherwise, so as to prevent its falling, was left loose. *Pooley v. Hicks* (1889) 5 Times L. R. 353.

A draw bar on the car of another railway company, which is of a different height from those on the defendant's, own cars is not a defect. *Ellisbury v. New York, N. H. & H. R. Co.* (1899) 172 Mass. 130, 51 N. E. 415.

It is not, as matter of law, the duty of persons operating coal mines to cut a manway, different and separate from the slope through which coal was brought to the surface, for the ingress and egress of their employees. *Whatley v. Zenilda Coal Co.* (1898) 122 Ala. 118, 26 So. 124.

Culpability is negatived by proof that the instrumentalities furnished are the same in character and quality as those used under similar circumstances by persons carrying on the same business as the defendant.

An open hook without a catch, to which a bucket is attached for raising and lowering loads, cannot be held to be a defect, where the plaintiff's evidence is that such a hook was always used in work of a similar kind, and no proof is given of the occurrence of any previous accident. *Claxton v. Mowlen* (1888) 4 Times L. R. 756.

The failure of an ironmaster to fence in about 10 feet of the lower end of a shaft through which ore was raised to a furnace gangway will not render him liable for injuries to a workman struck by a piece of the ore which fell through the opening, if it is shown that it was usual in the trade to leave so much of these shafts unfenced. *Murray v. Merry* (1890) 17 Sc. Sess. Cas. 4th series, 815.

No negligence can be inferred where a scaffold alleged to be defective is the ordinary kind of scaffold used by masons, and as strong as they are usually made. *Thompson v. Dick* (1892) 19 Sc. Sess. Cas. 4th series, 804.

A trap-door without a railing, such as is commonly maintained in factories, is not a "defect." *Moore v. Ross* (1890) 17 Sc. Sess. Cas. 4th series, 796.

A projecting set screw in a shaft, being a common device for the purpose for which it is

used, is not of itself a defect. *Donahue v. Washburn & M. Mfg. Co.* (1897) 169 Mass. 574, 48 N. E. 842; *Demers v. Marshall* (1899) 172 Mass. 548, 52 N. E. 1066 (1901) 178 Mass. 9, 59 N. E. 454; *Ford v. Mount Tom Sulphite Pulp Co.* (1899) 172 Mass. 544, 48 L. R. A. 96, 52 N. E. 1065. (In the last case recovery was denied though the screw had been placed on the shaft after the servant had entered the employment.)

Nor is a key-way with sharp edges, in a shaft. *Connelly v. Hamilton Woolen Co.* (1895) 163 Mass. 156, 39 N. E. 787.

An engineer employed in fitting up the boilers on a steamer in course of construction cannot recover for injuries caused by falling into an open manhole, while threading his way between decks in a dim light, on the theory that the master was bound to protect the manhole. *Forsyth v. Ramage* (1890) 18 Sc. Sess. Cas. 4th series, 21.

In a later case the court explained that this decision was based upon the ground that the risk in question was an ordinary one incidental to the work undertaken, and disclaimed the intention of laying down any such general rule as that a workman on a ship in course of construction cannot recover for injuries due to the danger of the place of work. *Jamieson v. Russell* (1892) 19 Sc. Sess. Cas. 4th series, 898, where the representative of an employee, killed by falling into an open tank, was allowed to recover for the reason that the tank was usually covered and lighted, and that neither of these precautions had been observed on the occasion when the accident occurred.

A workman injured through the slipping of some planks out of the loop in a hempen rope, by means of which they were being lowered to the bottom of a trench, cannot recover on the ground that a wire rope should have been used, where it appears that hempen ropes were ordinarily used for such a purpose. *Pack v. Hayward* (1889) 5 Times L. R. 233.

In the case of a machine of a simple character, the plaintiff is not entitled to go to trial merely upon averments that the machine was dangerous, and that it was usual to fence such machines. *Cameron v. Walker* (1898) 25 Sc. Sess. Cas. 4th series, 409, following *Milligan v. Muir* (1891) 19 Sc. Sess. Cas. 4th series, 18. As to unfenced machinery, see *supra*, VII. c, and the majority opinion in *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 686, 36 Week. Rep. 876, 53 J. F. 33, as quoted *supra*.

But in order to be conclusive in the master's

Am. Dec. 268, where a fireman was injured through the negligence of an engineer on the same train. However, the leading case upon the subject is undoubtedly that of *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339, in which Chief Justice Shaw delivered an elaborate opinion, which has been characterized by a distinguished jurist as "the fountain head of the common law of England and America on this subject." The development of the doctrine through judicial construction, and the largely increased area of its application caused by the increasing use of dangerous machinery, with a relative increase in the number of serious accidents, suggested the necessity of its material modification. Some of the states attempted to do so through judicial construction by the introduction of the rule of vice principal, while others had recourse to special legislation.

favor, as a matter of law, the usage appealed to must be, in a reasonable sense, a general one. Evidence which merely goes to show that he conformed to the practice of a few well-regulated concerns of the same description as his own will not justify a court in pronouncing him to be free from culpability. *Louisville & N. R. Co. v. Jones* (1901) 130 Ala. 456, 30 So. 586 (charge held erroneous, which proposed as a standard test the custom of eight railway companies to use ratchet jack-screws for holding up the body of a derailed car); *Richmond & D. R. Co. v. Weems* (1893) 97 Ala. 270, 12 So. 186 (charge held erroneous which assumed the usage of five railway companies to be a decisive test).

On the other hand, if usage is the controlling factor in the case, a jury will not be permitted to find him guilty of negligence where it is apparent that there is no uniform usage in regard to the subject-matter.

Failure to provide a temporary scaffold or platform around a "bleeder" used for the escape of gas above an iron furnace, on which the master mechanic could stand to repair the bleeder, does not constitute a defect in the ways, etc., where such scaffold was sometimes used in furnaces, but repairs were also made by means of a ladder. *Birmingham Furnace & Mfg. Co. v. Gross* (1893) 37 Ala. 220, 12 So. 36.

The statute is not construed so as to make the master an insurer of his servants' safety to the extent that he is bound to have his machinery so constructed and arranged as to provide for the contingency that one of the men, whose duty it is to attend to it, may, by negligently absenting himself from his post, cause it to operate in such a manner as to injure another servant. *Robins v. Cubitt* (1881) 46 L. T. N. S. 535.

An accident attributable to what is merely a condition of the material on which the employees were working, and necessarily incident to the business in which they were engaged, does not constitute a cause of action. *Welch v. Grace* (1897) 187 Mass. 590, 46 N. E. 387, where the court rejected the contention that the death of an employee, due to the subsequent explosion of a misspent blast which, owing to the character of the rock in which it had been placed, failed to explode in the first instance, may be deemed to be caused by a defect in the "ways, works, or machinery" of the employer.

IX. Defective system, employer liable for.

Under the various employers' liability acts, 57-L. R. A.

Among such statutes that have been most generally cited and most frequently construed we find the English employer's liability act of 1880, and the subsequent acts of Alabama, Massachusetts, Colorado, and Indiana. All of these acts are more comprehensive than our own, inasmuch as they are not restricted to railroad companies; but, on the other hand, they all contain certain conditions which materially affect their application. Our statute, on the contrary, is simply an unconditional abrogation of the kindred doctrines of fellow servant and assumption of risk as applied to railroad companies. It is the act of February 23, 1897, erroneously printed as chapter 56 of the Private Laws of 1897, and is as follows:

"The General Assembly of North Carolina do enact:

"Sec. 1. That any servant or employee of any railroad company operating in this

as is also the case at common law, the master is "no less responsible to his workman for personal injuries occasioned by a defective system of using machinery, than for injuries caused by a defect in the machinery itself." In other words, "a master is responsible, in point of law, not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used."

Lord Watson in *Smith v. Baker* [1891] A. C. 325, 353, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660, where a verdict was allowed to stand which found negligence in the system, where the plaintiff was injured by the fall of a stone from a crane which worked over his head intermittently, while he was engaged in drilling, and was thus prevented from being on his guard to avoid danger, when, in the course of the work, the stones lifted by the crane were swung around over his head.

The absence, in hoisting machinery, of a sufficient safeguard against such a probable occurrence as a slip in the management of the machinery, is a defect in the system. *Stanton v. Scrutton* (1893) 9 Times L. R. 238.

A master cannot be held liable, as for a defective system, where the evidence is that the plaintiff, a boy, was injured by the sudden starting of a brickpress while he was cleaning out the under part with his hands during a temporary stoppage of the machinery, but it was also shown that he had been warned not to use his hands for this purpose. *Race v. Harrison* (1893) 9 Times L. R. 567.

One who has contracted to take down a building which has been gutted by fire cannot be held to have adopted an improper method of doing the work where he arranges to remove one of the walls piecemeal by means of a scaffold constructed alongside the wall of the adjacent house. Hence, a workman injured by the fall of the former wall against the latter cannot recover on the theory that the omission to shore the wall to be demolished was negligence, inasmuch as the process of shoring would have been fully as dangerous as that of erecting the scaffold. *McManus v. Greenwood* (1885) 52 L. T. Jour. 160. The court of appeal reversed the judgment of the divisional court (1886) 2 Times L. R. 588. The question whether the method of demolition adopted was the best, was not discussed, the reversal being put upon the ground that defendant, although he knew that there was imminent danger of the collapse of the wall, and that the workmen

state who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death, in the course of his services or employment with said company, by the negligence, carelessness, or incompetency of any other servant, employee, or agent of the company, or by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company.

"Sec. 2. That any contract or agreement, expressed or implied, made by any employee of said company to waive the benefit of the aforesaid section shall be null and void."

This court has held this act to be constitutional as far as it applied to fellow servants. *Kinney v. North Carolina R. Co.* 122 N. C. 961, 30 S. E. 313; *Wright v. Southern R. Co.* 123 N. C. 280, 31 S. E. 652; *Hancock*

v. Norfolk & W. R. Co. 124 N. C. 222, 32 S. E. 679. We see no reason why the remainder of the act is not equally constitutional, as it is necessary to give any practical value to this act itself. It is well settled that the doctrine of fellow servant and assumption of risk rest entirely upon an implied contract; and, if an express contract could be made to take the place of an implied contract, the essential purposes of the act could be practically defeated at the will of the employer. That such statutes are not repugnant to the Constitution of the United States has been repeatedly decided. The Kansas statute was sustained in *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, where the court says, on page 210, 127 U. S., page 109, 32 L. ed. and page 1163, 8 Sup. Ct. Rep.: "But the hazardous character of the busi-

were ignorant of the conditions, did not give them any warning.

A servant injured by an explosion of gunpowder is not entitled to go to the jury on the question whether the system of work was defective, where the complaint merely alleges that the powder was stored in a magazine five minutes' distance from the work, in small barrels; that, when it was desired to fire a charge a barrel was carried from the store and opened at the place of work; and that while the plaintiff was firing a charge, a gust of wind carried a piece of fuse to a barrel from which powder had been taken, thus causing the powder to explode and injure him. Such allegations indicate rather the occurrence of an accident through the carelessness of the servant himself in not covering the barrel while the charge was being fired. *Mulligan v. McAlpine* (1888) 4 Sc. Sess. Cas. 4th series, 789. The common-law cases on this subject are collected in a note to *Nolan v. New York, N. H. & H. R. Co.* (1898; Conn.) 43 L. R. A. 305.

This principle was, strangely enough, quite lost sight of in a case which recently came before the Ontario court of appeal. *Slm v. Dominion Fish Co.* (1901) 2 Ont. L. Rep. 69. There it was correctly decided that the plaintiff was entitled to recover at common law upon a special finding that the master had made no provision for the inspection of appliances like that which caused the injury. But in the course of his opinion Chief Justice Armour took occasion to observe that, if the right of recovery had depended upon the employers' liability act, it would have been necessary to send the case back to another jury to determine whether some employee superior to the plaintiff was aware that the appliances were defective. It is manifest that this theory as to the effect of the verdict is erroneous. The declaration of the jury that the defendant had made no proper provision for the inspection of the appliances in question was clearly tantamount to a declaration that his system was defective in this regard. The finding, therefore, was expressive of a fact which implied personal negligence on the part of the master himself, and it was wholly unnecessary to ascertain whether the particular defect which caused the injury was known to a superior employee.

In many instances, it will be observed, the adoption of a defective system resolves itself into negligence in the exercise of superintendence. Under such circumstances, a default of this kind may be referred to either of the categories which are covered by this and the following provisions of the acts, and another provision

which will be discussed in a later annotation.

X. Not discovered or remedied owing to negligence, etc.

a. Generally.

The qualifying declaration in this statute, by which liability is excluded unless negligence is predicable of the failure to discover or remedy the defect which caused the injury, merely embodies, so far as the employer himself is concerned, the common-law doctrine that negligence cannot be imputed to a person who is not shown to have had actual or constructive knowledge of the conditions from which the injury resulted. See note to *Walkowiak v. Penock & G. Consol. Mines* (1898; Mich.) 41 L. R. A. 33, where this doctrine is analyzed and discussed at considerable length.

The converse proposition which is implied in this doctrine, *viz.*, that a master is culpably negligent if he permits the continuance of abnormally dangerous conditions, which, by the exercise of due care, he might have ascertained, suggests a reason for doubting the correctness of the decision of the Ontario court of appeal (*Slm v. Dominion Fish Co.* [1901] 2 Ont. L. Rep. 69) which is criticized on another ground in the preceding subdivision. It seems not unreasonable to say that, for the purposes of sustaining the judgment, a court of review would have been warranted in construing the finding of the jury, that the defendant had made no provision for a proper inspection, as being equivalent to a declaration by the jury that the defect in question would have been discovered, if such an inspection had been made. This would be tantamount to saying that the master ought to have known of the defect, and was therefore as culpable as if he had actually known of it and failed to remedy it. If this view be correct, the finding virtually attributed personal negligence to the master, and there was clearly no necessity to obtain the opinion of the jury upon the question whether the defect was known to a superior employee.

The imposition of liability for the defaults of the class of agents here designated may be regarded as being, for practical purposes, a legislative adoption of that doctrine of non-delegable duties which has been evolved, independently of statutes, in most of the American states. See the note to *Lafayette Bridge Co. v. Olsen* (1901; C. C. App. 7th C.) 54 L. R. A. 33, where a complete collection of the authorities will be found.

ness of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are without distinction made subject to the same liabilities." This case was quoted and approved in *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 211, 32 L. ed. 110, 8 Sup. Ct. Rep. 1176, sustaining the Iowa statute; in *Chicago K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; and in *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup.

Ct. Rep. 243. We have, therefore, no hesitation in holding the act of February 23, 1897, valid in its entirety, and that it deprives all railroad companies operating in this state of the defense of assumption of risk, whether resting in contract, express or implied, and whether pleaded directly or under the doctrine of fellow servant.

Beyond this we cannot go, as we think that the intent of the statute related simply to the contractual relations existing, expressly or by implication, between the plaintiff and defendant; and that the general assembly did not intend to forbid the plea of contributory negligence in the real meaning of the term. Some courts appear to have confused assumption of risk with contributory negligence, by regarding them as equivalent defenses; but they are essentially different in their nature, their origin,

b. Not discovered.

Whether the gravamen of the servant's complaint be the default of the master himself or of his agents, in failing to discover a defect, the existence or absence of culpability is tested by considerations of precisely the same kind as those which are applied in common-law actions.

The servant cannot succeed in his action where neither the employer himself, nor his representative within the meaning of this subdivision, had knowledge, actual or constructive, of the existence of the defect which caused the injury. *Graves v. Fuller* (1888) 4 Times L. R. 474 (plaintiff nonsuited); *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38; *Morgan v. Hutchins* (1890) 59 L. J. Q. B. N. S. 197, 38 Week. Rep. 412; *Griffiths v. London & St. K. Docks Co.* (1884) L. R. 13 Q. B. Div. 259, 53 L. J. Q. B. N. S. 504, 51 L. T. N. S. 533, 33 Week. Rep. 35, 49 J. P. 100, per Fry, L. J., Followed in *Rudd v. Bell* (1887) 13 Ont. Rep. 47; *Louisville & N. R. Co. v. Campbell* (1893) 97 Ala. 147, 12 So. 574; *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128; *Wilson v. Louisville & N. R. Co.* (1887) 85 Ala. 269, 4 So. 701.

The mere fact of age and long use of a stick which broke while being used as a lever will not justify a finding that the employer ought to have known the stick to be defective. *Allen v. G. W. & F. Smith Iron Co.* (1894) 160 Mass. 557, 36 N. E. 581.

In *Smith v. Baker* [1891] A. C. 325, 856, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660, Lord Watson commented thus upon § 2, subsec. 3, of the act, specifically requiring the servant to notify his employer or his superior officer of the existence of any "defect or negligence" which has come to his knowledge: "I think the object and effect of the enactment are to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favor of the employer."

This remark seems to be open to criticism, if it implies that the master was liable at common law for injuries caused by a defect, though he was ignorant of its existence, and his ignorance was not culpable. It is difficult to see how this conception can be reconciled with the 57 L. R. A.

theory, which is fully recognised by the English decisions, that a master is only bound to use ordinary care, and does not warrant the safety of his servants. *Weems v. Mathleson* (1861) 4 Macq. H. L. Cas. 215; *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 81 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405; *Mellors v. Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 883, 7 Jur. N. S. 845; *Ormond v. Holland* (1858) El. Bl. & El. 102.

Under the original Massachusetts act, the common-law rule established by *Mackin v. Boston & A. R. Co.* (1883) 135 Mass. 201, 46 Am. Rep. 456, that a railway company is not liable for the negligence of its car inspectors, was declared not to have been changed in regard to foreign cars received merely for forwarding. *Thyng v. Fitchburg R. Co.* (1892) 156 Mass. 13, 30 N. E. 169. Compare also *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128.

But this decision is no longer a correct statement of the law since the passage of the amendatory act of 1893, chap. 859, declaring that the mere fact of a car being in possession of a railroad company makes it a part of its "ways, works, or machinery."

And the servant cannot succeed where there was no reason to apprehend the particular casualty which occurred. *Booker v. Higgs* (1887) 3 Times L. R. 618 (recovery denied for lack of positive evidence on this point, in a case where a laborer was injured by the fall of a bank of earth which he had been ordered by the foreman to excavate by entering a hole in a wall against which the earth lay).

On the other hand, evidence that the defect might have been discovered if the instrumentality had been examined by a skilled person will justify a verdict for the servant. *Fraser v. Fraser* (1882) 9 Sc. Sess. Cas. 4th series, 896 (rope broke).

A judgment for the plaintiff will not be disturbed where he was injured by the breaking of a bolt, not shown to have any latent defect, and the evidence was that, although it had been subjected to usage which tended to diminish its strength, its strength had not been tested, as it should have been, with reasonable frequency. *Irwin v. Dennystown* (1883) 22 Sc. L. R. 379.

The fact that the machinery which caused the accident was replaced after the accident occurred is admissible as evidence that the master knew that it was defective. *Dodd v. Dunton* (1890) 16 Vict. L. Rep. 531.

Evidence that defects in a track had ex-

and their results. Contributory negligence, of course, always involves the fact of actual negligence on the part of the plaintiff, while the simple assumption of risk does not of itself imply negligence, which may or may not coexist. A defective machine carefully handled, or a safe machine carelessly handled, may equally result in an accident; but the resulting responsibility would be by no means the same. This is especially true since the act of 1897. As the law now stands, the use of machinery obviously defective will not prevent the plaintiff from a recovery for an injury resulting therefrom, unless the apparent danger is so great that its assumption would amount to a reckless indifference to probable consequences. What is recklessness, depending upon the rule of the prudent man, is, as is said in the former opinion of the court, a matter

of fact for the jury, as it necessarily depends upon the peculiar facts of each case. The best definition we can give, applicable to such cases as that at bar, is that adopted by this court in *Hinshaw v. Raleigh & A. Air-Line R. Co.* 118 N. C. 1047, 24 S. E. 426, that the danger of using the defective machine must be, not only apparent, but so great that there are more chances against its safe use than there are in favor of it. This risk must be considered in connection with the skill and experience of the plaintiff, as a sailor might with entire safety climb up into the rigging, where it would be utter recklessness for a landsman to follow. In all such cases the "personal equation" is an important factor. It is admitted that at the time of the injury the plaintiff had been in the railroad service for thirty years, in the service of the defendant

listed for several weeks prior to the accident is relevant on the question of negligence. *Kansas City, M. & B. R. Co. v. Webb* (1893) 97 Ala. 157, 11 So. 888.

A finding that a foreman should have seen that a plank which gave way was cross-grained and knotty, and consequently unsafe to walk upon in the position in which it was placed, will not be disturbed. *Caldwell v. Mills* (1893) 24 Ont. Rep. 462.

The mere fact that no accident has happened for several years does not prove that the master ought not to have known there was danger. "Long immunity from accident does not prove absence of carelessness. It may only prove long-continued habitual negligence." *Thomas v. Great Western Co.* (1894) 10 Times L. R. 244, Reversing decision of divisional court.

In determining the question whether the instrumentality ought to have been inspected by the defendant or his agents, the fact that it was furnished by a competent contractor, or that an express statement as to its condition had been made by such a contractor under circumstances in which it was apparently justifiable to rely upon his opinion, is, in England, deemed to be conclusive against the inference of negligence.

A master is not liable for injuries caused by the fall of a staging which only the day before had been erected by a contractor. He is not, under such circumstances, bound to inspect the staging himself, or to employ anyone specially to inspect it. *Kiddle v. Lovett* (1885) L. R. 16 Q. B. Div. 605, 34 Week. Rep. 518, per Denman, J. (sitting without a jury). The master had paid a sum of money to the servant, and was suing the contractor to recover the amount. It was held that he could not maintain the action.

No negligence is proved, where a foreman relies upon the assurance of a contractor engaged in reinstating a building which has been partially destroyed by fire, that one of the walls has been safely shored up, and sends his subordinates back to work near it, after having withdrawn them when he noticed the unsafe condition of the fabric. *Moore v. Gimson* (1889) 5 Times L. R. 177, 58 L. J. Q. B. N. S. 169.

c. Not remedied.

A remedy of a "defect in the condition of the machinery" does not mean putting the machinery in perfect condition for working purposes, but the removal of the source of danger to employees, which may be done by a temporary

device, as well as by permanent repairs. *Willey v. Boston Electric Light Co.* (1897) 168 Mass. 40, 37 L. R. A. 723, 46 N. E. 395 (defendant had argued that it was not liable because the defect could not have been permanently remedied before the accident).

The failure to stop a machine which is not working properly is a failure to "remedy" its defects. *Bacon v. Dawes* (1887) 3 Times L. R. 557.

Negligence cannot be inferred where a defect came to the knowledge of the master or superior so short a time before the accident that there was not sufficient time to remedy it. *Seaboard Mfg. Co. v. Woodson* (1891) 94 Ala. 143, 10 So. 87 (complaint demurrable which merely alleges that the defect was "known to the superior officers of plaintiff, and to the defendant").

"When the danger is not constantly present, but recurs at intervals, the defect may be cured by giving the workmen timely warning of its approach." *Smith v. Baker* [1891] A. C. 325, 354, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660. Lord Watson said: "The employer may protect himself, either by removing the source of danger, or by making provision for due notice being given. Should he adopt the latter course, he will still be exposed to liability if injury results from failure to give warning through the negligence of himself or of his superintendent."

d. Person intrusted with the duty, etc.

To bring an employee within this description there should be evidence showing that he was charged with the specific duty of keeping the defective instrumentality in proper condition.

The employer has been held liable for the negligence of the following agents:

An assistant roadmaster whose duty it is to inspect cars, and have them run upon the repair track when they are found to require repairs. *Louisville & N. R. Co. v. Davis* (1890) 91 Ala. 487, 8 So. 552.

A supervisor and section foreman, in a case where a defect in a switch caused a train to be derailed. *Kansas City, M. & B. R. Co. v. Webb* (1893) 97 Ala. 157, 11 So. 888.

A lineman sent out to search for and remedy a defective insulation on an electric wire. *Willey v. Boston Electric Light Co.* (1897) 168 Mass. 40, 37 L. R. A. 723, 46 N. E. 395.

A carpenter who understands and looks after machinery, although subject to the orders of a superintendent, who is also a salesman. *Cop-*

over four years as yard conductor, and was fully versed in the duties of his position. It further appears that the regular switch engine with a sloping tender was taken away, and a road engine substituted therefor, that had no hand-hold above the platform of the tender. This hand-hold could be used only while he was on the lower step, and yet, if he remained on that step, he could not see the engineer, or signal to him, without leaning outward in an uncomfortable and dangerous position. The proper performance of his duties required him to stand upon the platform of the tender where he could see and be seen; and to get up there he must pull up by catching hold either of the drainpipe or the top of the tender. He swears that of the two he considered the drainpipe the safer, as well as the more convenient. Neither had been provid-

ed for such use, and, if he pulled himself up at all, he was compelled to do so by using something intended for another purpose. He had been using this drainpipe regularly for such purpose for three weeks, but had used the one on the other side more because the most of his work was on that side. If the drainpipe had been properly fastened, it would have been safe, and he would not have been hurt. These are the most material points of his testimony, and he is largely corroborated by other witnesses. The plaintiff testifies that, if the drainpipe had been in proper condition, it should have held a thousand pounds. Heilig testified that drainpipes are usually threaded through a nut on the inside, and should support a thousand pounds, if necessary. Lacy, a witness for the defendant, says that drainpipes, when in proper condition are

thorne v. Hardy (1899) 173 Mass. 400, 53 N. E. 915.

An employee in charge of the stables of a street-car company using a horse when in an unfit condition to be worked. Harston v. Edinburgh Co. (1887) 14 Sc. Sess. Cas. 4th series, 621.

A "fireman" of a mine, whose duty it is to inspect the workings before the miners go to work, and report as to the state of the ventilation. Cowler v. Moresby Coal Co. (1885) 1 Times L. R. 575.

In Canadian Coloured Cotton Mills v. Talbot (1897) 27 Can. S. C. 198, it was held that evidence showing that an employee, who called a "loom fixer" to examine a loom, after being notified that something was wrong with it, had failed to make an examination, justified submitting the case to the jury.

But it is not necessary that he should be discharging the functions of a superintendent. Copthorne v. Hardy (1899) 173 Mass. 400, 53 N. E. 915, where the master was held liable for the negligence of one who attended, under the superintendent's orders, to the adjustment of machinery.

The negligence of a superior employee, not charged with that duty, who attempts, at the request of a servant who is using an appliance, to remedy a defect therein, is not imputed to the master. Thomas v. Bellamy (1899) 126 Ala. 253, 28 So. 707.

Nor is the clause applicable to an employee whose duty it is, under a rule of his master, to examine, for his own security, the appliances he uses. Memphis & C. R. Co. v. Graham (1891) 94 Ala. 545, 10 So. 283 (conductor and brakeman denied to be "persons intrusted, etc.").

Still less is the master liable for the negligence of a mere laborer working under or with others, even though it may be a part of his duty at some particular moment, in the progress of the work, to look after and attend to certain instrumentalities. O'Connor v. Neal (1891) 153 Mass. 281, 26 N. E. 857, where the court refused to hold the master liable for the negligence of a painter's assistant, who aided his principal in moving from place to place the planks and barrels from which a temporary scaffold was constructed, and adjusted one of the barrels so carelessly that the scaffold collapsed.

XI. Abnormal conditions resulting from the use of the appliances furnished by the master, how far regarded as defects.

Injuries resulting from those abnormal conditions. 57 L. R. A.

ditions which, in all kinds of industrial work, are temporarily created by the use of the appliances furnished by the master, are not considered to be caused by "defects" within the meaning of these statutes.

"The absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short-lived causes." Whittaker v. Bent (1897) 167 Mass. 588, 46 N. E. 121, denying recovery for an injury resulting from the temporary dampness of molds used in an iron foundry, which can be ascertained only at the moment when they are set up, the reason assigned being that the molds were small and numerous, the danger transitory, and any further inspection than that of employees setting them up impracticable.

The absence of stanchions on the sides of a trolley is not a "defect," where the placing of such stanchions is the duty of the servants who put on the load. Corcoran v. East Surrey Ironworks Co. (1888) 5 Times L. R. 103, 58 L. J. Q. B. N. S. 145.

The liability of a bank of earth which an employer is engaged in leveling for the purpose of grading the land of a third person, and upon which laborers are at work, to fall when undermined, if not properly shored up, is not a "defect in the ways," etc. Lynch v. Allyn (1893) 160 Mass. 248, 35 N. E. 550.

A defect in the "ways" is not predicable, unless there is some alteration in the permanent condition of the way itself. Obstacles lying on or near the way, which do not in any degree alter the fitness for the purpose for which it is generally employed, and cannot be said to be incorporated with it, are not within the purview of this provision. McGiffin v. Palmer's Shipbuilding & Iron Co. (1882) L. R. 10 Q. B. Div. 5, 52 L. J. Q. B. N. S. 25, 47 L. T. N. S. 346, 31 Week. Rep. 118, 47 J. P. 70, denying recovery where a car on which a workman was conveying heavy iron balls struck against a piece of a substance used for lining the furnaces, which had been negligently placed projecting into the roadway on which the car ran, the result being that one of the balls fell on him.

The words "ways, works, and machinery" do not cover a pile of lumber in the yard of a lumber dealer. Campbell v. Dearborn (1900) 175 Mass. 183, 55 N. E. 1042.

To the same effect, see the following cases, where the abnormal conditions were of the nature mentioned in the memorandum of the facts appended to the citations: Willets v. Watt [1892] 2 Q. B. 92, 61 L. J. Q. B. N. S. 540, 66

very secure, and would hold a man's weight, adding, "When first put in, always would." Hill, a witness for the defendant, says that the drainpipe "would hold a man's weight if in proper condition." Taking this evidence as true, and construing it in the light most favorable for the plaintiff, as we are bound to do on a motion to nonsuit or direction of the verdict, can we say, in the light of our own decisions, that the plaintiff was guilty of contributory negligence as a matter of law? The question is not whether the defendant had placed the drainpipe there for any such purpose, but whether, when the defendant made it necessary for him to pull up by something, without placing anything there for the purpose, the plaintiff was guilty of contributory negligence *per se* in catching hold of a drainpipe which was apparently secure, which he

had been using for three weeks, and which, if in proper condition, could have supported a thousand pounds. It seems to us there can be but one answer. It was an issue of fact for the jury, and, in the absence of any error in his honor's charge prejudicial to the defendant, we cannot disturb the verdict.

It is well settled that on a motion for nonsuit, or its counterpart, the direction of a verdict, the evidence for the plaintiff must be accepted as true, and construed in the light most favorable to him, as the jury might take that view of it if left to them, as they appear to have done in the case at bar. *Avera v. Sexton*, 35 N. C. (13 Ired. L.) 247; *Hathaway v. Hinton*, 46 N. C. (1 Jones, L.) 243; *State v. Allen*, 48 N. C. (3 Jones, L.) 257; *Abernathy v. Stowe*, 92 N. C. 213; *Gibbs v. Lyon*, 95 N. C. 146;

L. T. N. S. 818, 40 Week. Rep. 497, 56 J. P. 772 (temporary removal of the cover of a catch-pit lying in the line of a path along which servants had to pass in the course of their duties); *May v. Whittler Mach. Co.* (1891) 154 Mass. 29, 27 N. E. 768 (employee stumbled over some small pieces of wood which had been piled against the back of a planing machine, near which he had to pass, and was hurt by his hand coming into contact with the machine); *Kansas City, M. & B. R. Co. v. Burton* (1892) 97 Ala. 240, 12 So. 88 (car left standing near a railway track), overruling on this point *Highland Ave. & Belt R. Co. v. Walters* (1890) 91 Ala. 435, 8 So. 357; *Louisville & N. R. Co. v. Bouldin* (1895) 110 Ala. 185, 20 So. 325 (oil-box standing near the track, which came in contact with plaintiff's foot while he was standing on the pilot of an engine and threw him off); *Carroll v. Willcutt* (1895) 163 Mass. 221, 39 N. E. 1016 (the presence of a ledge stone on a scaffolding).

Both on the principle applied in these cases, and also on the ground that the accident was an unexpected one, it has been held that a master cannot be held liable, under the statute, for an injury due to a railway tie with a projecting spike in it, which has been taken up with a view to repairing it, and placed by the side of a road, where the cause of the injury was the fact that a horse, which the plaintiff was leading, was frightened, and, backing against him, knocked him down upon the tie. *McQuade v. Dixon* (1887) 14 Sc. Sess. Cas. 4th series, 1039.

Whether the proximate cause of the injury was the negligence of a fellow servant in regard to the mere use of appliances, is primarily a question for the jury. *Knight v. Overman Wheel Co.* (1899) 174 Mass. 455, 54 N. E. 890.

Especially is the rule applicable when the abnormal conditions would not have existed if the plaintiff himself had done his duty.

A verdict for the plaintiff should be set aside, where his own evidence shows that, if the machine had been properly attended to by himself, the accident would not have happened. *Kay v. Briggs* (1889) 5 Times L. R. 233.

An employer is not liable for the death of an employee while laying pipe in the bottom of a sewer trench in process of construction by the employer, through the caving in of the walls of the trench, due to insufficient shoring and bracing, where such employee was himself intrusted with superintendence of the shoring and bracing, and paid higher wages because of it. *Conroy v. Clinton* (1893) 158 Mass. 318, 33 N. E. 525.
57 L. R. A.

This particular situation, however, would seem to be more appropriately referred to the conception of an inability to recover, predicated from the contributory negligence of the injured person.

In cases of this class the only ground on which the master can be held liable is that he was guilty of negligence in not warning his servants of the increased risk to which they would for the time being be exposed. *Willets v. Watt* [1892] 2 Q. B. 92, 61 L. J. Q. B. N. S. 540, 66 L. T. N. S. 818, 40 Week. Rep. 497, 56 J. P. 772.

The temporary nature of the abnormal conditions complained of will not, however, protect the master, if they amounted to a structural alteration of the appliance in question, and that alteration was made by the employee in charge of it. See *Tate v. Latham* [1897] 1 Q. B. 502, 75 L. T. N. S. 694, 45 Week. Rep. 400, 66 L. J. Q. B. N. S. 349, holding that the absence of the guard of a saw was a "defect," where it had been temporarily removed by the sawyer.

This decision practically overrules the doctrine of *Fry, L. J.*, that the defects contemplated by the statute are those of a "chronic character." *Willets v. Watt* [1892] 2 Q. B. 92, 61 L. J. Q. B. N. S. 540, 66 L. T. N. S. 818, 40 Week. Rep. 497, 56 J. P. 772. (In the report in 61 L. J. Q. B. N. S. 540, the phrase used is "somewhat chronic.")

It was pointed out in the later case (*Tate v. Latham*) by *Bruce, J.* (divisional court), this theory is not necessary to sustain the conclusion arrived at. That conclusion, indeed, might well be put upon the ground that no negligence was established, as the catch-pit into which the plaintiff fell had been opened to allow work to be done, and was left unfenced because it was not possible to do the work while a fence surrounded it.

A fortiori, where such a structural alteration was intended to be permanent, the servant will not be excluded from the benefits of the statute simply for the reason that the new arrangements were only completed the day before the accident. *Copthorne v. Hardy* (1899) 173 Mass. 400, 53 N. E. 915 (shaft attached to the ceiling of a room by brackets and screws held not to produce conditions belonging to that transitory class for which the employer is not responsible beyond furnishing a choice of proper materials or instrumentalities).

Moreover, it would seem that conditions which, in the first instance, are merely temporary in their nature, will, if they are allowed

Springs v. Schenck, 99 N. C. 551, 6 S. E. 405; *Hodges v. Southern R. Co.* 120 N. C. 555, 27 S. E. 128; *Collins v. Swanson*, 121 N. C. 67, 28 S. E. 65; *Purnell v. Raleigh & G. R. Co.* 122 N. C. 832, 29 S. E. 953; *Cable v. Southern R. Co.* 122 N. C. 892, 29 S. E. 377; *Whitley v. Southern R. Co.* 122 N. C. 987, 29 S. E. 783; *Cow v. Norfolk & C. R. Co.* 123 N. C. 604, 31 S. E. 848; *Howell v. Norfolk & C. R. Co.* 124 N. C. 24, 32 S. E. 317; *Cogdell v. Wilmington & W. R. Co.* 124 N. C. 302, 32 S. E. 706; *Cowles v. McNeill*, 125 N. C. 385, 34 S. E. 499; *Brinkley v. Wilmington & W. R. Co.* 126 N. C. 88, 35 S. E. 238; *Moore v. Charlotte Electric Street R. Co.* 128 N. C. 455, 39 S. E. 57. In *Purnell's Case*, 122 N. C. 832, 29 S. E. 953, Justice Furches, speaking for the court, says: "This motion is substantially a demurrer to the

plaintiff's evidence, and, this being so, and the court having no right to pass upon the weight of evidence, every fact that plaintiff's evidence proved or tended to prove must be taken by the court to be proved. It must be taken in the strongest light as against the defendant." In *Capital Printing Co. v. Raleigh*, 126 N. C. 516, 36 S. E. 33, Chief Justice Faircloth, speaking for the court, says: "The defendant's motion to dismiss the action was equivalent to a demurrer to the evidence, and the plaintiff's evidence will be considered as true, and taken in the most favorable light for him [citing authorities]. An appellate court reviewing a judgment of nonsuit will assume every fact proved necessary to be proved, when the evidence tends to prove it." This same rule applies even in the Federal court, where the judges are permit-

to become permanent, be assimilated, for the purposes of the statutes, to defects inherent in the substance of the instrumentalities themselves.

This seems to be the rationale of a Scotch case, in which it has been held that a manhole at the side of a railway in a mine, so obstructed with rubbish that a miner is unable to use it as a refuge when cars are approaching, is a "defect in the ways." *Ferris v. Cowdenbeath* (1897) 24 Sc. Sess. Cas. 4th series, 615.

When the master keeps a readily accessible stock of simple appliances, he is not bound, under the statute, any more than at common law, to see that a servant asks for a new one when that which he has been using is worn out.

There can be no recovery for the death of an employee caused by the breaking of a wooden lever by which a fellow workman was helping to raise a heavy iron door on its hinges, causing the door to swing down and strike an iron lever held by deceased, driving it into his abdomen, in the absence of any evidence that the broken stick was defective, or, if so, that the defect could have been discovered. *Allen v. G. W. & F. Smith Iron Co.* (1894) 160 Mass. 557, 36 N. E. 581. The court said: "The whole matter was in the hands of the deceased. He was the person in immediate charge of the furnace. If a new stick was needed, it was his business to know it. The primary duty rested on him, not on any superior officer. Again, if a new stick had been needed, it could have been obtained of the carpenter by the deceased at any time. The defendant kept a stock of lumber of the proper size on hand, and the deceased had only to ask for what he wanted. If such a stick can be said to be part of the works or machinery, the defendant's duty to the deceased did not require it to see that he called for a proper one. It was enough that it had proper ones within convenient reach."

One of a number of chains furnished for use as required is regarded, when it is applied to the purpose for which it is designed, as a permanent instrumentality, and not one of those small things which go through a rapid course of wearing out and replacement, as to which the rule is that it may be left to the judgment of the workmen when one of them is to be discarded. The making of a link for such a chain therefore, is not one of those merely transitory adjustments which the master is under no personal obligation to see carefully performed. *Haskell v. Cape Ann Anchor Works* (1901) 178 Mass. 485, 59 N. E. 1113.

These decisions suggest that the temporary

or permanent nature of the defect is not the true differentiating factor in this class of cases, and that the essential questions are rather, (1) whether the abnormal conditions were mere incidents in the progress of the work or structural, and (2), supposing them to be of the latter description, whether they were brought about by the act or volition of the employee who was in charge of the instrumentality to which the injury was due.

XII. Defects in temporary appliances constructed by the servants themselves, not deemed to be chargeable to the employer.

A special application of the principle exemplified in the preceding section is the doctrine enforced in several American cases, that there can be no recovery, under this provision of the statute, where the injury was the direct result of the negligent manner in which the servants themselves constructed a temporary appliance from adequate and suitable materials furnished by the master.

The action has been held not to be maintainable where the cause of the injury was one of the following appliances:

Two ladders selected by employees from a supply furnished by the employer, and fastened together for use in painting a building. *McKay v. Hand* (1897) 168 Mass. 270, 47 N. E. 104. The court said: "From the description of the ladder which broke, it is difficult to see from the evidence that the defendant was negligent in keeping it among his lot of ladders, and in permitting it to be used; and if the sole negligence was that the ladders were fastened together and improperly placed against the house, that was the fault of the plaintiff and his fellow workman, and it was known to and appreciated by the plaintiff at the time. A ladder may be a sound, light ladder of sufficient strength to be used by itself, but not suitable to be made the butt of two ladders fastened together."

A temporary staging put up for the purpose of erecting a building. *Burns v. Washburn* (1894) 160 Mass. 457, 36 N. E. 199.

A temporary staging put up by workmen themselves, who are slating a roof. *Reynolds v. Barnard* (1897) 168 Mass. 226, 46 N. E. 703.

A temporary staging used by painters in painting the walls of a building. *Adasken v. Gilbert* (1896) 165 Mass. 443, 43 N. E. 199.

The master cannot be held liable, as for a defect, where a scaffold fell owing to the fact that a barrel by which it was supported was placed upon some rubbish of an accidental or

ted to express an opinion upon the facts, and where the rule as to a direction of the verdict is not so rigid as with us, as will be shown by the following quotations from a long line of cases: "If the evidence, giving the plaintiff the benefit of every inference to be fairly drawn from it, sustained this view, then the direction to find for the defendant was proper." *Kane v. Northern C. R. Co.* 128 U. S. 91, 94, 32 L. ed. 339, 341, 9 Sup. Ct. Rep. 17. "It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." *Grand Trunk R. Co. v. Ives*, 144 U. S. 427, 36 L. ed. 492, 12 Sup. Ct. Rep. 683. "In determining whether the plaintiff was so clearly guilty of contributory negligence as to entitle the defendant to a verdict, we are

bound to put upon the testimony the construction most favorable to him." *Chicago, M. & St. P. R. Co. v. Lowell*, 151 U. S. 209, 217, 38 L. ed. 131, 136, 14 Sup. Ct. Rep. 284. The inference from the facts must be "so plain as to be a legal conclusion," before the question can be withdrawn from the jury. *Northern P. R. Co. v. Egeland*, 163 U. S. 93, 98, 41 L. ed. 82, 86, 16 Sup. Ct. Rep. 977: "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these [negligence and contributory negligence] as well as others." *Jones v. East Tennessee, V. & G. R. Co.* 128 U. S. 443, 445, 32 L. ed. 478, 479, 9 Sup. Ct. Rep. 118: "The circuit court erred in not submitting the question of contributory negligence to the jury, as the con-

temporary character on the floor of the room where the plaintiff was at work. *O'Connor v. Neal* (1891) 153 Mass. 281, 26 N. E. 857.

Neither can he be held liable for an injury resulting from the defective manner in which planks were fastened together by the plaintiff's fellow servants, and temporarily laid by them on the top of walls about 5 feet from the ground. *Morris v. Walworth Mfg. Co.* (1902; Mass.) 63 N. E. 910.

The employer's liability for injuries sustained by the giving way of a part of a staging is not established where the evidence does not tend to show that they furnished the staging as a completed structure, or that they assumed to exercise any control or supervision as to how it should be built or kept or adapted for work, or that they failed to furnish a sufficient quantity of suitable materials, or that they employed incompetent workmen, but does show that the staging in use in the building had been in the care of the workmen themselves for several months. *Brady v. Norcross* (1899) 172 Mass. 331, 52 N. E. 528.

The gravamen of a declaration showing that the plaintiff, a journeyman painter, was injured owing to the negligence of another painter in failing to fasten properly his end of the hanging scaffold on which they were working, is the negligence of a fellow servant in handling or using an appliance, and therefore no cause of action under the statute is alleged. *Ashley v. Hart* (1888) 147 Mass. 573, 1 L. R. A. 355, 18 N. E. 416.

Failure to provide a temporary scaffold or platform around a "bleeder" used for the escape of gas above an iron furnace, on which the master mechanic could stand to repair the bleeder, does not constitute a defect in the ways, etc., where such scaffold was sometimes used in furnaces, but repairs were also made by means of a ladder. *Birmingham Furnace & Mfg. Co. v. Gross* (1893) 97 Ala. 220, 12 So. 30.

This rule is the counterpart of that doctrine which, in common-law actions, prevents recovery under similar circumstances. See note to *Lafayette Bridge Co. v. Olsen* (1901; C. C. App. 7th C.) 54 L. R. A. 136.

The rule under the statute is subject to the same qualification as the common-law doctrine, viz., that it does not protect the master if the defective appliance was one which he was bound to furnish in a completed condition. See *Brady v. Norcross* (1899) 172 Mass. 331, 52 N. E. 528.

From the case cited, it would appear that the servant has the burden of proving the ex-

istence of such an obligation whenever the appliance was one of an essentially temporary description, to be used only for the particular piece of work then in progress.

Another possible qualification of the rule is that the master might be held responsible if the temporary appliance was one constructed by a superintending employee, unless it should be held that proof of negligence on the part of such an employee would not sustain an allegation of injury caused by a "defect," and that, under the circumstances supposed, the complaint must be based on the words of the provision reviewed in the next subdivision.

In the absence of any direct authority on this point, all that can be said is that, in any case where it may be uncertain whether the master can be held liable simply on the ground of the existence of a defect, it would be well to insert an alternative count averring negligence in the exercise of superintendence.

XIII. Duty of servant to report defects.

a. Statutory and common-law doctrines compared.

There is the high authority of Lord Watson for the doctrine that the statute puts the servant in a more favorable position than he occupied under the common law. See *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660, where, in the course of his comments on the clause, he remarked: "I think the object and effect of the enactment are to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favor of the employer." This view has been adopted by the supreme court of Canada. *Webster v. Foley* (1892) 21 Can. S. C. 580. But with all deference to this very distinguished jurist, it seems open to doubt whether this theory is correct. There is, it is true, no English decision which in terms lays down the rule that a servant who learns of a defect is bound to communicate his knowledge to his master, and that his failure to give such information constitutes a breach of a specific duty which of itself is enough to prevent his recovering for any injury which he may thereafter receive owing to the existence of the defect. But the reason for the lack of direct authority on the point

clusion did not follow, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish." *Dunlap v. Northeastern R. Co.* 130 U. S. 652, 32 L. ed. 1059, 9 Sup. Ct. Rep. 647. (The italics are our own.) It cannot be doubted, and in fact it does not seem to be seriously questioned, that it was negligence on the part of the defendant to furnish an engine so obviously defective for its intended use, when the defect could have been so easily supplied. In fact, it is questionable whether this case would not come under the rule of continuing negligence laid down in the *Cases of Greenlee and Trozler*, aside from the act of 1897. *Greenlee v. Southern R. Co.* 122 N. C. 978, 41 L. R. A. 399, 30 S. E. 115; *Trozler v. Southern R. Co.* 122 N. C. 903, 30 S. E. 117, 124 N. C. 189, 44 L.

is sufficiently obvious. In all cases decided under common-law doctrines up to the time when Lord Watson delivered this opinion, the circumstances were necessarily such as to bring them within the scope of the principle that the servant's action was absolutely barred, whenever it was shown that he went on working with a full appreciation of a risk resulting from the master's negligence. The natural result was that, although the failure of the servant to report or complain of a defect was mentioned in some of the cases, for example, *Skipp v. Eastern Counties R. Co.* (1853) 9 Exch. 228, 8 C. L. Rep. 185, 23 L. J. Exch. N. S. 23, this fact was never treated as a material element in the case, the master's defense being regarded as complete without any reference to the question whether the servant had communicated his knowledge. In none of these cases was the evidential significance of the servant's silence considered in any other point of view than as a circumstance tending to show his acquiescence in the conditions, that is to say, as a circumstance, corroborating a presumption already absolute, that the risks in question had been accepted. Such being the state of the authorities, the mere fact that the existence of a duty on the servant's part to notify his master of a defect was never affirmed cannot fairly be adduced as a ground for denying that there was such a duty. When subjected to the test of general principles, the correctness of Lord Watson's theory seems to be equally disputable. It is impossible to adopt it without accepting the conclusion, that, if a jury has, in a common-law action, found that the servant was guilty of contributory negligence in failing to give notice of the defect which caused his injury, and it is clear that the verdict was based on the hypothesis that there was a legal duty incumbent on the servant to give the notice, a court of review would be constrained to set the verdict aside. Such a proposition seems too preposterous to entertain. The extreme improbability of such a verdict even being rendered may be readily conceded, but this practical consideration is immaterial in a discussion of the abstract point of law which is involved.

The general effect of the American decisions in this connection is inconclusive for the same reason as that which has been adverted to in commenting on the English cases. The failure to report a defect is usually treated merely as a cumulative ground for denying the servant's right of recovery, and not as the breach of a specific duty. See, for example, the language used in *Baltimore & O. R. Co. v. Baugh* (1893) 57 L. R. A.

R. A. 313, 32 S. E. 550; *McLamb v. Wilmington & W. R. Co.* 122 N. C. 862, 29 S. E. 894. In the celebrated case of *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339, the following significant reservation in the opinion of the court is found on pages 61 and 62, 4 Met., and page 345, 38 Am. Dec.: "In coming to the conclusion that the plaintiff in the present case is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished, and suitable persons employed, to accomplish

149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 224, 25 L. ed. 612, 617; *McQueen v. Central Branch Union P. R. Co.* (1883) 30 Kan. 691, 1 Pac. 139; *Pollich v. Sellers* (1890) 42 La. Ann. 623, 7 So. 786.

Inasmuch as a servant frequently finds himself relegated to his common-law rights, owing to his having failed to give due notice that the injury was sustained, or to bring the action within the statutory period, the true doctrine on this subject is still a question of more than theoretical interest in England and her colonies, where it has not yet been determined how far the doctrine enunciated in *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660, may, when the question arises, be held to have modified, in common-law cases, the theory of the older decisions that the servant's acceptance of a risk is to be inferred, as matter of law, from his continuance of work with a knowledge of its existence. It is significant that in this case Lord Watson was prepared to hold that, apart from the act of 1880, the plaintiff's remedy was not necessarily taken away by the mere fact that, in the knowledge of the risk and after remonstrance, he continued to work. In Massachusetts it seems to be immaterial, in this point of view, whether the action is brought at common law or under the statute, as the English doctrine that the servant's assumption of risks is a question for the jury where the statute is relied upon has been definitely repudiated in recent decisions. *O'Maley v. South Boston Gaslight Co.* (1893) 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1110; *Davis v. Forbes* (1898) 171 Mass. 548, 47 L. R. A. 170, 51 N. E. 20.

b. Position of a servant who fails to report a defect.

In an action brought under a statute which merely declares that the servant cannot recover unless he reports the defect, it is clear that if he fails to make the report, and goes on working without knowing that the master is aware of the defect, he cannot recover for any injuries which he may thereafter receive by reason of its existence. *Thomas v. Bellamy* (1899) 126 Ala. 253, 28 So. 707. The doctrine laid down in *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660, is presumably not applicable under such circumstances, though the writer is not aware of any case in which the point has been discussed. In Ontario and British Columbia the position of the

the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam engine; whether this would depend upon an implied warranty of its goodness or sufficiency, or upon the fact of wilful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company,—are questions on which we give no opinion." Does not this contain the germ of the *Greenlee Case*? If so, what would be the use of raising an implied warranty if the law at once rebutted it by an implied assumption of risk?

We do not think it necessary to add anything more to the opinion of the court as delivered by the Chief Justice, as the remaining principles therein decided are too well settled to need further discussion. It may be that, if we were jurors, we would find the plaintiff guilty of contributory negligence as a matter of fact, and not at all unlikely that the recovery would be less. But we are not jurors, and have no right to assume their functions. The plaintiff has a judgment obtained in a court of competent jurisdiction, which is before us on appeal only as to matters of law. As we find no substantial error in his honor's charge or the conduct of the trial, we cannot disturb the verdict or reverse the judgment on any view we may have as to the mere weight of evidence.

Petition dismissed.

servant is more favorable, the legislature having expressly enacted that the servant is not debarred from recovery merely by reason of his having continued to work with knowledge of the risk. If the extreme unlikelihood that any jury will ever, in a case of this description, pronounce the risk to have been assumed by the plaintiff, is adverted to, it will be apparent that the practical effect of this provision is to render almost nugatory the protection afforded to the master by the clause which makes it the duty of the servant to give notice.

By the express words of the statute, a servant is not bound to give information of a defect where he knows that it is already known to the master. *Truman v. Rudolph* (1895) 22 Ont. App. Rep. 250.

c. Position of a servant who has reported a defect.

The right of action acquired by a servant who has duly reported a defect in compliance with the statute, and then goes on working, depends largely upon the extent to which the maxim, *Volenti non fit injuria*, applies. A full treatment of the subject, therefore, would carry us beyond the scope of the present article. But a brief reference to the effect of the cases, in so far as they bear directly on the provision now under discussion, will not be out of place.

In an oft-cited case, Lord Esher expressed the opinion that the effect of this provision was that the servant was always entitled to recover if he gave information of the defect. *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 840, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. Bowen, L. J., did not refer specifically to this point in his celebrated opinion, but the theory upon which he and Lindley, L. J., proceeded in giving judgment against the plaintiff, *viz.*, that the maxim was, under the circumstances, a bar to the action, necessarily implies a disapproval of the doctrine that the right of recovery became absolute as soon as the servant had made a complaint to the proper person.

In another case, decided in the same year, Lord Esher remarked that it was very difficult to give a sensible construction to the provision, and enunciated a view somewhat different from that intimated in the earlier case, holding the meaning of the words to be that, if the servant did give notice, and the defect was not remedied, he might recover unless he was brought clearly within the maxim. *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283. The 57 L. R. A.

plaintiff's action was held by the majority of the court to be maintainable, and the fact that Lindley, L. J., who had concurred with the views of Bowen, L. J., in *Thomas v. Quartermaine*, agreed in the judgment, and that he did not give any intimation that his views had undergone a change since the earlier case was decided, shows that he did not intend to go to the length of holding that the servant had done everything that was required to give him an indefeasible right of action when he had given notice of the defect. The subsequent decision of the House of Lords in *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660, also falls short of the extreme theory suggested by Lord Esher in *Thomas v. Quartermaine*, as it simply decides that the servant does not forfeit his right of action merely because he goes on working after remonstrating against the manner in which the master's appliances are used. The testimony on the record was that one of the plaintiff's fellow workers had, in his hearing, complained to the foreman of the danger of alighting stones over their heads with the crane, and that he himself had told the crane-driver that this was not safe. But in the various opinions delivered these facts were referred to merely as evidence tending to show that the servant was fully aware of the risks he was running. The question whether the servant, by giving notice of the abnormal danger, acquires an absolute right to recover damages for such injuries as he may thereafter sustain from the existence of those conditions, was not discussed.

In Alabama it has been held that, in order to fulfil his statutory duty as to the reporting of a defect, a servant must notify either the master himself or the employee whose specific function it is to see that the instrumentality in question is kept in proper condition. It is not sufficient to notify a superior servant who is not entrusted with that function. *Thomas v. Bellamy* (1899) 126 Ala. 253, 28 So. 707. The rule is possibly more favorable to the servant in Ontario, though the point has not been directly raised in any case that has come to the writer's notice. In *Sim v. Dominion Fish Co.* (1901) 2 Ont. L. Rep. 69, Armour C. J. O. said that if the servant's right of action had depended on the statute it would have been necessary to send the case to a jury in order to determine whether a superior employee knew of the defect,—a remark which may, perhaps, be construed as an intimation that a notification to any superior employee would have been sufficient.

C. B. L.

Cook, J., dissenting:

The decision of the court is made to turn upon the fellow servant act of 1897, which is quoted in full in the opinion. The construction placed upon that act, in my opinion, is not warranted by its text, or the remedy intended to be provided by the legislature which passed it. So I will first peruse and consider the act in respect of the remedy intended. The rule for construing a remedial statute, as taught by Mr. Blackstone, is that there are three points to be considered,—the old law, the mischief, and the remedy; that is, how the law stood at the making of the act, what the mischief was for which the old law did not provide, and what remedy is provided to cure the mischief. To illustrate his meaning, he instances the restraining statute of 13 Eliz. chap. 10. "By the common law," he says, "ecclesiastical corporations might let as long leases as they thought proper. The mischief was that they let long and unreasonable leases, to the impoverishment of their successors. The remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives or twenty-one years." Applying this rule in construing the act, we find the law (made by judicial construction) to have been: First, that, where an employee of a railroad company was injured by the negligence of a fellow servant, the common employer was not responsible for the injury; and, second, that there was no statute or judicial ruling in this state by which an employee could be prevented from contracting with a railroad company to waive his right of action for injuries resulting from defects in the machinery. The mischief to be remedied was to release a fellow servant from his responsibility for the negligence of a fellow servant; and, second, to secure to the employee the right of action for injuries inflicted on account of defects in the machinery. The remedy applied by the statute is to create a liability upon the railroad company in favor of an employee for injury inflicted by the negligence of a fellow servant, and to declare null and void any such contract or agreement, express or implied, made for the purpose of waiving the right to maintain an action (1) for injury resulting from the negligence of a fellow servant, and (2) for injuries resulting from defects in the machinery. An analysis of the statute shows two propositions: (1) To change the relationship existing between fellow servants, and make them vice principal as to each other with respect to injuries resulting on account of their negligence, carelessness, or incompetency, and to prevent them from forfeiting their right of action by contract. (2) To prevent an employee from waiving his right of action for injuries received on account of defects in the machinery, ways, or appliances; or, in other words, a right of action accrues to a fellow servant, and the right to waive either action by any employee is forbidden. These relations being established by the statute, the liability of the railroad company as to furnishing safe and suitable machinery,

ways, and appliances, and the relationship of the employee and his assumption of risks in the performance of his work, remain unchanged. So I do not understand that it is within the purview of the statute to exempt an employee from responsibility for negligence in the use of safe machinery, or to license him to voluntarily assume unnecessary risk or hazard at the expense or upon the responsibility of the railroad company; for, if danger or peril exists in the performance of a service, it becomes obvious first to the employee, and frequently arises suddenly and unexpectedly, and he is under no obligation to the railroad company to incur it. Nor is the railroad company under a legal obligation to be ever present with its employee, and to exercise for him that good judgment and common sense in avoiding hazard while performing service which he assumed to have in accepting employment in a service which he knew to be accompanied with much danger, and liable to various accidents. The railroad company necessarily sees through the eyes of its employees, and a proper performance of its service and duties is dependent upon their eyes, good sense, and judgment. Whether machinery, ways, and appliances are sound or defective depends upon the knowledge and skill of its officers and employees, upon whom there must rest an obligation to make known and have remedied such defects when discovered, as well as to inspect them before and during use for the security of themselves as well as those using them. When once placed in the hands and under the control of an employee, it is through his eyes, above all others, that the company must rely for the detection of defects, and from whom information of the same should be obtained. Nor do I understand that it is within the purview of the statute, either by expression or intentment, to abrogate the doctrine of assumption of risk,—*Volenti non fit injuria*. From the nature of the employer corporation, it is compelled to operate through and depend upon its officers and employees. Each employee becomes a vice principal as to the service under his absolute control, and, if defects exist in the machinery intrusted to him, or become apparent thereafter, it is his duty to his employer, as well as to himself, to make it known, and to use his best offices to have them remedied. His failure to give information of such defects leads the employer to assume that none exist to the great hazard of its property and service. But, should he continue in the use of such, knowing the defects, and failing to give the employer an opportunity of making the remedy, then he does so knowingly and willingly, and must be considered to have undertaken to run the risks incident thereto.

Defendant company exhibited to the court, as a part of the case on appeal, a photograph of the engine and tender upon which the accident occurred. It appears therefrom, as explained by the evidence recited in the record (the tender when backing being in front, I shall speak of the rear end of the tender as the "front"), that there

was a platform upon the "front" of the tender, 6 inches wide, extending the width of the tender across the railroad track, and being about a foot or 16 inches from the ground or sills upon the track. This was a safe place for plaintiff, and was provided with a hand-hold; but it was not a comfortable place to stay and signal the engineer, as he would have to stoop over to see him, or by peeping around the corner. Above this platform or step was a tool box, and, with the lid shut down, was about 2 feet wide, and was a safe place to stand, and perfectly convenient in signaling the engineer. The way provided for getting up on this tool box was a step on the side of the tender, about 2 feet 4 inches from the ground. There was no grab iron there on the tender, and it was on that corner of the tender where the drainpipe extended out. The drainpipe was not used for, and was known to be unfit to be used as, a grab iron; but plaintiff had used the one on the opposite side three hundred times, and this one not so often (two or three times), and had never examined to see if it was sound or securely fastened; but, if it were, it would hold 1,000 pounds. Plaintiff, when injured, was not getting up on the tool box from the side of the tender where the grab iron should have been for that purpose, but was getting up from the platform (provided for his use, and in "front" of the tender) upon the tool box, and in doing so used for his support the drainpipe, which broke out, and he fell backwards upon the track in "front" of the moving tender, and was injured, before he could get outside of the rails, by one of the wheels running over his arm and otherwise doing him harm. Plaintiff was the yard conductor, having under his control the engineer and another employee. He was experienced in the railroad service, and for over two years had occupied the same position, and well knew the safe and unsafe methods of performing his service.

Now, then, with this understanding of the statute, and the burden of plaintiff's case resting upon the fact that there was no grab iron on the side of the tender, and that his injury resulted from the lack of such at that place, I shall briefly consider what I take to be the main question presented in this case: Was defendant company negligent in not putting a grab iron on the side of the tender before delivering the engine and tender to plaintiff for his use in its service? Plaintiff says his injuries resulted

from the breaking of a defective drainpipe (used as a substitute for the grab iron) while he was undertaking to mount upon the tool box. He was not mounting from the side of the tender where the grab iron was necessary for that purpose, for, had he chosen that mode,—which was the proper one,—and used the drainpipe, and fallen, his fall would have been outside of the track, and the wheels could not have injured him. But he was mounting from the platform (or step) in "front," with his back to the middle of the track, and undertaking to get upon the tool box from that direction, and in doing so used the drainpipe for his support, which broke out, and he fell in "front" in the middle of the track, and was injured by the moving train before he could get out of the track. Had he undertaken to mount from the side of the tender, this injury could not have occurred; but, having undertaken to mount from the "front," from which position no appliances were required to be fixed for mounting, and in a way not contemplated or suggested by the structure of the machine or the provisions made, his injuries did not result from the neglect of the defendant in failing to put grab irons on the engine, and I think his honor erred in not instructing the jury, as prayed by defendant, "that upon the whole evidence, taken in the light most favorable to the plaintiff, there is no sufficient evidence to go to the jury of any defective appliance, so far as the want of a grab iron is concerned, except that of which the plaintiff accepted the risk of continuing in the service of the defendant after full knowledge of such defect," to which defendant excepted, and assigned as error.

When this case was last before the court (123 N. C. 534, 39 S. E. 43), I simply entered my dissent, because the opinion of the court was filed so late that I did not have time thereafter to complete my opinion, which I was preparing, and was unwilling to delay the case on that account; and now again I find myself, in the press of other business before the court, similarly situated.

Montgomery, J., dissenting:

I cannot concur in the opinion of the court. It can serve no useful purpose for me to write anything further in the matter, and I content myself with the dissent entered by me in the case on its first trial, and reported in 123 N. C. 534, 39 S. E. 43.

MISSOURI SUPREME COURT.

STATE of Missouri, *Respt.*,

v.

John HAMEY, *Appt.*

(.....Mo.....)

1. A constitutional provision for the

NOTE.—As to the doctrine that the jury in a criminal case are judges of the law, see, in this series, *State v. Burbee* (Vt.) 19 L. R. A. 145.

As to the determination by jury of the punishment of a convict, see also *People ex rel. Bradley v. Illinois State Reformatory Bd. of Managers* (Ill.) 23 L. R. A. 139, and *Miller v. State* (Ind.) 40 L. R. A. 109.

transfer of criminal cases from a division of the appellate court to the court in banc on motion of the losing party when a judge dissents from the opinion applies in favor of the state; and the rule that in such cases the state is not entitled to a review of a judgment of the trial court, except in spe-

ishment of a convict, see also *People ex rel. Bradley v. Illinois State Reformatory Bd. of Managers* (Ill.) 23 L. R. A. 139, and *Miller v. State* (Ind.) 40 L. R. A. 109.

cial cases allowed by statute, is not applicable.

2. The adoption of a new constitution preserving the right of trial by jury "as heretofore enjoyed" does not include the right, which has existed by statute for many years, of having the jury assess the punishment in criminal cases whenever there is an alternative or discretion in regard to it.
3. It was no essential part of a jury trial at common law that the jury should also fix the punishment if they convicted the prisoner.
4. The assessment by the jury of the punishment in a criminal case when the statute imposes that duty on the court does not vitiate the verdict, but the court may ignore it and assess the punishment itself.
5. A defendant in a criminal case cannot complain of error in the admission of evidence which he himself draws out.
6. That the act was accomplished by force will not prevent a conviction under a statute making it a felony to have carnal intercourse with an unmarried female of previously chaste character between the ages of fourteen and eighteen years.

(*Sherwood and Marshall, JJ., dissent.*)

(March 29, 1902.)

APPEAL by defendant from a judgment of the Criminal Court for Buchanan County convicting him of violating the statute against carnal knowledge of unmarried females. *Affirmed.*

The facts are stated in the opinions.

Messrs. Culver & Phillip, for appellant:

The indictment does not charge the defendant with any offense, and the court therefore erred in overruling the motion to quash the indictment and the motion in arrest of judgment.

The allegation that the defendant "did unlawfully . . . have carnal knowledge of Jessie Champagne, an unmarried female," is equivalent only to the statement that she was unmarried at the time the indictment was written. She may have been unmarried then, though married at the time of the unlawful intercourse.

Bishop, *Crim. Proc.* 3d ed. § 410, p. 256.

Mo. Rev. Stat. 1899, § 1838, is unconstitutional in that it deprives the accused of the right of trial by jury as guaranteed by Mo. Const. art. 2, § 28.

4 Bl. Com. bk. 361.

When the Constitution of 1875 was adopted it was provided that the "right of trial by jury as heretofore enjoyed shall remain inviolate."

Mo. Const. art. 2, § 28.

This means, if it means anything at all, the right of trial by jury as enjoyed in this state at the time of the adoption of the Constitution.

State v. Bockstruck, 136 Mo. 358, 38 S. W. 317; *Creve Cœur Lake Ice Co. v. Tamm*, 138 Mo. 385, 39 S. W. 791; 1 Bishop, *Crim. Proc.* 3d ed. 892, and notes; *Flint River S. B. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 57 L. R. A.

260; *Flint River S. B. Co. v. Roberts*, 2 Fla. 102, 48 Am. Dec. 178.

The duty of the jury in all felony cases, without exception, prior to the adoption of the present Constitution, was to assess the punishment.

Foote v. State, 7 Mo. 502; *Swart v. Kimball*, 43 Mich. 448, 5 N. W. 635.

Nor can it be said that the constitutional provision does not apply to the offense charged in the case at bar because the statute creating it was passed after the adoption of the Constitution. The offense is a felony, and the constitutional provision applies to all felonies.

Wynehamer v. People, 13 N. Y. 426; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302.

Nor can it be urged that, though that portion of the statute which prescribes that the court shall fix the penalty is void, it is separable from the remainder of the section, which, therefore, should be held valid.

State v. Bookstruck, 136 Mo. 353, 38 S. W. 317; *Landis v. Vineland*, 54 N. J. L. 75, 23 Atl. 357.

The court should direct a verdict for either party where the facts are undisputed and the witnesses unimpeached, or where the verdict, if returned for the opposite party, would be set aside as against the law and evidence,—and this though there be a scintilla of evidence.

Morgan v. Durfee, 69 Mo. 476, 33 Am. Rep. 508; *Adams County Bank v. Hainline*, 67 Mo. App. 487.

Where the testimony is contrary to the daily experience of common life, or at war with the conceded and indisputable physical facts, neither courts nor juries can, without stultifying themselves, yield to it an iota of probative force or effect, and a verdict based upon such testimony will not be permitted to stand.

Payne v. Chicago & A. R. Co. 136 Mo. 575, 38 S. W. 308; *Lien v. Chicago, M. & St. P. R. Co.* 79 Mo. App. 475; *Kelsay v. Missouri P. R. Co.* 129 Mo. 362, 30 S. W. 339; *State v. Dettmer*, 124 Mo. 435, 27 S. W. 1117; *State v. Nelson*, 118 Mo. 124, 23 S. W. 1088; *State v. Bryant*, 102 Mo. 24, 14 S. W. 822; *State v. Turlington*, 102 Mo. 642, 15 S. W. 141.

The right of trial by jury, vouchsafed by the Constitution, is not limited to the right of trial by jury as known to the common law.

Creve Cœur Lake Ice Co. v. Tamm, 138 Mo. 385, 39 S. W. 791; *Edwardson v. Garnhart*, 56 Mo. 81; Cooley, *Const. Lim.* p. 69; *Lamar Water & Electric Light Co. v. Lamar*, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W. 756; *State ex rel. Crow v. Hostetter*, 137 Mo. 636, 38 L. R. A. 208, 39 S. W. 270; *Ross v. Irving*, 14 Ill. 180; *Gaston v. Babcock*, 6 Wis. 504; *Mead v. Walker*, 17 Wis. 190; *Cairns v. O'Brien*, 40 Wis. 469; *Monitor Iron Works Co. v. Ketchum*, 47 Wis. 177, 2 N. W. 80; *Lee v. Tillotson*, 24 Wend. 337, 35 Am. Dec. 624; *Lake Erie, W. & St. L. R. Co. v. Heath*, 9 Ind. 558.

The constitutional guaranty that "the right of trial by jury as heretofore enjoyed shall remain inviolate" applies as well to all newly created felonies as to those in existence when the present Constitution was adopted.

Plimpton v. Somerset, 33 Vt. 283; *State v. Peterson*, 41 Vt. 504; *Re Rolfs*, 30 Kan. 758, 1 Pac. 523; *Oreston v. Nye*, 74 Iowa, 369, 37 N. W. 777.

Mr. Edward C. Crow, Attorney General, for respondent:

The declaration in the bill of rights (Mo. Const. art. 2, § 25), that the right of trial by jury as heretofore enjoyed shall remain inviolate, means that all the substantial incidents and consequences which pertained to the right of trial by jury at common law are beyond the reach of hostile legislation, and are preserved to their full extent as then enjoyed.

State ex rel. St. Louis, K. & N. W. R. Co. v. Withrow, 133 Mo. 501, 34 S. W. 245, 36 S. W. 43.

The state Constitutions do not extend the right of trial by jury; they only secure it in cases in which it was a matter of right before.

Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 32 L. ed. 854, 9 Sup. Ct. Rep. 458; *Cooley*, Const. Lim. 6th ed. 504.

Assessment of punishment by jury is not an essential element of right of jury trial at common law.

Cooley, Const. Lim. 6th ed. pp. 391, 392.

The jury at common law was the trier of fact.

State v. Bangor, 41 Me. 533; 1 Bishop, Crim. Law, 8th ed. § 934.

The common-law jury trial was intended to be preserved by the Constitution, and it is beyond the power of the general assembly to impair the right or materially change its character.

State ex rel. St. Louis, K. & N. W. R. Co. v. Withrow, 133 Mo. 519, 34 S. W. 245, 36 S. W. 43; *Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194; *East Kingston v. Towle*, 48 N. H. 64, 2 Am. Rep. 174, 97 Am. Dec. 575; *People ex rel. Murray v. New York City & County Justices*, 74 N. Y. 406.

One of the characteristics of the jury trial at common law was that usually the jury simply determined the fact of guilt or innocence and the court assessed the punishment.

1 Bishop, Crim. Law, § 934.

Suppose that in certain classes of felonies the territorial statutes had provided that the courts should assess the penalty, would it be contended that after the adoption of the Constitution the general assembly could not provide by statute that the jury should find the facts and assess the penalty? This very question has been passed upon, and it has always been held that such statutes are constitutional.

State v. Bean, 21 Mo. 269; *State v. McQuaig*, 22 Mo. 320; 1 Bishop, Crim. Law, § 934; *Rice v. State*, 7 Ind. 332; *State v. Hookett*, 70 Iowa, 442, 30 N. W. 742.

It is constitutional to divide the respon-

sibility of the assessment of the punishment between the judge and jury.

State v. McQuaig, 22 Mo. 320; 1 Bishop, Crim. Law, § 934.

Even if the court should hold that the general assembly cannot authorize the court to assess the punishment in this class of cases, yet it is well settled that a part of an act may be constitutional and another portion unconstitutional, and the valid part separated from the invalid and maintained, unless the act shows on its face that the general assembly would not have passed it except as with the invalid portion attached.

State v. Bockstruck, 136 Mo. 353, 38 S. W. 317; *St. Louis County Ct. v. Griswold*, 58 Mo. 199; *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 49, 45 L. R. A. 363, 52 S. W. 595.

Delay in making complaint simply goes to the credibility of the testimony.

State v. Marcks, 140 Mo. 662, 41 S. W. 973, 43 S. W. 1095; *State v. Wilcox*, 111 Mo. 574, 20 S. W. 314; *State v. Owen*, 78 Mo. 368; *State v. Emery*, 76 Mo. 348; *Seaton v. Chicago, R. I. & P. R. Co.* 55 Mo. 416; *Withhouse v. Atlantic & P. R. Co.* 64 Mo. 524.

The evidence is sufficient to sustain the verdict.

This court will not reverse a case on the ground that the verdict is against the evidence, simply because a different verdict might very well have been returned under the evidence.

State v. Thomas, 78 Mo. 342; *State v. Musick*, 71 Mo. 402; *State v. Turner*, 110 Mo. 196, 19 S. W. 645; *State v. Glahn*, 97 Mo. 679, 11 S. W. 260; *State v. Cook*, 58 Mo. 549; *State v. Jackson*, 95 Mo. 623, 8 S. W. 749; *State v. Jones*, 61 Mo. 236; *State v. Hiltbrand*, 116 Mo. 543, 22 S. W. 805; *State v. Marcks*, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095.

Gantt, J., delivered the opinion of the court:

The defendant was indicted in the criminal court of Buchanan county for a violation of Rev. Stat. 1899, § 1838, which was enacted April 8, 1895 (Mo. Laws 1895, p. 149). That act provides that "if any person over the age of sixteen years shall have carnal knowledge of any unmarried female, of previously chaste character, between the ages of fourteen and eighteen years of age, he shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for a term of two years, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than one month or more than six months, or by both such fine and imprisonment, in the discretion of the court." The defendant was duly arraigned, and entered his plea of not guilty. At the November term, 1901, of said court, he was tried by a jury duly impaneled, which returned the following verdict: "We, the jury, find the defendant guilty, and assess his punishment at imprisonment in the county jail for a term of one month, and a

fine of \$500." And, his motions for new trial and in arrest having been overruled, the court sentenced the defendant to imprisonment in the county jail for one month, and to pay a fine of \$500. From that sentence he appeals. On a hearing of said appeal in division No. 2 the judgment of the criminal court was reversed, but, one of the judges dissenting, the cause, on motion of the attorney general, was ordered transferred to the court in banc, and it has been again argued at length.

1. When the cause was reversed in division No. 2 of this court, it was accompanied with an order of discharge. After the order was made transferring the cause to the court in banc, the defendant filed his motion to strike the same from the files, because, as he alleged, the Constitution did not confer upon the attorney general the right to have said cause transferred after a judgment by division No. 2 in favor of defendant's discharge. The argument is that as the state is not entitled to an appeal or to a review of a judgment rendered in the trial court, except in those instances expressly allowed by statute, it follows that it can have no right to have the judgment of an appellate court reviewed unless that right be expressly given. This contention ignores the amendment to the Constitution of this state which was adopted at the general election in November, 1890. Section 1 of that amendment confers exclusive cognizance of all criminal cases pending in the supreme court upon division No. 2 thereof, provided that a cause therein may be transferred to the court in banc as provided in section 4 of said amendment. Const. art. 6, Amend. 1890. Section 4 provides that, "when a judge of a division dissents from the opinion therein," "the cause on the motion of the losing party shall be transferred to the court in banc for its decision." Here, then, is the express authority in the organic law for removing the cause into the court in banc. It is not, however, an appeal. The provision was designed to give a losing party in either division of the court a hearing, under the conditions specified, by the whole court in banc. It has been uniformly ruled that the state was entitled to the same benefit of this provision as any other party. *State v. Marks*, 140 Mo. 650, 41 S. W. 973, 43 S. W. 1095. We are unanimously of opinion that the order of transfer made by division No. 2 in this cause conferred jurisdiction of this appeal on the court in banc, and that the judgment of discharge by division No. 2 was thereby vacated, or at least suspended to abide the judgment of the court in banc; and accordingly the motion to strike the cause from the docket is overruled.

Recurring now to the questions arising on this record:

The first proposition advanced by defendant is that Rev. Stat. 1899, § 1838, is unconstitutional, in that it violates §§ 22, 28, and 30 of article 2 of the Constitution of Missouri of 1875. Those sections are in these words:

"Sec. 22. In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county."

"Sec. 28. The right of trial by jury as heretofore enjoyed shall remain inviolate; but a jury for the trial of criminal or civil cases in courts not of record may consist of less than twelve men as may be prescribed by law. Hereafter a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment or a true bill."

"Sec. 30. That no person shall be deprived of life, liberty, or property without due process of law."

The first premise assumed by the learned counsel is that "the right of trial by jury at common law meant that one part of the jury's duty was to return into court a verdict, if they found defendant guilty, assessing his punishment as provided by law, or a general verdict of guilty, and thereupon the court fixed his punishment." Citing Bl. Com. bk. 4, p. 361. The text of Blackstone cited does not sustain counsel. On the contrary, that learned author says:

"When the evidence on both sides is closed, and, indeed, when any evidence hath been given, the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict, but are to consider of it and deliver it in, with the same forms as upon civil causes, only they cannot, in a criminal case which touches life or member, give a privy verdict. But the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court. And such public or open verdict may be either general, 'Guilty' or 'Not guilty,' or special, setting forth all the circumstances of the case, and praying the judgment of the court whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they doubt the matter of law, and therefore choose to leave it to the determination of the court, though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict if they think proper so to hazard a breach of their oaths. And if their verdict be notoriously wrong they may be punished and the verdict set aside by attain at the suit of the King, but not at the suit of the prisoner." But the practice heretofore in use of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdicts contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal, and was treated as such by Sir Thomas Smith two hundred years ago, who accounted "such doings to be very violent, tyrannical, and contrary to the liberty and custom of the realm of England." It will be observed there is nothing in this statement that justifies the assertion that at common law the jury had the right to assess

the punishment of the prisoner if they convicted him. On the contrary, their verdict was "Guilty," or "Not guilty," and the court fixed the punishment according to the laws in force; and such has been the common understanding of our law writers and courts. 1 Bishop, New Crim. Law, § 934; *State v. Bangor*, 41 Me. 533; *United States v. Mundel*, 6 Call (Va.) 245, Fed. Cas. No. 15,834; *People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill., loc. cit. 422, 23 L. R. A. 139, 36 N. E. 78; *George v. People*, 167 Ill. 447, 47 N. E. 741; *Miller v. State*, 149 Ind. 607, 40 L. R. A. 109, 49 N. E. 894; *Skelton v. State*, 149 Ind. 641, 49 N. E. 901.

But, say counsel, whatever the practice may have been or was at common law, when introduced into this state it was soon modified by requiring the jury, if they found a defendant guilty, to assess his punishment within the limits prescribed by law, and that such continued to be the statutory law until the adoption of the Constitution of 1875, when it was provided that "the right of trial by jury as heretofore enjoyed shall remain inviolate," and hence the statute (Rev. Stat. 1899, § 1838) is unconstitutional, because the jury, under said section, is not allowed to assess the punishment, but that duty is imposed on the court. This § 1838 must, of course, be read in conjunction with those general provisions of our statute law which govern in the trial of all prosecutions of felony. Since 1835, at least, the statutes of this state have provided that the courts in certain cases shall assess the punishment. Thus §§ 4, 5, 6, and 7 of article 7 of chapter 138, Rev. Stat. 1845, specify instances in which the court shall assess the punishment. Section 4 of the Revised Statutes of 1845 provides that "where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, or assess a punishment not authorized by law or in excess of that fixed by law, and in all cases of judgment by confession the court shall assess and declare the punishment and render a judgment accordingly." Section 5 provides that "if the jury assess the punishment, whether imprisonment or fine, below the limit prescribed by law for the offense for which the defendant is convicted, the court shall pronounce the sentence and render judgment according to the lowest limit prescribed by law." Section 6 provides that "if the jury assess a punishment, whether of imprisonment or fine, greater than the limit prescribed by law for the offense, the court shall disregard the excess and pronounce sentence and render judgment according to the limit prescribed by law in such cases." Section 7 also authorizes the court "to reduce the extent or duration of the punishment assessed by the jury if after it has found the conviction is proper the punishment assessed is greater than under the circumstances of the case should be inflicted." See Rev. Stat. 1845, pp. 883, 884. The same sections are carried forward into the statutes of 1855. See vol. 2, §§ 5-8, pp. 1196, 1197. The same provisions are found in the Statutes

of 1865, §§ 5-8, p. 852. The same provisions are found in the revision of 1879. See vol. 1, §§ 1930-1933, p. 323. And also in 1899. See Stat. 1899, vol. 1, §§ 4230-4233, p. 981. And also in the Statutes of 1899 (vol. 1, §§ 2649, 2651, 2652, p. 692). The same provisions are found in the Statutes of 1835. See Rev. Stat. 1835, §§ 4-7, p. 493. These references clearly show that the laws of Missouri have always recognized that it is constitutional to authorize either court or jury to assess the punishment in a felony case. It is to be observed that counsel do not assert that prior to the adoption of the Constitution of 1875 it was a constitutional right of defendant to have the jury assess his punishment in that class of felonies in which the punishment ranged from a minimum to a maximum punishment, and vesting a discretion in the jury to fix it within those limits. Certainly there was both under the Constitution of 1820 and that of 1865 a constitutional right of trial by jury, but that phrase was too well understood to admit of such a construction as counsel now places upon the present provision in § 28 of article 2 of the Constitution of 1875. Says Mr. Justice Story in his work on the Constitution (§ 1779): "It seems hardly necessary in this place to expatiate upon the antiquity or importance of the trial by jury in criminal cases. It was from very early times insisted on by our ancestors in the parent country as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes one of the fundamental articles of Magna Charta, in which it is declared. . . . 'No man shall be arrested, nor imprisoned, nor banished, nor deprived of life, etc.,' but by the judgment of his peers or by the law of the land. The judgment of his peers here alluded to, and commonly called, in the quaint language of former times, a 'trial per pais,' or 'trial by the country' is the trial by a jury who are called the peers of the party accused, being of the like condition and equality in the state. When our immediate ancestors removed to America, they brought this great privilege with them as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state Constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." It will be remembered that this eulogy of Judge Story of "trial by jury" referred to the trial by jury at common law, which did not include the right of the jury to assess the punishment. It will be further observed that neither Mr. Justice Story, nor the framers of the Constitution of the United States or of our own Constitutions, thought it necessary to define what the words "trial by jury" meant. He and they assumed that these words, *ex vi termini*,

meant a trial by twelve men impartially selected from the county in which the alleged crime was committed, who must unanimously concur in the guilt of the accused before he could be legally convicted. A law dispensing with any of these essential requisites, we all concede, would be a denial of the right of trial by jury, and necessarily unconstitutional. *Ex parte Slater*, 72 Mo. 102. Says Judge Cooley (Const. Lim. 6th ed. 389, 390): "Wherever the right to this trial is guaranteed by the Constitution without qualification or restriction, it must be understood as retained in all those cases which were triable by jury at the common law, and with all the common-law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused." In *State ex rel. St. Louis, K. & N. W. R. Co. v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43, this court, through Sherwood, J., said: "And § 28 of our bill of rights declares that 'the right of trial by jury as heretofore enjoyed shall remain inviolate,' which means that all the substantial incidents and consequences which pertained to the right of trial by jury are beyond the reach of hostile legislation, and are preserved in their ancient, substantial extent as existing at common law." This language is significant, because Barclay, J., contended that we had adopted the Missouri trial by jury in 1820, and not the English. Now, it is conceded our laws secure to the defendant in a prosecution under this § 1838 a trial by jury, with every common-law incident and protection. These, briefly, were: First. The jury must be twelve men indifferent between the prisoner and the commonwealth. To secure this, challenges must be allowed. Second. The jury must be summoned from the vicinage where the crime is supposed to have been committed. This gives the accused on the trial the benefit of his own good character and standing with his neighbors. Third. The jury must unanimously concur in the verdict. Fourth. The jurors must be left free to act in accordance with the dictates of their own judgment. As the right and duty devolved upon the court at common law to assess the punishment, it is plain this statute does not violate the common-law jury trial, in leaving the punishment to the court. All of these have been accorded to the defendant in this case. The Constitution of 1820 provided "that the right of trial by jury shall remain inviolate," and the Constitution of 1865 retained the same formula. According to Judge Cooley, these words in both of these Constitutions must mean that the right was retained in all those cases which were triable by a jury at common law, and with all the substantial common-law incidents of a jury trial, among which it cannot be maintained was the right to have the jury in a felony case assess the punishment when it was in the alternative, or subject to a scale.

We are thus brought to consider the true signification of the words, "the right of trial by jury as heretofore enjoyed shall remain inviolate," in the Constitution of

1875. The defendant insists that because for many years prior to 1875 the duty of assessing the punishment had been imposed by our statutes upon the jury when they convicted a defendant, except in those cases in which the law fixed but one punishment, that was one of the rights secured by the Constitution (and such was the view taken in division No. 2 in this case), and hence can never be changed by statute until the Constitution is changed. It will certainly not be contended that prior to the Constitution of 1875 the legislature could not have repealed the general provision which has been in all our revisions from 1845 to the present time, which requires that "in all cases of a verdict of conviction for any offense where by law there is any alternative or discretion in regard to the kind or extent of punishment to be inflicted the jury may assess and declare the punishment in their verdict." There was nothing in the Constitutions of 1820 or 1865 which tied the hands of one legislature so that it could not repeal or modify the acts of its predecessors. It is fundamental, in a system of government like ours, that one legislature cannot pass an irrevocable law. Says Judge Cooley: "The Constitution, in conferring the legislative authority, has prescribed to its exercise any limitations which the people saw fit to impose, and no other power than the people can superadd other limitations. To say that the legislature may pass irrevocable laws is to say that it may alter the very Constitution from which it derives its authority, since, in so far as one legislature could bind a subsequent one by its enactments, it could in the same degree reduce the legislative power of its successors; and the process might be repeated until, one by one, the subjects of legislation would be excluded altogether from their control, and the constitutional provision that the legislative power shall be vested in two houses would be, to a greater or less degree, rendered ineffectual. 'Acts of Parliament,' says Blackstone, 'derogatory from the power of subsequent Parliaments, bind not.'" Cooley, Const. Lim. p. 147; *Bloomer v. Stolley*, 5 McLean, 158, Fed. Cas. No. 1,559; *Kellogg v. Oshkosh*, 14 Wis. 624. And again, Cooley, in his Constitutional Limitations, at page 343, says: "We have said in another place that citizens have no vested right in the existing general laws of the state, which can preclude their amendment or repeal, and that there is no implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law." As the act of the legislature prior to 1875 permitting a jury to assess the punishment in cases when there was a discretion as to kind or length of punishment was a legislative, and not a constitutional, enactment, any subsequent legislature could repeal or amend the same, unless the contention of defendant is correct, that, by the addition of the phrase "as heretofore enjoyed," the people have imposed a constitutional prohibition upon any change in our criminal practice so long as the present Constitution shall survive.

What force and effect are to be attributed to this change in the Constitution in 1875? Fortunately the question is not altogether a new one. In 1870 the people of Illinois adopted a new Constitution, in which they provided that the right of trial by jury, "as heretofore enjoyed," shall remain inviolate. In 1897 the supreme court of that state was called upon to construe the effect of adding the words "as heretofore enjoyed" to the Constitutions of 1818 and 1848, which provided that the right of trial by jury "shall remain inviolate," as did our Constitutions of 1820 and 1865. The construction was invoked in *George v. People*, 167 Ill. 447, 47 N. E. 741, as to the constitutionality of the act of the general assembly of that state approved June 15, 1895, entitled "An Act in Relation to the Sentence of Persons Convicted of Crime and Providing a System of Parole." Laws 1895, p. 158. Section 1 of said act required the court to impose the sentence, whereas previous to and at the time of the adoption of the Constitution of 1870 there was a general provision in the Criminal Code of that state which provided that in all cases where the punishment shall be confinement in the penitentiary, if the case is tried by a jury, the jury shall say in their verdict for what time the offender shall be confined, etc. Rev. Stat. 1845, § 168, p. 182, 1 Starr & C. Anno. Stat. (Ill.) § 629, p. 1409. The prisoner in that case, as has defendant in this, had been tried by a jury of twelve chosen from the county in which the offense was committed, and they had unanimously pronounced him guilty, but, under the act of 1895, had not fixed or assessed his punishment. The court sentenced him according to the act, and on appeal the identical question here raised was presented to the supreme court. There, as here, it was earnestly contended that "the right of trial by jury as heretofore enjoyed shall remain inviolate" secured to defendant the right to have the jury assess his punishment; but that court held that "the right of trial by jury was the same under the Constitution of 1870 as it was under those of 1818 and 1848." Touching the argument now made, the court said: "It is, however, said that the words 'as heretofore enjoyed' relate to those enjoyed at the time of the adoption of the Constitution of 1870. The definition given by Webster of the word 'heretofore,' is, 'in times before the present; formerly.' The word 'heretofore,' as used, evidently relates to the past and, in order to determine the true meaning of the words 'the right of trial by jury as heretofore enjoyed,' it is necessary to go back to the common law of England. When this is done it will be found that the right of trial by jury constitutes certain specified things, which cannot be dispensed with or disregarded on the trial of a person charged with a felony. A jury of twelve men must be impaneled, and any less number would not be a common-law jury. The jury must be indifferent between the prisoner and the people. They must be summoned from the vicinage or body of the county in which the crime was

alleged to have been committed. The jury must unanimously concur in the verdict. (This latter is one of the old requirements of the common law.) The final decision upon the facts is to rest with the jury, and the court cannot interfere to coerce them to agree upon a verdict against their convictions. Cooley, Const. Lim. 394. These are some of the rights guaranteed by the Constitution. But under the common law a prisoner on trial for a felony has no constitutional right to have his term of punishment fixed by a jury. At common law the jury returned a verdict of guilty or not guilty, and the punishment was fixed by the court, and governed by the laws in force. 2 Bl. Com. bk. 4, p. 361. It is therefore plain that the rights of the defendant which are guaranteed by the Constitution were not infringed upon or taken from him. In *Kelly v. People*, 115 Ill. 583, 56 Am. Rep. 184, 4 N. E. 644, a conviction for a second offense was sustained, where the law itself fixed the time the prisoner should be punished by confinement in the penitentiary. If the language, 'the right of trial by jury as heretofore enjoyed shall remain inviolate,' shall be construed to mean that the system of trial by jury as it existed by statute at the time the Constitution of 1870 was adopted was ingrafted on, and became a part of, the Constitution, as is contended, many embarrassing results never contemplated would follow. When the Constitution of 1870 was adopted the statute provided that juries in all cases shall be judges of the law and fact. Did that provision of the statute become a part of the Constitution, so that it is beyond the power of the legislature to change it? At the time the Constitution of 1870 was adopted the statute required the court, in the trial of both criminal and civil cases, to instruct the jury in writing; oral instructions being prohibited. If the legislature should now pass an act providing that all instructions should be oral, would such an act be unconstitutional? Suppose the legislature should pass an act adopting a new system of impaneling a jury, entirely different from the one in force when the Constitution of 1870 was adopted; would such an act be unconstitutional? Indeed, since the adoption of the Constitution of 1870 numerous changes have been made in the criminal law relating to jury trials. Are these changes all void, under the language of the Constitution, 'as heretofore enjoyed?' Other examples might be given, but they are not required. It is manifest that the language of the Constitution was never intended to confer upon the jury a constitutional right to fix the term of imprisonment on the trial of a person indicted for a felony." Prior to that case the constitutionality of the reformatory act of 1891 was challenged in *People ex rel. Bradley v. Illinois State Reformatory*, 143 Ill. 413, 23 L. R. A. 139, 36 N. E. 76. Chief Justice Baker wrote the opinion of the court, and on this point said: "Nor is it true that a prisoner on trial for burglary and larceny, or for any other violation of the criminal law, has a constitutional right

to have the quantity of his punishment fixed by a jury. At common law the jury either returned a special verdict setting forth all the circumstances of the case, and praying the judgment of the court thereon, or a general verdict of guilty or not guilty. The punishment was fixed by the court, and governed by the laws in force. 2 Bl. Com. bk. 4, p. 361. And in this state and at the present time the penalties for violations of the Criminal Code are in many cases not fixed by the jury, but by the court. Rev. Stat. p. 413, §§ 446, 447 *et seq.* The constitutional right of trial by jury is limited to the trial of the question of guilt or innocence, and we think there can be no question of the validity of the sections of the statute to which we have made reference in this connection." That opinion was written in 1894,—twenty-four years after the adoption of the Constitution of Illinois of 1870.

In *Miller v. State*, 149 Ind. 607, 40 L. R. A. 109, 49 N. E. 894, the reformatory act of Indiana was challenged as unconstitutional. Said the court: "But because the jury are not allowed to fix the amount of the punishment which is to be inflicted, it is contended that the reformatory act deprives the accused of a jury trial, in violation of said § 13 of the bill of rights. This very objection to a similar act, under a similar constitutional provision in the Constitution of Illinois, in *People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill. 422, 23 L. R. A. 139, 36 N. E. 79, was held not good. It was there said: 'Nor is it true that a prisoner on trial for burglary and larceny . . . has a constitutional right to have the quantity of punishment fixed by a jury [and repeating the extract already copied from 148 Ill., 36 N. E., and 23 L. R. A., *supra*].' The supreme court of Illinois again decided the same way in 187 Ill. 447, 47 N. E. 741, in *George v. People*. We therefore conclude that the act does not deprive the defendant of a jury trial, in violation of the Constitution." It is significant that § 19 of the bill of rights of the Constitution of Indiana provided that "in all criminal cases whatever the jury shall have the right to determine the law and the facts," and when the same point was urged in *Skelton v. State*, 149 Ind. 641, 49 N. E. 901, the court again ruled in the same way, and added additional reasons against it as follows: "We are unable to see that any of these beneficent provisions of the bill of rights is violated by not requiring the jury to fix the punishment. Our statute, it is true, as we have seen, has heretofore provided that the jury shall, in their verdict, name the punishment to be inflicted. But the Constitution makes no such requirement; and that which the statute has done the statute may undo, provided it remain within the bounds fixed by the Constitution. The last act of the legislature controls in case of conflict. Indeed, aside from any statutory requirement, the fixing of punishment cannot be considered as any necessary part of the trial of a cause. When the verdict or finding has determined the existence

of the crime charged, the trial is ended, and the punishment to be thereafter inflicted is the sentence which the court pronounces under the law then in force. The fixing of such punishment seems to be a proper function of a court, rather than of a jury,—a matter of judgment, rather than of finding a verdict. Certainly the leaving of this duty to the court, instead of to the jury, as the act in question does, is no invasion of the sacred right of trial by jury. Article 6 of the Amendments to the Constitution of the United States secures the same right to jury trial in all criminal prosecutions; but it has never been held that the practice in the Federal courts, according to which the court, and not the jury, fixes the punishment, is an infringement of the right of trial by jury guaranteed by the Constitution. Neither is the provision in question a violation of the Constitution, which provides that, 'in all criminal cases whatever, the jury shall have the right to determine the law and the facts.' Ind. Const. art. 1, § 19. The law, when applied to the facts found, determines the guilt or innocence of the accused, and, in case of guilt, determines the crime committed. Of all this the jury has supreme control, under the Constitution. But the sentence is the judgment of the court as to what, within the statutory limits, ought to be the proper punishment for the crime of which the defendant has been convicted. We do not think, therefore, that the verdict provided for in the new statute is any violation of the Constitution. The right of trial by jury—the right to have the innocence or guilt of the person charged with the crime determined solely by a jury of his peers—is as fully guarded under the present as under the former statute."

The exact formula, "The right of trial by jury as heretofore enjoyed," used in the Constitution of Illinois of 1870 and in the Constitution of Missouri of 1875, we have not found in any other state Constitution. That of Pennsylvania, adopted in 1874, more nearly approaches it. There the language is (§ 6, art. 1), "Trial by jury shall be as heretofore, and the right thereof remain inviolate." That of New York (§ 2, art. 1) is: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate." There is, however, practically no difference in their meaning. In *Byers v. Com.* 42 Pa. 89, Strong, J., said: "It is insisted that this act is repugnant to that clause in the declaration of rights in the Constitution which guarantees 'that trial by jury shall be as heretofore and the right thereof remain inviolate.' The objection is based upon a misconception of what that right of trial by jury was which is protected by the Constitution. The founders of this state brought with them to their new abode the usages to which they had been accustomed in the land from which they emigrated. Among them was trial by jury. . . . Its extent and its privileges . . . were perfectly understood, and in bringing it with them the founders of the commonwealth doubtless intended to bring it as

they had enjoyed it. None of the frames of government or Constitutions under which we have lived have contemplated any extension of the right beyond the limits within which it had been enjoyed previous to the settlement of the state or the adoption of the Constitution. No intention to enlarge it appears in the laws agreed upon in England in 1682. Our first Constitution—that of 1776—declared that ‘trials by jury shall be as heretofore,’ the Constitution of 1790 and the amended one of 1838 adopted substantially the same provision. . . . All looked to preservation, not extension. It is the old right, whatever it was,—the one previously enjoyed,—that must remain inviolate alike in its mode of enjoyment and in its extent.” After discussing various cases, such as suits in equity, and various acts to punish petty offenses, in which the right of trial by jury never existed in England, the judge proceeds: “These acts were in force in 1776. In view of them the first Constitution was made, and it declared, not that trials by jury shall be in all cases, but as theretofore. And when that gave place to the later Constitutions they undertook to preserve only that right which had been enjoyed.” In that case the attention of the court was directed to the character of cases in which the right could be demanded, not the incidents of the right itself. In *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 335, it was the essential incident of a right of trial by jury of the vicinage or county which the statute denied, and, of course, it was unconstitutional. In *Wynehamer v. People*, 13 N. Y. 426, it was ruled that felonies were triable by a jury, and new felonies denounced and defined after the adoption of the Constitution must be so tried, “because they belong to the class of cases in which at the adoption of the Constitution such a trial was used.” But no case which our examination has enabled us to find has announced the doctrine that the fixing or assessment of the punishment in a criminal case by the jury was an essential element of a jury trial; but the common law was clearly otherwise, as the authorities already cited, we think, conclusively establish. In every case to which we have had access, when the prisoner has been adjudged to have been denied an essential incident of jury trial it appeared either that there was a denial of his right to trial by jury of the county or vicinage, or that he was denied a jury of twelve, or the jurors were not impartial, or was denied by statute a jury in cases which were so triable at common law.

We reject the argument that the common-law method never obtained in this state as to jury trials. The common law was adopted in 1816 in Missouri. 1 Terr. Laws, p. 436, chap. 154. In *Vaughn v. Scade*, 30 Mo. 604, Judge Scott says: “The term ‘trial by jury’ was well known and understood at the common law, and in that sense it was adopted in our bill of rights. Of course, the nonessentials of that institution, such as concern the qualifications of jurors, the mode of summoning them, and many other such matters, were left to the

regulation of law. The Constitution is preserved in retaining the substance of that form of trial, as it was known and practised among those from whom we have derived it. The subject has undergone examination in other tribunals, and we find them concurring in those views. They unite in declaring that, where there is a constitutional guaranty of the right to a trial by jury, twelve is the number of which the jury must be composed.” When, therefore, the text writers and courts speak of the beneficial incidents of jury trial, they must be understood as referring to those essentials which have already been mentioned, to wit, twelve impartial jurors, indifferent between the state and the prisoner. They must be summoned from the vicinage or county in which the crime is charged to have been committed. They must unanimously agree on their verdict, and must be left free to act in accordance with their oaths and judgment. These were the essentials which the Constitution was designed to preserve, not to extend; and it was the right to a trial by a jury thus organized, and with these incidents, which the framers of the Constitution and the people intended should remain inviolate. When we consider that the guaranty of a jury trial in the Constitution of the United States has never been construed as permitting a jury to assess the punishment, but that the invariable practice has been to require the judge to fix the punishment within the limits of the law, and a large number of our sister states whose Constitutions contain this same guaranty also devolve that duty upon the judges, it is absolutely certain that it was no essential part of a jury trial at common law that the jury should also fix the punishment if they convicted the prisoner. The testimony is too overwhelming to the contrary. If it was not an essential, then, as Judge Scott says in *Vaughn v. Scade*, it was left to the legislature to determine whether it would require the jury or the judge to assess the punishment where alternative or discretionary punishments are prescribed by law. The jealousy of the English people and our forefathers, and our own, against committing the trial of disputed facts and the determination of the guilt or innocence of an accused to the court, did not extend to the assessment of the punishment, which is prescribed within fixed limits, and would govern either judge or jury in assessing it. The well-merited eulogies upon jury trial are not based upon this right of a jury to fix the amount of punishment, but upon that far greater prerogative of weighing the evidence and passing upon the guilt or innocence of the defendant. Lord Camden, Erskine, Maynard, and Blackstone, who so eloquently commended “trial by jury” as the great birthright of the Englishman,—as “his fence and protection against all frauds and surprises and against all storms of power,”—knew nothing of the system in this state, and some of our sister states, requiring the jury to assess the punishment. Their commendation was of the enlightened common-law system of jury trial, which had been

perfected after years of experience, and after English juries had finally triumphed over despotic power and servile judges. It never could have, in our opinion, been intended to tie up the hands of the people themselves, through their chosen representatives, so that no beneficial changes and regulations of the trial by jury could be made as subsequent experience might dictate, as long as the essentials are preserved. As was said in *Beers v. Beers*, 4 Conn. 535, 10 Am. Dec. 186, it is within the reasonable intendment of the Constitution, so long as the recognized essentials of a common-law jury trial are preserved, to adopt new methods, if the public interests demand such changes; and there is nothing in the Constitution of 1875 which requires the general assembly to forever perpetrate the statutes requiring juries to fix the punishment, where alternative punishments are prescribed. As said by the attorney general, the Constitution is not a grant of powers to the general assembly, but it merely contains certain limitations and restrictions upon it; and, if there is no provision in it that prohibits the general assembly from imposing upon the courts the duty of assessing the punishment prescribed within the limits of the law, then it has the constitutional power to so direct, and the guaranty of the right of "trial by jury as heretofore enjoyed," in and of itself does not prohibit it, as those words simply preserve the right of trial by jury which our former Constitutions had also secured to us.

But I am referred to the decision in *Creve Cœur Lake Ice Co. v. Tamm*, 138 Mo. 385, 39 S. W. 791, in which division No. 2 of this court held a compulsory reference to a referee for the examination of a long account was not an infringement on the constitutional guaranty of trial by jury as heretofore enjoyed. An examination of that case will show that the decision proceeded on the view that inasmuch as the supreme court of this state, as early as 15 Mo. 144, in *Nhepard v. Bank of State*, had ruled that such a reference did not violate the right of trial by jury guaranteed by the Constitution of 1820, and then the people of this state, with full knowledge of that decision, continued the same language in the Constitution of 1865 and the General Statutes of 1865, and this court in 1874, prior to the adoption of our present Constitution, in *Edwardson v. Garnhart*, 56 Mo. 85, had held it was not to be presumed, in these circumstances, that by the adoption of the Constitution of 1865 the people intended to change the construction placed by this court on the same statute under the Constitution of 1820, *a fortiori* the Constitution of 1875 was not intended to do away with compulsory references in proper cases under that statute; and we said: "This, then, was the state of the law when the Constitution of 1875 was framed and submitted to the people of Missouri for adoption. As then understood and construed by the court of last resort in this state, neither the Constitution of 1820, nor that of 1865, prohibited the courts from referring cases without the

consent of either party, in the cases mentioned in the statutes. The right to a jury trial then was modified to this extent by this power to appoint referees. . . . These references had been sanctioned by the statutes and the opinions of the supreme court many years before that Constitution was framed, and when the people adopted it they ratified the provision as to jury trial as it had been enjoyed previously thereto, that is to say, they adopted it with the construction already placed upon it; otherwise the words 'as heretofore enjoyed' are utterly meaningless." We submit, that opinion rests upon sound legal grounds. It has been uniformly and consistently ruled that where judicial construction has put a certain meaning on the words of a statute, and then the legislature, in a subsequent act *in pari materia*, uses the same words, the presumption arises that the legislature intended to express the meaning previously put upon them. *McNichol v. United States Mercantile Reporting Agency*, 74 Mo. 457; *Sanders v. St. Louis & N. O. Anchor Line*, 97 Mo. 26, 3 L. R. A. 390, 10 S. W. 595. And especially is this so when revisions of the laws and Constitutions have intervened, and the language construed has been retained. *Sanders v. St. Louis & N. O. Anchor Line*, 97 Mo. 26, 3 L. R. A. 390, 10 S. W. 595. Outside of the reference to the state of the law at the time of the adoption of the Constitution, and to show that it had been the same with regard to references since the admission of the state into the Union, the decision throws no light upon the question for decision.

We hold that the construction put upon the words "as heretofore enjoyed," by the supreme court of Illinois and approved by the supreme court of Indiana and Pennsylvania, is the correct interpretation, and that the act in question (Rev. Stat. 1899, § 1838) is not unconstitutional because it permits the court, instead of the jury, to assess the punishment. A verdict of guilty, without assessing the punishment, under our laws, which permit the jury to fix the punishment, is not a failure to find a part of the issue. *State v. Foster*, 115 Mo. 451, 22 S. W. 468; *State v. Robb*, 90 Mo. 30, 2 S. W. 1. In *State v. Foster*, 115 Mo. 450, 22 S. W. 468, it was said: "Among the causes thus alleged in that motion is one claiming that to the jury alone belonged the fixing of the penalty for the crime of which defendant was found guilty. This contention is without foundation." The jury having failed to assess the punishment, it belonged to the court to assess it, and render judgment accordingly. Rev. Stat. 1889, § 4230. *Wynn v. State*, 1 Blackf. 28, confirms this view. In that case the jury returned a verdict "fining defendants \$10 each," and it was reversed because the jury did not find them guilty, which, said the court, "is a total neglect of the whole subject-matter put in issue." So that if they had found them guilty they would have responded to the whole issue. Without that finding no judgment could be imposed. So, in *State v. Foster*, 115 Mo. 450, 22 S. W. 468, had

the jury failed to find defendant guilty, the court would have been powerless to punish him; but, having done so, their verdict was ample to sustain the judgment which we affirmed. The office of the jury at common law is to find the truth of disputed facts, not to find the law. That is written for the guidance of court and jury alike. When the jury in a case of felony bring in a verdict of guilty, there is no room or occasion for any waiver by the defendant. The law of this state, which has never been questioned, provides that in such case the court shall assess the punishment and render the judgment. *State v. Foster*, 115 Mo. 450, 22 S. W. 468. His attempted waiver, in the circumstances suggested would not in the least affect the power of the court to assess his punishment.

It only remains to be added that this statute has been twice construed by this court,—once in *State v. Knook*, 142 Mo. 515, 44 S. W. 235, in which it was sustained without a suggestion of unconstitutionality, and the defendant sentenced to the penitentiary, and *State v. Hall*, 164 Mo. 528, 65 S. W. 248, in which the *Knook Case* was approved.

It needs only to be said that, in the determination of a question of the constitutionality of a law, it is a settled rule for the guidance of the courts that the acts of the legislature are presumed to be constitutional, and it is only when they manifestly infringe on some provision of the Constitution that they can be declared void for that reason. In case of doubt every possible presumption not directly inconsistent with the language and subject-matter is to be made in favor of the constitutionality of the act. *Phillips v. Missouri P. R. Co.* 86 Mo. 543; *Cooley*, Const. Lim. 6th ed. 61 S. W. 171; *Cooley*, Const. Lim. 6th ed. p. 216. With the highest courts of our sister states maintaining the constitutionality of laws like this, it certainly cannot be said to be removed from doubt, even if we do not accord them the meed of unanswerable argument.

2. The act is a general, and not a special, law. It operates equally upon all who violate its provisions, and establishes one mode of punishment for all such. It operates in every county of the state. *State ex rel. Crow v. Atna Ins. Co.* 150 Mo. 113, 51 S. W. 413.

3. The fact that the jury assessed the punishment does not vitiate the verdict. The court could ignore it and assess the punishment itself, and must be held to have done so by adopting it and rendering judgment. This identical case came before the court of appeals in *Harvey v. Com.* 23 Gratt. 941, and it was ruled that, although it was the duty of the court to assess the punishment, and it had directed the jury to do so, and the jury had fixed the punishment, yet it did not vitiate the verdict, or the judgment of the circuit court.

4. I find no error in the admission of Mrs. Irwin's testimony as to the declarations of the prosecutrix to her. This was drawn out by the defendant himself, and he

cannot complain of error committed at his own instigation and of his own seeking.

5. In the divisional opinion much time is devoted to discussing whether defendant was or was not guilty of rape, and the conclusion was reached that he was not. As he was not indicted for rape, the conclusion absolves the jury and criminal court of having convicted him of a crime of which he was not guilty, and for which he was not indicted. The indictment is bottomed upon § 1838, which prescribes that if a person over sixteen years of age have carnal intercourse with an unmarried female of previously chaste character, between the ages of fourteen and eighteen years, he shall be deemed guilty of a felony, and punished as therein prescribed. It is apparent that within the ages mentioned the female is incapable, under the law, of consenting to the defilement of her person. But it is argued by the able counsel for defendant that the court erred in refusing to instruct the jury that if they believed defendant had sexual intercourse with the prosecutrix against her will and consent, and that such intercourse was had by means of force and violence, and prosecutrix resisted having such intercourse, they should acquit defendant, and instructing that sexual intercourse by a man over sixteen years of age with an unmarried female of previous chaste character, who is between the ages of fourteen and eighteen years, would render him guilty, under this law, whether said act was accomplished by force, or with or without her consent. The learned criminal court unquestionably followed the decision of this court in *State v. Knook*, 142 Mo. 515, 44 S. W. 235, in which case this statute first received a construction by this court. In that case, as will be seen by a reference to the statement of the facts on page 520, 142 Mo., and page 235, 44 S. W., a young lady had gone to sleep in her own room, in the residence of the defendant, who was her uncle by marriage, and during the night was aroused by the presence of the defendant, who was attempting to get on top of her. "He grabbed her hands and held them over her mouth to prevent her screaming. With his knees he forced her legs apart, and had sexual intercourse with her." On another occasion he entered her room while she was dressing, and told her if she screamed he would kill her, and again forcibly had connection with her. In that case the criminal court instructed the jury that "sexual intercourse with an unmarried female of previously chaste character who is between the ages of fourteen and eighteen years is a violation of the law, with or without her consent." The defendant in that case requested the court to give the following instruction: "The court instructs the jury that if you believe from the evidence that the defendant had carnal knowledge of the prosecutrix against her will, and only accomplished the act by the use of force, then the defendant is not guilty of the offense charged, and you must acquit him,"—which the trial court refused. Speaking of this action of the court, this

court said: "The instruction asked by defendant was properly refused, for several reasons. In the first it is not the law, as asserted in defendant's first instruction, that, if 'force' be used, this exonerates the force user, when charged with the crime mentioned in the act of 1895, *supra*." Obviously the criminal court did not err in this case, unless that opinion was erroneous. We cannot agree that there was no evidence of force in that case. Indeed, there is a striking similarity in the character of force used in the two cases. Was the decision in the *Knoek Case* improperly decided? Clearly the statute itself makes no distinction between sexual intercourse with and without consent, or with and without force. In respect to the matter of consent, it is not a new character of legislation in this state. Thus § 3480, Rev. Stat. 1889 (now § 1837, Rev. Stat. 1899), provided that "every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of fourteen years," etc.; and it has been uniformly ruled that "carnal knowledge of a female child under fourteen years of age is rape, under this statute, whether accomplished with or without force, or with or without the consent of the child." *State v. Wray*, 109 Mo. 599, 19 S. W. 86; *State v. Meinhardt*, 73 Mo. 563; *State v. Houa*, 109 Mo. 654, 19 S. W. 35; *State v. Baskett*, 111 Mo. 272, 19 S. W. 1097; *State v. Duffey*, 128 Mo. 557, 31 S. W. 98; *State v. Baker*, 136 Mo. 74, 37 S. W. 810; *State v. Burries*, 126 Mo. 565, 29 S. W. 842. If, as we have so often held, it is competent for the legislature to provide that carnal knowledge of a female child under fourteen shall be rape, irrespective of consent or force, why could it not provide that if a man of over sixteen years of age shall have carnal knowledge of an unmarried female of previously chaste character, between fourteen and eighteen years of age, he is guilty of a felony, "irrespective of force or consent on her part?" But the argument is that the carnal knowledge under § 1838 is merged into the higher crime of rape when the evidence discloses force. 1 Bishop, *Crim. Law*, 7th ed. § 786, says: "The doctrine of merger is applicable to two classes of cases,—the one, where a criminal act falls within the definitions of two or more separate offenses; the other, where offenses are so graded that the less culpable are included in those involving a larger guilt, as shown at § 780 in our last chapter. The general rule is, as there explained, that the prosecuting power may select for conviction any one of these offenses, and the defendant cannot object, though his guilt covers also a larger or different one. . . . Merger in the criminal law occurs where the same act of crime is within the definition of a misdemeanor and likewise a felony, or of a felony and likewise of treason, and the rule is that the lower grade of offense merges in the higher." That is, an act cannot be both a felony and a misdemeanor,—a doctrine which applies only where the identical act constitutes both offenses." Again, in § 791, same volume, he 57 L. R. A.

says: "Subject to whatever exception may be found in the doctrine of merger, . . . a criminal person may be holden for any crime of whatever nature which can be legally carved out of his act. He is not to elect, but the prosecuting power is. If the evidence shows him to be guilty of a higher offense than he stands indicted for, or of a lower, or of one differing in nature, whether under a statute or at the common law, he cannot be heard to complain,—the question being whether it shows him to be guilty of the one charged." In *Com. v. McPike*, 3 Cush. 181, 50 Am. Dec. 727, the defendant was held to have no just ground of objection to a conviction under an indictment for manslaughter because the facts proved he had been guilty of murder. Our statute expressly permits this in all cases in which there are degrees of crime, and the finding is of a less degree than that charged in the indictment, and a verdict for manslaughter or murder in the second degree will not be disturbed because the evidence shows defendant guilty of murder in the first degree.

But here we are confronted with *State v. Woolaver*, 77 Mo. 103; *State v. Strattman*, 100 Mo. 540, 13 S. W. 814, and *State v. Lingle*, 128 Mo. 528, 31 S. W. 20, all of which follow *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321, in which it was ruled, on an indictment for incest, that, if it appeared that the sexual intercourse had been effected by force, it was rape, and the conviction for incest could not stand. None of these cases, except *State v. Ellis*, discussed the principle on which this ruling was based, but simply followed it. In that case it is put upon the ground of merger; that rape was the higher crime, and incest the lesser, and the latter was merged in the rape. The correctness of that decision is not challenged. In all of those cases, except the *Ellis Case*, it was ruled that, before the jury could acquit on the ground that the crime of rape had been shown, the jury must believe that if the defendant were on trial for rape it would be their duty to convict him of that charge; and in each this court held the conviction of the less offense proper, notwithstanding in each the female prosecutrix had testified she was "forced," this court saying that the evidence fell short of making out a case of rape. In *State v. Ellis* this court cited the following authorities: *People v. Harriden*, 1 Park. Crim. Rep. 344 (a nisi prius case; a prosecution for incest by a father with his daughter); and the trial judge ruled that the statute against incest applied only to cases where the connection was by mutual consent, and, if the connection was accomplished by force, to such an extent as to render defendant guilty of rape, incest was not sustained. And to the same effect is *Noble v. State*, 22 Ohio St. 541, in which it was also held that emission was an essential in incest,—a doctrine nowhere else recognized in this country. In *Croghan v. State*, 22 Wis. 444, in a prosecution for seduction, it was held error to instruct the jury that "if the woman ultimately consented to the illicit intercourse the crime was seduction [and

not rape], although she consented partly through fear," etc. The court held the woman must be tempted, lured, and led astray through influence and persuasion employed by her seducer until she freely consented, in order to constitute seduction. That the instruction was erroneous as to the proof in seduction, we have no doubt. *De Groat v. People*, 39 Mich. 124, was decided upon the ground that in incest both parties must consent, under the statute of that state, and as there was evidence of force, it could not be incest. In *State v. Thomas*, 53 Iowa, 214, 4 N. W. 908, it was held rape and incest could not be charged as a compound offense under the statute of that state; Beck and Day, JJ., dissenting. Whereas in *Com. v. Goodhue*, 2 Met. 193, the indictment was for rape, and the conviction for incest; the latter being included in the former. In each of these cases it will be seen that the basis of the opinion is that, whatever other crime defendant might be guilty of, he was not guilty of the particular crime of incest or seduction, as the facts would not sustain the statutory definition of those offenses; and the decisions are not referable to the technical doctrine of merger, as defined by Bishop and other law writers. Those cases do not determine that one criminal transaction may not present combinations which leave an election in the state in dealing with the offender. Thus, robbery is larceny aggravated by the fact that the goods are taken from the person of the owner by violence or putting in fear. Bl. Com. bk. 4, p. 243, says: "Open and violent larceny from the person or robbery (the rapina of the civilians) is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear." In *Bonsall v. State*, 35 Ind. 462, it was ruled that where one is indicted for larceny, and the evidence shows he might have been indicted for robbery, and therefore the state has arraigned him for a less aggravated crime than that of which he is really guilty, he cannot complain. In *Hickey v. State*, 23 Ind. 21, the defendant was indicted and convicted for grand larceny, but the proof showed he had committed robbery; and it was argued in his behalf that the conviction was erroneous, but the supreme court held otherwise, saying larceny was included in robbery, and as a general rule "a criminal person may be holden for any crime of whatever nature which can be carved out of his act," citing 1 Bishop, *Crim. Law*, §§ 419, 536, 682; 2 Bishop, *Crim. Law*, §§ 410, 675, 707, 966, 973, 993; Lewis, *Crim. Law*, 450, 455, 466; *People v. McGowan*, 17 Wend. 386. Applying this principle to the statute before us, and granting that the defendant might have been indicted and convicted for rape, a crime of the most atrocious character, which involved a forcible violation of the person of the prosecutrix,—how can the defendant complain because the state has elected to prosecute him for a violation of her person under this statute, in which it is unnecessary to prove a forcible deflour-

57 L. R. A.

ing of the prosecutrix? In what does it differ from a prosecution for larceny when the proof shows robbery, or for manslaughter when the proof shows murder, or for murder in the second degree when the proof shows murder in the first degree?

Upon mature consideration, we are fully satisfied that the construction given this statute in *State v. Knock*, 142 Mo. 515, 44 S. W. 235, was correct, and that the criminal court correctly ruled that proof of force did not entitle the defendant to an acquittal, every essential of the crime being otherwise proved; and it follows that *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321, and the cases named which have followed it, should on this point no longer be followed.

As to the sufficiency of the evidence to sustain the verdict of the jury: The testimony of the witnesses was heard by the jury. The jury had an opportunity of seeing them and observing their demeanor on the stand, and it was their peculiar province to weigh their testimony, and believe or disbelieve it. They believed the prosecutrix, and did not believe the defendant's witnesses. The verdict has been approved, also, by the judge of the criminal court, who also had the advantage of seeing the witnesses and observing their manner. We discover no such evidence of prejudice or partiality as would justify us, at this distance, in rejecting the verdict of the jury, and the judgment should accordingly be affirmed.

Robinson, Brace, and Valliant, JJ., concur *in toto*. **Burgess, Ch. J.,** concurs in the opinion as to the law of the case, but thinks the judgment should be reversed, and the cause remanded for further trial upon the ground of the want of substantial evidence to sustain the verdict.

Sherwood, J., dissenting:

This appeal comes from Buchanan county and was taken because defendant was convicted under an indictment bottomed on the violation of the prohibition contained in § 1838, Rev. Stat. 1899, and his punishment assessed at one month's imprisonment in the county jail, and the payment of a fine of \$500. The cited section, enacted in 1895, is the following: "If any person over the age of sixteen years shall have carnal knowledge of any unmarried female, of previously chaste character, between the ages of fourteen and eighteen years of age, he shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for a term of two years, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than one month or more than six months, or by both such fine and imprisonment, in the discretion of the court." Laws 1895, p. 149. Immediately above the section quoted is § 1837 of the same revision, which reads in this way: "Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of fourteen years,

or by forcibly ravishing any woman of the age of fourteen years or upward, shall suffer death, or be punished by imprisonment in the penitentiary not less than five years, in the discretion of the jury." The section last above mentioned has, with some modifications as to punishment, been on our statute books ever since § 23, p. 170, Stat. 1835, was enacted, and probably before that time. In 1879 § 1253 was enacted, and there an amendment occurred, which so amended § 23, p. 780, Gen. Stat. 1865, as to suffer the awarding of the penalty of death, and also added the words "in the discretion of the jury." Such amendment made the law as it is to-day. But as far back as § 10, p. 639, 1 Rev. Stat. 1855, an offender whose offense was punishable by imprisonment in the penitentiary for a term not less than any specified number of years, and no limit to duration of such punishment declared might be imprisoned during his natural life, or for any number of years not less than those prescribed. Gen. Stat. 1865, § 10, p. 826; Rev. Stat. 1879, § 1660; Rev. Stat. 1889, § 3955; Rev. Stat. 1899, § 2375. So that those words, "in the discretion of the jury," seem to have added naught to the force and effect of the given section. The pertinency of these prefatory observations, and the citation of the above sections, will appear in the following investigation.

Defendant makes assertion that § 1838 is unconstitutional, in that it deprives defendant of the right of trial by jury as guaranteed by § 28, art. 2, of our state Constitution, which declares: "The right of trial by jury [as heretofore enjoyed] shall remain inviolate." The bracketed words show the difference between a corresponding section and article in the Constitution of 1865 and the section above quoted, and the words added to the latter. It has been ruled respecting these words that whatever was the status of that right at the time the Constitution of 1875 was adopted was the status referred to in that instrument. *State v. Bockstruck*, 136 Mo., *loc. cit.* 358, 38 S. W. 317, and cases cited; *Creve Coeur Lake Ice Co. v. Tamm*, 138 Mo. 385, 39 S. W. 791, and cases cited. In Michigan the provision of the Constitution of that state similar to our own is this: "The right of trial by jury shall remain." Const. art. 6, § 27. Under that provision a statute was challenged, as to its constitutionality, which authorized persons charged with cutting timber on state lands to be tried in some county other than that in which the offense was committed. Discussing that statute in the light of that constitutional provision, Judge Cooley characterized the act as not only tyrannical and oppressive, but manifestly in conflict with one of the plainest and most important provisions of the Constitution. Proceeding further, that jurist observed: "The right is to remain. What right? Plainly the right as it existed before,—the right to a trial by jury as it had become known to the previous jurisprudence of the state. *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633. The right is not described here. It is not said 57 L. R. A.

what shall be its incidents. It is mentioned as something well known and understood, under a particular name; and by implication, at least, even a waiver of its advantages is forbidden. If the accused himself cannot waive them, plainly the legislature cannot take them away. The next section of the Constitution repeats the guaranty of this method of trial 'in every criminal prosecution,' and nothing is better settled on the authorities than that the legislature cannot take away a single one of its substantial and beneficial incidents." *Swart v. Kimball*, 43 Mich., *loc. cit.* 448, 5 N. W. 635.

At common law the jury impaneled to try a criminal cause could, when finding against the defendant, either bring in a verdict of guilty, whereupon the court fixed the punishment, or else make a special finding of facts, and leave the result of determining the fact of guilt, and also of fixing the duration or amount of the punishment, to the court. To use the language of Blackstone in regard to the verdict in such cases, where he says: "And such public or open verdict may be either general, 'Guilty' or 'Not guilty,' or special, setting forth all the circumstances of the case, and praying the judgment of the court whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they doubt the matter of law, and therefore choose to leave it to the determination of the court, though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper to so hazard a breach of their oaths; and, if their verdict be notoriously wrong, they may be punished and the verdict set aside by attain at the suit of the King, but not at the suit of the prisoner." 4 Bl. Com., Lewis's ed. 361. And under the common law a defendant on trial for a felony had no constitutional right to have the measure of his punishment fixed by a jury. 2 Hale, P. C. 310. Not only was a prisoner at common law denied the right of having the measure of his punishment determined by a jury, but, even when the jury found a verdict in favor of the accused, such verdict was liable to be set aside, if, in the opinion of the trial judge, it was "notoriously wrong," and the jury were punished and their verdict set aside by attain at the suit of the King, but not at the suit of the prisoner, in case of his conviction. Such was the right of trial by jury in its sum total, in its *tout ensemble* as it was known, practised, and existed at common law. Was there any change in this state in regard to that right, and in the methods of its practice as known and practised at common law? Yes; changes most radical were effected at least as early as the Statutes of 1835, which provided: "Where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, or assess a punishment not authorized by law, and in all cases of judgment on confession, the court shall assess and declare the punishment, and render judgment accordingly." Rev. Stat.

1835, § 4, p. 493; Rev. Stat. 1845, § 4, p. 883; 2 Rev. Stat. 1855, § 5, p. 1196; Gen. Stat. 1865, § 5, p. 852. And the statutes since 1825 have fixed the punishment to be awarded for murder in the first degree. 1 Rev. Laws 1825, § 3, p. 282; Rev. Stat. 1835, § 3, p. 168; Rev. Stat. 1845, § 3, p. 344; 1 Rev. Stat. 1855, § 3, p. 559; Gen. Stat. 1865, § 3, p. 778. That punishment is death, and has so continued down through every subsequent revision. That punishment is assessed by the law, and with its assessment neither jury nor court have any hand or concern whatever. And for this reason it is a matter wholly irrelevant to the present discussion to examine what the court could do under the territorial laws in regard to fixing the punishment in murder and rape cases. Such investigations savor too much of the last year's bird's nest theory. As well might we go back to the French laws that prevailed in this country prior to the "Louisiana purchase." The common law, in its right of trial by jury, has never prevailed in this state, so far as our Reports and statutes show; certainly not since 1835. Since that period such a verdict as a special verdict in a criminal case, as above described, or the setting aside of a verdict by attainat at the suit of the state, when in favor of a defendant, because "notoriously wrong," and the punishment of a jury for returning such wrong verdict, have never been known in this state. And yet those things were part and parcel—were but incidents and concomitants—of the right of trial by jury as known and practised at common law.

With matters in this statutory posture; with the duties of a jury in returning a verdict, and of the court when such verdict should be returned, firmly and explicitly established by positive law; and with our jurisprudence in regard to such matters settled by not infrequent decisions of this court, — the Constitution of 1875 was adopted. What does that Constitution say touching the point in hand? It says: "The right of trial by jury as heretofore enjoyed shall remain inviolate." Enjoyed where, when, or how? Enjoyed as it existed at common law? Enjoyed as it existed in England? Enjoyed as it existed when this state was a territory? The bill of rights does not thus declare. Had it been intended that that right was to be measured and defined by its definition and limitations as known and existing at common law, then the framers of our bill of rights were singularly unfortunate in their use of language. Had they designed to perpetuate the right as it existed at common law, they would have so declared in terms too plain to be misunderstood. They said "as heretofore enjoyed." Enjoyed where? Why, here in Missouri, and not in any foreign country. Enjoyed as it had been laid down in our statutes and expounded in our frequent decisions prior to the adoption of the Constitution of 1875. That is what was meant, and only that. And this court has so decided in *State v. Bookstruck*, 136 Mo., *loc. cit.* 358, 38 S. W. 57 L. R. A.

317. For sixty-seven years the right of trial by jury has been enjoyed in this state as pointed out in our statutes and practised in our courts, and now at this late day we are gravely told that, in spite of nearly three quarters of a century of statutory definition and judicial practice and exposition, the legislature could, at a word, wipe out all these statutory provisions, wipe out the 28th section of the bill of rights, and restore to full vigor the common-law right of trial by jury, with all its crudities, injustice, and barbarisms. I do not believe it.

In *Creve Cœur Lake Ice Co. v. Tamm*, 138 Mo. 385, 39 S. W. 791, touching the right of trial by jury, quotation is approvingly made from *Eduardson v. Garnhart*, 56 Mo. 81, where Judge Vorles said: "It is not to be presumed that the provision of the Constitution relied on was intended to change the law as it then existed, and had been practised in the state for a quarter of a century. The object of the framers of the Constitution must have been to preserve the right of trial by jury as it then existed and had been practised in this state, and not to establish a new rule of practice on that subject." This, then, was the state of the law when the Constitution of 1875 was framed and submitted to the people of Missouri for adoption. As then understood and construed by the court of last resort in this state, neither the Constitutions of 1820 nor that of 1865 prohibited the courts from referring cases without the consent of either party, in the cases mentioned in the statutes. The right to a jury trial then was modified to this extent by this power to appoint referees. These references had been sanctioned by the statutes and the opinions of the supreme court many years before that Constitution was framed, and when the people adopted it they ratified the provision as to jury trial as it had been enjoyed previously thereto; that is to say, they adopted it with the construction already placed upon it; otherwise the words 'as heretofore enjoyed' are utterly meaningless." And it was further said in that case, in concluding the opinion: "As the statute itself is an exception to the right of trial by jury, we shall not extend it by loose construction." If the language just quoted is good law as to a reference case, why not equally good and equally applicable to the case at bar. If not, why not? I take it, then, as twice decided by this court, the Constitution of 1875, upon its adoption, had the effect to perpetuate and place beyond legislative interference any beneficial or favorable incident pertaining to the right of trial by jury as it existed at the time that Constitution was adopted. Among those substantial, favorable, and beneficial incidents pertinent to such right was the coincident right to have the jury assess the punishment in all cases of felony. And, of course, the constitutional provision and guaranty that "the right of trial by jury as heretofore enjoyed shall remain inviolate," would apply as well to all newly created felonies as to those in existence when the present Constitution was adopted. This

point has passed into precedent. Thus in the court of appeals of New York it is said: ". . . 'Trial by jury in all cases in which it has heretofore been used shall remain inviolate forever' is broad enough and efficacious enough to secure it. The expression 'in all cases in which it has heretofore been used' is generic. It does not limit the right to the mere instances in which it had been used, but extends it to such new and like cases as might afterwards arise. For instance, felonies were triable only by juries. I do not doubt that all new felonies must be tried in that way, and that by force of this section. . . . The other section does require it, as well in new felonies as in old, because they belong to the class of cases in which at the adoption of the Constitution such a trial was used." *Wynehamer v. People*, 13 N. Y., *loc. cit.* 426. See also *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302.

The attorney general, however, says: "It must be remembered the Constitution of Missouri is not a grant of power to the general assembly, but a restriction; and, if there is no provision in it that prohibits the general assembly from providing for the court assessing the punishment, then the general assembly has the power to do so." But this assertion overlooks the well-settled rule of constitutional construction on this point. An eminent jurist and author says: "Another rule of construction is that, when the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases. On this ground it has been held by the supreme court of Maryland that, where the Constitution defines the qualifications of an officer, it is not in the power of the legislature to change or superadd to them, unless the power to do so is expressly or by necessary implication conferred by the Constitution itself. Other cases recognizing the same principle are referred to in the note. . . . We are not, therefore, to expect to find in a Constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which for a time, at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end,—especially when, as has been already said, it is but fair to presume that the people, in their Constitution, have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers

delegated, and with a view to leave as little as possible to implication." Cooley, *Const. Lim.* 6th ed. pp. 78, 79, 93, 94. Touching the same topic, Denio, Ch. J., says: "But the affirmative prescription and the general arrangements of the Constitution are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the lawmaking authority as strong as though a negative was expressed in each instance." *People ex rel. Wood v. Draper*, 15 N. Y. 544. These authorities distinctly show that the doctrine of "affirmative specification excludes implication," and that that and the similar rule or maxim of *Expressio unius*, etc., apply alike to constitutions and to statutes; and so this court has held in *Citizens' Nat. Bank v. Graham*, 147 Mo., *loc. cit.* 257, 48 S. W. 910. To the like effect, see *Ex parte Joffe*, 46 Mo. App., *loc. cit.* 365, and cases cited.

But it is contended that, even if that portion of § 1838 be held invalid which authorizes the court to assess the punishment, yet that this part may be separated from the rest of the section, and the section, being thus expurgated, could still stand as a valid enactment. In some instances this may be done. Discussing this point, this court said: "Now, nothing is better settled than that part of a law may be declared constitutionally invalid, and yet another portion properly separable therefrom, and therefore unexceptionable in every particular. This may be so even though the sound and unsound are in one section together. This is always the rule unless the parts, sound and unsound, are so mutually related, so blended together, as to constitute an entirety, making it evident that, unless the act be carried into effect as a whole, it could not have received the legislative sanction. Bishop, *Statutory Crimes*, § 34, and cases cited." *State v. Bockstruck*, 136 Mo., *loc. cit.* 353, 38 S. W. 317. A similar view was expressed in *Landis v. Vineland*, 54 N. J. L. 75, 23 Atl. 357. In that case an ordinance created an offense, and prescribed the penalty for its violation. That portion of the ordinance prescribing the penalty was held to be void, and the question presented to the court was whether the residue of the ordinance, declaring what should be an offense, was also invalidated. The court said: "The principle to be applied is that, if part of a law be void, other essential and connected parts are also void; but where that part which is bad is independent, and not essentially connected with the remainder, the latter will stand. . . . In applying this principle the question to be decided is whether it is clear that if the void part of the enactment be obliterated the residue will still express that which the legislature intended to become law, and which is enforceable as law.

In the present case the mayor and counsel ordained that certain acts should be visited with a fine not exceeding \$10. Is it clear that they intended that such acts might be visited with a fine of \$20? Is it clear that, if they had understood that the penalty might amount to \$20, they would have defined the prohibited conduct in the same terms? I think not. The misconduct and the penalty denounced by them must have been connected in their minds as essential parts of a single law. If the court should substitute the statutory penalty for that fixed in the ordinance, a law would be framed which the legislative power has not expressed its intention to enact." Touching this subject an eminent author and jurist observes: "If they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." Cooley, Const. Lim. 6th ed. 211, 212. And in a note to the above the same author very acutely remarks: "It must be obvious in any case where a part of an act is set aside as unconstitutional that it is unsafe to indulge in the same extreme presumptions in support of the remainder that are allowable in support of a complete act when some cause of invalidity is suggested to the whole of it. In the latter case we know the legislature designed the whole act to have effect, and we should sustain it if possible; in the former we do not know that the legislature would have been willing that a part of the act should be sustained if the remainder were held void, and there is generally a presumption more or less strong to the contrary. While, therefore, in the one case the act should be sustained unless the invalidity is clear, in the other the whole should fall unless it is manifest the portion not opposed to the Constitution can stand by itself, and that in the legislative intent it was not to be controlled or modified in its construction and effect by the part which was void." Cooley, Const. Lim. 212. An instance of holding the whole act invalid because of the invalidity of a portion of it occurred in Texas. There a statute made the same provision for taxing telegraph messages sent to points within and to points without the state, and, as it was void as to the latter, it was held wholly void. *Western U. Teleg. Co. v. State*, 62 Tex. 630.

In the case at bar it is by no means either clear or probable that the legislature would have enacted the section in dispute unless the clause giving the court the right to assess the punishment had been inserted. Including the various degrees, our Criminal Code of this state defines and punishes over 300 felonies, and in every one of them (except where the punishment is fixed by law, as in murder in the first degree) it is the duty of the jury to assess the punishment; 67 L. R. A.

and the only instance known to our laws where the court has a discretion to assess the punishment is where a violation of § 1838 is prosecuted to a conviction. In every other instance the punishment is to be assessed by the jury, if they agree. Rev. Stat. 1899, § 2648. And if they find a defendant guilty, and fail to agree on the punishment or to declare it in their verdict, or assess a punishment not authorized by law, then, and then only, can the court assess and declare the punishment. Id., § 2649. In other cases, where the jury agree, but bring in a verdict below the limit of legal punishment, there the court must raise the punishment to the lowest legal limit. Id., § 2650. Or if the jury in their verdict assess a punishment higher than the legal limit, there the court must fix the punishment at the highest legal limit. Rev. Stat. 1899, § 2651. Under Rev. Stat. 1899, § 2652, the court is authorized to reduce the punishment assessed by the jury. These sections have been on our statute books ever since 1835, and perhaps for a longer period, and come down to Gen. Stat. 1865, and are still the law. These statutes heretofore quoted constituted the sum total of the right of trial by jury as understood and practised when the Constitution of 1875 was adopted; and they explicitly delimited the respective provinces of court and jury as to assessment of punishment in criminal cases, and such delimitations became, to all intents and purposes, part and parcel of that Constitution upon its adoption. Considering the fact that, of all the felonies punishable under our statutes, the one denounced in § 1838 is the only one where, the jury not having failed to agree, the court has to fix the punishment, it seems beyond rational belief that the legislature should have so drawn that section, thereby causing it to differ from all our other penal statutes, unless upon the hypothesis of having their intent, aim, and purpose concentrated on the sole design of carrying the act into effect as a whole, whereby the right of trial by jury as heretofore enjoyed should be so far modified that for their discretion should be substituted the discretion of the court, unless, also, as suggested in *Landis's Case*, 54 N. J. L. 75, 23 Atl. 357: "The misconduct and penalty denounced by them must have been connected in their minds as essential parts of a single law." Considering the litigated section in every possible way, both on reason and authority, the section should be held invalid for the reasons heretofore stated, and that such invalidity, taking its origin in the clause which confers unwarranted discretion on the court, permeates with its poison the whole section, and causes it to fall under the ban of the Constitution.

And just here I wish to make a few additional observations: The assertion has been made that "the change in the tribunal or agency which shall assess the punishment which the law prescribes in no manner deprives the defendant of any of the substantial rights secured by the right of trial by jury as at common law, or as enjoyed un-

der the laws of this state prior to 1875." But this is mere assertion. The one-man power has always been carefully guarded against and restricted both in the civil and criminal statutes, practice, and jurisprudence of this state. But we are not here to inquire whether the allowing of a judge to assess the punishment in a criminal case would be just as fair to the defendant as if assessed by a jury. The question is, What has § 28 of the bill of rights ordained in this regard? But even were we to look at the bill of rights, as contemplated in the assertion just quoted, still the odds would be against the correctness of that assertion. Speaking of the one-man power, and the danger of its unrestricted exercise in determining matters of mere fact by a judge, Judge Cooley, quoting from Blackstone, says: "In settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder." 3 Bl. Com. 380." Upon this Judge Cooley remarks: "These are evils which jury trial is designed to prevent." Cooley, Const. Lim. 392, note. Our legislators and our Constitution framers were doubtless aware of the mentioned danger,—of the one-man power,—and therefore carefully guarded every avenue against its stealthy approaches and its insidious advance. Again, the assessment of the punishment to be inflicted is part and parcel of the issue joined between the state and the prisoner. If the verdict omits to find a part of the issue, to wit, the punishment to be assessed, it is as fatal to the validity of the verdict as is the failure to find the accused guilty. *Wynn v. State*, 1 Blackf. 28, and cases cited; 1 Bishop, New Crim. Law, § 1012. So that if, in spite of positive statutory law in existence on our statute books, and practised daily and adjudicated in our courts for forty years, in regard to the right of trial by jury,—a practice sanctioned by its adoption by the Constitution of 1875,—the legislature can take away from the jury the power to find a part of the issue, to wit, the punishment to be assessed, and still that law be constitutional, no reason can be given why a law would not be equally constitutional which should take away from the jury the power to find the other part of the issue, to wit, the guilt of the accused, and leave that, also, to be determined by the court. This is so, and you cannot deny it. Moreover, to further illustrate the point of the assessment of the punishment being a part of the issue, suppose that the jury in an ordinary case of felony should bring in a verdict of guilty; could the prisoner waive the assessment of the punishment by the jury, and successfully call upon the court to assess the same? Certainly not. If, then, the accused could not waive the assessment of the punishment by jury, then, according to Judge Cooley, plainly the legislature could

not take it away. *Stuart v. Kimble*, 43 Mich. 448, 5 N. W. 635.

Having discussed the chief constitutional question involved in this cause, it is proper to take up for examination that feature of the cause which constitutes the main ground on which defendant's appeal is bottomed, to wit, the entire insufficiency of the evidence to support the verdict. The prosecutrix, as will presently more fully and at large appear, testified to a clear case of rape. Defendant, upon this, and at the close of the testimony, asked this instruction: "If you believe from the evidence that the defendant had sexual intercourse with the prosecuting witness, Jessie Champagne, but that such intercourse was against the will and consent of said Jessie Champagne, and was had by means of force and violence used by said defendant, and that said Jessie Champagne resisted having such intercourse, then you will acquit the defendant." Comparing § 1837, *supra*, with its associate section, 1838, we find that they respectively define totally distinct and independent crimes,—the first, a crime of force, violence, or intimidation, or a combination of all these three; the second, the ordinary instance and illustration of the "irrepressible conflict" where mutual desire seeks and finds its outlet and gratification. But this, the law, where the parties are of a certain age, taboos. There is neither likeness nor similitude between the crimes described in the two sections,—neither as to their ingredients nor their punishments. The highest punishment of the first is death; its lowest, imprisonment for five years; while the highest punishment which can be inflicted under the second is imprisonment for two years; the lowest, one month's imprisonment and a fine of \$100. These considerations clearly show that the crime designated in § 1838 is not one of the lower degrees of the crime described in § 1837. If it could be justly thus regarded, it would be only upon the theory that § 1838 applies to all cases of carnal knowledge by a man over sixteen with a chaste unmarried female between the ages of fourteen and eighteen years, whether with the consent of such female, or forcibly and against her will, and that such man, though proved guilty of rape, could be convicted of mere carnal knowledge. And if the offense described in 1838 could be regarded as one of lesser degree than that described in 1837, then it would follow that a man could be indicted under that section, and, on proof of mere carnal knowledge, convicted under § 1838. Nay, more; counts for rape and for carnal knowledge could be united in the same indictment, and a conviction occur as the evidence might turn out to be, while our statute only allows such counts to be united "when by law an offense comprises different degrees," and there the "indictment may contain counts for the different degrees of the same offense." Rev. Stat. 1899, § 2524. Furthermore, if mere carnal knowledge, as designated in § 1838, is one of the degrees of the crime of rape,—if that word is a mere generic term for all

sexual offenses,—then a far more comprehensive and far-reaching result would follow than that already announced, because then an indictment could contain counts for rape; for carnal knowledge; for defiling a girl under one's protection, by carnally knowing her (Rev. Stat. 1899, § 1845); for seduction (Rev. Stat. 1899, § 1844); and for incest (Rev. Stat. 1899, § 2172). But such a theory would require great temerity to attempt to maintain it. Especially so as this court has expressly decided that, where rape is proved, incest ceases. *State v. Ellis*, 74 Mo., *loc. cit.* 386, 41 Am. Rep. 321, and cases cited. Especially so, as this court has three times decided, in *State v. Woolaver*, 77 Mo. 103, *State v. Stratman*, 100 Mo. 540, 13 S. W. 814, and *State v. Lingle*, 128 Mo. 523, 31 S. W. 20, that, under § 1845, if force be used, there can be no conviction of the offense therein mentioned. Now, if proof of force defeats the indictment under § 1845, and defeats it under § 2172, why does it not logically do so under § 1838? This question suggests the only reasonable answer that can be returned, and that is that it does.

Again, we have statutes declaring, in effect, that a party cannot complain, and is not entitled to a reversal, because not convicted of a higher offense than that with which he is charged, or where he is found guilty of an offense necessarily included in that charged against him. *State v. Gates*, 130 Mo., *loc. cit.* 357, 32 S. W. 971, and cases cited and statutes cited. Now, evidently, this court did not consider in *Ellis's Case*, 74 Mo. 386, 41 Am. Rep. 321, that the crime of incest was necessarily included in the crime of rape, nor that the latter was a higher degree of the same offense, because, had it done so, it must, as of course, have affirmed the judgment of conviction; and the same remark applies to the *Woolaver*, *Stratman*, and *Lingle Cases*, above cited, where this court would evidently have reversed the judgment of conviction had the crime of rape been proved. Tested by these considerations, and tried under these rules, it is difficult to see how a like conclusion can fail of being reached in the case before us. If consent prevents rape, and convicts of incest, or if rape predominates, and prevents conviction of incest, or if rape, intervening, where a guardian defiles his ward by carnally knowing her, prevents conviction under § 1845, how can it with any show of reason be said that having carnal knowledge under § 1838, by means and through instrumentality of rape, authorizes a conviction under that section? How can carnal knowledge obtained without consent defeat prosecution in the two classes of cases before mentioned, and yet fail to do so under the provisions of § 1838? The theory of the state on this point, reduced to its last analysis, renders it possible for the grand jury or the prosecuting attorney to elect under which section (1837 or 1838) the accused shall be prosecuted for the very same act. If the case is pretty strong against him, indict him under § 1837. If the case be regarded weak, indict under § 1838, and then

all you have to prove is the carnal knowledge; and if, in doing so, you prove a clear case of rape, this amounts to no defense. Men who are tried for crime must not be too nice as to the number of the section under which they are indicted. What does it concern them whether the last figure of the number of the section is a 7 or an 8? Further, under this head: If the theory of the state be correct, and if it be true that the offense mentioned in 1838 is not one of the degrees of the offense mentioned in 1837, then the state has the option, for the same act, to indict under either section, and, if defeated on the first one, may indict under the second, and *vice versa*, and a judgment of acquittal would be no bar to a second prosecution under the other section. And just here this additional thought occurs, and presents itself in the form of this query: If the accused must be apprised by the indictment of "the nature and cause of the accusation" (Const. art. 2, § 22), how is this right preserved where he is indicted for one thing, proved guilty of another, and still convicted under the groundless and unproved charge? These remarks bring into view *State v. Knook*, 142 Mo. 515, 44 S. W. 235, on which the state relies. I am abundantly satisfied, since pursuing the above train of thought in the light of the authorities and statutes cited, that that case, on the point of force being immaterial under § 1838, was erroneously decided, and should no longer be followed. But the error on that point was harmless, since no force was there in evidence, and so the remark was of the *obiter* variety, but which sometimes is as damaging as a direct out and out ruling. The instruction above mentioned should therefore have been given.

We come now to the predominant reason which induced this appeal, to wit, the utter insufficiency of the evidence to warrant a conviction. The testimony of the prosecutrix, on which alone this prosecution rests, is, in its substance and practical totality, the following: The story of the occurrence, as told by Jessie Champagne, the prosecutrix, is this: At the time of the assault, June 7, 1899, she had passed sixteen years of age. While she was yet an infant, her mother died, and she was reared by Mrs. Mary Irwin, the mother-in-law of the defendant, with whom she lived from the time she was three years of age in a two-room cottage on the farm of Sylvester Hamey, the defendant's father, near Lake Contrary, in Buchanan county. In another house, situated in the same yard, on the same farm, and only 30 yards distant from where Mrs. Irwin and the prosecutrix lived, the defendant, with his wife and three children (the oldest eleven and the youngest three years of age), the defendant's father, and the prosecutrix's father, resided, and were actually present in that other house at the time of the supposed outrage. The defendant was thirty-six years old, and had lived on this farm all his life. The prosecutrix had known him intimately since she was a child. One evening in June, 1899, after supper, Mrs. Irwin went over to the defend-

ant's house to help Mrs. Hamey wash her dishes. It was about 8:30 o'clock, dusk, and getting dark. The prosecutrix was alone in the house. She stood in the front room, combing her hair. Someone entered, "grabbed her around the waist," and kissed her. She jerked herself free, and, turning, recognized the defendant. She ran towards the door, but before she could escape he caught her again, and dragged her to a bed in the room. He threw her upon the bed, and forced a pillow over her mouth. She struggled in vain to free herself. She tried to halloo, but, for the pillow, she could not. Presumably holding the pillow with one hand, and controlling her hands with his other hand, in some manner not clearly explained by the witness, he raised up her clothes, and while she resisted with all her power he ravished her. When he "let her up," the defendant said, "My God, Jess! don't tell my wife," and went over to his own house. The prosecutrix testified that she was a pure, innocent girl; that she had never had intercourse with any man, nor did any man ever attempt to have intercourse with her; and yet she admits that at the time she was raped the doors to her home and to the defendant's home were open; that at the time her foster mother, her father, the defendant's father, and his wife, were in the house in the same yard, not 90 feet away; and though it nowhere appears that "she was under restraint or the influence of threats, or that she apprehended any violence from the accused," she did not, after the pillow was removed from her mouth, and the defendant had departed in peace, halloo or make any outcry, or exhibit the anguish that might with all propriety have been expected from one so pure and innocent; but, on the contrary, she testified that, when defendant left, she went out on the front porch and sat down to cool off. She says she waited there for her foster mother to return, and that "I kept intending to tell her, but I didn't," and the prosecutrix admits that she made no complaint to her, nor to her father, nor to the defendant's wife, nor to any other person, then or at any other time; giving no excuse for her failure to tell her mother; giving as her only excuse for her failure to tell her father, who was only 30 yards away, that she did think she would, but she was ashamed to; and giving as the excuse for failure to complain to the defendant's wife, "Well, I don't know; did not think she would believe it, anyhow." She further testified that she never told her foster mother as to what had occurred; never told a soul until after the child was born, and then she told her foster mother. And she never told her until the latter asked her, "Jessie, who was the cause of this?" And Jessie said "John Hamey." This answer was given in response to the state's question, "Who was the cause?" over defendant's objection and exception on the ground that the answer would be hearsay. After the alleged rape, and down at least to the cornfield incident, three months after the child was born, the same bearing, attitude, and

friendly actions which had existed and were customary between defendant and Jessie before the episode of the bed and the pillow in her room on the night in June continued to exist without a break in their uniformity. The wife of the defendant testified, corroborating Mrs. Irwin, the state's witness, that, during all the time that elapsed from the alleged assault until defendant's arrest, she and the defendant and her father-in-law and Mrs. Irwin and the prosecutrix visited each other, and that she never saw any change whatever in the conduct, relations, or feelings that had existed between the prosecutrix and the defendant before the crime. Defendant's family, consisting of a wife and three children, from three to eleven years old, with defendant's aged father, his mother-in-law, the prosecutrix, whom defendant had known all her life, and her father, all continued to live in the same yard together, with no discontinuance whatever in their former amicable relations. They all, including Jessie, continued to visit each other as before, and were, in fact, as one large family. Meanwhile, with all these friendly relations still *in statu quo ante*, and after the requisite time had elapsed, when signs of motherhood began to be largely and more largely developed, Mrs. Irwin, the foster mother, remarked to Jessie, "It looks funny that you are sick all the time," and she replied, "Oh, ma, you always say something." This conversation occurred along late in the fall, after the affair in June. It furthermore appeared from the testimony of the prosecutrix that, although she and the defendant continued to live within 90 feet of each other, she never spoke to him, nor he to her, about the connection which had taken place between them, until about three months after the child was born. Then, one day, about a year after the incident, the defendant and her father were plowing in the field, and prosecutrix went to defendant there, and asked him to support her child. The two were alone. Responding to this request, defendant denied its being his child; that he had nothing to do with it, and wouldn't support it; and further said, "Oh, no, Jessie, you can't come that." Thereupon the defendant asked Jessie whether she had told her father about the matter, and, when she replied that she had not, defendant suggested that they go and tell him. They went together. The defendant told the father that the prosecutrix had said that he was the father of the child, but that he had nothing to do with it. He refused to pay any money, and then she had him arrested. The witness did not testify, nor is there any evidence in the case, that, as a result of the outrage committed upon her, she was lacerated, or that she bled, or that her person was scratched or showed any marks of violence, or that any of her clothing was disordered or torn, or that she cried, or gave any signs of the physical condition and mental agitation which, by all the immutable laws of nature, must follow upon a rape of a resisting virgin, and such as would naturally be expected from a woman so

fully wronged. This is the state's entire story. No other witness was introduced to prove, by fact or circumstance, the guilt of the defendant. In addition to that, the prosecutrix was contradicted by defendant (who established an excellent reputation) as to what had occurred in her room in June, 1899, and contradicted by Mrs. Irwin and defendant's wife in many important matters, aside from her testimony as to the June occurrence, and contradicted by other witnesses as to the other important statements of hers. It will have been observed that the prosecutrix had never, by word, sign, or syllable, indicated to a single human being that she had been ravished. She never even said so when she went to defendant in the cornfield. She only asked him to support her child. Now, if defendant had really ravished her, it would have been the most natural thing in the world for her to have indignantly gone to him, and charged that he had forcibly despoiled her of her virtue, pillaged her of her chastity, and accomplished her ruin. Instead of that, however, she says nothing of outrage committed and chastity lost. At that time she appears to have been unaware of either loss of virtue or of honor outraged. Her only concern was of a financial nature,—to receive funds to support the child; and, when defendant denied its paternity and refused it support, she had him arrested. And not until she went on the witness stand in court did she declare she had been ravished. And in this case at no time does prosecutrix even so much as intimate that she was threatened by defendant if she told what had occurred, or that she was in any way intimidated by him.

It is believed that no instance can be found in the books where a prosecutrix has been allowed to testify against an accused party, charging him with rape upon her, after so long and unexplained a delay has occurred with every opportunity to make complaint, and without a single excuse to urge or offer for the delay, nor why complaint was not made at an earlier period, and without a single circumstance of fear, threat, or intimidation to prevent a prompt and full disclosure. More than that, the prosecutrix stands without a particle of corroboration, either as to immediate complaint made, the torn and disordered condition of her hair or clothing, scratches or bruises on her person, or that she was in tears or great mental distress, or even that the ravisher fled for it. And on top of that she is contradicted by Mrs. Irwin, her foster mother, as to whether prior to the assault she "kept company" with other young men; Mrs. Irwin affirming, prosecutrix denying. In this she was contradicted, also, by John McComb and Ernest Bally, who testified on behalf of defendant that they did "keep company with her," and had had sexual intercourse with her, prior to the time of the alleged assault by the defendant. And these two witnesses are corroborated by Mrs. Irwin, who also testifies that the prosecutrix did "keep company" with McComb, and that Bally was her frequent companion 57 L. R. A.

and sweetheart. In another important matter the prosecutrix was impeached. She testified that prior to the alleged assault the defendant "would never keep his hands to himself;" that he would pinch her, and feel of her bosom, and attempt to kiss her in the presence of his wife, and, when she would remonstrate with him, his wife would say, "Oh, you are too touchy." In this she was contradicted not only by defendant, but also by defendant's wife. The defendant, in order to establish that prosecutrix was not a female of "previous chaste character," introduced three witnesses,—Charles Dodd, John McComb, and Ernest Bally,—who testified that they had had sexual intercourse with the prosecutrix before June 7, 1899. Each of them gave time, place, and circumstances under which the prosecutrix had submitted to their desires. All three of them had resided near Lake Conrary for a number of years. At the trial there were present a large number of representative citizens, who had lived in the same vicinity for years,—witnesses as to the reputation of the defendant,—who must have known Dodd, McComb, and Bally. Yet no attempt was made by the state to attack the character or impeach the testimony of any of them; and their testimony is not contradicted, except by the prosecutrix herself, who contented herself with the mere statement that she had never had sexual intercourse with any of them.

It is thought proper to give here some instances where the courts have held the evidence wholly wanting in the elements which go to make up the crime of rape. Thus, in *Topolanek v. State*, 40 Tex. 160, the court said: "It would seem that the defendant was convicted alone on the testimony of the female alleged to have been injured, unsupported by other evidence, and not corroborated by circumstances. She says she told no one of what the defendant had done, for several weeks, leaving it to be inferred that she had given information to someone after that time; but what it was is not disclosed. Whatever the disclosure may have been, or whoever may have been the party, that party is not named in her testimony, and not called as a witness to corroborate her statement. It was several weeks after the offense is said to have been committed, and long after she had opportunity to complain. No complaint is made until March 1, 1873, more than three months after the wrong is said to have been done, and about three months and a half before her child was born. Her long silence is perhaps intended to be explained when she says the defendant threatened her life and the life of her father if she told anyone of what he had done. But it does not appear that she had any good reason for fear on account of such threats, if made. She was twenty-one years old, resided with her father, and was under his protection. Though she was legally competent as a witness, these circumstances diminish the credit to be given to her testimony, and leave the question of the defendant's guilt in so much doubt that the jury were not authorized to render any

other verdict than that of not guilty. And though the court cannot express any opinion as to the weight of the evidence, nor sum up the testimony on the trial before the jury, as they are the exclusive judges of the facts, yet on a motion for a new trial it is the duty of the court to set the verdict aside when it is contrary to the law and the evidence. 2 Wharton, *Crim. Law*, 1149; 3 Greenl. *Ev.* 212; Paschal's *Dig. arts.* 3059, 3137, cl. 9." Commenting on the above case, Henderson, J., among other things, said: "In this case, however, instead of only three months elapsing between the alleged offense and the complaint made by the prosecutrix, more than seven months had elapsed, and only when her condition exposed her did she state anything in regard to the matter. This long silence, and the circumstances under which she made the accusation, should go very far to discredit her, and to suggest that the act of carnal intercourse, if it was with the defendant at all, was with her consent. The excuse she gives, that she feared the appellant would kill her father, under the circumstances of this case, must appear very flimsy indeed. The appellant was shown not to live in the family, and not to have authority or control over her; and this statement of hers, as a reason for her long silence, does not comport with the integrity of a virtuous female, who has been outraged, and who is jealous of her honor. If we look to the circumstances of the outrage itself, as narrated by her, they likewise appear shadowy. There was no attempt at flight, though she was on horseback. No evidence of any injury or struggle. She appears to have unresistingly submitted to being lifted from her horse, and, after the outrage was accomplished, to be lifted back again, by the destroyer of her innocence, to have accepted his escort to her home, and to have gone with him on two sleigh rides a few days afterwards; and all this without any suggestion that he had demeaned himself towards her in any other wise than in a manner which met her approval. Under all of the facts of this case, it occurs to us that the lower court should have unhesitatingly granted a new trial in this cause. Although a stricter rule prevails here with reference to a new trial than in the lower court, yet, from the record in this case, we cannot permit this verdict to stand. Under the laws of this state, rape means 'the carnal knowledge of a woman, without her consent, obtained by force, and such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case.' And the proof of this must be made to appear beyond any reasonable doubt,"—citing cases. *Price v. State*, 36 Tex. *Crim. Rep.* 143, 35 S. W. 988. In *State v. Chapman*, 88 Iowa, 254, 55 N. W. 489, the indictment was for rape; verdict for assault with intent to commit rape. The prosecutrix was nineteen years of age, had known defendant for three years, and was going with him, on foot, to her home, about 6 miles distant.

57 L. R. A.

They were seen by two witnesses walking down the railroad track together. She testified that he proposed they go across the fields, to make the route shorter. She hesitated, and finally consented. While crossing the fields, he made improper proposals to her. She walked away and left him. He called her back to talk further, and she came. He renewed his proposals. She refused. They bantered. He threw her down, and, against her wishes, had improper relations with her. She endeavored to free herself and escape. The court says: "Her failure afterwards to make known the occurrence until her delicate situation made it necessary to tell her mother, . . . and her entire conduct after the affair, . . . presents a state of facts so inconsistent with her forcible defilement . . . that we think the verdict without sufficient support." In *State v. Connelly*, 57 Minn. 482, 59 N. W. 479, the defendant was convicted of the crime of rape upon a girl of the age of seventeen years. The defendant was a priest, and resided in an adjoining house. She testified that while she was on the porch of her own house the defendant called her over, to give her some pictures to put in her prayer book; that he took her upstairs into his bedroom; that he gave her some whisky, in which he put some stuff out of a little bottle; that she drank it, got weak, and began falling over a little; that he picked her up, and put her on the bed, and ravished her; that she resisted all she could, and hurrahd; that he accomplished his purpose by force; that he threatened to kill her if she told, and took his revolver from the bureau and pointed it at her at the time. This was March 9th. She told no one until May 25th following. The court says: "But a more vital question is whether the evidence was sufficient to warrant a conviction. There is no rule of law which forbids a jury to convict of rape on the uncorroborated evidence of the prosecutrix, provided they are satisfied beyond a reasonable doubt of the truth of her testimony. But the courts have always recognized the danger of convicting on her uncorroborated evidence. . . . Where the testimony of the prosecutrix is uncorroborated, and bears some intrinsic evidence of improbability, courts have sometimes refused even to submit it to the jury." In *Territory v. Webb*, 2 N. M. 147, 156, it was ruled that "under the rules governing the judicial administration of the criminal laws of this territory, this court can only review and determine errors of law appearing upon the face of the record. . . . It is quite beyond the scope of its duty to determine the credibility of witnesses testifying in the lower court, the weight of their testimony, aside from the law of the evidence, or the reconciliation of conflicting testimony;" but they have also held in the same case and in the same connection that "cases, however, might arise wherein there might be some evidence to sustain every material allegation of the indictment, yet at the same time the evidence might be so very slight as to justify an appellate court in reversing

a judgment rendered thereon." In *Owens v. State*, 35 Tex. 361, the court says: "Cases not infrequently come to this court, where a new trial has been refused, . . . when the weight of evidence is clearly against the verdict, or is so weak as to leave every correct and sound mind in doubt of the guilt of the accused. In all such cases the district court should grant a new trial, and, unless this is done, this court will be compelled to relax its rules, and reverse every judgment which we find rendered on lame and unsupported verdicts." In *Mares v. Territory* (N. M.) 65 Pac. 165, it was held that the disclosure of the assault made four months after its occurrence was of no value whatever as a corroborating circumstance; and the court, speaking through McMillan, J., said: "There is not in the whole case any corroborating evidence, nor a single corroborating circumstance; and the probability of the commission of the alleged offense is so far outside of the domain of reason that there was absolutely nothing for the consideration of the jury except the bare, improbable statement of the prosecutrix. It is not probable that an employee in a butcher shop located on a busy thoroughfare, and having large windows, uncurtained, giving a full view of the shop from the sidewalk, would, in the daytime, and at an hour of the day when people are accustomed to come to the shop to trade, assault and ravish a customer. It is not probable that a female twenty-two years of age, in such a place, while being pushed 15 to 18 feet towards an adjoining room by a man about to ravish her, would not make an outcry and resist, if she desired to protect her virtue. It is not probable that a woman of the mature age of the prosecutrix, who was with her mistress in the daytime, and her mother at night, would allow such an assault to go uncomplained of to one or the other until she was ill from miscarriage, four months after the alleged occurrence, if she were an innocent victim. It is not probable that a female having a miscarriage, and charged by her mother with wrongdoing, would not lay the offense at the door of another to shield herself. It is unnecessary to notice any of the errors assigned against the verdict of conviction, except the twenty-first, to wit, 'The verdict is against the law,' and the twenty-second, to wit, 'The verdict is against the evidence,' it appearing from the record that there is not sufficient evidence to justify the conviction. The complaint made to her mother by the prosecutrix four months after the alleged assault, and wrung from her at a time when she was ill from miscarriage, has no value whatever as a corroborating circumstance. 'A disclosure in the case of rape has no value whatever unless it is the natural result of the horror and sense of wrong which would prompt any virtuous female to make an outcry at the first suitable opportunity.' *People v. O'Sullivan*, 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880. In 1 Hale, P. C. 632, it is said: 'Complainant must make fresh discovery and pursuit of the offender; otherwise it carries

a presumption that her suit is but malicious and feigned.' In 1 East, P. C. 445, it is said that the evidence of the complainant 'is confirmed if she presently discovered the offense and made pursuit of the offender,' and that her evidence is discredited if she concealed the injury for any considerable time after she had opportunity to complain." And the judgment in that case was reversed. See also *Monroe v. State* (Miss.) 13 So. 884. In that case the headnote is as follows: "On a trial for rape of an eleven-year-old girl, the evidence relied on to convict was the testimony of the girl herself. The alleged crime occurred at noon, at a farmhouse, and no complaint was made to the neighbors; and there was a horn at hand, generally blown as a signal of an unusual occurrence, but not blown on the occasion of the alleged crime. There was no sign of struggle, and no suggestion of any choking or blows to disable, and no tearing of the girl's clothes. She stayed at home till night, and then told her brother of the alleged rape, who said he was going 'to tell ma,' and she then went to meet her mother, and told her. Held insufficient to sustain a conviction." There Campbell, Ch. J., said: "No error was committed by the court in the trial of this case, but, in our opinion, the verdict should not be permitted to stand. It is true that conviction of this detestable crime may be had on the uncorroborated testimony of the person raped, but it should always be scrutinized with caution; and, where there is much in the facts and circumstances in evidence to discredit her testimony, it is not sufficient to sustain a verdict of guilty. 1 Hale, P. C. 635 *et seq.*; *Innis v. State*, 42 Ga. 473; *People v. Hulse*, 3 Hill, 309; 19 Am. & Eng. Enc. Law, p. 958. The observations of the court in *People v. Hulse*, 3 Hill, 309, are just and appropriate, and commend themselves to our judgment. There is much in the testimony of the girl charged to have been raped by the accused to throw doubt on her testimony. There is not a single corroborating circumstance to support her statement, and much to suggest its falsity. . . . [No sign of any struggle was shown.] There was no suggestion of any choking or blows to disable, or bruising the arms or wrists, or tearing the clothes of the girl, or the bedclothes, or any circumstance, even the most trivial, to support her testimony. The rape occurred at 12 o'clock noon, and, although it was on a plantation, she made no complaint to any neighbor. Although there was a horn at hand, the blowing of which was a signal of something unusual having occurred at the house, it was not blown for this unusual occurrence. The girl waited at home until about night, when, having told her little brother, she says, who said he was going 'to tell ma,' she went to meet her mother, and told her. The strong probability is that the account of the affair given by accused is correct, and that the girl consented, and having been detected by the little brother, or from some other cause, she determined to tell. We regard her testimony as incredible." 71

Miss. 196. See also *Huber v. State*, 126 Ind. 185, 25 N. E. 904; *State v. Wilson*, 91 Mo. 410, 3 S. W. 870; *State v. Patrick*, 107 Mo. 147, 17 S. W. 666, and cases cited.

Acting in the light of these authorities, and, indeed, of the experience of common life, and of the ordinary instincts and promptings of human nature, we hold that a verdict based on such evidence as above offered by the state should not be permitted to stand; that evidence is contrary to all rational belief and all prior observations of human action in like circumstances. But even if rape were proved in the present instance, as that is not the crime charged in the indictment, for that very reason no verdict under § 1838 should be permitted to stand.

Summarizing the foregoing rulings, we hold: First, § 1838 unconstitutional; second, that a man indicted and tried under

§ 1838, and proved guilty under § 1837, cannot be convicted under § 1838, unless his right, under § 2 of the bill of rights, to be notified by the indictment of "the nature and cause of the accusation" against him, is wholly disregarded; third, that no man should be convicted of rape on such improbable, discredited, and unreasonable evidence as that offered by prosecutrix.

For these reasons, the judgment should be reversed, and defendant discharged. Rev. Stat. 1899, § 2718.

The foregoing, which, with some few things added, was the opinion of division No. 2 (*Burgess*, Ch. J., concurring therein; *Gantt*, J., dissenting), has ceased to be the opinion of the court; and, because of this, I herewith file the original as my dissenting opinion, in which *Marshall*, J., concurs.

WEST VIRGINIA SUPREME COURT OF APPEALS.

HORNER-GAYLORD COMPANY, *Appt.*,

v.

W. C. FAWCETT *et al.*

(50 W. Va. 487.)

*1. A deed of trust, executed in good faith to secure a bona fide debt, on a stock of goods, and extending to cover after-acquired property, duly recorded, is not fraudulent *per se*, or prima facie fraudulent, as to subsequent creditors with notice, in equity.

*2. A subsequent execution creditor has a plain, adequate remedy at law as to such after-acquired property; but equity will afford him no relief, as such deed as to such property is void at law, but will be sustained in equity.

(December 14, 1901.)

A PPEAL by plaintiff from a decree of the Circuit Court for Harrison County in favor of defendants in an action brought to set aside certain deeds of trust, and to apply the proceeds of the property to the satisfaction of plaintiff's execution. *Affirmed.*

The facts are stated in the opinions.

Mr. Lewis C. Lawson for appellant.

Dent, J., delivered the opinion of the court:

The Horner-Gaylord Company appeals from a decree of the circuit court of Harrison county in a suit in chancery wherein it was plaintiff, and W. C. Fawcett and others were defendants.

The first question presented by the rec-

*Headnotes by *DENT*, J.

NOTE.—As to the efficacy of a mortgage on chattels to be manufactured or acquired as independent articles, and not as increase or fruits of existing property, see note to *Deeley v. Dwight* (N. Y.) 18 L. R. A. 298.

57 L. R. A.

ord is the demurrer to the bill. The bill alleges, in substance, that C. D. Robinson, the owner of a one-half interest in a bookstore at Clarksburg, Harrison county, on the 14th day of July, 1896, executed a deed of trust thereon to Sherman Denham, trustee, to secure Earnest B. Morris the payment of three certain obligations, bearing even date therewith, for the sum of \$316.66½, due and payable in six, twelve, and eighteen months respectively, with interest from date; that on the 20th day of July, 1896, said Robinson executed to said Denham, trustee, another deed of trust on the other undivided half interest in said store, purchased by him on that day of J. H. Horner, to secure said Horner the payment of four certain obligations, for \$300 each, due and payable in six, twelve, sixteen, and twenty months with interest from date; that Earnest B. Morris assigned some of his said notes to S. O. Davis, and J. H. Horner assigned some of his said notes to Lynn S. Horner; that some of said notes had upon them as surety F. E. Robinson, and others I. N. Dean; that one of said notes was assigned to Flora E. Horner; that afterwards said Robinson sold said store to defendant W. C. Fawcett, or to Fawcett, Morris, & Co.; that on the 30 day of October, 1898 (but not properly acknowledged until the 15th day of October, 1898), said Fawcett assigned said store to J. L. Alexander to secure his various creditors according to priority, and his general unsecured creditors *pro rata* (plaintiff being included in the latter class), which assignment was not recorded until the 11th day of October, 1898; that said trustee sold the store, and received therefor \$1,300, part of which he disbursed on the prior trust debts, and the remainder he still holds in his hands; that on the 3d day of October, 1898, defendants Stuart Bros. & Co. obtained a judgment against W. C. Fawcett for the sum of \$55.34, with in-

terest, and \$2.25 costs, had an execution issued thereon, and levied on a part of the store goods alleged to belong to Fawcett, Morris, & Co.; that on the 8th day of October, 1898, complainant obtained a judgment against Fawcett, Morris, & Co. for \$106.87, and \$3.05 costs, on which execution was issued and levied on said day, at 8:30 p. m., on the property of Fawcett, Morris, & Co., to wit, books, stationery, show cases, fixtures, etc., being part of the property afterwards sold by said trustee, Alexander, who took possession thereof on the 10th day of October, 1898; that after said executions were so levied a controversy arose as to whether the constable making the levy, or the trustee, should take possession of and sell such property, and finally, said trustee agreeing to pay such executions out of the proceeds of the sale of such property, he was permitted to take and sell the same, but after such sale was made such trustee refused, at the instance of the beneficiaries under such prior deeds of trust, to pay off said execution; that Fawcett, after his purchase, put \$1,000 additional in such store, and the greater part of the goods sold accumulated by purchase after the execution of the deeds of trust given thereon by C. D. Robinson. Plaintiff further claims that said executions, having been issued and levied before the acknowledgment and recordation of the general assignment, are entitled to priority over the same; that the beneficiaries under the two first deeds of trust are claiming the whole of the fund arising from the sale of such store, and which is insufficient in amount to fully satisfy the same, and have directed the trustee not to pay said executions, but to pay the same on their prior claims; that said prior deeds of trust are void and ineffectual, as against said execution liens, as to the property levied on aforesaid. Plaintiff prays that a sufficient amount of the funds in the hands of said Alexander be applied to the satisfaction of its execution; that the rights and interest of the parties hereto be ascertained and determined, and the proceeds of said property be administered under the direction of the court; that the Denham, trustee, deeds of trust be set aside and declared null and void for uncertainty and other reasons apparent upon the same, and for general relief. Afterwards the plaintiff was permitted to amend its bill at the bar of the court by making parties thereto I. N. Dean, F. E. Robinson, and Flora E. Horner, with proper allegations touching their interests. The demurrer being again interposed to the bill as amended, the court overruled it.

The bill, taken as a whole, amounts to simply this: that the plaintiff, having an execution lien by levy on certain property, prior in right to all other liens, except the lien of two deeds of trust, void on their face, and which did not cover the property levied on, permitted such property to be sold by the trustee, Alexander, on condition that he would pay off such executions out of the proceeds of such sale, and which after making the sale he refused to do, and therefore plaintiff instituted this suit to compel

him to do so. Plaintiff sues to enforce the lien of an execution on personal property, and not as a beneficiary secured under the assignment for an accounting by the trustee. No accounting was necessary. The suit is hostile to the trust, for it seeks priority over the same, and independent thereof. If the prior deeds of trust are valid liens on the property, they take the whole fund, as conceded in the bill, and this suit would be wholly unnecessary and unavailing. If, on the other hand, they are void on their face, and do not cover the property, they are just as void at law as in equity, and they afford no justification for the interposition of a court of equity. In short, if the allegations of the plaintiff's bill are true, it had a plain, adequate remedy in a court of law, and there was no necessity for the intervention of a court of equity. Admitting all its pretexts, it merely demands the money on its execution lien, which the trustee had in hand and refused to pay because of a void claim upon him by other parties, and the only reason given for this appeal is because the money was not so applied. No person can file a bill of interpleader but the stakeholder, and he cannot do so if he is fully advised of the claims of both parties, so that he is able to determine to which of the parties he should pay the funds in his hands. 11 Enc. Pl. & Pr. 461. A person claiming in opposition to a trust or trustee cannot call upon the trustee to account. 27 Am. & Eng. Enc. Law, p. 278. The whole claim of the plaintiff, as set out in its bill, is in opposition to the trust, and not under it. It seeks to deprive the trustee of the property by a prior lien, and has no right to demand an accounting from him merely to get such priority settled. The plaintiff did not file this bill because it had a lien on the equity of redemption under the two prior Denham trusts, for the property had already been sold, and the proceeds were insufficient to satisfy such trusts; thus establishing the equity of redemption to be wholly valueless. Nor did it file it as a beneficiary under the Alexander trust, for its whole claim is in opposition thereto, and such beneficiary cannot maintain a bill to interfere with a trustee in the proper discharge of his duties as such. *Righter v. Riley*, 42 W. Va. 633, 26 S. E. 357; 2 Enc. Pl. & Pr. 885. Plaintiff's bill is peculiarly in its own interest, and not in behalf of the beneficiaries under the Alexander trust. Nor does it claim that the trustee has been derelict in administering such trust. It does claim that he has in his hands the proceeds of property not subject to such trust, but subject to its prior execution lien. 2 Enc. Pl. & Pr. 887. Its remedy at law for the real purpose and not fictitious pretexts of the bill is complete, full, and adequate. 2 Enc. Pl. & Pr. 911; *Id.* 679; *Freeman, Executions*, 3d ed. § 426, pp. 2296, 2297.

Admitting, however, that the plaintiff had the right, ordinarily, as a beneficiary under the Alexander trust, and not in opposition thereto, to file its bill for an account of the funds thereunder, still it was demurrable. It shows on its face that the funds

were insufficient to satisfy the two prior Denham deeds of trust, and that, therefore, as residuary beneficiaries, there was no fund applicable to their debt in any event, and an appeal to equity was wholly useless and unnecessary. While the prior deeds might have been void *per se* as to existing creditors at the time of their execution, they were good and valid as between the grantor and grantee, and all subsequent purchasers from the grantor having notice thereof. Fawcett had complete notice, and acceded to the terms, and became the paymaster thereof. The deeds were on record, and were notice to all persons of the condition of the stock of goods, and that the title was in the trustee, Denham, with the equity of redemption in Fawcett, with the privilege of sale, so long as he did not impair the security of the trust created thereby. Fawcett's trustee, Alexander, could acquire no greater right to the goods than Fawcett himself possessed, which was the mere equity of redemption. Fawcett having permitted his new purchases to take the place of his sales under the prior trust deeds, his trustee has no right to object thereto, as he receives the goods subject to all the prior legal burdens imposed thereon by his grantor. As is said in 3 Am. & Eng. Enc. Law, 2d ed. pp. 46, 47: "The assignee takes only such rights in the assigned property as the assignor had at the time of the assignment, subject to all existing equities." "The assignee takes subject to the liens and rights of the assignor's vendors." 2 Enc. Pl. & Pr. 879. Beneficiaries take no greater rights under the assignment than their trustee. By virtue of the rights or lien acquired under the Alexander trust, they cannot attack the prior equities of the Denham trust beneficiaries as to the after-acquired property placed among the stock by Fawcett; for had he at any time refused to permit such after-acquired property to take the place of the property sold, and become subject to the prior trusts, they would immediately have shut him up and closed out the store. So it must be presumed that he acceded to, and thoroughly acquiesced in, the conditions of the Denham trusts; and his trustee, Alexander, and the beneficiaries under such trust, are estopped from asserting anything to the contrary. It would be inequitable to permit them to do so. As creditors independent of such trust, they might have acquired liens by execution or otherwise upon such after-acquired property, and forced the sale thereof, and in this manner tested the validity of the clauses in the Denham trusts extending such clauses to cover such acquired property. It is plain from the allegations of the bill and the deeds that they were executed in good faith, with no intention to defraud the creditors of Robinson or his vendee, Fawcett, but were merely intended to secure the purchase money for such store, and at the same time permit the possessor thereof to continue business so long as the trust debts were secured. If the deeds of trust attacked had been voidable or void both at law and in equity, an entirely different case

57 L. R. A.

would have been presented, from where the deeds are void at law, but good in equity. By coming into equity the execution creditor loses his remedy at law, and benefits the trust debtor, who might otherwise have been compelled to file the bill himself to preserve his equitable rights, which he could not have asserted at law.

The real question which this record presents is as to whether the prior deeds of trust are void as to the after-acquired property sought to be included under their provisions in a court of equity. At law they are. And the plaintiff, had it sought its remedy in a court of law, would have found it adequate and complete, and the deeds of trust would have presented no bar to its recovery. 5 Am. & Eng. Enc. Law, 2d ed. p. 979; *Gregg v. Sanford*, 76 Am. Dec. 723, note [24 Ill. 17]; *Moody v. Wright*, 46 Am. Dec. 712, note [13 Met. 17]. But in refusing its plain legal remedy and coming into equity, it must do equity. The deeds of trust bear evidence on their face that they were executed for the purpose of securing the purchase money for the stock of goods,—being in the nature of a conditional sale,—and were intended to cover the after-acquired stock, so as to keep them safe and secure. They were duly recorded. Plaintiff's debt was after-contracted, and it had notice, so far as the record shows, actual and constructive, of these prior deeds of trust. They are not attacked for fraud in fact, but simply because of the provision on their face as to the after-acquired property, of which plaintiff had notice. While the law would avoid them, equity sustains them, as both prior in right and time to plaintiff's execution lien. In 5 Am. & Eng. Enc. Law, 2d ed. p. 982, the rule in equity is stated to be that "while it is declared that a mortgage of future-acquired property does not pass any immediate title to such property, yet, as 'equity considers that as done which ought to be done,' such a mortgage creates an equitable lien, which will attach to the subject-matter immediately upon its coming into existence, and create a valid title therein, as against the mortgagor and third parties with notice, without any further act on the mortgagee's part." The deeds of trust in controversy were but mortgages, with power to sell upon the happening of certain events; and, as far as the bill shows, there were no existing debts at the time they were taken and recorded. They are not governed by the numerous cases where existing creditors have attacked such deeds as fraudulent *per se*, from *Lang v. Lee*, 3 Rand. (Va.) 411, to *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203, but are governed more nearly by the cases of *Conaway v. Stealey*, 44 W. Va. 163, 28 S. E. 793; *Etheridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565; *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673; *Pennock v. Coe*, 23 How. 117, 16 L. ed. 436; *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. ed. 199; *Dunham v. Cincinnati, O. & O. R. Co.* 1 Wall. 254, 17 L. ed. 584; *United States v. New Orleans & O. R. Co.* 12 Wall.

362, *sub nom. New Orleans & O. R. Co. v. Mellon*, 20 L. ed. 434,—and numerous state cases, reference to which will be found in 5 Am. & Eng. Enc. Law, 2d ed. p. 982; *Gregg v. Sanford*, 24 Ill. 17, 76 Am. Dec. 731; *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 717.

These deeds were not fraudulent in their inception, but are free from all fraudulent intent; their object being to secure the purchase money, and at the same time furnish the grantor the means of satisfying it. The provisions as to the after-acquired property are perfectly consistent with the object of their execution. Their recordation was notice to all persons dealing with the grantor, and subsequent creditors dealt with open eyes; and at any time, by levying on the equity of redemption, they could have compelled a sale of the stock. They were not made with the intent to, nor do they, hinder and delay creditors in the collection of their debts. Equity limits both the lien of a judgment on real estate, and the lien of an execution on personal property, to the actual interest of the debtor at the time such lien was acquired, and will sell only such interest. A creditor who becomes such with full knowledge of the equities of others has no right to complain of such equities. The reasoning of Justice Brewer in the case of *Etheridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565, is unanswerable and conclusive on this question.

The demurrer to the bill should have been sustained, and the bill dismissed; but, as this is an error of which the appellant has no right to complain, *the decree is affirmed.*

Brannon, P., concurring:

I must say that I am reluctant and hesitating to concur in this decision; but I have only some doubt, and not a fixed conviction, such as to warrant a dissent. It is plain that, if the two prior deeds of trust are valid, the plaintiff has no ground on which to base its suit, for the simple reason that there is no money to go on its demand; but my doubt arises from the fact that I question or hesitate about those deeds of trust, as regards their validity, not because they cover after-acquired property, but because they contemplate the continued possession of the goods in the debtor, and contemplate his power to sell them by continuing the business. They do not expressly so authorize him, but they plainly so imply, and that is sufficient. *Clafin v. Foley*, 22 W. Va. 434; *Livesay v. Beard*, 22 W. Va. 585. The power to replenish, under these authorities, clearly implies continued possession and power of sale in the debtor. Those authorities and others will attest that such a deed of trust is "fraudulent on its face, is void in toto, and cannot stand as security for the debts therein attempted to be secured." *Gardner v. Johnston*, 9 W. Va. 403; *Adlington v. Etheridge*, 12 Gratt. 436; *Shattuck v. Knight*, 25 W. Va. 590; *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203. Certainly that is the law as to existing creditors, but some members of the court firmly

insist that it is only the law as to existing creditors, and that, as there are no other creditors in this instance whose debts existed at the date of those trusts, the said rule does not apply. I see force in this position,—so much force that at present I am not fully convinced that it is not the proper position. Nevertheless I see that those authorities say that a deed of trust containing such features as those mentioned is fraudulent *per se* as to creditors, not *prima facie* fraudulent, and subject to be sustained by proof of good faith, but conclusively taken to intend fraud as to creditors; and we all know that a conveyance that is fraudulent as to existing creditors is so, also, as to subsequent creditors. The beneficiaries under such trusts, though ever so free from intentional fraud, are taken by the law to be participants in fraud as to creditors. *Livesay v. Beard*, 22 W. Va. 592; *Clafin v. Foley*, 22 W. Va. 441. I looked through the cases cited, and others cited in them, to see if they drew the distinction as to existing and subsequent creditors; but, if they do so, I did not find it. The case of *Conaway v. Stealey*, 44 W. Va. 163, 28 S. E. 793, does not seem to control the case, because in that case the provision for the possession, replenishment, and sale of the stock was not, as it is in this case, on the face of the trust, but an oral agreement outside of the trust.

A petition for rehearing having been filed, *Dent, J.*, handed down the following additional opinion:

In *Lang v. Lee*, 3 Rand. (Va.) 433, Judge Cabell says: "As to the other point that the deed under which Lang claims is fraudulent *per se*, it is one on which I feel some difficulty; and as it is certainly one of great importance, and not necessary to be decided in this case, I purposely abstain from giving any opinion on it, that the question may be considered open for discussion whenever it may again occur before a fuller court." The two other judges (Coalter and Carr) gave their opinions. In *Sheppard v. Turpin*, 3 Gratt. 404, Judge Allen declined to consider the question raised as to the deed of trust being fraudulent *per se*, because the case turned on the question of the statute of limitations. Judge Baldwin concurred in the opinion of Judge Daniel. In neither of these cases was the question of the fraudulent character of the deeds involved necessary to the decision thereof, and in both, for this reason, concurring judges declined to consider the same; and yet they have been uniformly followed by the courts of this state as settling this principle of law as to when a deed of trust or mortgage is fraudulent *per se* conclusively. The principle thus admitted to be established is that when a grantor in a deed of trust who secures creditors reserves the possession and the power to sell the property to such an extent as will permit him to defeat the ostensible purposes of such trust, the same is void *per se* as to existing creditors not thereby secured, independent of any extraneous evidence, and being void as to existing cred-

itors, if there be any such, would also be void as to subsequent creditors; for, it matters not against whom fraud in fact is directed, if it be fraudulent as to one creditor it is fraudulent as to all. Judge Green, in the case of *Shattuck v. Knight*, 25 W. Va. 596, states the proposition as follows: "If the trustee by the terms of the deed of trust is not to take possession of the personal property until an indefinite future time, and the provision whereby after-acquired property of the grantor is attempted to be conveyed to pay trust debts, and the inference from the character of the property conveyed and attempted to be conveyed, is that the design of the grantor, clearly shown by these provisions, was, when he executed the deed of trust, to hinder other creditors, and at the same time not to devote any of his property then owned by him and conveyed in the deed of trust to the payment of the debts professedly secured by it, but to keep possession of it and dispose of it as he pleased, and to dispose of the proceeds as he chose, then such deed is *per se* fraudulent on its face. But if in a particular case, because of the character of the property conveyed or attempted to be conveyed, no such inference must necessarily be drawn, then such deed of trust is not *per se* fraudulent because of such provision." If the provisions of the deed are such as will permit the grantor, at his option, to defeat the same as a security for the debt ostensibly secured, then it is *per se* void as to creditors hindered thereby; for the certain inference is that it is a mere colorable security to place the property beyond the reach of existing creditors. In the case of *Sheppard v. Turpin*, 3 Gratt. 399, Judge Daniel intimates that, if all the existing creditors had assented to the deed, it would not have been fraudulent *per se*. At least, he says he is not prepared to so determine. In the present case the creditor secured owned a bookstore and fixtures. He sold it to the grantor on condition that he would secure payment of the purchase money by executing a deed of trust thereon for this purpose. Had he refused to do so, he never could have had possession of the property. By reason of the deed of trust he obtains possession thereof, and not otherwise. The natural inference is that he is to carry on the book business, replenish the stock, pay the expenses, and pay off the indebtedness secured. There were no existing creditors to be defrauded. Hence it is impossible to say, in the language of Judge Green, "that the design of the grantor, clearly shown by these provisions, was, when he executed the deed, . . . to hinder other creditors, and at the same time not to devote any of his property then owned by him and conveyed in the deed of trust to the payment of the debts professedly secured by it, but to keep possession of it, and dispose of it as he pleased, and to dispose of the proceeds as he chose." On the contrary, the primary design of the grantor, participated in by the

grantee, was to secure the purchase money, and at the same time permit the grantor to have such control and disposition of the property as would enable him to pay the same. In short, the property was the grantor's only on the condition that he should, out of the proceeds thereof, pay therefor. And even if these were existing creditors, these deeds could hardly be held fraudulent *per se* as to them, for the reason that it is especially provided therein that "it is expressly understood that the said party of the first part shall not allow said stock of goods to run down and become depleted, and worth less than the aggregate amount of said four obligations; and he shall keep said stock of goods insured in a sufficient amount, for the benefit of said J. H. Horner, to amply protect him against loss of fire. And upon the failure of the said party of the first part to keep said stock of merchandise replenished and insured as aforesaid, then, at the request of the said J. H. Horner, said trustee shall enter upon and take charge of said stock of goods, and sell the same in the manner prescribed by law as aforesaid." By this it is plainly apparent that the grantor could not sell or dispose of such stock of goods in such manner as to defeat the purposes of the trust. He could not sell in bulk, but only at retail, on condition that he would keep the stock a full security for the debts secured, and, in case of failure to do so, forfeit the right of possession immediately. This provision was not contained in the deeds heretofore passed on by the court, and has not, therefore, been construed by it. But in all the cases in which the trust was held fraudulent *per se*, as is said in *Sheppard v. Turpin*, 3 Gratt. 398, "the debtor, whilst professing to dedicate his whole property to the payment of his debts then due, reserves to himself a power by which he may, without any violation whatever of the express stipulations of the deed, divert the whole of the property to uses and purposes wholly foreign to the leading object avowed." In the present case, to allow the security to become impaired violates the express stipulations of the deed, and forfeits all right to the property. Not only is this true, but § 2, chap. 74, of the Code, as re-enacted by chapter 4, Acts 1895, especially reserves the right to the debtor to secure the payment of purchase money without infringing on the rights of existing creditors. But the question here is as to whether a deed not fraudulent *per se* as to existing creditors is fraudulent *per se* as to subsequent creditors having notice thereof, both actual and constructive. It is well-settled law that a person who contracts a debt with full notice of a deed and its provisions cannot be hindered, delayed, or defrauded thereby. Bump. Fraud. Conv. § 300. In the case of *Williams v. Banks*, 11 Md. 250, the supreme court of Maryland says: "We have no doubt that subsequent creditors, where there is fraud in fact, have a right to come in;

but we cannot comprehend how a person who at the time of becoming a creditor is aware of the existence of a deed can in any just sense be considered as 'disturbed, hindered, delayed, or defrauded' by it. It seems to us to be a contradiction in terms to say that a person is defrauded by an instrument, when he deals with a perfect knowledge of its existence and of its effect. If our registration laws have any operation, they certainly do, as they were designed, give notice to all the world, so that there may be no deceit practised upon anyone. If registration laws do not give notice to the community which will bind it, then they are of no use whatever, for without registration deeds would be binding *inter partes*." This language was quoted and approved in the later case of *Kane v. Roberts*, 40 Md. 590. In *Jones, Chat. Mortg.* § 381, it is said: "The policy of the registry laws is not consistent with the policy of the rule making void mortgages with power to use and sell mortgaged goods in the usual course of trade, and the latter rule should be made to yield to the more important general policy of the registry laws." *Peabody v. Landon*, 61 Vt. 318, 17 Atl. 781; *Hughes v. Cory*, 20 Iowa, 399; *Kreth v. Rogers*, 101 N. C. 263, 7 S. E. 682. Registry is equivalent to the delivery of possession. Any person has the right to give his property away or place it beyond the reach of subsequent creditors by conveyance, and, if such creditors have notice of such conveyance at the time of the contraction of their debts, they cannot complain thereof as being in fraud of their rights; for they had no right to look to the property encumbered at the time of such conveyance for the payment of their debts, and, having full notice thereof, there can be no fraud as to them. It is entirely different where there is a secret trust as to the grantor, and the conveyance is used merely as a mask to enable the grantor to hold and enjoy his property, and is only colorable as to the debt ostensibly secured thereby, or the creditor at the time of the contraction of his debt has neither actual nor constructive notice, but is misled and deceived by the false appearance of wealth into giving a credit that he would not otherwise extend. And it may be possible that such secret trust may be inferred from a deed where the power of sale and disposal of the proceeds is wholly unrestricted, amounting, in effect, to an entire revocation of such deed. A reservation of this character, being entirely inconsistent with the ostensible purpose of the deed, would render it merely colorable, and not made in good faith to secure the alleged debt used solely for the purpose of deception, and hence to secure to the grantor the illegal—under legal forms—enjoyment of his property in violation of his duty to discharge his just debts. The debt being fictitious, such a deed would be fraudulent in fact, as being con-

trary to the policy of the law, that a debtor's property should be liable for his debts. To justify such an inference from the face of the deed alone, the power of the grantor to defeat or revoke it must be so plain or absolute as to allow of no other conclusion. Otherwise the subsequent creditor must show the fictitious character of the debt secured by extraneous facts and circumstances. The deeds under consideration are not of this character, but they permit the grantor to sell portions of the property only on condition that such sales do not impair the security for the purchase-money lien, and that the same be preserved intact. Otherwise the right of sale is revoked, and the possession immediately forfeited. For the grantor, therefore, to attempt to defeat the purposes of the deed as a security for the purchase money or debt, is to violate the plainly expressed stipulations therein contained. Hence, it is impossible to infer from these deeds a secret trust in favor of the grantor, but their legitimate purpose is plainly expressed on their faces and in their terms; and this is that they were intended as a bona fide security for the purchase money, and at the same time furnish the grantor the means to honorably and honestly discharge such purchase money without impairing the security therefor; and, being duly recorded, no subsequent creditors could possibly be deceived or defrauded thereby. The subsequent creditor, having notice of the deeds at the time he extended credit, could acquire no greater rights as to the property than the debtor; and this is the right to levy on and sell any portion or all of the property, provided he did not impair the security, or in lieu thereof satisfy the lien. This same conclusion was reached in the case of *Conaway v. Stealey*, 44 W. Va. 163, 28 S. E. 793, except in that case the power of sale was by parol, instead of being entered on the face of the deed. This cannot affect the principles involved, in any sense, except to be more favorable to the bona fides of the deeds containing on their faces the extent of the reservations made by the grantor. "It matters not whether the agreement that the mortgagor may continue to deal in the property for his own benefit is contained in the mortgage, or exists in parol. . . . It is equally effectual to show the fraudulent purpose for which the mortgage was given, and the fraudulent intent which characterizes it." *Potts v. Hart*, 99 N. Y. 168, 1 N. E. 605. And for the same reason a reservation which is not fraudulent when made by parol cannot be made fraudulent by being reduced to writing and made a part of a recorded deed. It is only a question of proof, and not one of fraud. So this case and that of *Conaway v. Stealey* are precisely the same in principle, and the language used in that case is equally applicable here.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

SOUTH COVINGTON & CINCINNATI
STREET RAILWAY COMPANY, *Appt.*,

v.

Carrie STROH.

(.....Ky.....)

1. The admission of testimony of physicians appointed by the court to examine plaintiff in an action for negligent injuries, as to the result of an examination made after defendant's motion for such examination was withdrawn, is erroneous.
2. The instructions in an action for negligent injuries should confine the jury to a consideration of the acts of negligence alleged in the complaint.

(January 21, 1902.)

NOTE.—Power of court to call and examine witnesses.

- I. Power of court to call witnesses, 875.
- II. Power of court to examine witnesses.
 - a. To elicit facts or supply evidence, 878.
 - b. In order that the question or answers may be understood, 880.
 - c. To keep witnesses within bounds, 880.
 - d. Where they are reluctant, 881.
 - e. Leading and improper questions, 881.
 - f. Suggesting a change in the form of questions, 882.
 - g. Cross-examination of witnesses, 882.
 - h. Showing partiality or prejudice, 882.
 - i. Objection and exception to action of trial court, 884.
 - j. Summary, 884.

I. Power of court to call witnesses.

In *SOUTH COVINGTON & C. STREET R. CO. v. STROH* the court appointed two physicians, on motion of the defendant, to make a physical examination of plaintiff. After the plaintiff had testified, the record showed that "the motion of the defendant for the appointment of two physicians by the court to make an examination of plaintiff is withdrawn." After the introduction of defendant's testimony, save a witness who was not in court, the court called one of the physicians. The defendant objected, and both parties declined to examine him, whereupon the court asked him a number of questions, and then the counsel for the plaintiff continued the examination. The court then called the other physician, over the objection of the defense, and required the parties to examine the witness, over the objection of both parties. Counsel for plaintiff then examined this witness. It was held that their introduction by the court, against the protest of the defendant, tended to give undue weight to their testimony, and that, their "examination having been made after the withdrawal of the motion, . . . it was erroneous to introduce them as witnesses in the manner in which it was done." The court cited *Boite v. Third Ave. R. Co.* 38 App. Div. 234, 56 N. Y. Supp. 1038, and *Moses v. Newburgh Electric R. Co.* 91 Hun, 278, 36 N. Y. Supp. 149. In neither of these cases cited is the same question passed upon. In the first case the court practically took the examination of plaintiff's witness in his stead, and asked improper questions, that the counsel for plaintiff 57 L. R. A.

APPEAL by defendant from a judgment of the Circuit Court for Kenton County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Simrall & Galvin, for appellant:

The instructions do not limit the jury to the negligence charged in the pleadings, nor to that charged in the testimony of the witnesses, but leave them to speculate as to whether or not the falling off or throwing off of the appellee from the car was caused by any negligence, real or imaginary, of the employees of appellant.

The law requires that when a specific

would not have been permitted to ask. In the *Moses* Case the sole question was as to the right to have a physical examination without an affidavit showing that the defendant intended to use it. Stress seems to have been laid, in the *STROH* CASE, as grounds for reversal, on "the manner in which it was done." It seems that the court of appeals held that the action of the court in this particular showed a bias. If the court intended to say that the trial judge had no right to call for any witness to supply links in testimony or to ascertain the truth of a transaction, it seems that this would be an exceptional case, as the weight of authority is to the effect that a trial judge has the right, in a disinterested way, to direct that witnesses may be called in order to throw light upon the case.

The trial court has the right to suggest that witnesses may be called to throw light upon a doubtful question of fact where it is done in such a manner as not to show bias or prejudice. It is better practice for the judge to try the case as made out by the parties, as it is difficult for him to take any action in the matter of supplying evidence without indicating to the jury his opinion.

In *Fullerton v. Fordyce*, 144 Mo. 519, 44 S. W. 1053, where the defendants had obtained the appointment of physicians under an order of court for the examination of plaintiff, and had neglected to use them as witnesses, it was held that the plaintiff was properly allowed, over defendants' exception, to introduce and examine those witnesses; and it was further held that the remark of the court in stating: "The supreme court has indicated in this case that it would like to have this court appoint a commission. I have done so in response to that, and I will permit the commission to testify,"—was not prejudicial error. The court said: "By the course adopted defendants secured the advantage of a cross-examination of witnesses who had ascertained facts under an order of court made at their request, and they have no just ground to complain. Neither does it appear that the remarks of the court, on admitting the testimony, could have been prejudicial. The commission was appointed by an order of court, which was a matter of public record. The appointment was made at the request of defendants, for the purpose of eliciting the truth and in furtherance of justice. The information given by the court went no further than to advise the jury that the witnesses had made a physical examination of plaintiff by its direction, a fact which either

charge of negligence is made, and the issue made upon that, the fact charged must be proved; and therefore the thing specifically charged is the only thing that can be submitted to the jury.

Chesapeake & O. R. Co. v. Gunter, 21 Ky. L. Rep. 1803, 56 S. W. 527; *Louisville R. Co. v. Park*, 96 Ky. 580, 29 S. W. 455; *Sandy River Cannel Coal Co. v. Caudill*, 22 Ky. L. Rep. 1175, 60 S. W. 180.

A trial judge had no right, not only to name physicians on his own motion, but, over the objection of both parties, to call said physicians to the stand, and then examine one of them and compel the parties to examine the other.

Messrs. Ernst, Cassatt, & McDougall also for appellant.

Mr. B. F. Graziani, for appellee:

The appellee did not object to Dr. Walters

testifying, but refused to make him her witness, for the reason that if she made him her witness, she would be bound by his statements. The appellant had moved for the appointment of the physicians, and the court had appointed them, but the attorneys for the appellant, having questioned these doctors and finding that their testimony would not be favorable as they expected, did not want to be bound by their statements; but appellee's counsel simply declined to examine the witnesses so as to make them her witnesses. Counsel for appellant is in error when he urges that they were the witnesses of the court. The appellant called for their appointment; they were appointed; they made the examination; they testified. What harm was done if the testimony was truthful? The facts were made known to the jury by distinguished medical experts,

party had a right to elicit from the witnesses themselves. Surely defendants, at whose request the commission was appointed, should not complain of the information the jury incidentally acquired from the remarks of the court. Parties calling for such an examination must take the chances of the results. The experts who made the examination became the witnesses of the court, rather than of the parties to the action; and if the parties refused to call them the court had the right to do so, in which case greater credit would have been given them than was given by the remarks complained of."

In *Hall v. The Buffalo*, Newberry, Adm. 115, Fed. Cas. No. 5,927, where depositions had been taken by both parties and were not used by them, the court, on being apprised that they were on file, called for the same, and held that such avenue to the discovery of the truth was not to be closed by either a technical adherence to rule, or the omission of the parties to introduce them in evidence. In this case one of the depositions did not correspond with the evidence of the witness in court, and was inconsistent with an amended answer.

In *Moses v. Newburgh Electric R. Co.* 91 Hun, 278, 36 N. Y. Supp. 149, where an order was made directing that the plaintiff be physically examined before a referee, and that she be physically examined by a physician before the trial of the action, it was said: "Obviously a party cannot have any intelligent purpose as to whether he will use a certain person's testimony until he knows what it is to be. If it proves favorable to the party by whom it is taken, it will ordinarily be read by that party; if unfavorable, it will ordinarily be read by the other party."

The above case was cited by the court in the *STROH CASE*, and while it does not throw any light on the right of the court to call witnesses, it is a *dictum* to the effect that a party obtaining an examination for a personal injury cannot prevent the witnesses being called.

In *Sheets v. Bray*, 125 Ind. 33, 24 N. E. 357, the court called the parties to the suit as witnesses in the cause. It was claimed that it was an abuse of discretion, because there were several appellees, and but one appellant. It was held that the number of parties should not be considered as evidence that the court was guilty of an abuse of discretion in calling all the parties to the suit as witnesses, to testify to their knowledge of the facts under investigation, by reason of appellant's superior knowledge of the principal facts involved in the case.

In *O'Connor v. National Ice Co.* 24 Jones & 57 L. R. A.

S. 410, 4 N. Y. Supp. 537, it was held that the calling of a witness by the trial judge, where the witness was immediately accepted by the plaintiff as his witness, was not reversible error. In this case the court said: "If, as is now claimed, the circumstances under which this was done, and especially the remarks which passed between the trial judge and the counsel for the defendant at the time, tended to prejudice the defendant's case with the jury, the defendant, upon proof of the fact and a case regularly made and settled, should have moved at special term for a new trial as matter of discretion. This was not done. No relief will be granted on a mere general exception."

And in a prosecution for burglary, where the judge recalled the prosecuting witness on the failure of proof that the dwelling house was closed in the night, and the court had the omitted proof supplied under his own examination, it was held that there was no error. *State v. Lee*, 80 N. C. 483. In this case the court said: "It would not be proper for the judge in the course of a trial to usurp the place and duty of the state's counsel on the one hand, and prescribe the order of introduction of the witnesses, and become active in their examination; nor yet, on the other hand, to take the place of the prisoner's counsel, and assume the duties resting on him in the general conduct of the defense. But it is expected of the judge, in presiding at a trial, in the exercise of a perfect impartiality, to see the law properly administered, and justice done, both as respects the state and the accused. If a fact material to the state, or to the prisoner, be obviously overlooked and about to be omitted, it is usual, in practice and within the scope of the judge's duty, on motion, to allow a witness to be recalled to supply the omitted fact, or, in his discretion, to recall the witness, and have the oversight repaired under his own examination."

And where a judge recalled a witness after he had testified, in order to ascertain whether he had made certain statements in his testimony, it was held not to be error. *Lafferty v. State* (Tex. Crim. App.) 35 S. W. 374. In this case the objection was not to the question and the answer, but to the fact that he was recalled by the judge. This was held not to be error. The court said: "The court may have been in doubt as to what the defendant stated upon the subject. The court did not propose to prove any new fact, but simply to ascertain what the witness had stated about this matter."

And where the court of its own motion had

whose testimony was as beneficial to the appellant as to the appellee.

Belt Electric Line Co. v. Allen, 102 Ky. 551, 44 S. W. 89.

The court will not permit a party to an action to ask for the production of certain documents or testimony, and then, when it is ascertained that it is unfavorable to them, refuse its production.

7 Am. & Eng. Enc. Law, p. 111; *Morgan v. Kendall*, 124 Ind. 454, 9 L. R. A. 445, 24 N. E. 143.

Du Relle, J., delivered the opinion of the court:

The appellee alleged in her petition that she was a passenger on one of appellant's cars and signaled the conductor at the corner where she wished to alight, and that he, "standing on the rear platform of said car,

placed his hand upon the arm of the plaintiff, and, while pressing plaintiff forward down the steps from said car to the street, signaled her to alight, and while she was attempting to do so the car gave a sudden jerk or pitch, and, by the aid and acts of the defendant's conductor, employee, and agents, and the acts of said car, the plaintiff was thrown violently to the street," whereby she was injured; "and because of said wrongful acts" she had been permanently injured, has suffered great pain, and incurred expenses for medical treatment, to her damage in the sum of \$15,000. By an amended petition she averred "that as she attempted to alight from said car the same was negligently moved, jerked, or ran forward, by said defendant, its agents and employees, which caused the plaintiff to fall; and that said acts of said agents and employees were neg-

a witness recalled to restate his testimony, where counsel differed, it was held not to be error. *Hayes v. State*, 36 Tex. Crim. Rep. 146, 35 S. W. 983. In this case the court said: "On such occasions, however, the court should avoid expressing an opinion as to what the witness may have previously testified, and leave the witness free to reiterate his testimony untrammelled."

In *Rex v. Watson*, 6 Car. & P. 653, "Taunton, J., who tried the case, after the examination of witnesses to fact on the part of the prisoners, called back a witness for the prosecution, and asked him several questions; and then, addressing the prisoner's counsel, inquired if he had any question to ask upon it, saying that, although he, as judge, had called back the witness for the purposes of justice, he thought it right that the prisoner's counsel should have the opportunity of cross-examining the witness again."

In an action on a claim against a levy and sale, where the court, after motion for a nonsuit, examined the sheriff as to the person upon whom he served the notice of levy, and directed him to amend the return, it was held not error. *Primrose v. Browning*, 59 Ga. 69. In this case the court said: "Although the subsequent action of the court was unnecessary to make out a prima facie case for the plaintiff in *fi. fa.*, still, there was nothing objectionable in its action, in view of the facts, which would authorize this court to interfere and control its discretion in conducting the trial of the case before it."

In *Willitts v. Schuyler*, 3 Ind. App. 118, 29 N. E. 273, a wife filed a claim against her deceased husband's estate. The court called her as a witness, and permitted her to testify, although she would have been incompetent under the statute except for the questions of the court requiring her to testify. It was held that this was not an abuse of discretion. In this case the court said: "It is within the power of courts, in the exercise of their discretion, to require witnesses to testify who are rendered incompetent by the provisions of the above section, and there is no legislative restriction or limit upon such discretion, except that it shall be reviewable on appeal. In the case before us there are no indications of an improper use of the discretion confided in the trial court, and we can discover no reason for criticising its action." This was under Ind. Rev. Stat. 1881, § 498, which is as follows: "In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the deceased,

where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate; provided, however, that in cases where a deposition of such decedent has been taken, or he has previously testified as to the matter, and his testimony or deposition can be used as evidence for such executor or administrator, such adverse party shall be a competent witness for himself, but only as to any matters embraced in such deposition or testimony." This was a suit by a widow against her husband's estate. She claimed an indebtedness by note. The defense claimed that the note was given to induce her to unite in a sale of property, and that if the proceeds were invested in other property the note was to be void. This was denied by the widow, who was allowed to testify. The general statutory rule excluding such evidence cannot be ignored, and this decision will not be received as sound law.

In *Reg. v. Holden*, 8 Car. & P. 606, it was held that, on a trial for murder, every person who was present at the time of the transaction which gives rise to the charge ought to be called as a witness on the part of the prosecution; for, even if they give different accounts, the jury should hear the evidence, and draw their own conclusions as to the truth. Therefore, where the widow and daughter of the deceased were present at the time when the fatal blow was supposed to have been given, and the widow was examined as a witness, the judge directed the daughter to be called for the counsel for the prosecution, although she had been brought to the assizes for the other side, and her name was not on the back of the indictment.

And in *Rex v. Simmonds*, 1 Car. & P. 84, *Hullock, J.*, held: "Though the counsel for the prosecution is not bound to call every witness whose name is on the back of the indictment, it is usual for him to do so; and if he does not, I, as the judge, will call the witness, that the prisoner's counsel may have an opportunity of cross-examining him. The witness was then called by the counsel for the prosecution."

In *Coulson v. Disborough* [1894] 2 Q. B. 316, where the jury desired that a party in court should be placed on the witness stand, and the judge called him and questioned him as to whether he had taken his father's money and given it to plaintiff at the time

ligent and careless." The appellant denied the affirmative averments, pleaded contributory negligence, and the trial resulted in a verdict and judgment for \$4,000.

Various grounds for reversal are relied on. It will be necessary to consider only two of them. On the day the case was set for trial, the company moved to require appellee to submit to an examination by two physicians, named in the motion, for the purpose of ascertaining the character and extent of the injuries to her, and in order that said physicians might testify with reference thereto upon the trial of the case. This motion, on objection by appellee, was overruled, but the court offered to require the plaintiff to submit to an examination by two doctors to be appointed by the court, and the defendant filed a motion to that effect. The court named Dr. Allen and Dr.

Walters to make the examination. The parties thereupon went into trial. After the plaintiff herself had been examined and one other witness, the record shows that "the motion of defendant for the appointment of two physicians by the court to make an examination of the plaintiff is withdrawn." The plaintiff then continued the examination of her witnesses in chief, rested, and the defendant introduced its testimony in chief, with the exception of one witness, who was not present, and as to whom it asked the privilege of introducing him later in the trial. On the following day the court called Dr. Walters. The defense objected. Both plaintiff and defendant declined to examine him, and the court examined him, asking him a number of questions, after which counsel for the plaintiff continued the examination. The court then called Dr. Allen,

plaintiff claimed to have received it, and for which she had been arrested and had brought an action of false imprisonment, and the witness answered both questions in the negative, it was held that the judge properly refused the application of plaintiff to allow them to cross-examine this witness. It was said by Lord Esher, M. R., that, "when a witness is called in this way by the judge, the counsel of neither party has a right to cross-examine him without the permission of the judge." Smith, L. J., said: "A witness called in this way is the witness of the judge, not of either of the parties. It is the function of the judge to try and find out the truth whether he is hearing the case with or without a jury. Neither party can cross-examine a witness so called as of right: the leave of the judge must be obtained."

In *Selph v. State*, 22 Fla. 537, it was said: "Our conclusion is that the counsel prosecuting for the state cannot be compelled to call all the witnesses who were present at the time of the commission of an offense, or all whose names are on the indictment. We do not deny the right of the presiding judge, when prompted by sound discretion, to call and examine witnesses of his own accord, when the interests of justice demand it, whether the witness be for or against the state, and in such a case to permit counsel on both sides to cross-examine such witness."

But where a defendant in an embezzlement case showed by witnesses a purchase in good faith, and the court said in the presence of the jury: "I am not satisfied with this, let the defendant take the stand,"—it was held that this was improper, and was calculated to prejudice the defense. *Lyman v. People*, 107 Ill. 423. In this case the court said: "Whether the court was satisfied or not, was not a matter proper to be communicated to the jury. They should have been left free to consider the evidence given by both parties, without any expression of opinion from the court. Undoubtedly the court has the discretionary right—the exercise of which may tend to elicit the truth—to direct that witnesses shall be recalled for further examination, or that other witnesses may be called to the stand to be examined; but the court ought not to state to the jury that it is or is not satisfied with any particular portion of the evidence. Expressions of that character are calculated to have great weight, and if the jury are to be controlled in that way, their services might as well be dispensed with in the first instance."

This ruling was rather on the prejudicial 57 L. R. A.

comment of the court, than against the power to call the defendant to the stand.

II. Power of court to examine witnesses.

a. To elicit facts or supply evidence.

It seems to be a general rule, accepted everywhere, that the trial judge has the right to ask questions of witnesses to elicit facts or supply evidence. Of course this must be done in a fair, impartial way, because the conduct of a judge showing bias or prejudice during the trial is just as erroneous in the examination of witnesses as in any other particular. The authorities all agree, however, as to the power of the court to ask questions of the witness that are necessary to elicit the truth. There are a few cases which, although not denying the power and the right of a court to examine witnesses, indicate that in their judgment it is better practice for the court not to do so on account of the danger of being misconstrued.

A searching examination of a witness by the court, as to the competency of a witness on the matter of valuation, was held not to be erroneous, in *Keith v. Wells*, 14 Colo. 321, 23 Pac. 391. In this case the court said: "As we have seen, there was a wide difference of opinion among the witnesses in reference to the value of the property, and, under the circumstances, it is fair to presume that the court was of the opinion that the jury were entitled to the fullest information in reference to the competency of the witnesses testifying as to the value; and, as the questions propounded to the witness by the court were calculated to elicit information in reference to the knowledge of Howland on this subject, we are of the opinion that the error assigned is not well taken."

And active participation by the court in the questioning of a party who was a witness was held not to be error, where it was not shown that the party was prejudiced. *Baur v. Beall*, 14 Colo. 383, 23 Pac. 345. In this case the court said: "The circumstances may have rendered it necessary upon that trial—of which we have no means of judging—in order to arrive at the facts."

In a prosecution for assault with intent to kill, a witness testified that she saw a person running after the shooting, and she could not tell who it was. The court asked her: "At the time you saw that person running, and not from what you have heard, did you know it was Dave Long?" A. "I took it to be Dave

the other doctor who had been appointed to make an examination of the plaintiff, over the objection of the defense, and required the parties to examine the witness, over the objection of both parties. Counsel for plaintiff then examined this witness. From the testimony of the two doctors it appeared that they had examined the plaintiff about half past five on the previous evening, and therefore after the motion to require an examination by physicians appointed by the court had been withdrawn. As the plaintiff claimed to be suffering from prolapsus uteri as a result of her fall, and of a blow and bruise upon the abdomen from her umbrella handle, upon which she fell, the testimony of the two physicians, which showed the organ to be misplaced, and that such displacement might be the result of a fall or blow, tended to support plaintiff's theory of the

case, at least to some extent, and could not but have been prejudicial to the defense, for the reason that these physicians were appointed by the court, and introduced by the court against the objections of the defense. They were presumably disinterested, and the fact of their introduction by the court against the earnest protest of the defense tended to give undue weight and prominence to their testimony, in so far as it supported plaintiff's contention. It is not necessary to decide what might have been done had the examination been made before the withdrawal of the motion. That examination having been made after the withdrawal of the motion, we think it was clearly erroneous to introduce them as witnesses in the manner in which it was done. See *Botte v. Third Ave. R. Co.* 38 App. Div. 234, 56 N. Y. Supp.

Long at the time. I cannot say for certain who it was, now." *Long v. State*, 95 Ind. 481. In this case the court said: "It is the duty of the presiding judge to see that the truth is developed, and for this purpose he has the right to propound proper questions to witnesses. Of course, he should scrupulously avoid all semblance of partiality. There was nothing in the question, we think, to in any way indicate to the jury that the judge had either any opinion or wish in the matter. It should be observed, too, that the answer of the witness was not such as to materially affect the case either way."

And in an action for damages for fraudulent representations in a land trade, where the court directed a witness to state what the defendant had said to him as to the representation that he had made to the plaintiff in regard to the land, it was held not to be erroneous. *Bartlett v. Falk*, 110 Iowa, 346, 81 N. W. 602.

And in *Cobb v. State* (Miss.) 23 So. 1015, where the circuit judge interrogated witnesses for the defense, it was held that there was nothing improper in any of the interrogatories. The court said: "The circuit judge is not a nonentity. It is his duty to see that the course of the trial is according to law, and to elicit the truth. He is not powerless to ask questions, and, where the questions are proper, it is his privilege, and may be even his duty, to ask them."

In a prosecution for rape, where the court questioned the prosecuting witness as to her underwear, it was held that the answer was beneficial to defendant rather than otherwise, and that, if the relevancy or materiality of this testimony was questionable, it was wholly without prejudice. *Fager v. State*, 22 Neb. 332, 35 N. W. 195. In this case objection was made to the conduct of the presiding judge as to the course pursued by him in the examination of the witness, where leading questions were asked. The court said: "As a matter of practice in this state, we think the rule generally adopted by the judge has been to avoid examining witnesses, and to permit the case to go to the jury as made by the attorneys. This, of course, is subject to the exception above stated, in which case there can be no doubt as to the right and duty of a trial judge. Courts should also see that the examination of a witness is conducted in fairness to both of the litigants, and to the witness. Whether or not a judge has a right to go beyond this, under the provisions of our Criminal Code, might be a serious question."

In a prosecution for murder, it was held not 57 L. R. A.

to be erroneous for the court to examine a witness, after he testified as to dying declarations, and to inquire as to the condition of the mind of deceased at the time he made the declarations. *Chalk v. State*, 35 Tex. Crim. Rep. 116, 32 S. W. 693.

And where the court, after a witness had been examined, interrogated him as to his state of feelings towards a party, and brought out the evidence that he had had a quarrel with him, it was held that it was no abuse of the discretion by the court. *Lefever v. Johnson*, 79 Ind. 554. In this case the court said that there was nothing wrong in the court's asking the witness any question, the answer to which would likely throw any light upon his testimony.

In *Riegler v. Tribune Asso.* 41 App. Div. 490, 58 N. Y. Supp. 807, it was held not to be error for the court to ask questions of the defendant after he was recalled, which were pertinent for the purpose of eliciting the truth and presenting the facts clearly to the jury.

So, in *De Ford v. Painter*, 3 Okla. 80, 30 L. R. A. 722, 41 Pac. 96, it was held that the interrogation of witnesses during the progress of the case is not error, and the judge may, in the exercise of his discretion, aid in eliciting material matter suggested by the evidence.

And in *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254, it was said that the fact that a presiding judge asked questions of the witnesses because necessary to elicit the truth would not be held error; but that no opinion should be expressed by him upon the facts, nor any expression used calculated to prejudice the rights of either party. In this case the court refused to pass upon this question, as applied to the facts in this case, stating that on a new trial it would likely not occur again.

In a manslaughter case the accused testified that the deceased drew his hand from his pocket, and that witness thought he had a weapon. The court asked: "Did you find any weapon in his hand, or about him?" and he answered, "No." It was held that this was not prejudicial error, and that it was not necessary to do so in view of reversal on another question. *McDonald v. State*, 89 Tenn. 161, 14 S. W. 487. In this case the court said: "As a rule courts are to try cases as made by parties or attorneys, and not make the effort to supply what may seem to them as missing links in the chain of testimony; to do so would be error."

In *State v. Stephens*, 70 Mo. App. 554, and *State v. Pagels*, 92 Mo. 300, 4 S. W. 931, it was held that there is no doubt as to the right of

1038; *Moses v. Newburgh Electric R. Co.* 91 Hun, 278, 36 N. Y. Supp. 149.

The instructions objected to seem to correctly state the law applicable to the case, with the exception that they do not confine the jury to the consideration of the acts of negligence specifically alleged in the petition as amended. As said by Judge O'Rear in the opinion in *Sandy River Cannel Coal Co. v. Caudill*, 22 Ky. L. Rep. 1175, 60 S. W. 180: "The jury should be confined to the

consideration of such facts of alleged negligence as were the basis of plaintiff's complaint." See also *Chesapeake & O. R. Co. v. Gunter*, 21 Ky. L. Rep. 1803, 56 S. W. 527. Instruction No. 4 was not prejudicial to appellant, and is not complained of by appellee.

For the reasons given, *the judgment is reversed*, and the cause remanded, with directions to award appellant a new trial, and for further proceedings consistent herewith.

a trial judge to interrogate a witness if he deems it necessary to supply some omitted or legitimate question, or to fully develop the facts bearing on the case. It was also held that the questions propounded by the court were proper, and not obnoxious to any valid objection.

So, the asking of a pertinent question by a trial judge, to elicit a fact overlooked by counsel, was held not to be error, where it tended to protect the innocent, or prevent the escape of the guilty. *Hill v. State*, 5 Lea, 725. In this case the court said: "If, too, the trial judge were to show by his active interference in the conduct of the cause that he was not the impartial arbiter he should be, there can be no doubt that it would be our duty to correct his error."

In *Wilson v. Ohio River & C. R. Co.* 52 S. C. 537, 30 S. E. 400, it was held not to be error where the judge took part in the examination of witnesses. It was further held that Const. 1895, art. 5, § 26, providing that judges shall not charge juries in respect to matters of fact, but shall declare the law, was materially different from the former powers of a circuit judge. This made no change as to his powers in the conduct of the trial of a case which of necessity must be left in a large measure to his discretion. It was further held that the exercise of this discretion was not a subject of appeal, unless it has been abused, which was not alleged in this case.

In *Butler v. Boyles*, 10 Humph. 155, 51 Am. Dec. 697, it was said: "A judge may very properly ask question of witnesses; and especially may an arbitrator do so, as the tribunal is less dignified, less formal, and usually unassisted by counsel. That the arbitrator was requested to question the witness, is no proof of partiality. There was nothing secret about it; nothing that showed the existence of an influence in favor of the party making the request."

Where the court asked plaintiff a question, and he testified to new matter, it was held that the defendant was entitled to testify himself in answer thereto. *Myers v. McCarthy*, 2 Sandf. 399.

See *Sparks v. State*, 59 Ala. 82, *infra*, II. h, and *State v. Lee*, 80 N. C. 483, *supra*, I.

b. In order that the questions or answers may be understood.

In an action for personal injuries received by a passenger in getting on a train, where the court asked questions of several witnesses in the endeavor to properly understand the facts in evidence, it was held not prejudicial. *Schaefer v. St. Louis & S. R. Co.* 128 Mo. 64, 30 S. W. 331. The court said: "We do not see why it was not a commendable thing in both the court and the jury endeavoring to ascertain just exactly the situation at the time of the injury."

And where the court put only one question to a witness, for the object and purpose of ascertaining if the witness understood a question 57 L. R. A.

that counsel had propounded to her, it was held that it was the duty and province of the court to see that the witness comprehended the questions asked in order that they might be answered understandingly. *Scroggin v. Johnston*, 45 Neb. 714, 64 N. W. 236.

And where the questions asked by the court were unobjectionable, and not asked so as to improperly influence the jury, it was held that no error was committed. *Cole v. State*, 75 Ind. 511. In this case the court said: "The court would not, of course, be warranted in assuming the duties of counsel, but has a right, when the testimony of a witness is not clearly understood, or when, for the purpose of ruling intelligently upon a question, an explanation is needed, or a fuller answer required, to ask questions of the witness. We see nothing in the record before us indicating that the court, in any way, wrongfully prejudiced the rights of the appellant by the questions asked witnesses."

And where the character of an examination by the court indicated that the only purpose of the court was to have the witness's meaning understood, and the answers were but repetitions of what the witness had already stated, though made somewhat clearer, it was held not to be prejudicial error. *Pothast v. Chicago G. W. R. Co.* 110 Iowa, 458, 81 N. W. 693.

The examination of a witness by the judge, in order to bring out more fully the facts about the localities in a murder case, and intended to make more plain what has already appeared, without intending to indicate an impression to the jury, was held not to be error. *State v. Hargroves*, 104 Tenn. 112, 56 S. W. 857.

So, where the trial judge refreshed his memory as to the testimony of a witness by having him restate his evidence on a certain point, and he also asked him other questions, it was held not error. *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770. In this case the court said: "While the practice of the trial judge, taking the examination of a witness into his own hands, is not to be commended or approved, it is a matter of everyday experience in our courts for the trial judge to ask a witness a question. When it is realized what a great responsibility is devolved upon a circuit judge in seeing that justice is properly administered in the court, some latitude must, of necessity, be accorded him."

See *Lafferty v. State* (Tex. Crim. App.) 35 S. W. 374, *supra*, I.

c. To keep witnesses within bounds.

In *Rounds v. Alee* (Iowa) 89 N. W. 1098, the court asked pertinent questions calculated to impress defendant with the necessity of what was said, rather than of giving his conclusions. This was held not to be erroneous.

And where the court interrupted a witness by such remarks as, "How do you know?" "Tell what you know?" "Don't tell what you suppose,"—it was held not to be error. *Fer-*

guson v. Hirsch, 54 Ind. 387. In this case the court said: "The court has a judicial discretion in directing the conduct of a witness, the exercise of which very much depends on the character of the witness, his conduct, manner, intelligence, willingness, unwillingness, stubbornness, ignorance, youth, inexperience, etc., all of which the circuit court has a much better opportunity of knowing than this court; and such discretion must be very clearly exceeded before we can revise it by reversing a judgment. We see nothing of the kind in the case before us."

d. Where they are reluctant.

In *Varnedoe v. State*, 75 Ga. 181, 58 Am. Rep. 465, the court propounded questions to a reluctant witness. It was held that it is the duty of the court to propound such questions as to strip the witnesses of the subterfuges to which they resort to evade telling the truth. In this case it was apparent that the witness held back, and did not fully respond to the questions asked him, and the judge sought to ascertain the cause of his unseemly reticence. The court said: "Had he gone further, and reproved him for his indecorous conduct, he would not have transcended the limits of his duty."

And where the party assaulted in a rape case was an unwilling witness, it was held not to be error for the court to elicit evidence from her that the mother of the accused had hired her to remain away from court. The witness testified that the accused did not know of this. The remedy then was for the defendant to strike from the case the previous answer of the witness. *Lockhart v. State*, 92 Ind. 452. In this case the court said: "The court had the right, we think, as the attorney for the state would have had, to ascertain from her, if possible, her feeling and purpose in the case. If appellant had hired her to stay away, we know of no reason why the court might not have compelled her to state the fact to the jury. It is not the province of the court to shield the guilty or convict the innocent, but to see to it that exact justice is done to the state and the accused. For this purpose the judge may propound to witnesses of this character all such proper questions as may throw light upon their statements, and especially upon the motives that actuate them."

And where the court questioned witnesses who were showing a disposition to equivocate, and the questions of the prosecuting attorney were not calculated to develop material facts, it was held not to be error. *State v. Spiers*, 103 Iowa, 711, 73 N. W. 343. In this case the court said: "A trial court should not, as a rule, interfere with the examination of witnesses when the examination is being fairly conducted, unless to rule upon objections and motions. But the trial court is not required to remain silent when unwilling witnesses persist in such a course as will conceal the truth and make the trial a travesty of justice. We do not find that the district court exceeded the power which rightfully belonged to it, in assisting in the examination of witnesses, and in compelling answers."

e. Leading and improper questions.

There seems to be a conflict of authority as to the right of the court to ask leading or improper questions. In some cases the court is held to the same rule as attorneys. Of course, under some circumstances, leading questions may be proper. On the other hand, some cases hold that the trial court may ask any question

without regard to the well-recognized rules binding on attorneys.

The same rules in regard to asking leading questions, that apply to counsel, are held to be applicable to a trial judge. *Hopperwood v. State*, 39 Tex. Crim. Rep. 15, 44 S. W. 841. In this case the court said: "We would remark, in this connection, that the state furnishes, for the purpose of examining witnesses and conducting prosecutions, a district or county attorney, whose province it is to examine the witnesses; and rarely should it occur that a judge should undertake the examination of a witness. Of course, there may be occasions when it would be necessary for him to interfere, and have a witness restate his testimony, or state more clearly parts of his testimony. But such occasions can rarely occur; and, when they do occur, the judge should interfere in the examination of a witness with great caution."

In a murder case the court interposed, and asked the witness leading questions to show that the deceased had abandoned the quarrel before the homicide. This was held to be error. *State v. Crotts*, 22 Wash. 245, 60 Pac. 403. In this case the court said: "Again, outside of any constitutional provision, these questions were leading. They would not have been tolerated for a moment, had they been asked by counsel. There can be no principle of law in the administration of justice that will allow a court to ask an incompetent question, any more than counsel. It is true that courts may sometimes ask leading questions; but, under such circumstances, it would be proper for the court to permit counsel to ask leading questions; but they must be asked neither by the court nor the counsel, excepting when the necessity exists therefor, and there was no necessity shown in this case. Courts may frequently indulge in asking questions in furtherance of justice, when there has been an omission on the part of the officers of the state which would tend to bring about a miscarriage of justice; but even then such questions must be competent questions."

And where an improper question was asked by the judge, it was held that the question and answer should be stricken from the case. *People ex rel. Lauchantin v. Lacoste*, 37 N. Y. 192. The court said: "We do not understand that the court has any greater right to ask, against the objections of counsel, improper questions, than counsel have. And if, against objection, he asks improper questions, it is the duty of the appellate court to correct the error."

But in *White v. State*, 56 Ga. 385, it was held that the judge may propound leading questions to a witness introduced by the state.

See other Georgia cases, *infra*, II. h.

In a prosecution for poisoning, a witness testified to statements made by defendant's wife while the defendant was in an adjoining entry. The judge asked his witness: "Did the defendant appear to be listening?" A. "Yes." This was to prove that the defendant was called upon to deny the statements. On cross-examination the witness testified that the defendant was in full sight while the wife was talking. It was held that an objection to a leading question put by the court will not avail. *Com. v. Galavan*, 9 Allen, 271.

And where the court cross-examined a party by leading questions suggesting answers in his favor, it was held not to be error where the answers did not modify the party's testimony in chief. *Sessions v. Rice*, 70 Iowa, 306, 30 N. W. 735. In this case the court said: "But the witness gave an answer which left his testimony wholly unmodified. The fact that he re-

fused to change his testimony might be considered as giving it emphasis, but it would hardly be claimed that we could reverse upon such ground."

In a prosecution for murder by poisoning with calomel, where the court asked the witness: "Have you ever seen the body of one who died from calomel, except this one?"—it was held not to be prejudicial error. *State v. Milling*, 85 S. C. 16, 14 S. E. 284. The court said: "The point of the objection, however, seems to rest upon the last three words of the question,—'except this one,'—which, it is claimed, were sufficient to indicate that the judge who propounded the question had reached the conclusion that the deceased had died from overdoses of calomel. It does not seem to us that this necessarily followed, for a person who had reached no conclusion of his own upon the subject might very well have framed the question in the way in which it was propounded, having reference to what had previously been testified to by the other physician, and not to any opinion of his own. But even if the form of the question could be regarded as sufficient to indicate the judge's own opinion as to the cause of the death, that would not constitute such an error of law as could warrant this court in reversing the judgment."

See *State v. Marshall*, 105 Iowa, 88, 74 N. W. 763, *infra*, II. 1; *People v. Bowers*, 79 Cal. 415, 21 Pac. 752, *infra*, II. h, and *Fager v. State*, 22 Neb. 332, 35 N. W. 195, *supra*, II. a.

1. Suggesting a change in the form of questions.

The fact that the court suggested a different form for a leading question was held insufficient cause for a new trial. *Metropolitan Street R. Co. v. Johnson*, 91 Ga. 466, 18 S. E. 818.

And where an objection to the form of a question propounded by the commonwealth's attorney was sustained, it was held not to be error for the court to ask the question in the proper form. *Lowry v. Com.* 23 Ky. L. Rep. 1553, 65 S. W. 434. In this case the court said: "The evidence proved by the witness in response was proper and admissible. In the action of the court there was nothing to suggest bias or leaning one way or the other. It was evidently done to save time, and was not prejudicial error."

So, where questions of the prosecution had been objected to as leading, and the trial judge wrote out certain questions and handed them to the interpreter to propound to the witness, it was held not to be prejudicial error. *Malcek v. State*, 83 Tex. Crim. Rep. 14, 24 S. W. 417. In this case the court said: "If the conduct of the judge impressed the jury that he (the judge) was a prosecutor, or that he believed the appellant guilty and was aiding in developing his guilt to the jury, this judgment should be reversed, it being a settled rule in this state that the judge's mouth must be closed against any expression tending to show his opinion of the guilt of the accused. Nor will he be permitted by 'his conduct' to exhibit to the jury his opinion that the accused is guilty, nor his opinion as to the truth or falsity or weight of the testimony, nor the credit to be given any witness. Was the conduct of the judge under discussion calculated to impress the jury that he believed him guilty, or that he desired that the accused should be convicted? We think not. The matter sought to be elicited from the witness was important testimony, and it required caution in the questions propounded to him to prevent leading or suggesting to him the answer. The questions 57 L. R. A.

written by the judge accomplished the purpose without being obnoxious to either objections."

g. Cross-examination of witnesses.

The cases as to the right of the trial court to cross-examine witnesses indicate that, while they sustain the right, the court is held to the same strictness as attorneys, and any indication of prejudice or bias will entitle a reversal.

In *State v. Lockett*, 168 Mo. 480, 68 S. W. 563, it was held that the trial court had the undoubted right to question or cross-examine any witness provided this were done within such bounds as controlled attorneys in similar interrogations.

In *Gordon v. Irvine*, 105 Ga. 144, 31 S. E. 151, it was held that the judge has the right to interrogate a witness introduced by either party; but this should not be done in such a way as would have a tendency to cast discredit upon the witness. While the form of the question put to the witness in this case by the judge was not entirely proper, yet a new trial would not be granted on this account, when it appeared from the entire evidence that the verdict was manifestly correct. In this case the court said: "The rather rigid cross-examination and repeated pressure upon the witness on a particular point in his testimony might possibly have been calculated to lead the jury to infer that the judge had very decided convictions in his own mind as to what was the real truth of the transaction. The form and character of the question at this particular point of the trial had too much the appearance of the court taking charge of the plaintiff's case. We cannot, therefore, approve the way in which the judge conducted this examination. But, under our view of this case, the verdict is manifestly correct, and we do not think the court's interference by interrogating the witness is so serious as to require a new trial."

Where the judge took the cross-examination of several of the witnesses out of the hands of the lawyer, and conducted it himself, it was held that, while such a course was not commendable, it would not be held error. *State v. Atkinson*, 33 S. C. 100, 11 S. E. 693.

See *Barlow Bros. Co. v. Parsons*, 73 Conn. 696, 49 Atl. 205, *infra*, II. h; *Sessions v. Rice*, 70 Iowa, 306, 30 N. W. 735, *supra*, II. a.

h. Showing partiality or prejudice.

In general, it may be said that conduct of the court in questioning witnesses that indicates partiality or prejudice will be held erroneous. This has been held especially where the court took the examination of the witness out of the hands of the attorney and acted as attorney in the case. So, where a judge intimates that a witness is unworthy of belief, or expresses opinions on the replies elicited by him from the witnesses, it will be held erroneous. In Georgia, while it has been held that there is no limit to the power of the court to interrogate witnesses, it is also held that prejudicial comments on the answers of the witnesses will be held error.

In *Boite v. Third Ave. R. Co.* 38 App. Div. 234, 57 N. Y. Supp. 1134, it was held error for the court to take the examination of the witnesses out of the hands of the plaintiff's counsel, and to bring out plaintiff's case upon points which have not yet been touched upon, where this occurred with every witness of plaintiff, and where the court did not help the defendant to elucidate any facts as he had done for the plaintiff, and where many of the questions propounded by the court were leading.

In *Riegler v. Tribune-Asso.* 41 App. Div.

490, 58 N. Y. Supp. 807, the court said: "On this motion the appellants lay great stress upon the fact that the opinion failed to discuss the point that a new trial should be granted upon the ground of the decision in *Bolte v. Third Ave. R. Co.* 38 App. Div. 234, 57 N. Y. Supp. 1134, argued at the February term. That was an exceptional case, the decision of which depended on the peculiar features presented. Upon full consideration of this case, and after a careful examination of the record, we are satisfied that such circumstances and conditions as required the action taken in the *Bolte* Case did not appear in this. It did not seem to us necessary to discuss the differences that existed."

In *Knox v. Fuller*, 23 Wash. 34, 62 Pac. 181, the court took the examination of the witnesses out of the hands of the attorney, and indulged in remarks about counsel beating around the bush. This was held to be improper. But the injury in this case was held not to be prejudicial on account of the evidence given. In this case the court said: "Ordinarily such an examination by the court would have its influence on the minds of the jury, prejudicial to the party calling the witness."

In a prosecution for keeping a disorderly house the defendant declined to cross-examine a witness for the state. The judge whispered to the witness and then told him, if he knew any fact or circumstance, not already stated, that would tend to establish the character of the defendant, or of the house, to state it. The witness then made statements in regard to his son visiting the house, and that he and his wife went there to take their son away, and that he heard angry talking in the house between his wife and someone else. It was held that it was not the province of a judge to confer privately with a witness, either in or out of court, to ascertain whether he had knowledge of particular facts, or to suggest to a witness, after his examination, that there were facts other than those to which he had testified within his knowledge. *Sparks v. State*, 59 Ala. 82. In this case the court said that it is the duty of the judge "to propound to the witnesses such questions as he may deem necessary to elicit any relevant and material evidence, without regard to the effect of such evidence, whether it may benefit or prejudice the one party or the other. The development and establishment of the truth is his purpose and duty."

And where the judge frequently questioned the witnesses, always in the interest of the prosecution, and often by leading questions, it was held that the impression would be given to the jury that the defendant was guilty, and it was held erroneous. *People v. Bowers*, 79 Cal. 415, 21 Pac. 752.

The action of the trial judge in questioning the witness on immaterial, new matter which tended to prejudice the jury was held erroneous, in *Flinn v. Ferry*, 127 Cal. 648, 60 Pac. 434. In this case the court said: "It is the duty of the court, in the trial of a case before a jury, to confine the testimony to the issues, and to sustain objections to all proper questions asked by counsel, which would only tend to prejudice the jury against either party. Such questions are none the less erroneous because asked by the presiding judge. In fact, they would generally be much more injurious. We think the questions were improper, and the error such as must have injured the plaintiff's cause."

And, where the court, after the cross-examination, undertook the examination of a witness in the form generally of cross-examination 57 L. R. A.

questions, and commented upon the replies of the witness in the style of censures and upbraiding, indicating with painful distinctness that the judge regarded the witness as unworthy of belief, and did all these in the presence of the jury, it was held to be erroneous. *Barlow Bros. Co. v. Parsons*, 73 Conn. 698, 49 Atl. 205. In this case it was said: "It is undoubtedly within the authority of a trial judge to ask a question, or repeated questions, of a witness. Sometimes this might be desirable to call out some fact which the jury ought to know; and such judge may, perhaps, indicate his opinion as to the credibility of the evidence, so long as he leaves the question open to the jury. The credibility of any witness, as to the weight to be given to his testimony, is a matter wholly within the province of the jury. Any conduct by a trial judge in the examination of a witness, which in effect imposes upon the jury his own belief as to the credibility of that witness, is not justifiable. Such conduct would be a departure by the judge from his own proper sphere, and an invasion of the province of the jury. We are also of the opinion that, having asked these questions in the manner as shown, the judge should have carefully instructed the jury that any indication of his own opinion as to the credibility of Mr. Merriman was not binding on them. Nothing of that kind was said. There was manifest error."

And where a witness testified to the peaceful character of the defendant, and there was no evidence of the defendant having beaten his wife, and the judge asked the witness: "Have you not heard that defendant once beat his wife with a butcher's file?"—It was held that this question ought not to have been asked by the judge, because it probably produced the impression that he considered the defendant a bad man, as he intimated that he had heard about the defendant beating his wife; and because it intimated an opinion against the defendant. *Harris v. State*, 61 Ga. 359.

The ruling in this and the next case, taken in connection with the following case, indicates that the trial court in these two cases overstepped the line, by reason of the manner of the examination and the comments on the witness's evidence, showing bias and prejudice.

So where, in a criminal case, the vital issue of fact was whether or not the alleged crime was committed within the period of the statute of limitations, and the judge, while a witness for the state was on the stand, carried him through a rigid examination upon this point, eliciting from the witness answers which failed to establish the time when the crime was committed, the witness giving answers to the effect that it may or may not have been perpetrated within the period of the statute of limitations, it was held error for the judge, when the witness had finally brought the time within the statute, to remark within the hearing of the jury: "That is sufficient." *Hubbard v. State*, 108 Ga. 780, 33 S. E. 814. In this case the court said: "This, under the circumstances of the case, might be fairly construed as such an expression of opinion on the evidence as, under § 1032 of the Penal Code, imperatively requires the grant of a new trial."

So, where the court said to a witness: "How do you remember dates so well? You have a talent, a gift, that way;" and when another witness, Sam. Webb, was introduced, the court said: "The witness has not got the money that John Carr has. Do you know John Carr? He has a better recollection than you. Which is the elder man, you or he?" and again, when John Carr was recalled, the court said to him: "You have established a reputation for a good recollection, but you cannot tell the price of

wheat that year; you ought to keep that reputation up."—It was held that all these questions were out of order, the effect on the jury not being known. *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349. In this case the court said: "The court may often with great propriety ask questions of a witness on the stand for the purpose of bringing out the facts of the case, but should never indulge in remarks to witnesses, or in comments upon their testimony, which may either magnify or diminish its effect upon the jury as to credibility or value."

But in *Eppe v. State*, 19 Ga. 102, where the court took the examination of the witness out of the hands of the prosecuting attorney and examined him himself, it was held not to be erroneous. In this case the court said: "We know of no limit to the right which belongs to the court, of interrogating witnesses, either in civil or criminal cases, especially the latter. The life or death of a man may hang upon a full development of the truth. The presumption that this liberty will not be honorably and impartially exercised is not to be tolerated for a moment. When they see, therefore, that a material fact has been omitted, which ought to be brought out, it is not only the right, but the duty, of the presiding judge, to call the attention of the witness to it, whether it makes for or against the prosecution; his aim being neither to punish the innocent nor screen the guilty, but to administer the law correctly."

1. Objection and exception to action of trial court.

The weight of authority seems to be that objection and exception must be taken, at the time, to the action of the court in questioning witnesses, or the alleged error will not be reviewed. To this there are some exceptions.

In *Huffman v. Cauble*, 86 Ind. 591, the court asked a witness, in regard to a settlement, what were his intentions as to settling all accounts between him and the plaintiff. The objection to this was on the ground that there were plenty of lawyers to represent the plaintiff without the aid of the court, and that it tended to prejudice the defendant. It was held that this objection was properly overruled.

And where objections to questions of the court were not specific, it was held that they would not be considered on appeal. *Dunn v. People*, 172 Ill. 582, 60 N. E. 137. In this case the court said: "It is a task of great delicacy and much difficulty for a presiding judge to so conduct the examination of a witness that nothing, in either the tone or inflection of the voice, the play of the features, the manner of propounding or framing the question, or the course of investigation pursued in the examination, will indicate to the jury the trend of the mind of the questioner. An extended examination of a witness by the court must be unfair unless it partakes partly of the nature of a cross-examination, and though great skill and tact and perfect fairness be employed, there is much danger the impression or opinion of the court as to the truthfulness, candor, and reliability of the witness, and as to the weight and value of his testimony, will be manifested to the jury. . . . It is believed the instances are rare, and the conditions exceptional in a high degree, which will justify the presiding judge in entering upon and conducting an extended examination of a witness."

So, where the court propounded questions to a witness, but they were not embodied in the motion for a new trial, it was held that they would not be reviewed. *State v. Nickens*, 122 Mo. 607, 27 S. W. 389. In this case the court

said: "This contention, however, seems to be without merit. It would be, indeed, strange if the trial judge were not permitted to ask such question of witnesses during the trial as he thought necessary for his own information, or that of the jury, without being subject to unjust criticism. It was not only his right, but his duty, to do so."

Where it was claimed that a judge instructed a witness to "state all you heard and said," and this statement was denied by the court, it was held that the denial would have to be accepted as correct. *State v. Robinson*, 52 La. Ann. 616, 27 So. 124. In this case the court said: "There is force in the objection of the accused to the method of examination adopted, and it should not be followed. The declaration made by a judge, in his addendum to a bill of exceptions, that there was nothing in which any exceptions or objections could be leveled, is a mere conclusion by him as to matters which it is the object of the bill to have the appellate court itself determine."

But in *State v. Marshall*, 105 Iowa, 38, 74 N. W. 768, it was held that an attorney need not object to the examination of a witness by the court, but he may move to strike out the evidence immediately upon the conclusion of the judge's examination. In this case it was said: "The authorities are agreed that a judge may ask questions leading in character. . . . But in other respects his examination of a witness is subject to such legal objections as may be interposed when conducted by a party or his attorney."

In *State v. Crofts*, 22 Wash. 245, 60 Pac. 403, some leading questions were asked before an objection was made. The court discusses at length the delicate position in which attorneys are placed in making objection to the court in questioning a witness, and holds that, notwithstanding the rule that exceptions not made will not be considered on appeal, in a case where the judge places the attorney in such a position, the rule will be disregarded, and holds that an attorney is not compelled to prejudice his case by opposing the court in objecting to all the questions. It was further held that no exception is necessary where a constitutional right was invaded.

See *Sheets v. Bray*, 125 Ind. 33, 24 N. E. 357, *supra*, I.

2. Summary.

It may be said that the weight of authority is that the court has the discretionary power to call other witnesses to the stand, and examine them, or cause them to be examined, in the interest of truth and justice. Unquestionably, the court may ask questions in order that other questions may be understood by the witness, or that the witness may be understood. So, he may ask questions to keep the witness within bounds, or to draw the facts from a reluctant witness. He may suggest a change in the form of a question. The court may cross-examine witnesses if he does not show partiality, prejudice, or bias. As to leading questions, there is some doubt in permitting the trial court to do that which neither attorney is allowed to do, and there is a conflict of authority on this question. Any action of the court showing partiality, prejudice, or bias in any of these matters will be held erroneous, particularly unfavorable comments on answers by witnesses to questions put by the court. There are some cases that take the ground that in all these matters it is safer ground for the court to try the case as made by the parties or attorneys, and that it is dangerous for the court to take a hand in the proceedings on

account of its influence and the difficulty of refraining from showing favor or prejudice. For this reason, some cases suggest that on appeal it is not necessary to apply the rule that

exceptions not taken at the time to the action of the court will not be considered, but the weight of authority requires adherence to this rule. I. T.

NEBRASKA SUPREME COURT.

LINCOLN SAVINGS BANK & SAFE DEPOSIT COMPANY

v.

William G. MORRISON *et al.*

City of LINCOLN, Intervener, *Plff. in Err.*

(.....Neb.....)

- *1. Misappropriation of a trust fund does not entitle *cestui que trust*, merely as such, and for that reason alone, to a preference over general creditors of an insolvent trustee.
2. In order to obtain a preference, *cestui que trust* must show that the estate out of which he claims such preference has been increased to some extent by the misappropriation of the trust property, and he is entitled to a preference to the extent of such increase only.
3. Where a trustee mingles trust moneys with his own funds, *cestui que trust* is entitled to a charge upon the whole; and, so long as any portion of the mass into which the trust fund has entered remains in any form, it is subject to such charge, and may be followed and claimed.
4. The burden is upon *cestui que trust* to show that the trust money did in fact increase the estate out of which he seeks a preference, or is represented therein in some form. But it seems that where such money has gone into the general estate of a trustee who afterwards becomes insolvent, there is a presumption that it remains therein at his insolvency; and the courts will not say that it cannot be traced or has wholly disappeared, where the contrary may fairly be inferred.
5. It is presumed that moneys drawn out of a fund wherein the trustee has mingled his own money and that of *cestui que trust* are his own, and, so long as any portion of the fund so constituted remains, it may be followed, and the charge of *cestui que trust* thereon may be asserted.
6. But if the whole of such fund, or a greater portion thereof than that representing the trustee's own money, is used by an insolvent trustee in paying his debts, *cestui que trust* is not entitled to a preference over general creditors for the amount of his money so lost.
7. Property or assets of the insolvent trustee, acquired before, or with the proceeds of property held before, the trust money came into his hands, and not in any way mingled therewith, are not subject to any lien of claim in *cestui que trust*, and

*Headnotes by POUND, C.

NOTE.—As to preference of claim of *cestui que trust* to funds in hands of receiver, see also, in this series, Kimmel v. Dickson (S. D.) 25 L. R. A. 309, and Marquette Fire & W. Comrs. v. Wilkinson (Mich.) 44 L. R. A. 493.

As to preference of a claim against the as-

sets of the latter with respect thereto are those of a general creditor only.

8. A change in the form of a portion of a fund in which money of the trustee personally and of *cestui que trust* has been mingled is not necessarily a withdrawal of such portion. When the trustee retains such portion and dissipates the remainder, the portion retained in the altered form is taken to represent such fund, and may be claimed by *cestui que trust*.
9. Where a portion of a fund made up of trust money and of individual money of the trustee is invested, and a profit results, *cestui que trust*, in following the trust money into the investment, may claim such profits as the proceeds of the original fund upon which he had a charge,—at least to the extent of said charge upon the original fund.
10. *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, 60 N. W. 115, and *State v. Midland State Bank*, 52 Neb. 1, 71 N. W. 1011,—limited. *State v. Bank of Commerce*, 54 Neb. 725, 75 N. W. 28, and *Morrison v. Lincoln Sav. Bank & S. D. Co.* 57 Neb. 225, 77 N. W. 655,—adhered to.

(May 21, 1902.)

ERROR to the District Court for Lancaster County to review a judgment entered in the insolvency proceedings of the Lincoln Savings Bank & Safe Deposit Company, which denied a preference to intervener to payment of its claim out of the funds in the possession of the bank. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. Lambertson & Hall, for plaintiff in error:

The law in such a case as this is properly laid down in *State v. Midland State Bank*, 52 Neb. 1, 71 N. W. 1011, and *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, 60 N. W. 115.

All that is necessary for the city to do, in order to recover in this case, is to show that its money was loaned to the Lincoln Savings Bank by its treasurer, and that the Lincoln Savings Bank knew at the time it accepted this money that it belonged to the city of Lincoln, and that it had a large amount of property when it suspended.

Anheuser-Busch Brewing Assn. v. Morris, 36 Neb. 33, 53 N. W. 1037; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, 60 N. W. 115.

sets of an insolvent bank for a deposit creating a trust, see *Bruner v. First Nat. Bank* (Tenn.) 34 L. R. A. 532, and note; *Richardson v. New Orleans Debenture Redemption Co.* (C. C. App. 5th C.) 52 L. R. A. 67; and *Richardson v. Olivier* (C. C. App. 5th C.) 53 L. R. A. 113.

The duty of the bank when it received said funds from the treasurer of the city of Lincoln was to keep them inviolate, separate, and distinct; not to invest them in securities, nor to pay them out to the depositors of the bank, nor to use said funds in any form whatever, but to have them ready for the city of Lincoln whenever they were called for. Can it be possible that the rights of the municipality are no more sacred than those of the individual? In the one case the right of debtor and creditor is established, that of bank and depositor; in the other case the fiduciary relation of trustee and beneficiary; and the abuse of such a trust can confer no rights on the party abusing it, or upon those who claim any privity with him.

2 Story, Eq. Jur. § 1258; Snell, Principles of Equity, 155.

As the money was a trust fund and never belonged to the bank, its creditors can have no greater rights in and to said money than the bank.

Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 60, 20 L. ed. 699; *San Diego County v. California Nat. Bank*, 52 Fed. 62; *Massey v. Fisher*, 62 Fed. 959; *Farmers' & M. Nat. Bank v. King*, 57 Pa. 208, 98 Am. Dec. 215; *State ex rel. Anderson v. Thum* (Idaho) 55 Pac. 858; *First Nat. Bank v. Hummel*, 14 Colo. 259, 8 L. R. A. 788, 23 Pac. 986; *Foster v. Rincker*, 4 Wyo. 484, 35 Pac. 470; *Kimmel v. Dickson*, 5 S. D. 221, 25 L. R. A. 309, 58 N. W. 561; *Mechem*, Pub. Off. § 922; *Winslow v. Hurriman Iron Co.* (Tenn. Ch. App.) 42 S. W. 698; *Hubbard v. Alamo Irrigating & Mfg. Co.* 53 Kan. 637, 36 Pac. 1053, 39 Pac. 625; *Ryan v. Phillips*, 3 Kan. App. 704, 44 Pac. 909.

Messrs. A. S. Tibbetts and L. C. Burr for defendants in error.

Pound, C., filed the following opinion:

This is a petition in error prosecuted by the city of Lincoln, an intervener in a suit brought to wind up the Lincoln Savings Bank & Safe Deposit Company, other phases whereof have been before this court several times. The plaintiff in error by its petition in intervention sought a preference over general creditors for some \$5,000,—a balance of moneys of said city loaned to the bank upon certificate of deposit by the city treasurer in contravention of law, and with knowledge on the part of the bank officers as to whose moneys it was. It appeared from a stipulation of the parties and from the evidence adduced that on April 9, 1895, the city treasurer placed \$6,095.35 of the city's funds in the bank, taking a certificate of deposit therefor. Afterwards \$1,055.35 was paid on the certificate, and a new certificate was issued for \$5,000. After said deposit was made, the bank had on deposit, in all, about \$240,000, of which \$41,699.96 was on hand in cash. On December 16, 1895, the bank suspended. At that time the deposits had fallen to about \$150,000, or, to be precise, \$92,534.43 had been paid out to depositors between the time when the city's money had been placed in the bank and the

date of suspension. No money was loaned and no investments were made during this period, except that on April 16, 1895, the bank bought state warrants of the market value of \$36,750, using in payment therefor \$1,750 of the cash on hand, and \$35,000 borrowed of a bank in New York. The remainder of the cash on hand on April 9, 1895, and such moneys as accrued from collection or sale of paper already in the bank, it used in paying depositors and in running expenses. At the time the bank suspended there was but \$200 cash on hand. This sum had been pledged to secure sureties upon a supersedeas bond in a case wherein judgment had been rendered against the bank, and was afterwards applied upon such judgment. A receiver was appointed on January 22, 1896. When he took possession he received \$1,562.61 in cash, and "cash items" to the amount of \$239.07. He also received \$3,334.37 from sale of the warrants above referred to; such sum being the \$1,750 originally invested therein, and the profit after repaying the money borrowed to make the purchase. But it appears from the evidence that the cash and cash items which came into the hands of the receiver accrued from loans made by the bank, or from paper which it held, before the city's money was deposited therein. The district court, upon this testimony, found generally for the receiver, and dismissed the city's petition.

Under the rulings of this court in *Morrison v. Lincoln Sav. Bank & S. D. Co.* 57 Neb. 225, 77 N. W. 655, and *State v. Bank of Commerce*, 54 Neb. 725, 75 N. W. 28, several of the questions raised may be disposed of readily. But the former case does not of necessity involve the questions presented by the case at bar, nor were the facts such as to require an affirmance of *State v. Bank of Commerce*, 54 Neb. 725, 75 N. W. 28, while the latter case is vigorously assailed by counsel, and we are asked to overrule it, and to reaffirm the rule recognized in prior decisions. Ordinarily we should not feel justified in reviewing a question determined by two recent decisions of this court. Were it a mere matter of these two decisions, so long as we feel satisfied that they are sound, we should do no more than cite them, and proceed to apply them to this controversy. But in several prior cases (*State ex rel. Ladenburger v. State Bank*, 42 Neb. 896, 61 N. W. 252; *State v. Midland State Bank*, 52 Neb. 1, 71 N. W. 1011; and especially *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, 69 N. W. 115), this court had expressly or by strong implication recognized and adopted a different rule. The cases last cited are sought to be distinguished in *State v. Bank of Commerce*, 54 Neb. 725, 75 N. W. 28. Counsel have pointed out, however, that the attempt to distinguish the latter case from *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, 69 N. W. 115, is founded on an entire misapprehension of the facts there presented; and, in any event, the reasoning in these two cases and the authorities severally relied on therein cannot be reconciled. For this reason we think it expedient to state plainly that this court

no longer adheres to the extreme view as to the right of *cestui que trust* to be preferred on insolvency of the trustee, expressed in the cases of *State v. State Bank*, *State v. Midland State Bank*, and *Capital Nat. Bank v. Coldwater Nat. Bank*, but adheres to the position taken in *State v. Bank of Commerce*, 54 Neb. 725, 75 N. W. 28, and *Morrison v. Lincoln Sav. Bank & S. D. Co.* 57 Neb. 225, 77 N. W. 655, to set forth our reasons for rejecting the one view and adopting the other; and to state as clearly and definitely as we may the rules by which causes such as the one at bar are to be decided.

The origin of the rules now recognized with respect to following trust money which has been mingled with the personal funds of the trustee, or has passed into his general estate, is to be found in the opinion of Jessel, M. R., in *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696. Prior to that decision it was said that money had no earmark, and that when a trust fund, in the form of money, became mingled with the moneys of the trustee personally, it lost its identity and could not be traced. Since that vigorous and convincing judgment, the idea that money, as such, could not be traced, and that trust property lost its identity when turned into money and confused with the trustee's funds, has been abandoned completely. But the limits of the extension of the rights of *cestui que trust* with respect to the property of insolvent trustees, to which the decision in *Knatchbull v. Hallett* gave rise, were not perceived at first. All which that decision did was to wipe out the old dogma that money had no earmark, and to substitute the sensible rule that whenever trust property enters into a mass, to which the property of *cestui que trust* and that of the trustee have contributed, so long as the trust property remains in or forms a part of such mass, *cestui que trust* has a claim or charge thereon to that extent, and general creditors cannot take advantage of, or derive a benefit from, the increase in the assets due and traceable to misappropriation of the trust fund. Several courts in this country, however, went much further, and established a rule which, though generally abandoned or modified in the more recent authorities, is still adhered to in some quarters, and at one time had the support of the decisions of this court. *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214; *First Nat. Bank v. Hummel*, 14 Colo. 259, 8 L. R. A. 788, 23 Pac. 986; *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499; *Myers v. Clay Center Bd. of Edu.* 51 Kan. 87, 32 Pac. 658; *Evangelical Synod v. Schoenich*, 143 Mo. 652, 45 S. W. 647; *Tierman v. Security Bldg. & L. Asso. No. 2*, 152 Mo. 135, 53 S. W. 1072; *Independent District v. King*, 80 Iowa, 497, 45 N. W. 908; *Davenport Plow Co. v. Lamp*, 80 Iowa, 722, 45 N. W. 1049. The supreme court of Iowa has receded somewhat in *Eureka Dist. Twp. v. Farmers' Bank*, 88 Iowa, 194, 55 N. W. 342. And a divided court in Wisconsin has overturned *McLeod v. Evans*, 57 L. R. A.

66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214, which was itself the decision of a divided court. *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383. See also *Bircher v. Walther*, 163 Mo. 461, 63 S. W. 691. But this court, in *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, 69 N. W. 115, expressly refused to follow the latter case, and adhered to *McLeod v. Evans*. In the view of these authorities, if trust property has been misappropriated and has gone into the estate of the trustee, *cestui que trust* is to be preferred, and is to receive his money to the exclusion of general creditors. As the court put it in *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, 69 N. W. 115, the question is not one of identifying or claiming a sum actually deposited, but of compelling the insolvent to first restore the trust property, treating that as something which he had no power to commingle with other funds, but must keep whole and make up so long as he has any funds or property out of which to do so. Other cases do not go so far expressly, but reach the same result, either by holding that, if the insolvent trustee uses the whole fund to pay his debts, the effect is to increase his general estate, and create a charge thereon in favor of *cestui que trust*, or by ruling that, when the trust fund is once traced into the general property of the trustee, it is conclusively presumed to remain there. *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214; *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499; *Myers v. Clay Center Bd. of Edu.* 51 Kan. 87, 32 Pac. 658; *Independent District v. King*, 80 Iowa, 497, 45 N. W. 908.

We are not able to agree to the rule just stated in any of the forms which it has assumed. We are satisfied that the court did well when, in *State v. Bank of Commerce*, it withdrew its support therefrom, and took a position in accord with the great weight of recent authority. The court was in error in saying (54 Neb. 731, 75 N. W. 28) that the moneys which came into the hands of the receiver of the Capital National Bank on its insolvency were more than sufficient to meet the preferred claims established in *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, 69 N. W. 115, and its companion cases. Such sum was greater than the preferred claim established in any one suit, but the aggregate considerably exceeded it, and the record in each case showed that fact. Hence *State v. Bank of Commerce* is not reconcilable with prior decisions of the court, and must stand on its own foundation, which we think it may do safely. Not only is it in accord with the overwhelming majority of recent decisions upon this point, and with the general tendency to abandon or recede from *McLeod v. Evans* and the cases following that decision, but on principle is clearly right. Of express decisions in the last three years upon this very point, we may cite *Ellicott v. Kuhl*, 60 N. J. Eq. 333, 46 Atl. 945; *Collins v. Stewart*, 58 N. J. Eq. 392, 44 Atl. 467; *Collins v. Lewis*, 60 N. J. Eq. 488, 46 Atl. 1098; *Twohy Mercantile Co. v. Melbye*,

78 Minn. 357, 81 N. W. 20; *Beard v. Independent District*, 31 C. C. A. 562, 60 U. S. App. 372, 88 Fed. 375; *Robinson v. Woodward*, 20 Ky. L. Rep. 1142, 48 S. W. 1082; *Wulbern v. Timmons*, 55 S. C. 456, 33 S. E. 568; *Byrne v. McGrath*, 130 Cal. 316, 62 Pac. 559; *Shute v. Hinman*, 34 Or. 578, 47 L. R. A. 265, 56 Pac. 412, 58 Pac. 882; *Bircher v. Walther*, 163 Mo. 461, 63 S. W. 691. The cases and many others cited in *State v. Bank of Commerce*, 54 Neb. 725, 75 N. W. 28; and *Morrison v. Lincoln Sav. Bank & S. D. Co.* 57 Neb. 225, 77 N. W. 655, establish clearly that misappropriation of a trust fund does not entitle *cestui que trust*, merely as such, and for that reason alone, to a preference over general creditors of an insolvent trustee. So long as the trust property, in any shape or form, can be recognized, it belongs to *cestui que trust*. So long as it enters into any fund property, or mass of assets in any way, *cestui que trust* has a charge or lien, which he may enforce upon the whole. But if the trustee "destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of a trust." Wood, V. C., in *Frith v. Cartland*, 2 Hem. & M. 417. In such case, *cestui que trust* has no specific claim against any property or fund. He is merely a creditor of the trustee, and stands on the same basis as other creditors. The right to a preference is based on his ownership of some specific fund or assets, or on a claim or charge upon all the fund or assets, because his property is contained in, or has contributed to, them. In other words, to obtain a preference, *cestui que trust* must show that the estate out of which he claims such preference has been increased to some extent by the misappropriation of the trust property, and he is entitled to a preference to the extent of such increase only. This proposition in no way detracts from, and is but another way of stating, the general rule, announced in the cases cited, that, where a trustee mingles trust moneys with his own funds, *cestui que trust* is entitled to a charge upon the whole, and, so long as any portion of the mass into which the trust fund has entered remains in any form, it is subject to such charge, and may be followed and claimed. In *State v. Bank of Commerce* and *Morrison v. Lincoln Sav. Bank & S. D. Co.* it was held that the burden is upon *cestui que trust* to show that the trust money did in fact increase the estate out of which he seeks a preference, or is represented therein in some form. This is only to say that a plaintiff must prove his case. He claims a specific fund as his, or he claims a charge on the general mass of assets, and he must show the facts to justify his claim. But we think this should not be pushed too far. When it is once proved that trust money has gone into the general estate of a trustee who afterwards becomes insolvent, it would seem that we ought to presume, in the absence of other evidence, that it remains therein at his insolvency, and that we ought not to say it cannot be traced, or has wholly disappeared, 57 L. R. A.

where the contrary may fairly be inferred. *Sherwood v. Central Michigan Sav. Bank*, 103 Mich. 109, 61 N. W. 352; *Independent District v. King*, 80 Iowa, 498, 45 N. W. 908. In the case at bar the city showed that its money was put into, and became part of, the general fund of "cash on hand" in the bank. It appeared also that the receiver came into possession of cash or "cash items" amounting to some \$2,000. If these facts stood alone, we should feel obliged to allow the city a preference to the extent of what came into the receiver's hands when he took possession. *State v. Bank of Commerce*, 54 Neb. 725, 75 N. W. 28. But as the evidence stands, it is clearly proved that the cash and cash items taken over by the receiver do not represent the city's money in any form. The city's money entered into, and was part of, the \$41,000 cash on hand on April 9, 1895. The city had a charge on that fund for its money. Whatever moneys were drawn out of that fund and dissipated are presumed to be those of the bank. The portion that remains in the bank, in whatever form, is taken to be and represent the trust fund, and to be liable to be followed and claimed as such by the city. But if the whole of the cash on hand into which the city's money entered, or a greater portion thereof than that representing the bank's own money, was used in paying off other depositors or in running expenses, the city is not entitled to a preference over general creditors for the amount of its money so lost. *Morrison v. Lincoln Sav. Bank & S. D. Co.* 57 Neb. 225, 77 N. W. 655; *Cocin v. Gleason*, 105 N. Y. 256, 11 N. E. 504; *Collins v. Stewart*, 58 N. J. Eq. 392, 44 Atl. 467; *Ellicott v. Kuhl*, 60 N. J. Eq. 333, 46 Atl. 945.

All of the cash on hand after the city's money became mixed therein, with the exception of the \$1,750 used in the purchase of warrants, which will be considered presently, and the \$200 in the bank when it suspended, was used in paying debts and expenses. The \$200, as has been seen, was pledged to indemnify sureties on the bank's bond, was afterwards paid on the judgment superseded thereby, and never came into the receiver's control. In other words, except said sum of \$1,750, it was wholly dissipated. Although there are decisions to the effect that the mere fact of use of the money in the trustee's general business or in paying his debts is, in effect, an increase of the assets, and suffices to create a charge thereon, that position is entirely at variance with the principle by which such cases must be governed, and is repudiated by all the later authorities. *Spokane County v. First Nat. Bank*, 16 C. C. A. 81, 29 U. S. App. 707, 68 Fed. 979; *Metropolitan Nat. Bank v. Campbell Commission Co.* 77 Fed. 705; *Boone County Nat. Bank v. Latimer*. 67 Fed. 27; *Bircher v. Walther*, 163 Mo. 461, 63 S. W. 691. As the court said in *Spokane County v. First Nat. Bank*, 16 C. C. A. 81, 29 U. S. App. 707, 68 Fed. 979, "even if it is proven that the trust fund has been but recently disbursed, and has been used to pay debts that otherwise would be claims against

the estate, there would be manifest inequity in requiring that the money so paid out should be refunded out of the assets; for in so doing the general creditors, whose demands remain unpaid, are, in effect, contributing to the payment of the creditors whose demands have been extinguished by the trust fund." Moreover, in this case the money which came into the hands of the receiver when he was appointed was the proceeds of loans made before the city's money came into the bank. For reasons already stated, it must be manifest that property or assets of the insolvent trustee acquired before, or with the proceeds of property held before, the trust money came into his hands, and not in any way mingled therewith, are not subject to any lien or claim in *cestui que trust*, and that the rights of the latter with respect thereto are those of a general creditor only. *Eureka Dist. Twp. v. Farmers' Bank*, 88 Iowa, 194, 55 N. W. 342.

We come now to the money derived from sale of the warrants. It will be remembered that after the city's money came into the bank it bought the warrants, using \$1,750 of the moneys in which the funds of the city had been mixed, and \$35,000 borrowed on security of the warrants. The receiver contends that since there was over \$40,000 in cash in the bank at the time, of which but \$6,000 belonged to the city, it will be presumed that the \$1,750 was the bank's own money. Such would be the case, without doubt, had the bank withdrawn the money and dissipated it in some fashion. But it did not do this. It merely changed the form of a portion of the fund in which the city's money had been wrongfully mixed. After purchase of the warrants said fund was represented by the cash still in the bank, and by the bank's interest in the warrants. State warrants are readily convertible into cash. If the bank preferred to keep part of its cash fund as warrants, the identity of the fund was not changed. So long as any portion of the fund into which the city's money entered may be traced into money which came to the receiver, the city may assert the claim which it had upon the whole fund. The warrants were all that remained of that fund. In accordance with the presumption that whatever was retained and not dissipated was the city's money, and not the bank's, these warrants and their proceeds in the hands of the receiver represent money to which the city has a prior claim, and in which general creditors have no right to share. The city's right to follow the money does not fail because no one can say what part of the cash on hand in the bank went into the warrants. The city had a charge upon the whole in any form in which the bank might keep it. When all was wasted except the warrants, that charge remained upon them, because they were a part of that fund, though in an altered form. *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696; *Importers' & T. Nat. Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319; *Byrne v. McGrath*, 130 Cal. 318, 62 Pac. 559; *Farmers' & M. Nat. Bank v. King*, 57 57 L. R. A.

Pa. 202, 98 Am. Dec. 215; *Smith v. Combs*, 49 N. J. Eq. 420, 24 Atl. 9; *Third Nat. Bank v. Stillwater Gas Co.* 36 Minn. 75, 30 N. W. 440. We do not think this view of the transaction in question conflicts in any way with the holding of Bradley, J., in *Frelinghuysen v. Nugent*, 36 Fed. 229, followed in *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693, and *Peters v. Bain*, 133 U. S. 670, 33 L. ed. 696, 10 Sup. Ct. Rep. 354, and approved in *Morrison v. Lincoln Sav. Bank & S. D. Co.* 57 Neb. 225, 77 N. W. 655. In *Frelinghuysen v. Nugent* the cashier of a bank had wrongfully turned over large sums to a partnership engaged in manufacturing, under such circumstances as to make the latter constructive trustees. The evidence indicated that the money had been entirely dissipated, and there was nothing to show that the stock on hand represented the trust fund, or a fund with which it had been mixed in any form. On the contrary, it was clear that said stock had been bought recently on credit, and represented the debts of general creditors. But in the case at bar a portion of the fund into which the city's money entered is traced directly into the warrants, in which form that portion was held till the bank suspended. The warrants were a cash asset, and the money thus held was still fairly to be called a part of the cash fund. It was not made way with, and it came into the receiver's hands, on sale of the warrants, as the last remnant of the fund with which the city's money had been mixed. The city had a charge upon the warrants, as upon the fund with a portion whereof they were bought, for the full amount of its moneys contained in said fund. Hence its claim upon the proceeds is not limited to the \$1,750 which was used in buying them, but extends to the profit accruing therefrom, as well. The \$3,334.37 which came into the hands of the receiver upon sale of the warrants represents the cash fund in which the city's money was mixed, and the profits of an investment of that fund. The profits of trust money belong to *cestui que trust*, and we see no warrant for limiting recovery to the actual sum invested, especially where there is not enough, in any event, to satisfy the charge on the original fund. *Farmers' & T. Bank v. Kimball Milling Co.* 1 S. D. 388, 47 N. W. 402; *Brown v. Rickets*, 4 Johns. Ch. 303, 8 Am. Dec. 567; *Frank's Appeal*. 59 Pa. 190; *Butler v. Hicks*, 11 Smedes & M. 78. We therefore recommend that the order of the district court be reversed, and the cause remanded, with directions to enter a new order granting the city a preference to the extent of the proceeds of said warrants, namely, \$3,334.37.

Barnes and Oldham, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the order of the District Court is reversed, and the cause is remanded, with directions to enter an order granting the plaintiff in error a preference to the extent of \$3,334.37.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, *Plff. in Err.*,
v.

John E. SATTLER, Admr., etc., of Emanuel
Leveroni, Deceased.

(.....Neb.....)

- *1. A passenger on a railroad train does not lose his character as such by leaving his car at a regular station from motives of either business or curiosity, although he has not yet arrived at the terminus of his journey.
2. Where, however, the train in which the passenger is being transported is run upon a switch to allow the passage of another train, or is stopped at a place other than that used by the carrier for receiving and discharging passengers, and the stoppage is not for the purpose of allowing passengers to board the train or alight therefrom, one who leaves the train must usually assume all the ordinary risks incident to his action.
3. All passengers actually on the train, whether the same is moving or not, are passengers "being transported over the road," within the meaning of § 3, art. 1, chap. 72, of the Compiled Statutes; and passengers who have left the train at the express or implied invitation of the carrier, for any necessary purpose incident to their journey, are passengers being transported, within the meaning of said section.
4. Where a passenger leaves his car of his own volition, for some purpose of his own, not incident to the journey he is pursuing, and at a place not designed for the discharge of passengers, he cannot claim the protection of § 3, art. 1, chap. 72, of the Compiled Statutes, although the carrier may, under some exceptional circumstances, still owe him the duty imposed on it by the common law.
5. A through train between Denver and Chicago ran onto a side track at an intermediate station to allow the passage of another through train from the east. A through passenger left his car, crossed the main track of the road to the depot, and went to a pump for a drink of water. He filled his cup from the pump, but, before drinking, heard the whistle of the incoming train, and started on a rapid run to regain his car. From the pump the track over which the incoming train was approaching could be seen for about 100 feet, and three steps from the pump toward the track over which the train was approaching the track was visible for a mile or more. When the passenger reached the track the approaching train was about 50 feet distant from him, and running at a high rate of speed. The passenger attempted to pass in front of the train, and was struck by the engine and killed. *Held*, that under the circumstances he was not "a passenger being transported over the road," within the meaning of § 3, art. 1, chap. 72, of the Compiled Statutes,

*Headnotes by DUFFIE, C.

NOTE.—As to effect of passenger's temporarily leaving vehicle before completion of journey upon rights and liabilities of the parties, see *Finnegan v. Chicago, St. P. M. & O. R. Co.* (Minn.) 15 L. R. A. 399, and *note*; also *Conroy v. Chicago, St. P. M. & O. R. Co.* (Wis.) 38 L. R. A. 419.
57 L. R. A.

and the railroad was not liable for damages on account of his death, because of his own negligence.

(May 8, 1902.)

ERROR to the District Court for Cass County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed*.

The facts are stated in the Commissioner's opinion.

Messrs. M. A. Low, W. F. Evans, and Woolworth & McHugh, for plaintiff in error:

Deceased was guilty of gross recklessness. He failed to exercise the slightest care or caution, by reason of which he was struck and killed by the train.

Myers v. Baltimore & O. R. Co. 150 Pa. 386, 24 Atl. 747; *Rigler v. Charlotte, C. & A. R. Co.* 94 N. C. 604; *Belton v. Baxter*, 54 N. Y. 246, 13 Am. Rep. 578.

No obligation rested upon the plaintiff in error to provide a means to enable him to leave or return to the train at that station.

Frost v. Grand Trunk R. Co. 10 Allen, 387, 87 Am. Dec. 668; 2 Rorer, Railroads, pp. 1163, 1164; *DeKay v. Chicago, M. & St. P. R. Co.* 41 Minn. 178, 4 L. R. A. 632, 43 N. W. 182; *State v. Grand Trunk R. Co.* 58 Me. 176, 4 Am. Rep. 258.

The carrier was required to afford only a reasonable time for the passengers to alight from or get upon the train, and when that time expired the passengers took the risks and dangers in boarding or leaving the train.

State v. Grand Trunk R. Co. 58 Me. 176, 4 Am. Rep. 258; *Chaffee v. Old Colony R. Co.* 17 R. I. 658, 24 Atl. 141; *Chicago, B. & Q. R. Co. v. Yost*, 61 Neb. 530, 85 N. W. 561.

Section 3, chap. 72, Neb. Comp. Stat. 1899, upon which this instruction is founded, has no application to the case at bar. That statute applies only in cases brought against a railroad company, in which a passenger was injured "while being transported over its road."

If deceased was guilty of any negligence which caused or contributed to his death, even though it was not gross, this action cannot be maintained.

Lincoln v. Gillilan, 18 Neb. 114, 24 N. W. 444.

No person, by his own transgression, can create a cause of action in his own favor against another for not interfering. That to which a man consents, or causes by his own action, cannot be considered an injury for which he can recover damages. *Volenti non fit injuria*.

Richards v. Waupun, 59 Wis. 45, 17 N. W. 975; *Field, Damages*, § 126; *Weeks, Damnum Absque Injuria*, § 121; *Wharton, Legal Maxims*, p. 139.

Mr. Matthew Gering, for defendant in error:

The deceased was a passenger at the time he was killed, and did not lose his character as such in leaving the car.

Pennsylvania R. Co. v. Price, 96 Pa. 256; *Woolsey v. Chicago, B. & Q. R. Co.* 39 Neb. 798, 25 L. R. A. 79, 58 N. W. 444.

Where a person purchases a through ticket, he is a passenger during the entire journey, even though he leaves the train at an intermediate station, provided he does not leave the premises of the company.

Alabama G. S. R. Co. v. Coggins, 32 C. C. A. 1, 60 U. S. App. 140, 88 Fed. 456; *Dodge v. Boston & B. S. Co.* 148 Mass. 207, 2 L. R. A. 83, 19 N. E. 373; *Parsons v. New York C. & H. R. R. Co.* 113 N. Y. 355, 3 L. R. A. 683, 21 N. E. 145; *Hrebrik v. Carr*, 29 Fed. 300; *Keokuk Northern Line Packet Co. v. True*, 88 Ill. 608; *Atchison, T. & S. F. R. Co. v. Shean*, 18 Colo. 368, 20 L. R. A. 729, 33 Pac. 108; *Dice v. Willamette Transp. & Locks Co.* 8 Or. 60, 34 Am. Rep. 575; *Clussman v. Long Island R. Co.* 9 Hun, 618, 73 N. Y. 606; *Peniston v. Chicago, St. L. & N. O. R. Co.* 34 La. Ann. 777, 44 Am. Rep. 444; *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 568; *McKimble v. Boston & M. R. Co.* 141 Mass. 463, 5 N. E. 804; *Wandell v. Corbin*, 17 N. Y. S. R. 718, 1 N. Y. Supp. 795; *Louisville & N. R. Co. v. Keller*, 104 Ky. 768, 47 S. W. 1072; *Montgomery & W. P. R. Co. v. Boring*, 51 Ga. 582.

If the deceased had purchased a ticket at the depot of the defendant at Alvo, he would have become a passenger from the time he purchased the ticket and until he reached the car, although he might be compelled to cross a track in reaching the car.

Gaynor v. Old Colony & N. R. Co. 100 Mass. 208, 97 Am. Dec. 96; *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. New York C. & H. R. R. Co.* 84 N. Y. 241; *Jewett v. Klein*, 27 N. J. Eq. 550; *Baltimore & O. R. Co. v. State use of Hauer*, 60 Md. 449.

The railroad company is liable, whether negligent or not in managing its trains, unless the deceased was guilty of criminal negligence.

Comp. Stat. § 3, chap. 72; *Missouri P. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913; *Union P. R. Co. v. Porter*, 38 Neb. 235, 56 N. W. 808; *Chicago, B. & Q. R. Co. v. Landauer*, 39 Neb. 803, 58 N. W. 434; *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 449, 62 N. W. 887; *Chicago, B. & Q. R. Co. v. Hague*, 48 Neb. 97, 66 N. W. 1000; *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678, 79 N. W. 556; *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689, 55 L. R. A. 610, 82 N. W. 26.

The application of this statute is not restricted to the party injured, but extends to third parties who have suffered any pecuniary loss.

Omaha & R. Valley R. Co. v. Chollette, 41 Neb. 579, 59 N. W. 921; *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689, 55 L. R. A. 610, 82 N. W. 26.

The deceased was not guilty of gross or criminal negligence in crossing the track in the manner and under the circumstances which he did. It is not even contributory negligence for a passenger to fail to look

and listen for a train while crossing a track.

Atchison, T. & S. F. R. Co. v. Shean, 18 Colo. 368, 20 L. R. A. 729, 33 Pac. 108; *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. New York C. & H. R. R. Co.* 84 N. Y. 241; *Archer v. New York, N. H. & H. R. Co.* 106 N. Y. 589, 13 N. E. 318; *Klein v. Jewett*, 26 N. J. Eq. 474, 27 N. J. Eq. 550; *Baltimore & O. R. Co. v. State use of Hauer*, 60 Md. 449; *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 394, 45 L. R. A. 671, 42 Atl. 333; *Wheelock v. Boston & A. R. Co.* 105 Mass. 203; *Parsons v. New York C. & H. R. R. Co.* 113 N. Y. 355, 3 L. R. A. 683, 21 N. E. 145; *Pennsylvania R. Co. v. White*, 88 Pa. 327.

Every person who does an unlawful act carelessly or negligently, or a lawful act in a grossly careless and negligent manner, or who, through wanton or reckless conduct, or wilful misconduct or neglect, or gross want of skill and attention, or through wilful omission or neglect of duty, endangers, or causes to be endangered, the life or safety of another, is guilty of crime.

4 Am. & Eng. Enc. Law, p. 677; *Jewett v. Klein*, 27 N. J. Eq. 550; *Atchison, T. & S. F. R. Co. v. Shean*, 18 Colo. 368, 20 L. R. A. 729, 33 Pac. 108; *Chicago, B. & Q. R. Co. v. Hague*, 48 Neb. 99, 66 N. W. 1000; *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Neb. 162, 67 N. W. 8; *Omaha & R. Valley R. Co. v. Chollette*, 33 Neb. 146, 49 N. W. 1114.

The railroad company was guilty of negligence in managing the train that struck the deceased, and upon which he had taken passage.

Ray, Neg. 133; *Union P. R. Co. v. Sue*, 25 Neb. 777, 41 N. W. 801; *Gonzales v. New York & H. R. Co.* 38 N. Y. 440, 98 Am. Dec. 58; *McGee v. Missouri P. R. Co.* 92 Mo. 208, 4 S. W. 739; *Robostelli v. New York, N. H. & H. R. Co.* 33 Fed. 799; *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848, 861, 28 L. R. A. 824, 63 N. W. 51; *Missouri P. R. Co. v. Hansen*, 48 Neb. 232, 66 N. W. 1105; *Wabash R. Co. v. Henks*, 91 Ill. 412; *Chicago & A. R. Co. v. Engle*, 84 Ill. 399; *Omaha & F. Valley R. Co. v. Talbot*, 48 Neb. 628, 67 N. W. 599; *Missouri P. R. Co. v. Geist*, 49 Neb. 489, 68 N. W. 640; *Gulf, C. & S. F. R. Co. v. Morgan* (Tex. Civ. App.) 64 S. W. 688.

Duffie, C., filed the following opinion:

John P. Sattler, the defendant in error, is administrator of the estate of Emanuel Leveroni. The deceased was killed by a train of the railroad company at the station of Alvo, in Cass county, Nebraska, on the 11th of April, 1899. The jury returned a verdict against the company for \$4,000, upon which judgment was entered, and the company has brought the case to this court by petition in error.

There is little or no dispute over the facts in the case. Leveroni, the deceased, was a through passenger over the railway of the plaintiff in error from the city of Denver to Chicago. The train upon which he was traveling arrived at the station of Alvo

from the west on schedule time, at 2:52 in the afternoon. On its arrival at the station the train went upon a side track to await the arrival and passage of a west-bound train which was then due at that point; its schedule time being the same at that station as the train upon which the decedent was traveling. The train from the east was behind time, and, while the train upon which Leveroni was a passenger was waiting on the side track, Leveroni left his train, and crossed over the main track to the depot platform, and to a pump a few feet west of the depot, to get a drink of water. About the time that he reached the pump the west-bound train was heard to whistle, when Leveroni left the pump, and started on a run for his car, and, in crossing the track upon which the west-bound train was approaching the station, was struck by the approaching train and instantly killed. The east-bound train upon which he was a traveler did not move from the side track until after the deceased was killed, nor had any signal or order been given that said train would move or start. It might be further stated that the evidence is undisputed that there was plenty of good drinking water in the car upon which the deceased was a passenger, and in all the cars of that train.

Two questions are presented by this record for our determination: (1) Was the deceased a passenger, within the legal meaning of that word, after leaving his car while it was standing upon the side track for the purpose of allowing an approaching train to pass? (2) If he was such passenger, can his administrator claim for him or his estate the benefits of the provisions of § 3, art. 1, chap. 72, of the Compiled Statutes of 1901?

Relating to the first question, the courts may be said to be fairly divided. In Maine and Minnesota the rule appears to be that a passenger on a railway, who purchases a ticket for a distant station, and gets off the train temporarily, and without objection or notice, while it is stopping at an intermediate station, surrenders for the time being his place and rights as a passenger. *State v. Grand Trunk R. Co.* 58 Me. 176, 4 Am. Rep. 258; *De Kay v. Chicago, M. & St. P. R. Co.* 41 Minn. 178, 4 L. R. A. 632, 43 N. W. 182. See also *Missouri P. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. 326. In *De Kay v. Chicago, M. & St. P. R. Co.* the facts were very similar to the facts under consideration in the case at bar. The conclusion of the court upon these facts is well expressed in the syllabus of the case as follows: "Where a passenger enters a railway train, and pays his fare to a particular place, his contract does not obligate the company to furnish him with means of egress and ingress at an intermediate station; and, if he leaves the train at such a station, he, for the time being, surrenders his place as a passenger, and takes upon himself the responsibility of his own movements; but, if he leaves without objection on part of the company, he does no illegal act, and has a right to re-enter and resume

his journey. . . . While, if a railway company permits the practice of passengers leaving and re-entering their train while on a side track at an intermediate station for the purpose of letting another train pass on the main track, it is bound to use reasonable care not to expose such passengers to unnecessary danger, yet it is not bound to so regulate its business as to make the side track as safe a place of ingress or egress as the station platform; nor does it give any assurance, under such circumstances, to passengers, that no trains will pass while they are crossing or recrossing the main track. Neither does the call of 'All aboard!' by the conductor of the side-tracked train give an assurance to those who have left their train that they may cross the main track in safety without looking for approaching trains. Passengers who have thus left their train, when they attempt to cross the track, under these circumstances, are bound to exercise reasonable care and caution to avoid injury from passing trains, and must use their senses for that purpose. The station platform, and not the side track, is the proper place to enter or leave a train; and those who, for purposes of their own, use the latter, assume all the extra risks necessarily incident to such a practice, and are bound to exercise a degree of care corresponding to the increased risks." Another class of cases establishes the rule that a passenger on a railroad train does not lose his character as such by alighting from the cars at a regular station from motives of either business or curiosity, although he has not yet arrived at the terminus of his journey. *Parsons v. New York C. & H. R. R. Co.* 113 N. Y. 355, 3 L. R. A. 683, 21 N. E. 145; *Clusman v. Long Island R. Co.* 9 Hun, 618.

Of the two classes of cases which we have been examining, we think that the latter establishes the better rule. In this country of long journeys by railway trains, there can be no impropriety in a passenger claiming the right, which may be said to be established by long custom, to leave his car at any intermediate point on his journey, where a stop of any considerable time is made, to send a message, to obtain exercise and relief by walking up and down the platform, or to gratify his curiosity, provided he does not interfere with the employees of the company, or run counter to any established rule brought to his notice. In the exercise of this privilege he does not lose his character of passenger, and the common-law duties of the carrier are still to be exercised in his behalf, and injuries received on account of a failure on the part of the carrier to observe all its duties toward him required by the rules of the common law must be responded to in an action for damages. We think that the supreme court of Massachusetts has announced the true rule in *Dodge v. Boston & B. SS. Co.* 148 Mass. 207, 2 L. R. A. 83, 19 N. E. 373, where the following language is used: "To determine the rights of the parties in every case, the question to be answered is, What shall they be deemed to

have contemplated by their contract? The passenger, without losing his rights, while he is in those places to which the carrier's care should extend, may do whatever is naturally and ordinarily incidental to his passage. If there are telegraph offices at stations along a railroad, and the carrier furnishes in its cars blanks upon which to write telegraphic messages, and stops its trains at stations long enough to enable passengers conveniently to send such messages, a purchaser of a ticket over the railroad has a right to suppose that his contract permits him to leave his car at a station for the purpose of sending a telegraphic message; and he has the rights of a passenger while alighting from the train for that purpose, and while getting upon it to resume his journey. So if one who leaves a train to obtain refreshment, where it is reasonable and proper for him so to do, and is consistent with the safe continuance of his journey in a usual way. Where one engages transportation for himself by a conveyance which stops from time to time along his route, it may be well implied, in the absence of anything to the contrary, that he has permission to alight for his own convenience at any regular stopping place for passengers, so long as he properly regards all the carrier's rules and regulations, and provided that his doing so does not interfere with the carrier in the performance of his duties."

All the cases agree that the carrier must furnish safe ingress and egress to and from the train for its passengers. In many of the larger stations the passenger has to cross two or three or four tracks in going to or from his train. In such cases he may assume that the company will see that his way across such tracks is clear and uninterrupted, and that no injury will be incurred in crossing the same. In *Jewett v. Klein*, 27 N. J. Eq. 550, it is held that a person who, in passing from the depot to the train he was about to take, was obliged to cross an intervening track, was not guilty of contributory negligence, in that he did not, before approaching the train, look up or down the track to see whether there was danger from an approaching train, and in that he approached the train diagonally from the platform to the station, and before his train had come to a full stop. Referring to this case, the supreme court of Colorado, in *Atchison, T. & S. F. R. Co. v. Shean*, 18 Colo. 368, 20 L. R. A. 729, 33 Pac. 108, says: "By the foregoing and well-considered cases it is settled that a passenger on a railroad, while passing from the cars to the depot, is not required to exercise that degree of care in crossing a railroad track as is imposed upon other persons, and that he has the right to assume that the company will discharge its duty in making the way safe, and, relying on this assumption, may neglect precautions that are ordinarily imposed upon a person in holding that relation. And this distinction is to be taken into consideration in determining the propriety of his conduct."

We do not care to extend this rule to pas-

sengers who leave the train at an intermediate station at a place other than that used by the carrier for the ingress and egress of its passengers. One who leaves the train at a point not intended for the discharge of passengers, and while the train is standing for some other purpose, must himself assume all the ordinary risks incident to his action. The cases above cited differ from the case at bar in the fact that the passenger left or boarded the train at its regular stopping place, and at the point where passengers were regularly received and discharged.

In the case now under consideration no stop was made to receive or discharge passengers. The train was not run to the depot platform, but was side-tracked to allow the passage of the west-bound train. It is probably true that parties who desired either to board or leave the train at Alvo, and who were aware of the custom of the train to side-track at that point to allow the west-bound train to pass, took advantage of the opportunity thus offered to take passage on the train, or to leave it while standing on the side track; but no inducement to do this was extended by the company, as the evidence discloses that it refused to sell tickets to passengers who desired to take this train at that station. Those on the train must have known that the stop upon the side track was not for the purpose of receiving or discharging passengers, and those who left the train without any express or implied invitation so to do on the part of the company, and without some known reason requiring them to do so, should, in all reason, assume the natural and ordinary risks of their own voluntary action.

A part of the fourth instruction of the court expresses so clearly our views upon this question that we insert it here: "If you find from the evidence that when the said Emanuel Leveroni left his car while standing on the side track at Alvo, Nebraska, he did so without the invitation of the defendant, either express or implied, and not for the purpose of attending to any personal want of his own, usually incident to a through passenger, nor made necessary by the manner in which the defendant's train was operated, then it was his duty, while absent from said train, to exercise ordinary care to avoid any injury to himself; and if you find from the evidence that while so absent from his car he failed to exercise ordinary care, and was injured through his failure so to do, then the defendant would not be liable."

Having now defined what we believe to be the rights of a passenger at common law, we will proceed to examine our statute relating to injuries received by passengers while being transported over a railway, and the questions discussed in the briefs of counsel in the light of that statute.

Section 3, art. 1, chap. 72, of our Compiled Statutes, is as follows: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the persons of passengers while being transported over its

road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." In *Chicago, B. & Q. R. Co. v. Landauer*, 39 Neb. 803, 58 N. W. 434, it was held that this statute made a common carrier an insurer of the safety of its passengers, except as against the gross negligence of the passenger, or his violation of some rule of the carrier brought to his notice; but up to this time this court has not been called on to determine the particular persons or class of persons taking passage with a railroad company who were intended by the legislature to be included in the phrase "passengers being transported over its road." The plaintiff in error insists that the statute was not intended to cover all cases of injuries to passengers, and its position on this question cannot be more clearly or briefly stated than by quoting from its reply brief: "Although no one but passengers can be brought within the section, yet it is not designed to cover injuries to all passengers. By express provision, as clear and positive language will permit, the section carved out of the general body of passengers of a company the particular class thereof to which it applies. 'Every railroad shall be liable for all damages inflicted upon the person of passengers' (so reads the section) 'while being transported over its road.' The liability imposed by this section with respect to injuries to passengers extends only to those injuries which passengers receive while such passengers 'are being transported over its road.' The clause 'while being transported over its road' is a clear limitation modifying the general word 'passenger' in the section. Therefore, to bring a case within this section, it must be shown that when the injury was received by a person he was not only a passenger, but that at the time of the injury he was, as such passenger, 'being transported over the line of the railroad company.' There is, of course, a manifest reason for this qualifying clause. The purpose of the act was to relieve the passenger injured 'while being transported over the line of the company' from the necessity of specifically proving the act of negligence which caused the injury. The passenger who buys a ticket and takes his seat upon the train may know that the court will presume that any injury which he receives on account of the operation or management of the train will be presumed to be attributable to negligence on the part of the railroad company. The train and all agencies connected with its management belong to the railroad company. All knowledge with respect to the cause of injuries resulting from the operation or management of the train is known to the company, but these causes may be difficult for an injured person to ascertain. The section was designed to relieve the passenger so injured from the necessity of proving the specific act of negligence. The manifest reason for the adoption

57 L. R. A.

of this section shows the purpose of the insertion of its provision, 'while being transported over its road.' After a person leaves the train provided for his transportation, then whatever dangers he encounters are dangers not connected with the operation and management of his train; and, if he is injured, he must prove negligence, and recover, if at all, upon the common-law liability. While riding upon the train provided for his transportation, he may not be able to learn the cause of an injury so received, due to the operation and management of the train. Therefore, as was said, this section was provided to relieve him of the necessity of proving such facts. But when the passenger leaves the train provided for his transportation, and is injured by reason of dangers entirely disconnected from the operation and management of his train, then there will be no difficulty in his ascertaining the cause of his injury, and in alleging and proving it in case of suit. Therefore the legislature did not intend that the presumption of negligence provided by the section should apply to such a case; and, to make the meaning clear, the legislature expressly made the section apply, not to injuries to all passengers, but to injuries received by passengers 'while being transported over the road of the company.' The legislature having expressly limited the operation of the statute to the cases of injury received by passengers 'while being transported over the road of a company,' this court cannot obliterate the qualifying clause referred to. This court, in construing this statute, must give effect to every provision thereof. When the legislature expressly limited this section to cases of liability for injuries to those passengers only who were injured 'while being transported over the road of a company,' this court has no power or authority, nor will it have any inclination, to nullify the express will of the legislature, and to extend this section to cases which the legislature expressly excluded from its effect."

We are agreed that the words "while being transported over its road" is a qualifying phrase, intended to limit liability on the part of the company, and that we must give it the force intended by the legislature. We cannot, however, agree with the plaintiff in error that it was intended to exclude all passengers who leave the car provided for them by the carrier. It is well known that many—perhaps most—roads provide eating houses and other accommodations for the comfort or convenience of their patrons, and that regular stops are made for meals, requiring the passengers to leave the car in which they are being transported, and often to cross numerous tracks on their way to and from the car to the dining room or restaurant. In such cases one does not lose his character as a passenger in the course of transportation over the road, or the protection of the statute. The duty of the company to provide him safe egress and ingress for such necessities as are required on his journey, and which the road assumes to furnish, and which it invites him to

partake of, is no less stringent than to furnish him safe passage on its cars. While seated in the dining room of the company he is under its control, and must conform to its rules, as fully as while on the train; and, while thus subject to the rules and regulations of the company, he is their passenger, entitled to like protection from damage from the operating of the road as while seated in the car, proceeding on his journey. We believe and hold that it was intended to include in the words "while being transported over its road" all passengers actually on the train, whether the same is in motion or standing on any part of the road; and it further includes those passengers leaving the train for any necessary purpose incident to their journey, such as a change of cars, or to procure refreshments at any point where the same is furnished by the company, and where an express or implied invitation is extended to the passengers to leave the car for that purpose. Where, however, the passenger leaves the car for some purpose of his own, not incident to the journey he is pursuing, and at a place not designed for the discharge of passengers, he cannot claim the benefit of this statute, although the company may in such cases, under certain conditions, owe him the duty imposed on carriers by the common law. *Parsons v. New York C. & H. R. R. Co.* 113 N. Y. 355, 3 L. R. A. 683, 21 N. E. 145; *Gulf, C. & S. F. R. Co. v. Morgan* (Tex. Civ. App.) 64 S. W. 688. The only evidence offered by the company was that of one witness to show that there was plenty of good drinking water in the car in which the deceased was being carried. All of the testimony relating to the circumstances attending the killing of Leveroni came from the witnesses of the plaintiff below. These witnesses all testify that they distinctly heard the whistle of the train approaching from the east. Most of them testify that they saw Leveroni at the pump. One (a Mrs. Brown, a passenger sitting in the car) says that she saw him ascending the steps of the depot platform with a cup in his hand. All who saw him at the pump say that he filled his cup, but that, before he had time to drink, the whistle of the approaching train was heard; that Leveroni thereupon dropped the cup, and ran in a rapid manner for his train. Mrs. Brown relates what occurred as follows: "He went from the steps to the pump, and pumped water into a tin cup which he had. He dropped it. The whistle blew. That is the first warning he had, I am confident." He left the train of his own volition while standing on the side track, and for a wholly unnecessary purpose. In so doing he abandoned the protection of the statute. The witnesses agree that from the pump the railway track can be seen for the distance of 100 feet toward the northeast, from which direction the train was approaching. By taking three steps from the pump toward the main line of the road, the view is unobstructed for a mile or more, and the approaching train could have been seen for that distance. 57 L. R. A.

When Leveroni reached the track, running rapidly to reach his car, the train was about 50 feet away, and running at a high rate of speed. The evidence is convincing that Leveroni heard the whistle of the approaching train. It was that which caused him to drop his cup, and to run hurriedly to reach his car. He attempted to cross the track in a diagonal course, running partly in the same direction with the approaching train. This, however, is no reason why he should not turn his head to ascertain the position of the train, and whether it was safe to attempt to cross ahead of it. As we have seen, Leveroni was not, under the circumstances, "a passenger being transported over the road," within the meaning of the above-quoted statute. His case must therefore be determined by the rules of the common law, in accordance with which he must be held to suffer the consequences of his own carelessness and negligence. With full knowledge, or full opportunity for knowing the danger, he left a place of safety on the platform of the depot, and ran to his death.

We know of no rule of law that allows a recovery under such circumstances, and we recommend that the judgment of the district court be reversed, and the case remanded for further proceedings according to law.

Albert and Ames, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and the case remanded for further proceedings according to law.

Daniel W. ILER, Captain of Police, *Plff.*
in *Err.*,
v.

Charles ROSS *et al.*

(.....Neb.....)

*1. Under the provisions of the charter act governing cities of the metropolitan class, the authorities thereof, for the purpose of protecting and preserving the public health, comfort, and welfare, are empowered to enact by ordinance all necessary and reasonable regulations for the collection and

*Headnotes by HOLCOMB, J.

NOTE.—For other cases in this series as to monopoly in contract for removal of garbage, see *Smiley v. MacDonald* (Neb.) 27 L. R. A. 541, and *note*; *Walker v. Jameson* (Ind.) 28 L. R. A. 679; *Schoen Bros. v. Atlanta* (Ga.) 33 L. R. A. 804; *State v. Orr* (Conn.) 34 L. R. A. 279; and *State v. Hill* (N. C.) 50 L. R. A. 473.

As to power of municipality to regulate removal of garbage generally, see cases in *note* to *Hagerstown v. Witmer* (Md.) 39 L. R. A. 653.

As to municipal power over nuisances affecting safety, health, and personal comfort, including cases as to collection and removal of garbage, see *note* to *Harrington v. Providence* (R. I.) 38 L. R. A. 305.

removal of all garbage, filth, and other noxious and unwholesome substances, ashes, stable manure, rubbish, and other waste and refuse matter accumulating in centers of population, and which, without such regulations, would become nuisances, menacing to the comfort and health of the inhabitants of such cities, and to license persons engaged in such occupation or business.

2. Such cities may also, as incident to the power of regulation, grant an exclusive privilege by contract to one person to collect and remove, under its own immediate direction and control, and in pursuance of regulations enacted for that purpose, those noxious and unwholesome substances which are nuisances *per se*, and a menace to the public health.
3. The legislature cannot, under the guise of police regulation, arbitrarily invade private property or personal rights. The test when such regulations are called in question is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained.
4. It is not competent for the city, as a police regulation, to grant a monopoly to one individual, by contract, to enter upon the private premises of the inhabitants of the city, and at their expense collect and remove those innoxious substances, such as ashes, clinders, stable manure, or other substances not in themselves nuisances, but which, if allowed to accumulate in unreasonable quantities, would become such, or which may be utilized for some beneficial purpose. Such an attempted exercise of power is in excess of the authority granted by the charter, an invasion of the personal and property rights of the citizens, in restraint of trade, and unnecessarily creates a monopoly.
5. The section of the ordinance of the city of Omaha now under consideration held void and unenforceable, because an attempted exercise of power in excess of the authority conferred by the charter governing such city.

(May 21, 1902.)

ERROR to the District Court for Douglas County to review a judgment in favor of petitioners in a habeas corpus proceeding to obtain their release from custody to which they had been committed for a violation of an ordinance of the city of Omaha. *Affirmed.*

The facts are stated in the opinion.

Messrs. **W. H. Thompson** and **W. J. Connell**, for plaintiff in error:

The right to grant an exclusive contract and privilege, which necessarily includes the right to deny the privilege to another, has been fully settled by the decisions of this court.

Grand Rapids v. De Vries, 123 Mich. 570, 82 N. W. 269; *Smiley v. MacDonald*, 42 Neb. 5, 27 L. R. A. 540, 60 N. W. 355; *Coombs v. MacDonald*, 43 Neb. 632, 62 N. W. 41.

A nuisance of the kind dealt with by this ordinance may be summarily abated.

Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Manhattan Mfg. & Fertilizing Co. v. Van Keuren*, 23 N. J. Eq. 251.

57 L. R. A.

The annotator in 27 L. R. A., referring to the case of *Smiley v. MacDonald*, reported at page 540 of that volume, says: "*Smiley v. MacDonald*, 42 Neb. 5, 27 L. R. A. 540, 60 N. W. 355, appears to represent the rule upon the subject so far as it has been established by the reported decisions, while *Re Lowe*, 54 Kan. 757, 27 L. R. A. 545, 39 Pac. 710, seems to stand alone in so far as it holds that the regulations for the removal of garbage and filth from a city must leave a way open to every person who will comply with the ordinance to engage at least in so much of the business of scavengers as relates to entering on private property and removing filth and garbage therefrom."

Boehm v. Baltimore, 61 Md. 259; *Walker v. Jameson*, 140 Ind. 591, 28 L. R. A. 679, 37 N. E. 402, 39 N. E. 869; *Ex parte Casinello*, 62 Cal. 538; *People v. Gordon*, 81 Mich. 306, 45 N. W. 658; *River Rendering Co. v. Behr*, 7 Mo. App. 345; *Alpers v. San Francisco*, 32 Fed. 503; *Louisville v. Wible*, 84 Ky. 290, 1 S. W. 605; *Sanitary Reduction Works v. California Reduction Co.* 94 Fed. 693; *Kilvington v. Superior*, 83 Wis. 222, 18 L. R. A. 45, 53 N. W. 487.

Mr. I. J. Dunn for defendants in error.

Holcomb, J., delivered the opinion of the court:

The defendants in error, relators in the court below, sued out a writ of habeas corpus for the purpose of regaining their liberty from imprisonment in the city jail, where they were committed for the alleged violation of one of the ordinances of the city of Omaha; it being alleged as a ground for the issuance of the writ, and contended at the trial, that the section of the ordinance authorizing their conviction and imprisonment was null and void, and their detention, therefore, unlawful. A trial in the district court resulted in a judgment holding the section of the city ordinance under which the conviction was had void, and discharging the relators from custody. The respondent, as custodian of the prisoners under the commitment issue on conviction in the criminal trial, prosecutes error proceedings in this court for the purpose of obtaining a reversal of the judgment discharging the relators from custody. The question determined in the lower court, and the only one of a substantial character involved in the controversy, is with relation to the validity of an ordinance numbered 4462, of the city of Omaha, entitled "An Ordinance Regulating the Collection and Removal of Dead Animals, Garbage, Manure, Ashes, Filth, Offal, Night Soil and Other Refuse Matter, Providing Penalties for the Violation of the Provisions Hereof, and Repealing Ordinances Numbered 3735, 3869, 4008, and 4080." Section 1 of said ordinance, which is the one directly bearing on the subject, and which it is contended is void, provides that any person who shall collect or remove any dead animals, garbage, ashes, filth, offal, night soil, or other refuse matter within the corporate limits of the city of Omaha, not having a contract with said city so to do,

shall be deemed guilty of misdemeanor, and upon conviction thereof shall be fined in any sum not less than \$5 nor more than \$20. The relators were charged and convicted of unlawfully collecting and removing garbage, ashes, filth, and other refuse matter without having a contract with the city, contrary to the provisions of said § 1. The object of the ordinance, which is rendered obvious from a reading of the whole of it, is to empower the city to enter into an exclusive contract with some individual, association, or corporation to collect and remove within the corporate limits of the city all of the substances, materials, and objects mentioned in § 1, which, if allowed to accumulate in a city, would become a nuisance; to provide maximum charges therefor, to be paid by the owner or occupant of the premises from which removed; to regulate the collection and removal; and to punish anyone engaging in such business without having a contract with the city therefor. If the city is empowered to enact an ordinance providing that a contract shall first be entered into with it before any person is authorized to do any of the things prohibited, it follows as a legal sequence that the city may grant an exclusive right to one individual with whom it may enter into a contract and refuse to contract with all others; that is, if it is authorized to contract at all, it may lawfully contract with one or more, as may best suit its own views as to the propriety, necessity, and terms upon which it will enter into such contractual relation with another. Over the objections of the city, and for the purpose of showing the city was incapacitated from contracting with the relators, there was offered at the trial of the cause in the court below and received in evidence a contract with one McDonald, giving to him the exclusive right to collect and remove within the corporate limits all of the things mentioned in § 1 of the ordinance. Aside, however, from this evidence, we regard it as altogether clear that, if the section of the ordinance mentioned is sustained as valid, it must be done on the theory that the city may lawfully provide by exclusive contract for one contractor alone to engage in the business of collecting and removing the garbage and other waste matter mentioned in the ordinance, and to exclude all others from such business by suitable penalties for a violation of the provisions of the act. In fact, counsel for plaintiff in error fairly and frankly meets the issue in his brief by asserting: "The right to grant an exclusive contract and privilege, which necessarily includes the right to deny the privilege to another, has been fully settled by the decisions of this court." The issue is thus directly presented as to the validity of the section of the ordinance under the provisions of which the relators were arrested, tried, convicted, and sentenced to imprisonment for its violation, the relators contending that such ordinance is void, as being an unwarranted invasion of private property rights in restraint of trade, creating a monopoly, and

contrary to a sound public policy; while respondent maintains that it is a lawful exercise of the police powers invested in the city by its charter for the protection of the health of the inhabitants of the city, and to preserve and promote the public comfort and welfare.

This is the only issue adjudicated in the trial court, and as it involves the substantial merits of the controversy, and goes to the very core of the subject of the litigation, we are disposed to confine ourselves in the consideration of the cause to this question alone, to the exclusion of all collateral matters. The only exception contained in § 1 as to the right of any person save the contractor therein provided for to remove any of the substances spoken of is a proviso that the act shall not apply to anyone hauling their own stable manure from their own premises with their own team or teams, and also a proviso regarding the use of manure for lawns, gardens, etc., under certain regulations, not necessary to mention. By § 11 the word "garbage," as used in the act, is defined to mean all refuse matter, animal or vegetable. It will thus be observed that the act is most sweeping in its character, and in effect, if valid, prohibits any resident of the city himself, or by the employment of another, from undertaking the collection or removal of any or either of the substances mentioned from his own premises, save the one exception noted as to the removal of stable manure by the owner or occupant from his own premises with his own team. All waste material, all accumulation of rubbish of whatsoever character, which, in time, if allowed to accumulate in large quantities, would doubtless become a nuisance, to abate which the city might employ any lawful means, can be collected and removed only by the contractor of the city at the expense of the private owner or occupant of the premises, at charges not exceeding the maximum rate allowed by the ordinance. Can such sweeping powers be justified as a valid exercise of the police powers of the city under its charter authority? By § 54 of the city charter act the corporation is empowered "to make and enforce all police regulations for the good government, general welfare, health, safety, and security of the city and the citizens thereof in addition to the police powers expressly granted herein and in the exercise of the police power may pass all needful and proper ordinances" (Comp. Stat. 1901, p. 148), with provisions for penalties for violations of ordinances enacted under the provisions of said section. The right of a city, under charter acts such as the one we have quoted, to make all needful rules and regulations for the proper collection and removal of all forms of rubbish, waste, and other refuse matter constantly accumulating in cities and towns, where the population is centered in a small territory, in order to protect the health of the inhabitants and preserve the public welfare, to provide the manner, method of collecting such material, and character of the vehicles in which the same

shall be removed, and the place of depositing such refuse matter so as not to endanger the public health, and to license those engaging in such industry or business, seems so plain a proposition as to scarcely require elucidation or discussion, and is one on which the text writers and the utterances of all the courts are in entire harmony. Such regulation was clearly contemplated by the legislature in the enactment of the statute quoted from, and to that extent, at least, there is left no room for doubt or difference of opinion. *People v. Gordon*, 81 Mich. 306, 45 N. W. 658; *Ouray v. Corson*, 14 Colo. App. 345, 59 Pac. 876; *Vandine, Petitioner*, 6 Pick. 187, 17 Am. Dec. 351; *Boehm v. Baltimore*, 61 Md. 259. In the last case cited it is said in the opinion: "The validity of these ordinances was not seriously questioned in argument. That they are a lawful and proper exercise of the power 'to preserve the health of the city and to prevent and remove nuisances' does not admit of doubt. Such powers have been universally granted to municipal corporations in this country. In fact, the preservation of the health and safety of the inhabitants is one of the chief purposes of local government, and reasonable by-laws in relation thereto have always been sustained in England as within the incidental authority of such corporations."

In this jurisdiction we are committed to the doctrine, from which we do not believe it wise to recede, although the authorities are divided, that as to those substances which are in themselves nuisances, and for the protection of the public health require speedy and prompt abatement and removal by the city, or someone by it authorized to perform the work, the exercise of the power is in its nature a public function, to be engaged in by the city in its own behalf or by the employment of such agencies as will best accomplish the desired result, and that regarding such matters the granting of an exclusive privilege by the city to one individual for the removal of such unwholesome substances is not an unlawful exercise of power, nor does it conflict with the principle of law opposed to the creation of monopolies or an invasion of personal rights. The power thus exercised is incidental to the right to prevent and abate nuisances for the better protection of the health of the inhabitants of the city, and to accomplish the desired result the corporation may adopt the method of acting through its own agencies, or one of its own choosing, and directly under its own direction and control. *Smiley v. MacDonald*, 42 Neb. 5, 27 L. R. A. 540, 60 N. W. 355, which is relied on by the city in the case at bar to sustain the ordinance under consideration. In that case, after quoting from the charter provisions as then existing, which it is to be noted are materially different from those of the present charter, it is said in the opinion: "It requires no argument to prove that the subject of the contract before us is within the strict letter of these provisions of the charter. . . . But the removal of the nox-

ious and unwholesome matter mentioned in the contract tends directly to promote the public health, comfort, and welfare, and is therefore a proper exercise of the police power." It is further held in the opinion that the fact of conferring an exclusive privilege was, as the case was presented, immaterial; that the power conferred by the charter on the city implied the right of the city to determine the means and agencies best adapted to the end in view. The ordinance then under consideration was not by any means of such sweeping character as the one under consideration in the present case. Many rights there reserved to the property owner and occupant as to the disposition of rubbish, *débris*, and other waste material are by the latter ordinance entirely swept away. As that case was presented and determined, we think it goes no further than to hold that the noxious and unwholesome substances, such as dead animals not killed for food, garbage in the strict sense of the word, and probably other substances which are nuisances *per se* might lawfully be removed by the city, in its exercise of lawful authority, for the protection and preservation of the health, comfort, and welfare of the inhabitants, or the same end might be accomplished by creating an exclusive agency under the direct control of its own officers to perform the work necessary for such result. This is also the extent of the decision in the Michigan supreme court in the case of *Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269, also relied on in support of the contention of the respondent. In the case last cited was involved the question of the authority of the city, in the exercise of its police powers, to grant an exclusive license for the removal of garbage only. Under the ordinance then under consideration, "garbage," as used therein, was defined to mean the refuse accumulation of animal or vegetable matter, liquid or otherwise, attending the preparation, use, cooking, dealing in, or storing meat, fish, fowl, fruit, or vegetable. The court held this to mean such refuse and discarded matter of the kinds mentioned which in fact had been discarded and rejected as of no further use for any beneficial purpose for food of any kind, and that, when so considered, the substances were and should be regarded as in themselves nuisances, for the removal and abatement of which the city could lawfully, by ordinance, grant an exclusive license to one individual as an exercise of the police power for the benefit of the public health. It is also held that the granting of an exclusive license to remove such unwholesome matter is not in restraint of trade, such removal not being a business, trade, or occupation within the meaning of the word when used in stating the principle invoked for the purpose of having the ordinance declared void as being in restraint of trade.

The principle on which rests the right of a city to grant an exclusive privilege to collect and remove those noxious and unwholesome substances which menace the public health and endanger the welfare of the citi-

zens seems to be that not only the prevention and abatement of those accumulations of substances which are in themselves nuisances, and dangerous to the health of a community, is necessary and essential for the preservation of health, but also because of their unwholesome and noxious character the proper and safe removal and disposition of such substances must, for the benefit of the public welfare, be in such manner and methods, at such times, and over such particular routes of travel as will best subserve the public interests, and that this may best be accomplished when such removal is under the direct control and immediate supervision of the city authorities, or with an agency of its own selection, with whom it may contract for such purpose. It is as necessary that the abatement or removal of the nuisance shall be accomplished speedily, in a particular manner, and by certain fixed agencies, ever ready to act, and at all times under the control of the municipality, as it is that such nuisance shall not be permitted to exist in the first instance. It would, therefore, seem that as to those things which are calculated to menace the public health if not properly and in a particular manner disposed of, and are in their nature regarded as nuisances within themselves, it is within the power of a city, for the benefit of the public health, and as a police regulation, not only to provide for the removal of such substances, but also, and as incident of the power of regulation, to grant an exclusive privilege to an individual or corporation by contract entered into for that purpose to perform the work of removal in such manner and methods as will best accomplish the desired result. It appears reasonably clear that such results can be obtained more satisfactorily and with less danger and inconvenience to the health and comfort of the inhabitants by the employment of one who shall at all times be subject to the control and direction of the city, and be held directly responsible to it for any failure to perform in the proper manner and promptly all that shall be necessary to effectuate the desired object. What may be termed for convenience the "dead animal contract cases" illustrate the principle and the reasons therefor most forcibly. In *River Rendering Co. v. Behr*, 7 Mo. App. 345, it is held that a city ordinance is valid, when passed as a sanitary police regulation, granting the exclusive right to remove the carcasses of dead animals from the streets. It is said in the opinion: "The municipal legislature is especially charged with the preservation of the public health. That high duty lies in prevention, rather than cure. It would be poorly discharged, or not discharged at all, if the surest and most well-known precautionary measures were not thoroughly put in practice against the introduction of disease. In a populous city, where large numbers of animals die every day, it is of the first importance that their carcasses be speedily removed from the centers of human habitation. The city authorities would be grossly derelict if they left

the chances of removal to be determined by the owners of the animals or by the enterprise of possible purchasers. They are in duty bound to appoint special agencies for the purpose, and to render performance certain by whatever means their best judgment may suggest. If they find that this certainty can be secured only by confining the agency to a single person or corporation upon terms of responsibility for a failure to perform, it is their duty and their privilege to so secure it. The agency so appointed is rather the instrument in the hands of the municipal authorities for the fulfillment of a public duty than the beneficiary of an exclusive privilege." Says Mr. Justice Field in *Alpers v. San Francisco*, 32 Fed. 505: "There is no doubt that the contract between the plaintiff and the city and county of San Francisco is one within the competency of the municipality to make. It is within the power of all such bodies to provide for the health of their inhabitants by causing the removal from their limits of all dead animals not slain for human food, which otherwise would soon decay, and, by corrupting the air, engender disease. And provisions for such removal may be made by contract, as well as the performance of any other duty touching the health and comfort of the city; its authorities always preserving such control over the matter as to secure an observance of proper sanitary regulations." But in the exercise of police powers conferred upon cities for the benefit of the health of the inhabitants and to preserve the public welfare and comfort, and conceding the right to take possession and remove through its own agencies or by granting the exclusive privilege to one with whom they may contract for that purpose those substances which are inevitably and intrinsically nuisances and injurious and unwholesome, can an ordinance be upheld and justified as broad and of so sweeping a character as the one under consideration, which includes all accumulations of ashes, stable manure, rubbish, *débris*, etc., many different kinds of which may properly be regarded of some utility to the owner or others and which are not *per se* noxious and harmful? Is a city empowered to contract with one individual, and authorize him exclusively to go upon the private premises of the inhabitants, collect and remove at the owner's expense all such substances, and to make it a penal offense for another to engage in the performance of the same kind of labor? Can the city, merely by its fiat, declare all and every substance of the kind mentioned nuisances, and direct their abatement and removal through the agency of an exclusive contractor? The personal rights and property interests of the citizens have, with an unvarying rule, in all the authorities cited, been respected and preserved, and in *Smiley v. MacDonald*, 42 Neb. 5, 27 L. R. A. 540, 60 N. W. 355, is announced the same rule in the last paragraph of the syllabus, where in it is held: "The legislature cannot under the guise of police regulation, arbitrarily invade private property or personal

rights. The test when such regulations are called in question is whether they have some relation to the public health or public welfare, and whether such is in fact the end sought to be attained." By the provisions of the ordinance under consideration neither the owner nor occupant of the premises nor a person employed for that purpose can haul or transport within the corporate limits of the city any of the substances included in the ordinance, even though such material might be utilized for some beneficial purpose. He is prevented from disposing of it in any manner, and must submit to its collection and removal by the city contractor in the manner and by the means pointed out in the ordinance. Stable manure has value, not only for the purpose of fertilizing lawns and gardens in the city, but is also highly prized by the thrifty husbandman in agricultural communities, because it enriches the soil and increases the yield of the crops. Cinders and ashes may be and are regarded as useful for many purposes. Many other substances coming within the meaning of the language of the ordinance in the nature of *débris*, rubbish, and other waste material which might be specifically mentioned could probably be used for some beneficial purpose, and many others having no utility like those referred to are not within themselves nuisances and a menace to the health of the public. It is quite true their accumulation in unreasonable quantities and for an unreasonable length of time would render them nuisances, and to prevent which all reasonable regulations may be imposed. These are all classed in the ordinance in the general category of dead animals, garbage, and other unwholesome and noxious substances, and made the subject of the same regulation under the provisions of the ordinance, and the right to collect and remove all such material and substances given exclusively to the city garbage contractor. Such attempted regulation is, in our judgment, unreasonable, oppressive, and contrary to a sound public policy. The ordinance not only grants a monopoly, always odious in the eye of the law, without justification or necessity therefor as a sanitary measure for the protection and preservation of the public health, comfort, and welfare, but is also an unwarranted invasion of the natural rights of the inhabitants of the city. It is true the banker, the merchant, and the lawyer may remove from their own premises, and with their own teams, stable manure, but nothing else. The man without a team and the one who desires to earn an honest living in removing for others these things which are not in themselves injurious to health are completely debarred. The personal right of the individual must give way regarding all the matters mentioned to the exclusive right of the contractor to collect, transport, and dispose of all such accumulations. Not only is the owner's property taken from him when he could perhaps dispose of it or make arrangements for its disposal to some advantage, but he is com-

pelled to bear the expense of the taking. We cannot believe such an ordinance can be justified and upheld by the application of any sound principle of law. In *Vandine, Petitioner*, 6 Pick. 190, 17 Am. Dec. 351, it is said: "If the regulation is unreasonable, it is void; if necessary for the good government of the society, it is good." In *State v. Hill*, 126 N. C. 1139, 50 L. R. A. 473, 36 S. E. 326, it is held in the syllabus that an ordinance regulating scavenger work must be reasonable in its provisions, and not necessarily interfere with natural rights; and, if it does interfere with such rights, the public necessity must appear. In the opinion it is said by the author: "The prisoner is not charged with carrying on the business of a public scavenger, but simply with doing the work for one man, and it is admitted in the argument that the effect of the ordinance would be to prevent the owner himself from removing the refuse from his own premises. This is clearly an interference with a natural right, and, while this may be allowable on the ground of public necessity, some such necessity must appear, and the ordinance must be reasonable in its provisions,"—citing in support thereof *State v. Higgs*, 126 N. C. 1014, 48 L. R. A. 446, 35 S. E. 473; 1 Dill. Mun. Corp. 4th ed. § 319; 2 Wood, Nuisances, 3d ed. § 745; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239. It is also there said, which is pertinent to the case at bar: "We do not say that the defendant, or even the owner of the premises, had the right to clean out their closets in a manner offensive to their neighbors, or detrimental to the public health and comfort. They would be subject to such reasonable regulations as were necessary to attain these ends. Nor do we say that the city might not, under reasonable regulations, require anyone to take out license before acting as a public scavenger, or even do the work through its own officers." The right of reasonable regulation for the prevention of nuisances of every kind, and the method of removal through and over the streets of a city of all accumulations of refuse matter, rubbish, and other waste material for the purposes of sanitation and in the interest of the general health and comfort of the inhabitants, should be and is fully recognized. It is but the exercise of an authority properly appertaining to a municipality in the interest of the public, and to promote and preserve the welfare and convenience of all the people; but there must be a line of demarcation beyond which the authorities cannot go without assuming powers in excess of those properly belonging to them, and in the case at bar we can but conclude that such powers have been transcended.

The ordinance is likewise invalid because it creates a monopoly. It is not competent for the city to grant an exclusive privilege to one individual to gather and remove those substances which are not *per se* nuisances. There can be, in the nature of things, no reasonable necessity for the city to gather

and remove from the private premises of the inhabitants the accumulations of rubbish and waste material which are not in themselves, and when not allowed to accumulate in unreasonable quantities, nuisances. How can it be said that a necessity exists, in order to protect the public health, to enter private grounds, and remove therefrom the refuse of the barn, ashes from the yard, and other material not offensive in itself if not permitted to accumulate in large quantities and for an unreasonable length of time? By what process of reasoning can it be said that the owner may be deprived of the right to keep his premises neat and clean, and remove all such material as rapidly as it may accumulate in such quantities as to warrant its disposition, and under such reasonable regulation as to the method of removal as may be imposed by the authority of the city? Why and for what reason must he engage only the city contractor to perform such services? If such may be lawfully required in the interest of proper sanitation laws, then may not the city grant an exclusive privilege to perform all work of drayage, hauling of material of whatever description, in order that a possible nuisance may be prevented? It cannot, we think, be said, as was said in the Michigan case, *Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269, that the removal and hauling of such substances is not a trade or occupation recognized by law. It may well be doubted whether the reason given in that case for holding the exclusive privilege granted not a monopoly is a valid one. We are all cognizant of the fact that scavenger work has a well accepted and defined meaning, and the occupation or business, lowly though it be, has existed and been recognized and regulated for ages. Certainly hauling refuse from barns, ashes, rubbish, and other waste matter is a legitimate calling, and engaged in whenever opportunity affords by many as one of the means of acquiring a livelihood. Why license drays, scavenger wagons, teamsters, and others engaged in hauling from place to place those things necessary to be carted from the owner's premises in cities and towns in order to prevent them from becoming nuisances, if the trade and calling is not legitimate, and so regarded and recognized by law? The reason for the rule is fully stated and discussed in the case of *Re Lowe*, 54 Kan. 757, 27 L. R. A. 545, 39 Pac. 710, and, although its application in that case is not supported by the weight of authority, yet in the case at bar the principle should be applied, because the right to transport and remove rubbish, ashes, manure, and other waste material not of itself a menace to the public health must be regarded as a lawful calling, and the attempted deprivation of the right to engage in it by all who may comply with all reasonable regulations pertaining to the subject is in restraint of trade, and therefore void. It follows that in the enactment of the section of the city ordinance now under consideration the city exceeded its powers, and for that reason the 57 L. R. A.

section should be, as was by the trial court, adjudged invalid and unenforceable.

The judgment of the District Court is therefore accordingly affirmed.

M. H. MEEKER, Admr., etc., of Sophia K. Brown, Deceased,

v.

Augusta LARSON et al., Impleaded with Leonard Olson et al., Appts.

(.....Neb.....)

*1. While subrogation is not founded on contract, and is a creation of equity, existing solely for accomplishing the ends of substantial justice, there must, in every case where the doctrine is invoked, in addition to the inherent justice of the case, concur therewith some established principle of equity jurisprudence, as recognized and enforced by courts of chancery.

2. One who furnishes money for the purpose of discharging a mortgage lien upon real estate cannot claim subrogation to the rights of the mortgagee, in the absence of an agreement or understanding that the mortgage is to be kept alive for his benefit, or that he shall be given a lien on the premises in lieu of the one which has been discharged.

(June 4, 1902.)

A PPEAL by defendants Leonard Olson et al. from a judgment of the District Court for Lancaster County in favor of plaintiff in an action brought to subrogate plaintiff to the rights of a mortgage to the Connecticut Mutual Life Insurance Company and to foreclose the same for plaintiff's benefit. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. S. L. Geisthardt, for appellants:

The Brown mortgage for \$1,300 could in no case convey more than a life estate in the property for the life of Augusta Larson, and in fact, under the circumstances, conveyed only the dower interest of the defendant, Augusta Larson.

Where the owner of a homestead dies, the survivor takes a life estate, and a mortgage by the survivor conveys the life estate.

Nebraska Loan & T. Co. v. Smassall, 38 Neb. 516, 57 N. W. 167.

The right of subrogation must in every case rest upon some recognized principle of equity jurisprudence, such as a mistake of fact, an agreement or understanding that the money advanced was for the express purpose designated, or the like.

*Headnotes by DUFFIE, C.

NOTE.—As to right of person furnishing money to pay mortgage to be subrogated to the rights of the mortgagee, see also, in this series, *Wilton v. Mayberry* (Wis.) 6 L. R. A. 61; *Holland v. Citizens' Sav. Bank* (R. I.) 8 L. R. A. 553; and cases in note to *Crumlish v. Central Improv. Co.* (W. Va.) 28 L. R. A. on page 181.

Seieroe v. Homan, 50 Neb. 601, 70 N. W. 244.

The mere fact that from the proceeds of a later mortgage prior mortgages have been paid, that the lien of them might be removed, affords no ground for subrogation thereto.

Bohn Sash & Door Co. v. Case, 42 Neb. 281, 60 N. W. 576; *Rice v. Winters*, 45 Neb. 517, 63 N. W. 830; *Hoagland v. Green*, 54 Neb. 164, 74 N. W. 424; *Hayden v. Huff*, 60 Neb. 625, 83 N. W. 920.

Mr. Willard E. Stewart for next friend of infants.

Messrs. Mockett & Polk and C. S. Polk, for appellee:

The homestead of the deceased descends to the survivor for life. It is not necessary to the homestead right that the survivor continue to occupy it.

First Nat. Bank v. Reece (Neb.) 89 N. W. 804; *Cooley v. Jansen*, 54 Neb. 33, 74 N. W. 391.

Therefore it was unnecessary to show that Augusta Larson, then Olson, occupied the homestead at the time the \$1,300 mortgage was given. It was so occupied at the time of the death of Carl Olson, and then the homestead right attached for the benefit of widow, and she could only be divested by her own deed.

There are two well-defined classes of cases where the right of subrogation is recognized: (1) Where a junior lien holder takes up a senior lien for the protection of his junior lien; (2) in estate matters where, because of legal disabilities, the estate cannot re-encumber its real estate, or pay off liens against it.

Under the second class of cases, the rule against "volunteer" or "intermeddler" is unknown.

Arlington State Bank v. Paulsen, 57 Neb. 717, 78 N. W. 303.

One who pays at the request of a debtor is not a volunteer.

Trible v. Nichols, 53 Ark. 271, 13 S. W. 796; *Sheldon*, Subrogation, 2d ed. § 8; 2 *Ballard*, Real Prop. § 534; *Kelley v. Ball*, 14 Ky. L. Rep. 132, 19 S. W. 581; *Bailey v. Bailey*, 41 S. C. 337, 19 S. E. 669, 728; *Haverford Loan & Bldg. Assn. v. Fire Assn. of Philadelphia*, 180 Pa. 522, 37 Atl. 179; *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 48 N. E. 161.

And one who pays a lien to protect an interest in land will be subrogated to the rights of the lien holder.

1 *Ballard*, Real Prop. § 423; *Jefferson v. Edrington*, 53 Ark. 545, 14 S. W. 99, 903; *Sheldon*, Subrogation, 2d ed. § 51; *Kocher v. Kocher*, 56 N. J. Eq. 545, 39 Atl. 535.

The Browns took a mortgage from Mrs. Olson on the entire estate. This mortgage was defective in that the mortgagor had only a life estate in the land.

7 *Ballard*, Real Prop. § 245.

Where money is loaned to pay off a mortgage, and the mortgage given to secure it is defective or void, the junior mortgagee will be subrogated to the rights of the mortgage already satisfied.

57 L. R. A.

Veeder v. McKinley-Lanning Loan & T. Co. 61 Neb. 892, 86 N. W. 982; *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303; *Haverford Loan & Bldg. Assn. v. Fire Assn. of Philadelphia*, 180 Pa. 522, 37 Atl. 179; *Crippen v. Chappel*, 35 Kan. 495, 57 Am. Rep. 187, 11 Pac. 453; *Perry v. Adams*, 98 N. C. 167, 3 S. E. 729; *Hunter v. Hunter*, 58 S. C. 382, 36 S. E. 734; *Sheldon*, Subrogation, 2d ed. § 20; *Emmert v. Thompson*, 49 Minn. 386, 52 N. W. 31, 566; 1 *Ballard*, Real. Prop. § 423; 2 *Ballard*, Real. Prop. § 534.

Mr. George E. Hibner also for appellee.

Duffie, C., filed the following opinion:

The facts in this case are not in dispute. September 28, 1886, the defendant Augusta Larson, then Augusta Olson, with her husband, Carl Olson, executed to the Connecticut Mutual Life Insurance Company a note and mortgage on the property in controversy for the sum of \$1,800, due September 23, 1891. January 13, 1890, Carl Olson died intestate, and seised in fee of the mortgaged property, leaving surviving him his widow, Augusta Olson, who has since intermarried with the defendant Gust Larson, and five children; these children being appellants in this case. At the maturity of the above-mentioned mortgage the widow, Augusta Olson, endeavored to obtain an extension, and, this being refused, applied to her brother Frank G. Brown, now deceased, for a loan of money sufficient to enable her, in connection with a fund which she herself had, to take up the mortgage. Accordingly, on November 24, 1891, Frank G. Brown and Sophia K. Brown, his wife, advanced to her the sum of \$1,300, and took from her a mortgage upon the property in controversy for that amount, due five years after date. The mortgage purports to convey the entire property, although Augusta Olson was only possessed of a life estate therein under the homestead laws of this state. The \$1,300 borrowed from Frank G. and Sophia K. Brown, together with \$518.60 furnished by the widow herself, was used to pay the \$1,800 mortgage to the Connecticut Mutual Life Insurance Company; and this mortgage was thereupon satisfied and released by an instrument bearing date the 8th day of December, 1891, which was duly delivered to the widow, and by her recorded. Frank G. Brown, one of the mortgagees, died on August 27, 1892, and Sophia K. Brown, the other mortgagee, departed this life July 15, 1899, and the plaintiff is the administrator of the estate of both decedents. Since the making of the mortgage for \$1,300, the widow, Augusta Olson, has intermarried with Gust Larson, and is impleaded herein in the name of Augusta Larson. The \$1,300 not being paid at maturity, Meeker, as administrator, brought this action to enforce the same against the land. In his petition in this case he sets out the foregoing facts, and further alleges as follows: "It was agreed at this time between Augusta Olson (now Larson), Frank G. Brown, and Sophia K. Brown, since both deceased, and the Con-

necticut Mutual Life Insurance Company, that the mortgage and note executed by Carl Olson and Augusta Olson to the Connecticut Mutual Life Insurance Company, above described, was to be held by the said Frank G. Brown and Sophia K. Brown as security for the sum of \$1,300 so advanced by them as above set forth, and that the said Connecticut Mutual Life Insurance Company on the 8th day of December, 1891, executed a release and discharge of their said above-described mortgage, and forwarded the same to Augusta Olson, to be turned over by her to the said Frank G. Brown and Sophia K. Brown until the said \$1,300 was fully paid, but that the said Augusta Olson failed to deliver said release as aforesaid, but, by mistake of fact, did on the 23d day of February, 1892, file the same for record in the office of the register of deeds of Lancaster county, Nebraska." The prayer of the petition is, among other things, that "the plaintiff be subrogated to the rights of the mortgage of the Connecticut Mutual Life Insurance Company, as above set out, and that the discharge and satisfaction of its said mortgage be canceled; that an accounting may be taken of the amount due the plaintiff, and that said premises may be sold according to law, and out of the proceeds thereof the plaintiffs may be paid the amount adjudged to be due them, with interest; that, if the court should find there was no equity in plaintiff's bill as to the subrogation to the rights of the mortgage of the Connecticut Mutual Life Insurance Company, . . . that then the court decree a foreclosure, and order sold the dower interest in the land aforesaid, and that it be decreed that Augusta Olson has a life estate in the remainder thereof by virtue of her homestead right, and that said life estate and dower right be sold, and the proceeds thereof brought into court for the satisfaction of plaintiff's claim." The minor defendants filed an answer by their guardian *ad litem*, admitting that they had an interest in the land, and further denying each and every allegation of the petition. A similar answer was filed on behalf of another of the Olson children who was of full age. Augusta Larson, the widow, admitted the execution of the notes and mortgages in question, and the facts relating to the title to the property, and denied each and every allegation of the petition not admitted. The court entered a decree finding the plaintiff entitled to be subrogated to the rights of the Connecticut Mutual Life Insurance Company under its mortgage to the extent of the amount due on the \$1,300 mortgage, and ordering that the satisfaction of said mortgage to that extent be canceled and set aside, and directing a sale of the land to satisfy the amount found due.

From the foregoing statement it will be seen that the principal question to be determined is the right of the plaintiff to be subrogated to the lien of the mortgage held by the Connecticut Mutual Life Insurance Company, to the extent that the money furnished by Frank G. and Sophia K. Brown

was used to pay and satisfy said mortgage. The eighth finding of the court, which is probably as strong in plaintiff's favor as the evidence will allow, is as follows: "The court further finds that upon the 24th day of November, 1891, Frank G. Brown and Sophia K. Brown, since deceased, at the request of Augusta Larson, then Olson, advanced for the payment of said note and mortgage due to the Connecticut Mutual Life Insurance Company the sum of \$1,300; and the court finds that said sum of money was so applied upon the payment of said note and mortgage,—the defendant Augusta Larson furnishing the balance thereof,—and that said note and mortgage was fully paid, and said mortgage satisfied and discharged of record." It will be observed that there is nothing in this finding tending to establish that there was any agreement existing between the parties that Brown and his wife were to have a first lien upon the mortgaged premises for the amount of money furnished by them to discharge the mortgage of the insurance company, or that said mortgage was to be kept alive for their benefit. In relation to the claim made in the petition that such an agreement existed, the plaintiff, in his brief, expressly disclaims that there was any evidence to support it. He says: "We claim nothing by reason of the alleged agreement to keep the mortgage of the Connecticut Mutual Insurance Company alive. We failed in the proof as to this allegation. It was not intended as a feint, but appellants have put up their best defense on this point, and in the trial court rested wholly upon the failure to prove such agreement." The immediate question to be determined, then, is whether, under the proofs in this case, on the principle of subrogation the plaintiff can be treated as the equitable assignee of the mortgage of the Connecticut Mutual Insurance Company, and whether the indebtedness secured by that mortgage can be treated as still subsisting, and be enforced against the mortgaged property for the benefit of the plaintiff, notwithstanding it has been discharged of record.

Courts of equity are often called upon to enforce the right of subrogation where one pays the debt of another which he was under a legal obligation to pay either because he was surety or guarantor. The principle upon which this is done rests upon the right of a surety who discharges the debt of his principal to have the creditor make over to him the property or securities which may have been pledged by the debtor to secure the payment of the debt. It has well been said that in such a case the law creates or implies a contract on the part of the creditor that such property or securities will be turned over to the one who is secondarily liable as soon as he pays the creditor's claim. The same principle is also extended to cases where a second lien holder, or one having a reversionary interest in the property, is compelled to advance money to save the property from sale upon a prior existing lien. In the present case Mrs. Olson, upon the death of her husband, became

vested with a life estate in the mortgaged property, the same being the homestead of her husband. It is conceded by the appellants that, if she had furnished the money necessary to discharge the mortgage of the insurance company, she could claim subrogation to the rights of that company under its mortgage, as such payment was necessary in order to preserve her life estate in the property. But the plaintiff had no interest in the property to preserve, and hence he cannot claim the benefit of the equitable principle which we have been discussing. The appellee insists, however, that, because the money was furnished at the request of Mrs. Olson for the express purpose of discharging the life insurance company's mortgage, he is entitled to all the rights possessed by the mortgagee of such mortgage. He asserts that the rule is well established that one who, at the request of another, pays off an encumbrance upon the latter's land, is entitled to be subrogated to the security. In *Cumberland Bldg. & L. Asso. v. Sparks*, 49 C. C. A. 510, 111 Fed. 647, Judge Thayer, in an admirable opinion, reviews many of the cases relied upon by the appellee in this case in support of this rule, and in relation to these cases makes the following remarks: "Without going over these authorities in detail, it will suffice to say that they sustain the following propositions: That where money is advanced to a debtor in pursuance of an express agreement that it is to be used to retire existing liens or encumbrances on his property, and that the creditor who loans the money is to have a first lien upon the property to secure its repayment, such creditor may be subrogated to the rights of the encumbrancer or lienor whose debt has been paid, not only as against the borrower, but as against anyone else who subsequently acquires an interest in the property with knowledge of the circumstances under which the money to pay off the encumbrances or liens was advanced. They further hold that if money is advanced to a debtor to discharge an existing first mortgage upon his property and in pursuance of an agreement that the lender is to have a fixed lien upon the property for the repayment of the sum loaned, the lender is entitled, as against a junior encumbrancer, to be treated as the assignee of the first mortgage, which has been paid off and discharged with the money loaned, whenever it becomes necessary to do so to effectuate the agreement with the lender, and to prevent the junior encumbrance from being raised accidentally to the dignity of a first lien, contrary to the intention of the parties. The species of subrogation mentioned in both of these instances is what has been termed 'conventional subrogation,' and does not depend upon the establishment of any privity of contract."

We have examined all the cases referred to in the brief of appellee, and we do not find that any of them, with the possible exception of *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303, supports his 57 L. R. A.

contention. The next strongest case in support of appellee's position is *Emmert v. Thompson*, 49 Minn. 386, 52 N. W. 31. It was there held that one who lends money for the express purpose of taking up and discharging liens upon real property, and who discharges those liens at the request of the debtor, expecting that his securities will, of record, take the place of that which he discharged, is not a volunteer, stranger, nor intermeddler, and therefore, if justice requires it, may be subrogated to the lien thus discharged, and allowed to assert it, as where he discharges liens in the belief that none other exist against the property, and afterwards learns of liens subordinate to those discharged, which are attempted to be asserted against him as having priority to the lien taken by him upon the same property to secure his advances. Nor will the fact that the lien of which he was ignorant was of record defeat his claim for relief. It will be noticed that the case does not go to the extent of the claim made by the appellee, for the reason that there was an express agreement between the parties that the party making the advance to discharge the prior lien should himself have a first lien upon the property, while in the case at bar the evidence entirely fails to show any such agreement between Mrs. Olson and the Browns; the utmost that can be claimed for the evidence in the record being that the Browns furnished the money for the purpose of discharging the insurance company's mortgage without reference to the same being kept alive for their benefit, or their being given a first lien upon the property to secure the advance thus made. This court has also expressly repudiated the doctrine laid down in *Emmert v. Thompson*, and has said in relation to that case, and to other cases supporting the same doctrine, that the decided weight of authority is against them. *Rice v. Winters*, 45 Neb. 517, 63 N. W. 830. In *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303, parties who had advanced money which was used in paying the debts of the testator's estate which had been allowed by the probate court, and taxes upon the real estate of which the testator died seised, as well as mortgage liens, were held entitled to be subrogated to the lien of the debts thus discharged, although no agreement to that effect had been shown. In the opinion it is said: "The doctrine or rule of subrogation is not a fixed and inflexible rule of law or equity. It does not owe its origin to statute or custom. It is a creature of the equity courts, invented and applied by them to do justice or prevent an injustice being done in a particular case, and under a particular state of facts, where the law is powerless in the premises." Grave doubt has been thrown upon the correctness of this holding in the opinion filed on the re-argument of the case, and reported in 59 Neb. 94, 80 N. W. 263. It is there said: "The principal contention of counsel for appellants is that the question of subrogation was not properly presented for decision, and that the conclusion announced upon that

subject is, in any view of the case, unwarranted. It may be that the views expressed in the opinion are radical, that the decision is a new development of the doctrine of subrogation, and that it goes too far. The question is an important one, but we will not now stop to determine it, because it appears incontestably from the record that the right of appellees to subrogation was neither claimed nor litigated in the court below. The correctness of the former decision on this branch of the case will therefore remain an open question."

In the present case we have sought for some rule which would allow us to affirm the decree of the district court, and give the plaintiff the benefit of subrogation to the rights of the insurance company under its mortgage. We have been loath to take from the children of Frank G. and Sophia K. Brown the \$1,300 advanced for the payment of this mortgage, and to give to the children of Mrs. Olson the advantage derived from such payment. We have been unable, however, to find any principle upon which we can affirm the decree of the district court without extending the doctrine of subrogation further than warranted by any decision called to our attention; nor have we been able, after a somewhat extended research, to find any case that supports the broad claim made by the appellees. It may be true that in the present instance an affirmation of the decree would best subserve the principles of justice and equity, but it would work such a radical departure from the rule heretofore adopted by this court that we do not feel justified in so doing.

We recommend, therefore, that the decree of the district court be reversed, and the case remanded, with directions to enter a decree foreclosing the plaintiff's mortgage upon the life estate held by Augusta Olson in the mortgaged premises, and ordering a sale of such interest for the satisfaction of the amount due upon the mortgage.

Ames and Albert, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the decree of the District Court is reversed, and the case remanded, with directions to enter a decree foreclosing the plaintiff's mortgage upon the life estate held by Augusta Olson in the mortgaged premises, and ordering a sale of such interest for the satisfaction of the amount due upon the mortgage.

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*,
v.

Eliza CHURCH.

(.....Neb.....)

1. Evidence as to directions which the sendee had given a telegraph

NOTE.—For another case in this series, similar to the one above, as to damages for failure to deliver to a physician a telegraph message 57 L. R. A.

company as to delivery of telegrams for him is admissible in an action by a third person against the company for failure promptly to deliver a message to him.

2. A physician may state his opinion as to the probable further duration of a confinement case had he reached the mother at a time when all but the head and one arm of the child had been delivered.

3. Objections to the form of hypothetical questions addressed to expert witnesses must be made in the trial court.

4. Substantial damages may be given for breach of a contract to transmit promptly a telegram which the company knew to be addressed to a physician and to direct him to come to the sender's house at once.

5. Damages for breach of a contract promptly to transmit and deliver a telegram from a sick person summoning his physician "at once" may include an allowance for the pain and suffering endured during the physician's absence because of such breach.

6. An award of \$950 damages is not excessive where, on account of the failure of a telegraph company to transmit and deliver a telegram summoning a physician, a woman was left in labor for thirty minutes with the child partly born, which resulted in the death of the child and great pain of body and mind to the woman.

(May 21, 1902.)

ERROR to the District Court for Jefferson County to review a judgment in favor of plaintiff in an action brought to recover damages for defendant's failure to transmit and deliver a telegram promptly. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. W. P. Freeman and W. W. Morsman for plaintiff in error.

Messrs. John Heasty, R. A. Clapp, and W. H. Barnes, for defendant in error:

Physicians are permitted to testify to what, "in all probability," may result from a certain treatment.

Hendershot v. Western U. Teleg. Co. 106 Iowa, 529, 76 N. W. 828; *McPeck v. Western U. Teleg. Co.* 107 Iowa, 356, 43 L. R. A. 214, 78 N. W. 63.

Section 12, chap. 89 A, Neb. Comp. Stat., makes telegraph companies liable for all damages resulting from a failure to perform any duty required of them by law, and one of the duties imposed upon them by law is to make prompt delivery of all messages intrusted to them for transmission and delivery.

Ibid.; *Postal Teleg. Cable Co. v. Lathrop*, 131 Ill. 575, 7 L. R. A. 474, 23 N. E. 583; *Western U. Teleg. Co. v. Adams*, 75 Tex. 531, 6 L. R. A. 844, 12 S. W. 857; *Western U. Teleg. Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. 25; *Western U. Teleg. Co. v. Sheffield*, 71 Tex. 570, 10 S. W. 752; *Brown v. Western U. Teleg. Co.* 6 Utah, 219, 21 Pac. 988; 25 Am. & Eng. Enc. Law, p. 845; *Thompson v. Western U. Teleg. Co.* 106 N. C. 549, 11 S. E. 269; *Loper v.*

summoning him to attend a woman in confinement, see *Western U. Teleg. Co. v. Cooper* (Tex.) 1 L. R. A. 728.

Western U. Teleg. Co. 70 Tex. 689, 8 S. W. 600.

It is not required that the parties must have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may be fairly supposed to have contemplated when they made the contract.

Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; *First Nat. Bank v. Western U. Teleg. Co.* 30 Ohio St. 565, 27 Am. Rep. 485; *Baldwin v. United States Teleg. Co.* 45 N. Y. 744, 6 Am. Rep. 165; *Bartlett v. Western U. Teleg. Co.* 62 Me. 209, 16 Am. Rep. 437; *Pepper v. Western U. Teleg. Co.* 87 Tenn. 554, 4 L. R. A. 660, 11 S. W. 783; 25 Am. & Eng. Enc. Law, p. 838.

Mental and bodily suffering is incapable of measurement by any fixed and arbitrary rule, but must from its nature depend largely upon the judgment of the jury, governed by the circumstances of each particular case.

St. Joseph & G. I. R. Co. v. Hedge, 44 Neb. 450, 62 N. W. 887; *Western U. Teleg. Co. v. Cooper* (Tex.) 20 S. W. 47; *Western U. Teleg. Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. 25; *Western U. Teleg. Co. v. Broesche*, 72 Tex. 664, 10 S. W. 734; *Western U. Teleg. Co. v. Simpson*, 73 Tex. 423, 11 S. W. 385; *Stuart v. Western U. Teleg. Co.* 66 Tex. 580, 59 Am. Rep. 623, 18 S. W. 351; 25 Am. & Eng. Enc. Law, p. 866.

Kirkpatrick, C., filed the following opinion:

This is an action brought in the district court of Jefferson county by Eliza Church, defendant in error, against the Western Union Telegraph Company, plaintiff in error, to recover the sum of \$1,990, as damages claimed to have been sustained on account of the failure of the telegraph company promptly to deliver a telegram which had been sent to a physician in the city of Fairbury to come to her home at once. The petition sets out that on the 28th day of January, 1898, she delivered to the telegraph company a message as follows: "Dr. Andrews: Come to L. C. Church's at once. L. C. Church;" that the telegraph company received the message at the village of Thompson, and undertook to deliver the same promptly to Dr. Andrews, at the city of Fairbury, which was distant 7 or 8 miles; that the company was paid for transmitting the message; that it was delivered to the company for transmission about the hour of 6 o'clock P. M., and that it was not delivered to Dr. Andrews until about the hour of 9 o'clock P. M. of the same day; that Dr. Andrews was a skilful and competent physician and surgeon, and that the defendant in error had previously arranged with him to attend her during her confinement, which was expected to occur soon; that he had agreed to come immediately upon receiving notice; that, upon receipt of the telegram, Dr. Andrews started immediately for the residence of defendant in error, arriving there about 10 o'clock P. M., and after the birth of the child, which

died during birth; that, on account of the negligence and carelessness of the telegraph company, she was prevented from having the care, attendance, and assistance of a physician, and that her confinement was unduly prolonged, and that she suffered greatly in body and mind on account of not having the care and assistance of a physician; and that the period of labor was greatly lengthened, aggravated, and intensified,—all to her damage in the sum claimed. To this petition, plaintiff in error filed an answer, admitting its corporate character, and that it owned and operated a telegraph wire between the village of Thompson and the city of Fairbury, and that it held itself out to the public as a common carrier of information, and further denied each and every allegation contained in the petition, together with an allegation that plaintiff's petition did not state facts sufficient to entitle her to any relief.

Trial was had to a jury, which resulted in a verdict and judgment for defendant in error in the sum of \$950, to reverse which the cause is brought to this court. Four assignments of error are argued in briefs of counsel for plaintiff in error, and they will be considered in their order: First. That the court erred in permitting Dr. Andrews, over objections, to testify that other telegrams had been sent to him which the company had delayed in delivering; that by reason of such delay he had lost money, and that he had informed the agent of plaintiff in error that he wanted messages addressed to him delivered to him at once, and that if they continued to hold messages they would be responsible for somebody's death, and that witness was losing money in having the telegraph company hold messages until they could find some person to deliver them to him. Second. That the court erred in permitting Dr. Andrews, over objection, to testify that if he had arrived at the residence of defendant in error at about 8 o'clock in the evening, and found her in confinement, and all of the child born except the head and one arm, he could, in all probability, have completed the delivery in three or four minutes thereafter. Third. The court erred in permitting the jury to find more than nominal damages. Fourth. That the verdict is excessive.

The facts, as disclosed by the record, briefly stated, are as follows: Some time prior to January 28, 1898, defendant in error, expecting confinement soon thereafter, talked to Dr. Andrews about attending upon her at that time, and he agreed to come upon notice. On January 28, 1898, defendant in error caused to be delivered to the agent of plaintiff in error at its office in the village of Thompson the message hereinbefore set out. The message was forwarded by the company's agent at Thompson within a very few minutes after its receipt from the sender, and was received by the company's agent at Fairbury. Dr. Andrews was well known in Fairbury as a practising physician and surgeon, and both his office and residence were within the free-delivery

limit established by the company. The message was not delivered to him until about 8:45 p. m. He immediately hitched his horse to his buggy and started for the residence of defendant in error, distant about 7 miles, arriving there about 10 o'clock. It appears from the evidence that defendant in error was taken with premonitory labor pains about 3 o'clock in the afternoon. Soon afterwards she sent a young woman to the house of a neighbor woman, and then to the telegraph office with the message. Between 6 and 7 o'clock her pains became more violent and frequent, and about 8:30 the child was delivered. The birth was an instance of what is commonly called "foot presentation." After all of the body except the head and one arm was born, birth was delayed for about thirty minutes, and it seems that during this time the life of the child became extinct. At the time the doctor arrived (about 10 o'clock), defendant in error was in bed, resting easily. He left a prescription, and returned home. Defendant in error suffered intensely during the last half hour of her labor.

Dr. Andrews was called as a witness for defendant in error, and the following testimony by him is quoted from the record, as being the basis of the first assignment of error urged for consideration:

Now, you may state whether prior to that time you had received telegrams which had been transmitted to you from the defendant company?

A. Yes, sir.

Q. Many times?

A. Yes, sir.

Q. Have they been delivered to you by the defendant at your office prior to that?

A. Sometimes at the office, and sometimes at my residence.

Q. You may state whether prior to that time you had had any talk with the defendant company with reference to delivering telegrams to you? (Objected to as immaterial and incompetent. Overruled. Exception.)

A. I had explained to them in regard to the delay in the different telegrams sent to me, and I lost money by that.

Q. (By attorney for defendant company.) Explained to whom?

A. To Mr. Catlin. There was a telegram sent to me about three weeks, I think, before this time, from Reynolds. It was received here at 6 o'clock in the evening, and delivered to me at 5 o'clock the next day. (Objected to as not responsive to the question and immaterial. Sustained.)

Q. State what you said to him at that time about telegrams sent to you, and what should be done with them? (Objected to as immaterial. Overruled. Exception.)

A. I told him I wanted telegrams sent to me immediately. I didn't want them to keep them at the office; that, if they continued that, they would be responsible for somebody's death, and not only was that true, but I was losing money by telegrams being

held until they could find somebody to bring them to me.

The testimony to which more particularly objection is urged in the briefs of counsel for plaintiff in error is that given to the last question quoted above. The testimony elicited by the questions immediately preceding, while it may have been objectionable, could not, we think, have resulted in prejudice to plaintiff in error. Regarding the last question, it may be said that no objection was made to its form; the only objection being that it was immaterial. Two inquiries were made in the question: First, "State what you said to him at that time about telegrams sent to you?" and, second, "What should be done with them?" The first portion of the question would likely call for immaterial testimony, and was objectionable; but the second portion called for any directions which the witness may have left regarding the delivery of messages to him,—whether they were to be delivered at his office or residence, between what hours at either place, or any such instruction as may have been given. If proper objection had been made to the form of the question, no doubt the court would have required the question to be separated, and would have excluded that portion which had no bearing upon the matter in controversy. The rule is elementary, and based upon sound reason, that objection made to a question is properly overruled unless the objection is good as against the entire question. "Where a part of testimony objected to as a whole is admissible, it is not error to overrule the objection." *Schulze v. Jalonick*, 18 Tex. Civ. App. 296, 44 S. W. 580. After the witness had answered the question, plaintiff in error moved to strike such portion as was not responsive. This motion was sustained by the trial court. Plaintiff in error did not ask to have any other portion stricken out. The trial court struck out that part of the answer to which plaintiff in error directed his motion, and we are of the opinion that there was no error of the trial court in this regard of which plaintiff in error can complain. The first contention, therefore, must be decided adversely to plaintiff in error.

After plaintiff in error had rested its case, defendant in error called Dr. Andrews for further examination in chief. He then testified as follows:

Q. If you had arrived at the residence of Mrs. Church that evening at the hour of 8 o'clock, or about that time, and found her suffering in confinement, and all of the child born, except its head and one arm, could you, in all probability, have perfected the delivery within three or four minutes thereafter? (Objected to as immaterial and being mere conjecture, and asking the witness as to a case of probability. Overruled. Exception. Further objection that the plaintiff has rested its case without showing any facts disclosing to defendant the circumstances and conditions upon which she

predicates her claim for damages. Overruled. Exception.)

4. There is a probability in it, and I was answering along that line — (Question read, and further answer.) Yes, sir.

That the question called for a mere conjecture, and asked the witness as to a case of probability, is the only one of the three objections relied on by counsel, or mentioned in brief. It cannot be said that the question was objectionable for the reason stated. The witness was qualified as an expert. There was sufficient evidence already in the record to authorize the assumed state of facts contained in the question. The answer called for was whether the witness, as a competent physician, in the case stated, could, in all probability, have effected a delivery within a given time. A greater degree of certainty cannot reasonably be required in the testimony of medical experts. The science of medicine and surgery has not reached that degree of excellence when its votaries can say to a mathematical certainty what, in a given case, would be the results of a given remedy. In the case of *Peterson v. Chicago, M. & St. P. R. Co.* 38 Minn. 511, 39 N. W. 486, the court says with reference to the following question asked of a medical expert: "What, in your judgment, is the probability of her recovery?" "The point of the objection is that it called for an answer purely speculative in its character. While we have no disposition to extend the scope of this kind of evidence beyond the limits of established rules, yet we do not see that this question is obnoxious to the objection made. In view of the nature of the subject-matter of the inquiry, it amounted to nothing more than asking the witness his professional opinion whether she would recover. This was not an event the occurrence of which could be stated with absolute certainty. It was wholly a question of probabilities, and all that any honest witness, however skilful, could say, would be that the recovery was either probable or improbable." *Hendershot v. Western U. Teleg. Co.* 106 Iowa, 529, 76 N. W. 828; *Block v. Milwaukee Street R. Co.* 89 Wis. 371, 27 L. R. A. 365, 61 N. W. 1101. But in brief counsel suggests that the question called, not for testimony to be considered by the jury, but a conclusion or decision to be accepted by them, and that it called for a conjecture or a guess as to what he (the witness) could, in all probability, have done in the case which was the subject of the controversy. It is doubtful whether the question can be said to be vulnerable to this objection. But this objection directed to the form of a hypothetical question should have been made at the trial, so that the trial court could have passed thereon with this criticism in mind. Manifestly, this was not done. The objection was that the question "was mere conjecture, and asking the witness as to a case of probability." As we have already seen, this is no valid objection to the testimony of a medical expert. We think, from the question as put, and the

answer of the witness, the jury must have understood this testimony as being nothing more than the opinion of the doctor, as a professional man, familiar with matters of this kind by reason of his habit and experience, as to the probabilities of an immediate delivery if he, as a physician, arriving at the hour stated, had found the conditions assumed to exist in the question. In the case of *Potter v. Detroit, G. H. & M. R. Co.* 81 N. W. 80, it is said: "An objection that, by the terms of an hypothetical question put to a medical expert, the witness was at liberty to consider the subjective symptoms in giving his answer, made for the first time on appeal, will not be considered." 122 Mich. 179. In the case of *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239, 78 N. W. 521, it is said: "It is a general rule, to which the record in this case presents no exception, that objections not urged in the trial court will not be considered here." In the case of *Asbestos Pulp Co. v. Gardner*, 57 N. Y. Supp. 353, it is said: "It is a well-settled rule of evidence that a person objecting to the reception of testimony must state the grounds of his objections, so that the judge can rule with the criticism in his mind. Unless this is done, objections founded upon the admitted testimony are unavailing, unless they are of such a character that they could not have been obviated upon the trial." 39 App. Div. 654. In the case of *Puth v. Zimbleman*, 68 N. W. 895, it is said: "Unless a party objecting to evidence states valid reasons for its exclusion, the objection is properly overruled, though a sufficient ground for excluding it may exist." 99 Iowa, 641. *Continental Ins. Co. v. Pratt*, 8 Kan. App. 424, 55 Pac. 671. We do not think that there was any error in the admission of this testimony of which plaintiff in error is in a position to complain, and the second contention of plaintiff in error can therefore not be sustained.

It is next contended that the court erred in permitting the jury to find more than nominal damages, for the reason that the substantial damages claimed and awarded are not such as would usually and ordinarily arise out of the breach of the contract to deliver the message in question, but are too remote to have been in the contemplation of the parties, or to be reasonable. It is contended that, under the evidence, it was the duty of the court to have instructed the jury, as requested, that only nominal damages could be recovered. The contention is that the telegram itself, and all that was said to the agents of the company, were insufficient to apprise plaintiff in error of the injury sued for, or what was likely to arise from a failure promptly to deliver the message. We are unable to accept this view. It seems clear that the telegram itself, addressed to a physician,—one known to be such by the agent of plaintiff in error at Fairbury,—was sufficient to apprise it of the necessity of prompt delivery. It cannot be supposed that a message of the character of that in controversy should specifically set out the actual conditions calling for a phy-

sician's presence, the person who was sick, or the nature of the disease; and it is not necessary that this should be done in order to apprise the company of the need promptly to deliver the message. The telegram, however, did direct the physician to come at once. By no possibility could the physician come at once if the message was not delivered until some hours after its receipt. *Western U. Teleg. Co. v. Sheffield*, 71 Tex. 570, 10 S. W. 752. In *Postal Teleg. Cable Co. v. Lathrop*, 131 Ill. 575, 7 L. R. A. 474, 23 N. E. 583, it is said: "It certainly cannot be contended that the agent must be informed of all the facts and circumstances pertaining to a transaction referred to in a telegram which are known by the parties themselves, to make his company liable for more than nominal damages. If it should be so held, the telegraph would cease to be of practical utility to the commercial world." In the case of *Western U. Teleg. Co. v. Adams*, 75 Tex. 531, 6 L. R. A. 844, 12 S. W. 857, it is said: "It is well known to the public, and cannot be unknown to telegraph companies, that the utmost brevity of expression is cultivated in correspondence by telegraph. It is as well known that that mode of communication is chiefly resorted to in matters of importance, financially and socially, requiring great despatch." One Green was called as a witness for defendant in error, and testified that he received the message from his sister, in the village of Thompson, and took it across the street to the telegraph office, and delivered it to the agent of the company. Answering an inquiry as to what he said, he testified that he would not be sure, but believed that he said the message should be sent in haste. Further answering, he said he would not be positive; that he could not remember. The testimony was contradicted by the Thompson agent of the company, but its truth was a question for the determination of the jury. There can be no question that the company's agent at Thompson knew from the message itself that someone was sick, and that a physician's presence was desired at once. He testified that he knew Dr. Andrews was a physician, and where he lived. In answer to interrogatories, he testified as follows:

Q. Did you know what that telegram was sent for?

A. Why, I could guess.

Q. From the telegram you knew what was meant?

A. I knew that his services were required. That is all I knew about it.

Q. You knew, then, that there was something that required the attention of a doctor at once, didn't you?

A. Yes, sir.

The physician testified that in prior conversations with the agent at Fairbury he had requested that messages directed to him be delivered promptly, and the agent at Fairbury had knowledge that the person to whom the message was addressed was a

physician. The telegram itself, together with all the evidence, was submitted to the jury; and they, no doubt, concluded that the company was aware of its importance, and that injury would likely result from delay in its delivery.

Plaintiff in error contends that a recovery on account of the pain and suffering of defendant in error endured during the absence of the physician, resulting from the fault of the company, cannot be sustained, and that such damages are too remote, and did not flow directly and naturally from the negligence of the company, and that the parties did not have such possible injury in contemplation at the time the message was delivered to the company for transmission. The correct rule, as we conceive it to be, is that speculative, contingent, and remote damages must be excluded, but that a party guilty of a breach of the contract will be held liable for all injury flowing directly and naturally as a result of the wrong, which both parties would have contemplated if at the time the contract was entered into their attention had been called to the natural and direct consequence of the breach. The rule does not require that the parties must have contemplated the actual damages for which a recovery would have been allowed; nor does it embrace within its scope all the consequences which might be shown to have resulted from a particular omission of duty, but only those which might properly be deemed to have been within the contemplation of the parties. The rule is practical, founded on wise policy, and is consistent with equity and good sense. *Leonard v. New York, A. & B. Electro Magnetic Teleg. Co.* 41 N. Y. 544-567, 1 Am. Rep. 446; *Pepper v. Western U. Teleg. Co.* 87 Tenn. 554, 4 L. R. A. 660, 11 S. W. 783; *United States Teleg. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751. The rule by which to determine whether damages are immediate and proximate, or remote and speculative, is well stated by Justice Post in the case of *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448, 62 N. W. 887, as follows: "The question in all such cases is whether the facts shown constitute a continuous succession of events, so linked together as to make a natural whole, or was there a new and independent cause intervening between the wrong and the injury? The intervening cause must be one not produced by the alleged wrongful act or omission, but independent of it, and adequate to produce the result in question. There may be, it is evident, a succession of intermediate causes, each dependent upon the one preceding it, and all so connected with the primary cause as to be, in legal contemplation, the proximate result thereof." In the case at bar there was no independent intervening cause adequate to produce the result. The message was sent in ample time to prevent the injury complained of. It was not delivered promptly, and the physician did not arrive at the residence of defendant in error until after his services were no longer required. In the case of *Western U. Teleg.*

Co. v. Cooper, 1 L. R. A. 728, which is in nearly all respects like the one at bar, it was said: "Damages in a suit against a telegraph company for failure to deliver a message to a physician, summoning him to attend a woman in confinement, cannot be based upon the death of the child before birth, and the grief of the parents occasioned thereby, but a reasonable consideration should be allowed for any increased pain and mental suffering caused to the mother by the physician's absence." 71 Tex. 507, 9 S. W. 598. In the case at bar there can be no doubt that the labor during confinement was prolonged on account of the failure of the physician to attend, and we are of the opinion that the defendant in error is entitled to substantial, rather than nominal, damages.

The last assignment of plaintiff in error is that the verdict returned is excessive, being so large as to lead to the presumption that it is the result of passion and prejudice and improper influence. It will be conceded that the verdict of a jury, in cases properly submitted, is ordinarily conclusive. In the absence of any showing that the jury were improperly influenced, the amount of the verdict must be so far beyond all reason as to raise a presumption that it is the result of passion and prejudice. The only question raised for consideration, therefore, under this assignment, is whether the verdict is so excessive as to raise a presumption of passion and prejudice, calling for a reversal of the case. Counsel say that it is more than twice as large as could fairly be awarded where the verdict is limited to mere compensation. It is conceded that there is no fixed rule by which the actual damages in a case of this kind are to be measured. This being true, it would seem to follow that the jury's verdict is the best and most satisfactory means of determining the extent of the damages. We do not feel warranted in saying that the verdict is excessive. That great pain and agony ordinarily accompany childbirth, even in cases where sympathetic and competent persons are in attendance to render all assistance lying within human power, is a matter of common information. It may be said that this pain and agony are such that no person could negligently be the occasion of its prolongation without being culpable. We do not believe that the jury in the case at bar returned a verdict so excessive in the premises as to be presumptively the result of passion and prejudice against plaintiff in error.

After a careful examination of the record in this case, we have arrived at the conclusion that no prejudicial error occurred at the trial, and the judgment is right, and should be affirmed. It is therefore recommended that the judgment of the district court be affirmed.

Day and Hastings, CC., concur.

Per Curiam:

The conclusion reached by the Commissioners is approved, and, it appearing that 57 L. R. A.

the adoption of the recommendation made will result in a right decision of the cause, it is ordered that the judgment of the District Court be affirmed.

CHICAGO LUMBER COMPANY

v.

Florence M. BANCROFT *et al.*

LEXINGTON BANK, *Cross Petitioner,*
Appt.

(.....Neb.....)

- *1. The unchallenged findings of fact by a referee, when confirmed by the court, are binding on the party against whom they operate, and from the legal consequences flowing therefrom he cannot escape.
2. Where a debtor executes a note and mortgage for a loan of money at a lawful rate of interest, and, at its maturity, enters into a new contract with the lender for a further extension of the loan, which is tainted with the vice of usury, and the lender, by agreement, retains the note and mortgage as collateral security to the usurious contract, in a suit to enforce the mortgage security the lender is restricted in his recovery to the amount due on the indebtedness at the time of making the usurious contract, after which all interest is, by force of the statute, forfeited.

(*Sedgwick, J., dissents.*)

(March 19, 1902.)

A PPEAL by the defendant bank from a judgment of the District Court for Dawson County disallowing its lien on certain property upon which plaintiff sought to enforce a mechanic's lien. *Affirmed.*

The facts are stated in the opinion.

Mr. H. D. Rhea, for appellant:

Where usurious interest has been charged and not paid, an action cannot be maintained to recover it; neither is it the subject of a set-off in defense of an action against the pleader for affirmative relief on foreclosure of a mortgage.

The payment of the illegal interest as alleged, being the amount merged into Dr. William M. Bancroft's note, was a complete settlement of the doctor's indebtedness by his wife, and cannot be successfully pleaded in this action.

Hall v. First Nat. Bank, 30 Neb. 99, 46 N. W. 150; *Blain v. Willson*, 32 Neb. 302, 49 N. W. 224; *Blackwell v. Wright*, 27 Neb. 269, 43 N. W. 116.

The original contract sued on in this action was wholly free from the vice and taint of usury; and it will not be invalidated by a subsequent agreement to pay usurious interest after the debt has matured.

*Headnotes by HOLCOMB, J.

NOTE.—As to liability of obligors on an original contract as affected by a renewal or substituted contract which is void, see *note* to *Frederick Town Sav. Inst. v. Michael* (Md.) 33 L. R. A. 628.

Dell v. Oppenheimer, 9 Neb. 454, 4 N. W. 51; *Richards v. Kountze*, 4 Neb. 200.

All subsequent renewals of the \$1,122 note are, under the law, mere collateral paper.

Young v. Hibbs, 5 Neb. 437; *Muldon v. Whitlock*, 1 Cow. 306, 13 Am. Dec. 533; *Weakly v. Bell*, 9 Watts, 273, 36 Am. Dec. 116; *Ripley v. Greenleaf*, 2 Vt. 129; *Day v. Leal*, 14 Johns. 404; *Okie v. Spencer*, 2 Whart. 253, 30 Am. Dec. 251.

The cashier of a bank has no authority, by virtue of his office as such, to release a surety unless specifically empowered to do so, unless the debt has been paid in full.

Merchants' Bank v. Rudolf, 5 Neb. 536; *Cocheco Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 68; *Bank of United States v. Dunn*, 6 Pet. 51, 8 L. ed. 316; *Hodge v. First Nat. Bank*, 22 Gratt. 51.

When the fact is alleged that the new renewal notes are taken in payment of the original debt the affirmative is assumed, and the fact must be affirmatively shown by a preponderance of the evidence.

Blackburn v. Ostrander, 5 Neb. 219; *United States v. City Bank*, 21 How. 358, 16 L. ed. 131.

Messrs. Warrington & Stewart and E. A. Cook, for appellees:

This note is within the rule laid down in *Cattle v. Haddox*, 14 Neb. 527, 16 N. W. 841.

It being established that there is usury in that note, it taints all renewals of the note with the vice of usury.

The court ought, as a conclusion of law, to determine that there was usury in this contract, and that the cross petitioner is only entitled to recover the amount of the principal debt less the interest and payments thereon, and less the amount of valuable collateral.

McDonald v. Beer, 42 Neb. 437, 60 N. W. 868; *Doud v. Reid*, 53 Mo. App. 553.

Holecomb, J., delivered the opinion of the court:

Plaintiff instituted a suit to foreclose a mechanic's lien on real estate, making the appellant, the Lexington Bank, and appellees Bancroft parties defendant in the action. Defendants Bancroft were the fee owners of the property involved in the suit, and defendant bank claimed a lien thereon by virtue of a mortgage in its favor executed by the Bancrofts. The bank appeared in the action, and, by way of cross petition, pleaded that the Bancrofts were indebted to it on a promissory note for the sum of \$1,122, executed by them to the bank, and that said note was secured by a real-estate mortgage on the premises described in the petition, and prayed a finding of the amount due on the note and mortgage, and that the same might be adjudged a valid lien on said premises, and that the real estate be sold in satisfaction of the amount due, if the same were not paid at a short date, to be fixed by the court. To this cross petition of the bank the Bancrofts filed an answer, in which the giving of the note and mortgage

was admitted, and, as a defense, it was pleaded that the contract evidenced thereby was usurious, in that by the agreement of the parties thereto a greater rate of interest was charged for the loan and forbearance of money than the rate of \$10 per annum on the \$100, the answer setting forth in detail the particulars of the transaction and the different items entering into the consideration of the note, and the amount of unlawful interest included therein. It was also pleaded that, after the maturity of the note and mortgage mentioned in the cross petition, a new contract was entered into between the parties for a further extension of the indebtedness, and that said contract was likewise usurious; the answer stating in detail the facts constituting the alleged usury. Further renewal of contracts was also pleaded, each of which, it was alleged, was usurious, and that at the time of filing the cross petition the defendant bank held two notes of defendants Bancroft, other than the one declared on, as evidencing the usurious contract so pleaded, one being for the sum of \$1,400 and the other for the sum of \$200, giving the dates and maturity thereof. The answer prayed for an accounting, and the ascertainment of the amount actually due the bank, after allowing credits and payments claimed to exist in favor of the mortgagors, and for general equitable relief. There were other issues tendered by the answer, as to certain collaterals alleged to have been given to secure the debt, for the proceeds and value of which the Bancrofts claimed they were entitled to credit; but, as all such matters are eliminated from the questions presented for our consideration by this appeal, we need not further notice them. A reply was filed, denying the usury alleged in each and all of the transactions mentioned in the answer; the reply stating in detail the items entering into each of the notes executed by the Bancrofts, and the amount of interest charged in each, which, it was alleged, did not exceed 10 per cent per annum, and on the issues thus framed the parties went to trial. A referee was appointed to take the testimony and report to the court the evidence, with its findings of fact and conclusions of law. We will only notice such portion of the report of the referee and the action of the trial court thereon on exceptions by the defendants Bancroft as seems necessary to an intelligent understanding of the points involved in the consideration of the case on appeal. We are not favored with a brief on the part of the appellees Bancroft, and are compelled to decide the controversy upon the record and a brief by appellant's counsel, with such independent research as we have had time for at our command.

The referee made several findings of fact, those material to the question now under consideration being as follows: "(6) I find that neither upon the note for \$1,122 made by the defendants Bancroft to the defendant Lexington Bank, and by them delivered to it, which note is set forth in the de-

fendant Lexington Bank's cross petition and answer, nor upon any of the notes of which it is a renewal, nor upon any of the items which are included in said note of which it is a renewal, was there contracted for, received, or reserved a rate of interest exceeding 10 per cent per annum, said note being the one secured by the mortgage set out in said cross petition. (7) I find that no part of said \$1,122 note has been paid, and there is now due thereon the sum of \$1,865.88, according to the terms thereof. (8) I find that on the 12th day of April, 1893, a new note for the sum of \$1,299 was made and delivered by the defendants Florence M. Bancroft and William M. Bancroft to the defendant Lexington Bank, as a renewal of the said \$1,122 note, and for the purpose of keeping the obligation created by said \$1,122 note in bankable shape, the said \$1,122 note being retained by the defendant bank, and marked "Collateral," as shown by indorsement thereon, and said mortgage was also retained by said bank; that from time to time after the making and delivery of said renewal other renewals were made and delivered by the defendants Florence M. Bancroft and William M. Bancroft to the defendant Lexington Bank, for the same purpose, said \$1,122 note and said mortgage still being retained by said bank. (9) I find that in these renewals and on them a greater rate of interest than 10 per cent per annum was contracted for, by and between the parties and by the defendant bank, and by it charged and included in said notes. (10) I find that all of these renewals have been canceled and surrendered by the defendant bank to the defendants Bancroft, excepting the last two given, one of which two is for the sum of \$1,400, dated January 14, 1895, and signed by Florence M. Bancroft and William Bancroft; and the other is for the sum of \$200, dated January 9, 1897, and made by William M. Bancroft, into which two notes all of the other renewals were merged; and the said \$200 note is the one in these findings mentioned in which said taxes and said interest found to have been paid by William M. Bancroft were included, together with other items of indebtedness of said William M. Bancroft to said bank." As a conclusion of law the referee found that the bank had a valid lien on the premises mortgaged for the amount found due by the seventh finding of fact, and was entitled to a decree of foreclosure as prayed, and a sale of the premises in satisfaction of the amount found due. On objections and exceptions by the defendants Bancroft, the trial court set aside the seventh finding of fact, and approved and confirmed the remainder. The court construed the referee's ninth finding to be and mean that at the time the indebtedness was renewed, April 12, 1893, a new and original contract was entered into, and the note and mortgage sued on were, by agreement of the parties, retained as collateral security to the contract then entered into, and so found, in effect, that such contract was tainted with the vice of usury, as was found by the referee, and that the amount then due on the indebtedness was the sum of \$1,238.13, to which sum the cross petitioner was limited in its recovery, by reason of the usurious character of the contract, less credits which should be applied thereon, and regarding which there is no controversy, and entered a decree of foreclosure accordingly. The bank appeals.

It is argued, in substance, that, the note sued on being free from the vice of usury, and retained by the payee, the renewal contract did not discharge the indebtedness evidenced thereby, and that the agreement to take usury, even though made, could not affect such note and mortgage, and that the bank was entitled to recover the full amount due thereon, including interest, according to its terms; that the contracts of renewal can only be regarded in their character as collateral to the principal indebtedness, which is unaffected by any subsequent usurious agreement. It is also contended that the evidence will not support the finding of the referee that usury was contracted for in all or either of the renewal notes given after the maturity of the note for \$1,122, which was made the foundation of the bank's cause of action, as stated in its cross petition. As the bank did not challenge the findings of the referee, which were, with the exception noted, confirmed by the court, we think it is now bound by such findings, and cannot be heard to dispute their truthfulness, or escape the legal consequences flowing therefrom.

This, therefore, leaves but one question to be determined, and that is, What is the legal effect with respect to the rights of the contesting parties, because of the contract of renewal entered into between them, whereby it was agreed that usurious interest should be charged for the further loaning of the money for which the notes were given, which indebtedness prior to the time of the first renewal had been evidenced by the note and mortgage pleaded in the bank's cross petition, and which was found to be free from the taint of usury? Was it an extension of the time of payment under the old contract, which was free from usury, or was the nature of the transaction such as to give it the character of a new contract affected with the vice of usury? The finding of the referee, though somewhat obscure, was, we think, as construed and found by the trial court, a finding that the original indebtedness was satisfied by the execution of the new note then given providing for the payment of the sum for which made payable, at a stated time in the future, and the retention of the note and mortgage originally given, as collateral security for the fulfilment of the contract last entered into. The evidence as to the course of dealings between the parties fully justifies this inference. It was as though the parties had canceled the evidence of the old indebtedness, and, as security to the new, executed a note and mortgage on the debtor's real estate and delivered the same as collateral to the unsecured notes evidencing the usurious

contract. This is, in effect, what was in fact done. The note and mortgage were satisfied for the purpose for which they were executed and retained by the creditor as further security to the notes evidencing the new contract. The transaction by which the first renewal was accomplished, and which was tainted with usury, as well as all subsequent transactions relating to the extension of the time of the payment of the debt, falls, we think, within the principle of the rule stated in *McDonald v. Beer*, 42 Neb. 437, 60 N. W. 868, in which it is held: "Where a loan is made at a legal rate of interest, and a note executed as evidence of the indebtedness thereby created, and at the maturity of the note a contract is made by which the time of payment is extended, and a new note is given, in which is included interest on the amount of the loan at a usurious rate for the time of the extension, the renewal note is tainted with usury." In the opinion it is said: "The judge who tried the case in the district court evidently adopted the view that the transaction was an illegal one, or tainted with usury, from the date, January 16, 1885, when the first renewal notes were given in part for the interest figured at a usurious rate, and rendered judgment for the amounts loaned, with legal interest from the dates of inception to January 16, 1885, deducting therefrom the several sums paid; and this, we think, was right, and according to the correct rule of law as applied to such transactions. Where a loan is made at a legal rate of interest, and a note executed as evidence of the indebtedness thereby created, and at the maturity of the note a contract is made by which the time of payment is extended, and a new note is given, in which is included interest on the amount of the loan at a usurious rate for the time of the extension, the renewal note is tainted with usury. *Tyler, Usury*, 352; *Webb v. Bishop*, 101 N. C. 99, 7 S. E. 698, and cases cited." Applying the rule above cited to the case at bar, the bank would be entitled to recover the amount of the original indebtedness evidenced by the \$1,122 note, with all lawful interest accrued thereon to the date of the renewal contract, when usury was charged and contracted for, after which, by reason of the force of the statute on usury, the creditor must lose all interest which would otherwise accrue: and all payments made, whether as interest or as a part of the principal, would apply in extinguishment of the principal and lawful interest accrued to that time. The decree of the district court based on the findings of the referee conformed to the rule stated; and this, we think, adjusted the differences between the parties in harmony with the law. The note and mortgage sued on were held as a pledge to the payment of the valid demands owing by the makers to the payee, and nothing more. Whatever sum was justly due the bank on the principal indebtedness, to which the mortgage was held as collateral security, the bank had the right to subject the property mortgaged to its

satisfaction; but it could not claim or recover a greater sum, or establish a lien for a greater amount, than was actually due on the principal indebtedness. To the extent that the principal notes evidencing the indebtedness existing between the parties fail, because of their usurious character, to the same extent would the collateral security fail. *Webb, Usury*, § 318; *Bell v. Lent*, 24 Wend. 230; *Moncure v. Dermott*, 13 Pet. 345, 10 L. ed. 193; *Kellogg v. Adams*, 39 N. Y. 28, and authorities therein cited.

The decree of the District Court gave to each of the parties their lawful dues, and is accordingly affirmed.

Sullivan, Ch. J., concurring:

I agree fully with the views expressed in the foregoing opinion. It is the business of the courts to ascertain the agreements of parties, not to make agreements for them by presuming the existence of mutual intentions which in truth never existed. It is entirely clear from the indorsement on the original note that it was to be held by the bank as collateral security. In other words, it became, by the express contract of the parties, a mere incident or accessory of the renewal notes. This contract was supported by a valuable consideration, and I can conceive of no sound legal reason why it is not enforceable. The amount due upon the original note could not be made the measure of the bank's recovery without violating the agreement under which the renewal notes were given. The parties having, by a valid contract, made the original note collateral, it is collateral, and must be dealt with as such. If the renewal notes were wholly void, the case would be different, for then there would be no consideration for the agreement making the original note a mere adjunct of the renewals.

Sedgwick, J., dissenting:

The proposition that the giving of the renewal note, by which it was agreed to pay an illegal rate of interest upon the loan, operated to make the original note and mortgage usurious, seems to me unsound. In *Burnhisel v. Firman*, 22 Wall. 170, 22 L. ed. 766, it is said: "If a security founded upon a prior one be fatally tainted with that vice [usury], and the prior one were free from it, but given up and canceled, and the latter one thereafter be adjudged void, the prior one will be revived, and may be enforced as if the latter one had not been given." In *Rountree v. Brinson*, 98 N. C. 107, 3 S. E. 747, it is held: "When a note or bond taken for a valid debt, or to renew a valid note, is void for usury, the creditor may, in an action thereon, recover judgment for the valid debt, when the complaint alleges the facts constituting that debt; and an assignee of the note or bond has the same rights as the original creditor." To the same effect are *Cook v. Barnes*, 36 N. Y. 520; *Farmers' & M. Bank v. Joslyn*, 37 N. Y. 353; *Rice v. Welling*, 5 Wend. 595; *Russell v. Nelson*, 99 N. Y. 119, 1 N. E. 314. In *Farmers & M. Bank v. Joslyn*, 37 N. Y.

353, it was said: "The infected contract did not absolve the mortgagor from his antecedent obligations; nor did it impair the rights of the plaintiff under a prior and valid agreement. It is true that the usurer is not permitted, at his own election, to allege his illegal act, as a ground for reinstating an old security; but it is equally true that a party, who claims to be the victim of exaction, cannot avail himself of the invalidity of a later contract, as a shield from liability on one of earlier date, which was honest and free from vice. *Brown v. Dewey*, 1 Sandf. Ch. 57; *Swartwout v. Payne*, 19 Johns. 294, 10 Am. Dec. 228; *Billington v. Wagoner*, 33 N. Y. 31; *La Forge v. Herter*, 9 N. Y. 241; *Crane v. Hubbel*, 7 Paige, 413." Some of the cases were decided under statutes providing that a usurious note is void, and the fact is mentioned that the giving of such a contract would furnish no consideration for the surrendering of the former valid one, but I do not see any reason for making a distinction in this case. The finding of the referee was that all of the renewals which were usurious had been canceled and surrendered by the bank to the defendants Bancroft, excepting the last two given, and that when the first usurious renewal was given the original note, which was not usurious, was marked "Collateral," and it, with the mortgage securing it, was retained by the bank. It was upon this mortgage and note that this action was brought. There was then no agreement on the part of the bank to surrender or cancel the note and mortgage in suit. On the other hand, it was expressly agreed that it should remain a valid obligation, and be held as collateral to the subsequently executed renewal notes. It may be admitted that these transactions amounted to new agreements to pay an illegal rate of interest on the original principal, but this would not affect the liability on the note and mortgage in suit. In *Richards v. Kountze*, 4 Neb. 200, after the original notes, which were not tainted with usury, became due, a contract was indorsed thereon, by which it was agreed to extend the time of payment of the principal of the indebtedness, and to pay usurious interest for such extension. Justice Gantt, delivering the opinion of the court, said: "If the original contract is bona fide, and wholly free from the taint of usury, then no subsequent agreement to pay usury, or an usurious premium upon the debt, will invalidate the instrument given for the payment of the debt, or affect the original contract with the vice of usury, or prevent the collection of the debt, with its legal interest. And this proposition, I think, is well founded in principle, and just in equity; for, if there was once a valid subsisting debt, bearing interest, the contract creating such debt cannot be impaired or destroyed by a subsequent void agreement. Such agreement would be a mere nullity, and could not impair or destroy rights acquired under a valid subsisting contract. *Stewart v. Peetree*, 55 N. Y. 623, 14 Am. Rep. 352; *Rice* 57 L. R. A.

v. Welling, 5 Wend. 597; *Rogers v. Rathbun*, 1 Johns. Ch. 367; *Early v. Mahon*, 19 Johns. 150, 10 Am. Dec. 204." This case was approved and followed in *Dell v. Openheimer*, 9 Neb. 454, 4 N. W. 51. If in giving the renewal notes it had been expressly agreed that they should take the place of the former note, and if the former note had thereupon been canceled and surrendered to the maker, and the mortgage released of record, it might be questioned whether, under our statute, the illegal renewals could be rejected, and an action maintained to reinstate the former securities which had been surrendered and canceled for the sole consideration of an illegal agreement; but the facts in this case, as found by the referee, do not present that question. Here it was agreed that the original valid note and mortgage should continue as a liability against the makers thereof, and it seems to me clear that the holder of the valid note and mortgage can maintain this action thereon, unaffected by the subsequent illegal agreement. *McDonald v. Beer*, 42 Neb. 437, 60 N. W. 868, does not seem to be in point, because in that case the action was on the renewal note, which was affected with usury, and in this case the action is upon the original note and mortgage, in which there was no usury.

I think the decree should be entered for the amount of the note sued on and interest, as reported by the referee.

Mary C. KITCHEN, Plff. in Err.,
v.

William G. CHAPIN.

(.....Neb.....)

*A married woman is liable on her guaranty of a promissory note owned by her and made payable to her order, and the purchaser of such a note is not driven to an inquiry of the purpose to which she intends to devote the proceeds of a sale thereof.

(March 5, 1902.)

ERROR to the District Court for Lancaster County to review a judgment in favor of plaintiff in an action brought to recover upon a guaranty of a promissory note. *Affirmed*.

The facts are stated in the Commissioner's opinion.

*Headnote by DUFFIE, C.

NOTE.—As to wife's powers and liabilities in relation to negotiable instruments generally, see also, in this series, *Robinson v. Queen* (Tenn.) 3 L. R. A. 214; *Binney v. Globe Nat. Bank* (Mass.) 6 L. R. A. 379; *Roop v. Real Estate Investment Co.* (Pa.) 7 L. R. A. 211; *Miller v. Shields* (Ind.) 8 L. R. A. 406, with note as to married woman's contract as surety; *Vorels v. Nussbaum* (Ind.) 16 L. R. A. 45; *Frederick Town Sav. Inst. v. Michael* (Md.) 33 L. R. A. 628; *Harrisburg Nat. Bank v. Bradsbaw* (Pa.) 34 L. R. A. 597; *McCollum v. Boughton* (Mo.) 35 L. R. A. 480; and *Thompson v. Taylor* (N. J. L.) 54 L. R. A. 585.

Messrs. Morning Brothers, for plaintiff in error:

Even where the wife signed a note with her husband, and gave a mortgage to secure it upon her own real estate, she would not be bound for a deficiency judgment, where it appears that the actual fruits of the transaction went to her husband.

Grand Island Bkg. Co. v. Wright, 53 Neb. 574, 74 N. W. 82; *Godfrey v. Megahan*, 38 Neb. 748, 57 N. W. 284.

The effect of our statutes is to enable a married woman to bind her separate property to the same extent only that she could formerly bind it in equity.

Kocher v. Cornell, 59 Neb. 315, 80 N. W. 911.

Estoppels *in pais* are not applicable to married women.

2 Herman, Estoppel, § 1116; *Innis v. Templeton*, 95 Pa. 262, 40 Am. Rep. 643.

Mr. J. S. Kirkpatrick for defendant in error.

Duffie, C., filed the following opinion:

William G. Chapin brought this action in the district court of Lancaster county against Mary C. Kitchen and A. D. Kitchen, alleging as his cause of action that he was the owner of a promissory note for \$500 made by James H. O'Neill, and payable to the order of Mary C. Kitchen; that after the execution and delivery of said note, and before the maturity thereof, the said Mary C. Kitchen sold, assigned, and delivered the note to him, and for that purpose the said Mary C. Kitchen and A. D. Kitchen indorsed on the back of said note the following:

For value received, I hereby assign the within note unto William G. Chapin, and hereby guaranty payment of the same, and waive demand and notice of protest on same when due.

Mary C. Kitchen.
A. D. Kitchen.

It is alleged that the note is due and unpaid, and judgment is asked against the defendants. Mary C. Kitchen filed the following answer: "Now comes Mary C. Kitchen, and, for her answer to the petition of the plaintiff, says: At the time the note sued on was executed, and the indorsements of assignment and guaranty made, she was a married woman, the wife of her codefendant, A. D. Kitchen, and living with him. That previous to this time she owned some city lots in Lincoln, of uncertain value. Her said husband was engaged in the erection of some brick buildings in said city, and was needing money. This defendant said to him if he could sell some of her lots she would make a deed to the purchaser, and he, her said husband, could have the money realized from said sales to use in the erection of the said buildings he was erecting. Later he represented to her that he had negotiated a sale for certain lots, and asked her to execute a deed to the same to the defendant O'Neill, which she did. Later he brought to her the note and mortgage in suit, and asked her to write her name on the back of it, so he could use it in his business, which she

did. The defendant alleges that she had no business dealings with the plaintiff whatever; that she has never been engaged in any trade or business, and did not get or receive any benefit or consideration for the sale of said lots, or for the execution of the deed she executed thereto, or for the transfer of said note to the plaintiff, or for said assignment and guaranty. She alleges that she did not enter into said contract of guaranty for the purpose of binding her separate estate, or with reference thereto, but only for the purpose of passing the title of said note, so her husband could get the money to use in his own business and enterprises. Wherefore she prays that she may go hence without day, and recover her costs." The reply is a practical admission of all the facts set out in the answer, except that she did not indorse the note for the purpose of binding her separate estate, or with reference thereto. The case was tried to the court without a jury, and judgment entered for the plaintiff below, and Mrs. Kitchen has taken error to this court.

The only question presented by the record is whether the plaintiff in error, a married woman, is liable upon her guaranty, under the admitted facts in this case. In order to assist her husband in some building operations in which he was engaged, she sold certain lots which she owned in her own right, taking this note as a part of the purchase price. For the purpose of negotiating the note, and obtaining money thereon for her husband's use, she guaranteed payment of the note, in the form above shown. Was this a contract relating to her separate estate, and did she intend thereby to bind her separate estate? In *Grand Island Bkg. Co. v. Wright*, 53 Neb. 574, 74 N. W. 82, Judge Norval, in speaking of the liabilities of a married woman under our enabling act, remarks at page 578, 53 Neb., and page 83, 74 N. W.: "But this statute does not, expressly nor by implication, enlarge a wife's capacity to contract generally. She can buy and sell property in her own name and upon her own account, and enter into valid contracts with reference to her separate estate, the same as if she were a *feme sole*, or as a married man may in relation to his property." It is undisputed that the note in suit was taken by Mrs. Kitchen on a sale of her separate property, and that the note itself was her separate property. She had the same right to hold and collect it or sell and negotiate it that a married man would have, and in the sale and transfer of the note she could undoubtedly bind herself by any contract of indorsement or guaranty that is usual or customary in the sale and transfer of such instruments. The contract was one relating wholly to her separate estate, in relation to which the statute empowers her to contract with the same freedom and to the same extent as though she were unmarried. The fact that the proceeds of the sale of the note were to go into her husband's business would not in the least affect her power to guarantee the payment

of the note, and to bind herself by such guaranty.

The third finding of the court is as follows: "That, before the purchase of said note by the plaintiff, Mary C. Kitchen had given said note to the defendant A. D. Kitchen to use by him in his business, but that before said purchase said Mary C. Kitchen signed the guaranty hereinbefore found, and authorized her husband to put said note in circulation with said guaranty thereon." It is insisted that this finding shows that Mrs. Kitchen had parted with all interest in the note, and had given the same to her husband, prior to indorsing the same, and that she is therefore no more liable upon her indorsement than she would be by indorsing the note of her husband or of some third party. This third finding of the court is inconsistent with the admitted facts, and we think it is not to be considered. It is undoubtedly true that Mrs. Kitchen agreed with her husband, prior to a sale of this note to the defendant in error, that he might sell some of her lots and use the proceeds in his business. As before stated, the note in question was taken as part consideration on the sale of some of her lots; and, in the sense that she had agreed with her husband to give him the proceeds of these lots, she had given him this note. The record and her own answer make it plain, however, that she never transferred to her husband the legal title to the note by indorsing the same to him; and her answer admits that she indorsed the note at the request of her husband in order that it might be sold, and the proceeds used in his business. We think that she is bound by the allegations of her answer, and that, fairly construed, admits that she indorsed the note in its present form for the sole purpose of negotiating the same and transferring the title.

Our attention has been called to some cases from other states, and particular attention directed to *Russel v. People's Sav. Bank*, 39 Mich. 671, 33 Am. Rep. 444. It appears from the statement of facts made by Judge Cooley in that case that Mrs. Russel, a married woman, was the owner of a note made to her by the Hamtramck Iron Works. She was also a stockholder in the Detroit Car Works. The latter company was indebted to the People's Savings Bank, which threatened suit for the collection of its claim. To prevent suit, Mrs. Russel indorsed the note given her by the Hamtramck Iron Works, and gave it to the bank as a collateral security for the debt due it from the car company. The note not being paid at maturity, the bank brought suit against Mrs. Russel upon her indorsement. Judgment went against her in the superior court, which was reversed in the supreme court upon the ground that her contract of indorsement was made for the benefit of the bank, and that she could not bind herself as surety for another. The statement of the case shows that she indorsed this note, not for any purpose of her own, but as security for the payment of a debt due the bank from the car company, and the fact that she was

a stockholder in the company could not enlarge her liability on the contract. Judge Cooley disposes of such a claim in the following apt words: "But it is said that in this case the suretyship was for the benefit of a corporation in which Mrs. Russel was a stockholder, and therefore she must be supposed to have had in view in making it her own interest in the corporation. Mrs. Russel, however, was not identified with the corporation otherwise than as having an interest in it. The legal identity of each was distinct, and contracts for the benefit of the corporate estate were in no sense contracts for the benefit of the estate of one of its corporators. . . . The test of competency to make the contract is to be found in this: that it does or does not deal with the woman's individual estate. Possible incidental benefits cannot support it. Tested by this criterion, this contract of indorsement, so far as it involves a personal responsibility, must fail. Mrs. Russel has contracted for the advantage, not of her own estate, but of a corporation with which she is no more identified in law than she is with her husband or any third person. . . . But there is no occasion to indulge in presumptions one way or the other. It is sufficient that the contract is one of suretyship, merely, and as such is not one the statute empowers a married woman to make." In the case we are now considering, the note was made payable to Mrs. Kitchen. She offered it on the market with her indorsement in the form above set out; and, while the purchaser of negotiable paper takes it with constructive notice of the disability of the maker or the indorser, we do not think he is driven to the inquiry of the use to which a married woman intends to devote the proceeds of a note payable to her order, and which she indorses to give it currency. Concededly, the law is that she would be liable on this contract of indorsement, had she invested the proceeds of the sale in the improvement of her separate estate or to her own personal use; and we cannot bring ourselves to think that because she may invest it in presents made to her friends, or turn it over to her husband to be used by him in his business, her liability is lessened in the slightest degree. A married woman in this state may engage in trade. Of necessity, she may take notes and bills in the conduct of her business, and, having taken them, she may dispose of them like other traders. As a trader, she gives an implied warranty of her title to every article which she sells; and, in case the property is lost to the purchaser because she had no title when she sold to him, there can be no doubt of his right to maintain an action against her on her implied warranty of title. This being so, why can she not make an express warranty of the quality of the goods she offers for sale,—a warranty that is valid and may be enforced against her? If she has not that power, then the statute which gives her leave to engage in trade places her at a disadvantage with other traders, who can make a valid warranty

upon which their customers may rely as affording them protection. So, too, in the disposal of the notes and bills taken in the conduct of her business, if she cannot sell and dispose of them when the necessities of her business demand ready money, and make an indorsement upon which she may be held liable personally,—if she can indorse so as to transfer the legal title only,—then she is again at a disadvantage, and may be compelled to dispose of the notes and bills taken in the course of her business at a large discount, to a purchaser who would be willing to pay their full face value if he could rely upon her indorsement, rather than on the solvency of the maker, who is perhaps unknown to him. These considerations lead us to believe that it was the intent of the legislature to give to a married woman the same rights as a married man possesses, and to impose on her the same liabilities, in all transactions connected with her separate estate or trade or business, and that a person dealing with her in relation to her separate property need make no inquiry as to her intention in the disposition of the proceeds realized by her from a sale made either of notes or bills or of other property held by her in her own right.

We recommend the affirmance of the judgment.

Albert and Ames, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

UNIVERSITY OF MICHIGAN, Substituted for Charles E. Bates, Admr., etc., of Elizabeth H. Bates, Deceased, Appt., v.

Daniel L. McGUICKIN et al.

(62 Neb. 489.)

*1. In this state marriage is a civil contract, and whenever the minds of parties capable of entering into such a contract with each other meet in a common consent thereto at the same time, there is a valid marriage.

2. In the absence of a bill of exceptions, the findings of the trial court on a question of fact will not be reviewed.

3. Answer examined, and held to contain a sufficient averment of marriage between the defendants, when assailed for the first time on appeal.

On rehearing.

†4. The marriage relation is, in only

*Headnotes by ALBERT, C.

†Rehearing headnotes by AMES, C.

NOTE.—For cohabitation as proof of marriage, where it begins unlawfully, see also, in this series, *Collins v. Voorhees* (N. J. Eq.) 14 L. R. A. 364, and note; *Schuchart v. Schuchart* (Kan.) 50 L. R. A. 180; and *Barker v. Valentine* (Mich.) 51 L. R. A. 787.

As to what is sufficient to constitute marriage, and validity of common-law marriages 57 L. R. A.

a limited, qualified sense, contractual. It is a social status, for the assumption of which, by persons of the requisite legal capacity, all that is essential is their free consent.

5. The consent requisite to the creation of the marriage relation need not be expressed in any especial manner, or by any prescribed form of words, but may be sufficiently evidenced by any clear and unambiguous language or conduct.

(Holcomb, J., dissenting.)

(July 10, 1901.)

A PPEAL by plaintiff from a judgment of the District Court for Douglas County in favor of defendants in an action brought to foreclose a mortgage. *Affirmed.*

The facts are stated in the opinions.

Messrs. Wright & Stout, for appellant:

The fact of copulation after a promise *per verba de futuro* is simply evidence from which the court may presume a new promise or a promise *de presenti*; and the fact of living together is not itself marriage, but is simply evidence from which the court may presume that a promise was made. This presumption, which ordinarily would arise from continued copulation, in the case at bar is overcome by the positive finding that no new promise was made, and that the relation was meretricious at its inception. Having been meretricious at its inception, it is presumed to continue meretricious until there is positive evidence of a change or a new promise.

Duncan v. Duncan, 10 Ohio St. 181; *Barnum v. Barnum*, 42 Md. 251; *Hunt's Appeal*, 86 Pa. 294; *Stolts v. Doering*, 119 Ill. 234; *Crymble v. Crymble*, 50 Ill. App. 544; *Collins v. Voorhees*, 47 N. J. Eq. 315, 20 Atl. 676; *Cartwright v. McGoun*, 121 Ill. 388, 12 N. E. 737; *Cheney v. Arnold*, 15 N. Y. 345, 69 Am. Dec. 609; *Holmes v. Holmes*, 1 Abb. (U. S.) 527, Fed. Cas. No. 6,638; *Cram v. Burnham*, 5 Me. 213, 17 Am. Dec. 218; *Collins v. Collins*, 80 N. Y. 1; *Goldbeck v. Goldbeck*, 18 N. J. Eq. 42; *Robertson v. State*, 42 Ala. 509; *Clark v. Cassidy*, 64 Ga. 662; *Beverson's Estate*, 47 Cal. 621; *Van Tuyl v. Van Tuyl*, 57 Barb. 235; *State v. Worthingham*, 23 Minn. 528; *Ahlberg v. Ahlberg*, 24 N. Y. Supp. 919; *Bates v. Bates*, 7 Misc. 547, 27 N. Y. Supp. 872; *Bishop, Mar. & Div.* ¶ 255-281.

Messrs. I. B. Andrews and J. J. Breen, for appellees:

A mortgage upon the homestead, not executed and acknowledged by the husband and wife, is absolutely void, even though the wife be living apart from the husband at the time.

Bonorden v. Kris, 13 Neb. 121, 12 N. W.

generally, see *State v. Bittick* (Mo.) 11 L. R. A. 587; *Re McLaughlin* (Wash.) 16 L. R. A. 699; *Nims v. Thompson* (Wis.) 17 L. R. A. 847; *Morrill v. Palmer* (Vt.) 33 L. R. A. 411; *State v. Zichfeld* (Nev.) 34 L. R. A. 784; and *Atlantic City E. Co. v. Goodin* (N. J. L.) 45 L. R. A. 671.

831; *Aultman & T. Co. v. Jenkins*, 19 Neb. 209, 27 N. W. 117; *Betts v. Sims*, 25 Neb. 166, 41 N. W. 117; *Rogers v. Day*, 115 Mich. 664, 74 N. W. 190; *Gadsby v. Monroe*, 115 Mich. 228, 73 N. W. 367; *Lamb v. Wogan*, 27 Neb. 236, 42 N. W. 1041; *Larson v. Butts*, 22 Neb. 370, 35 N. W. 190; *Herron v. Knapp, S. & Co. Co.* 72 Wis. 553, 40 N. W. 149; *Rosholt v. Mehue*, 3 N. D. 513, 23 L. R. A. 239, 57 N. W. 783; *Whitlock v. Gosson*, 35 Neb. 829, 53 N. W. 980; *France v. Bell*, 52 Neb. 57, 71 N. W. 984.

Under our statute, marriage is a civil contract requiring only the consent of the parties capable of contracting.

Neb. Comp. Stat. chap. 52, § 1.

Such consent may be shown by direct or circumstantial evidence.

Bailey v. State, 36 Neb. 808, 55 N. W. 241; *Goodrich v. Cushman*, 34 Neb. 460, 51 N. W. 1041; *Bishop, Mar. & Div.* p. 503.

If the cohabiting parties earnestly desire to assume the marital relations, and know of impediments, they may be presumed to have consented at a reasonable time after the obstruction was removed.

Bishop, Mar. & Div. § 13, pp. 508-511; *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244; *Northfield v. Plymouth*, 20 Vt. 582; *Yates v. Houston*, 3 Tex. 433; *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245; *Brouer v. Bowers*, 1 Abb. App. Dec. 214; *Camden v. Belgrade*, 75 Me. 126, 46 Am. Rep. 364; *Jackson ex dem. Van Buskirk v. Claw*, 18 Johns. 347.

A common-law marriage will suffice to change a cohabitation which is illicit in its origin to one which is lawful.

Badger v. Badger, 88 N. Y. 547, 42 Am. Rep. 263.

Even upon doubtful facts, the court ought to presume a lawful marriage by mutual consent, after the impediment has been removed, rather than to presume thirteen or fourteen years of notorious immorality.

Peet v. Peet, 52 Mich. 464, 18 N. W. 220; *Taylor v. Swett*, 3 La. 33, 22 Am. Dec. 156; *North v. North*, 1 Barb. Ch. 241; *Caujolle v. Ferrie*, 23 N. Y. 90; *Com. v. Hurley*, 14 Gray, 411; *Gibson v. Gibson*, 24 Neb. 394, 39 N. W. 450; *Rose v. Clark*, 8 Paige, 574; *Donnelly v. Donnelly*, 8 B. Mon. 113; *White v. White*, 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 276.

Albert, C., filed the following opinion:

This action was brought by Elizabeth H. Bates against Daniel L. McGuckin and Anna McGuckin to foreclose a mortgage executed by the first-named defendant to the plaintiff. Anna McGuckin resisted the foreclosure, on the ground that at the time of the execution of the mortgage, and at all times subsequent thereto, she was the wife of her codefendant, and that the mortgaged premises was their family homestead; that the mortgage, not having been signed and acknowledged by her, was void. The reply was a general denial. A trial of the issues joined resulted in a finding and decree in favor of the defendant, to reverse which 57 L. R. A.

the case is brought to this court on appeal. For reasons not necessary to state in detail, the case is now prosecuted under its present title.

The first question presented is whether the findings of the trial court are sufficient to sustain the decree. The appellant challenges the sufficiency of the finding on two grounds, which will be considered in their order. It is first urged that the findings do not establish a marriage between Anna McGuckin and her codefendant. The finding on this point is as follows: "(4) The court further finds that the said Anna McGuckin entered the home of Daniel L. McGuckin in the month of April, 1880, as housekeeper for Daniel L. McGuckin. That she was then the wife of James Lavelle. That at the solicitation and expense of Daniel L. McGuckin she commenced an action for divorce against said James Lavelle in Burt county, Nebraska, and that a divorce was granted her on May 4, 1880, in the district court of Burt county, Nebraska. That at the time of the filing of her petition in Burt county, Nebraska, she was living in Burt county, Nebraska, and that her parents, with whom she had made her home since separating from said James Lavelle, were residing in said Burt county, Nebraska. (5) That in April, 1880, Daniel L. McGuckin was a married man, and that he obtained his divorce from his wife in August, 1880, and that said Anna McGuckin did not know of the fact that Daniel L. McGuckin was married until May 4, 1880. That at a time prior to the obtaining of her divorce, to wit, on May 4, 1880, said Daniel L. McGuckin and Anna McGuckin promised to marry as soon as she could get her divorce, and that they commenced cohabiting together at said time, and continued to so cohabit until April, 1893. That the said Daniel L. McGuckin again promised to marry the said Anna McGuckin after she got her divorce, and before he obtained his divorce, and promised that he would so marry her as soon as he could procure a divorce from his wife. That pending his action for divorce they cohabited as husband and wife, and held each other out to the world as husband and wife, and that no marriage ceremony was ever performed, and that she continued to live with and cohabit with the said Daniel L. McGuckin until the spring of 1893. That they announced themselves as husband and wife to her relatives, and so conducted themselves wherever they went. That he introduced her as his wife in society and in the church, and spoke of her as his wife in stores where they traded, addressed her as 'Mrs. McGuckin' in the presence of company, paid her bills, and supported her as his wife. That Daniel L. McGuckin gave her an engagement ring and a wedding ring. That she gave birth to five children, whose paternity Mr. McGuckin has always acknowledged, and which were duly baptized in the Catholic Church as children of legally married parents. Four of said children are still living. That the promises

above made were the only promises ever made, and that no new promise was made after the obtaining of the divorce by Daniel L. McGuckin, nor was there any apparent change in their manner of living or holding themselves out as husband and wife." In our opinion the foregoing is a finding of a marriage between the parties. Marriage in this state is purely a civil contract, and whenever the minds of parties capable of entering into a marriage contract with each other meet in a common consent thereto at the same time, there is a valid marriage. *Bailey v. State*, 36 Neb. 808, 55 N. W. 241. No particular form of words is required to express such common consent. The announcement of the parties to her relatives that they (the defendants) were husband and wife in itself shows a meeting of their minds at the same time in common consent to bear that relation each to the other. That the relations between the parties, before divorced from their respective spouses, was meretricious, is immaterial, so long as their minds did meet, as before stated, at a time when they were both free to enter into a contract of marriage. *Poole v. People*, 24 Colo. 510, 52 Pac. 1025; *State v. Zichfeld*, 23 Nev. 304, 34 L. R. A. 784, 46 Pac. 802.

It is next urged that the defendant Anna McGuckin had waived or abandoned her right to claim a homestead as against the appellant. The question involved is purely one of fact, and, as such, was submitted to the court, and the court found against the appellant. The evidence is not before us, and it will be presumed that the findings of the court are sufficiently sustained by the evidence.

It is next urged that the answer of Anna McGuckin does not allege that she was the wife of her codefendant at the time the mortgage was executed. This fact might have been pleaded with greater certainty, but in our opinion it sufficiently appears when called in question for the first time on appeal. The decree of the district court should be affirmed.

Ames and Duffie, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the decrees of the District Court is affirmed.

A rehearing having been granted, Ames, C., on March 19, 1902, filed the following additional opinion:

This cause is resubmitted upon arguments and briefs upon a rehearing granted from a former decision in the same cause. The opinion in which was filed on the 10th day of July, 1901. The case was submitted upon a record containing the pleadings and findings of fact of the trial court, only. The principal question discussed upon the reargument, and the only one with which we think it requisite to deal in this opinion, is that of the validity of the alleged marriage between the appellees Anna Mc-

Guckin and Daniel McGuckin. The findings of fact relative to this inquiry are copied in the former opinion, and need not be repeated here. The district court found, as a conclusion of law, that they were sufficient to establish the validity of the marriage. In this conclusion this court, in its former opinion, concurred. The facts found are many of them evidential, rather than ultimate, in character. The beginning of the cohabitation was meretricious, each of the parties having a lawful spouse then living; but both these obstacles were soon afterwards removed by decrees of divorce, and thereafter the parties not only continued for a long term of years to live together as husband and wife, and to enjoy the repute of that relation, but continuously represented themselves to the public and individuals as being such. During this time, and before the making of the mortgage in question, five children were born of the union, whom their parents unitedly represented to the public, and caused to be baptized into church, as the children of lawful wedlock. That these facts and certain others recited in the finding would, if standing alone, be sufficient evidence of marriage, cannot be doubted, and is explicitly admitted by counsel for the appellant in both brief and argument. But in connection with them, and as a part of the same finding in which they are set forth, the court also found that, although the parties made promises to marry prior to the obtaining of the divorces, yet that such promises "were the only promises ever made, and that no new promise was made after obtaining of the decree of divorce by Daniel McGuckin, nor was there any apparent change in their manner of living, or holding themselves out as husband and wife." Counsel thereupon insists that a lawful marriage could have had its inception only in a promise or agreement of marriage after the removal of the legal obstacles thereto; that the evidential facts found are of no significance, except as tending to establish the making of such a promise or agreement, or of raising a presumption that one had been made, and that whether one had been made was the only ultimate fact in controversy; and that the language quoted above from the finding, being an express negation of such promise, is decisive of the case, so that the evidential facts found are immaterial. In other words, it is contended, as we understand counsel, that a single finding by the court that there was no promise or agreement after obtaining of the divorces would have had the precise legal weight of the actual finding, and that it is not a material inquiry whether the court recited all or only part of the evidence establishing this ultimate fact, because it was not obligatory upon him to recite any of it. We can hardly believe that this is the interpretation which the trial judge himself put upon his findings, and we are not convinced that it is the true one to be given to that document. In our opinion, an express verbal promise or

agreement of marriage is not in all cases indispensable under our law. The statute enacts (Comp. Stat. chap. 52, § 1): "In law, marriage is considered a civil contract to which the consent of the parties capable of contracting is essential." The main purpose of this definition is, we think, to negative the idea that marriage is an ecclesiastical sacrament, or that in the eye of the law it is controlled by the mandates or dogmas, or subject to the observance of the rituals or regulations, of any particular churches or sects. That it is not a contract resembling in any but the slightest degree, except as to the element of consent, any other contract with which the courts have to deal, is apparent upon a moment's reflection. This was pointed out by the late Mr. Justice Field, with his usual clearness of expression and wealth of illustration, in *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723. What persons establish by entering into matrimony is not a contractual relation, but a social status; and the only essential features of the transactions are that the participants are of legal capacity to assume that status, and freely consent so to do. It may be true, as counsel for appellant contends, that the indispensable consent cannot be implied, but must in all cases be expressed; but it does not follow that it must be expressed in any especial manner, or by any prescribed form of words. The statute above cited dispenses with all ceremonials,—verbal as well as other. It was probably this idea which was in the mind of the trial judge when he penned the words quoted above from his finding. In other words, it appeared to him, as it appears to us, that there was sufficient evidence that after the obtaining of the last divorce the parties consented to assume the status of husband and wife, although they made no explicit verbal contract or agreement so to do. Doubtless the very phrase which counsel for appellant regards as establishing the ultimate, conclusive, and solely essential fact, the trial judge looked upon as slightly, if at all, material. So construed, his finding is inconsistent neither with itself, nor with the conclusion of law and judgment, and that this is its true interpretation is to our minds perfectly clear. As has already been said, it is conceded, and, indeed, it could not well be disputed, that there is in the finding, aside from this single expression, sufficient evidence of the consent of the parties, after the removal of their disabilities, to assume the marriage relation. That evidence is not rebutted by the mere negative fact that they omitted to express that consent by formal words. The ultimate fact is not that the parties made a formal promise or contract, but that they mutually consented to a social relation. This consent may be expressed by conduct as effectively as by words, and proof of the conduct is proof of the consent. In both cases the conclusion drawn by the court is from an implication, but in either case all that is required is that the expression be clear and

unambiguous. In neither case can it properly be said that the contract or the consent is implied.

It is recommended that the former decision of this court be adhered to, and the judgment of the district court affirmed.

Albert and Duffie, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, it is ordered that the former decision of this court be adhered to, and the judgment of the District Court affirmed.

Holcomb, J., dissents.

George E. ALDRICH, *Plff. in Err.*,
v.

BANK OF OHIOWA.

(.....Neb.....)

*Annual crops growing on the land do not pass to the purchaser at judicial sale; and for the purpose of saving the debtor's rights thereto, these annual crops will be regarded as personality.

(March 19, 1902.)

ERROR to the District Court of Fillmore County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged wrongful conversion of certain grain. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Charles H. Sloan and Frank W. Sloan, for plaintiff in error:

The mortgagee of growing crops, where the mortgage is taken during the pendency of a suit in ejectment, is not entitled to them as against the plaintiff, as they are a part of the realty; and the mortgagee is not entitled to possession of the premises for the purpose of harvesting such crops.

Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33; *King v. Fowler*, 14 Pick. 238; *Shepard v. Philbrick*, 2 Denio, 174; *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235; *McGinnis v. Fernandes*, 135 Ill. 69, 26 N. E. 109; *Craig v. Watson*, 68 Ga. 114; *Samson v. Rose*, 65 N. Y. 418; *McLean v. Bovee*, 24 Wis. 295, 1 Am. Rep. 185; *Haven v. Adams*, 8 Allen, 363.

Mr. C. A. Fowler, for defendant in error:

Our statute regulating judicial sales seems to have been taken from that of Ohio, where it has long been fully settled that in these sales the crop does not pass with the land.

*Headnote by OLDHAM, C.

NOTE.—For a case in this series holding that title to grass severed after the land had been sold on execution, but before the confirmation of the sale, does not pass to the purchaser, see *Yeasel v. Einspahr* (Neb.) 24 L. E. A. 449.

Cassilly v. Rhodes, 12 Ohio, 88; *Houts v. Showalter*, 10 Ohio St. 124.

Public policy requires that the law should be so construed as to encourage, rather than discourage, the tilling of land under such circumstances.

Monday v. O'Neil, 44 Neb. 728, 63 N. W. 32; *Yeazel v. White*, 40 Neb. 432, *sub nom.* *Yeazel v. Einspahr*, 24 L. R. A. 449, 58 N. W. 1020; *Foss v. Marr*, 40 Neb. 559, 59 N. W. 122; *McKean v. Smoyer*, 37 Neb. 694, 56 N. W. 492; *Sornberger v. Berggren*, 20 Neb. 399, 30 N. W. 413.

Oldham, C., filed the following opinion:

One Nierstheimer owned a farm in Thayer county, Nebraska, of 160 acres, upon which George E. Aldrich (the plaintiff in error) had a mortgage. This mortgage was foreclosed by a decree of the district court of Thayer county, in 1897, at the February term thereof. The statutory stay was taken. Nierstheimer, the mortgagor, was in possession of, and was farming, this land, and in the month of September of the year 1897 he planted 40 acres of this land to wheat. On November 15, 1897, he gave to the Bank of Ohiowa (the defendant in error) a chattel mortgage on the north one-half of this field of wheat, to secure his note, which he had that day given it for \$850. This note was, by its terms, due in ninety days from its date. This mortgage was duly filed for record, and it is stipulated in the record that this note has not been paid. The land was sold under the decree of foreclosure by the sheriff of Thayer county on January 24, 1898, Aldrich being the purchaser. The sale was confirmed, and a deed thereon was issued to Aldrich on March 21, 1898, and Aldrich at once took possession of this land, and still has the possession. The bank claimed the right to go upon this land and harvest this mortgaged wheat, and demanded of Aldrich that it be permitted to do so. This was refused by Aldrich, who claimed the wheat by reason of his ownership of the land, and harvested and marketed the same; whereupon the bank brought its action against Aldrich for the conversion of the wheat. This action was tried to the district court of Thayer county (a jury being waived), which resulted in a judgment for the bank for the sum of \$130.76,—the value of the wheat, less the cost of harvesting and marketing,—from which judgment Aldrich prosecutes error to this court.

The problem for solution, then, is, Who is entitled to the wheat,—the mortgagee or the purchaser of the land at judicial sale? There is no question presented as to the validity of this chattel mortgage in its inception. The property was *in esse*, and the right to mortgage is not questioned; but it is claimed that by the confirmation of the sale the title to the real estate on which the wheat was growing passed to Aldrich and carried with it the wheat. So the ownership of this property is dependent on the question, Do crops that are not matured, but growing on the land at the time of the confirmation of the judicial sale, pass to the

purchaser of the land, or do they remain the property of him who planted them? Phases of this question have been passed upon by this court. In *Foss v. Marr*, 40 Neb. 559, 59 N. W. 122, this court held: "A matured crop of corn standing ungathered upon land sold at judicial sale, which was not considered or taken into account by the appraisers in arriving at the value of the premises sold, did not pass to the purchaser at the judicial sale, but remained the property of the mortgagor, who had planted and cultivated it." In *Monday v. O'Neil*, 44 Neb. 724, 63 N. W. 32, the court says that "a tenant for years of mortgaged land planted a crop after the rendition of a decree foreclosing the mortgage, the tenant having been a defendant in the foreclosure suit. The land was sold under the decree, and the sale confirmed, while the crop was growing, and before it matured. The purchaser did not obtain possession of the land, but permitted the tenant to retain possession, merely notifying him that he, the purchaser, would expect from the tenant rent in money or in kind. Held that, as between the tenant and purchaser, the former was entitled to the crop." In this last case the court did not determine what the rights of the parties would have been had Monday secured possession and evicted O'Neil before the crop matured. But the court, in both *Foss v. Marr* and *Monday v. O'Neil*, bases its decision on the case of *Cassilly v. Rhodes*, 12 Ohio, 88, and *Houts v. Showalter*, 10 Ohio St. 125. The doctrine of these cases is that annual crops growing on the land do not pass to the purchaser on judicial sale, because in law they are regarded as personalty. We must either accept this classification or reject the doctrine of the Ohio cases absolutely. To reject this would be to overturn *Foss v. Marr* and *Monday v. O'Neil*, which, to the extent they have gone in the application of this doctrine, have become a rule of property in this state; and for this reason we do not feel justified in overthrowing them. This being so, nothing but the other alternative is left to us, which is the acceptance of this classification, and, with the Ohio cases, hold that the title to the annual crops growing on the lands do not pass to the purchaser on judicial sale, for the reason that the law regards them as personal property. This being their legal status, the controversy over whether or not they were taken into account by the appraisers becomes immaterial. The appraisers of the land would have no right to appraise the personalty which they may find upon the land. This status of the property also renders the question of possession by the purchaser a plain and reasonable one. It will be conceded that a purchase of real estate would not carry with it the personal property of the vendor. When you buy and receive title to my land, you do not buy my horse, and by the act of buying the land you have acquired no right to the horse. The result would be, and is, the logical sequence of all personal property of whatso-

ever nature and kind, and hence Aldrich acquired no ownership of this property in controversy by reason of his purchase at judicial sale of the land on which the wheat was growing. Having no ownership, how would the possession of the land give him the right to treat this property as his own and apply it to his own use? Counsel suggest no answer to this question. Nor do we think it could be answered to his advantage. The land passes by a judicial sale to the purchaser, burdened with any and all the rights of other parties, including the mortgagor, that are not inconsistent with, or opposed to, title. Title, and this alone, is all the court gives the purchaser. From this he may, or may not, according to the circumstances of the case, or the rights of others, have the right of possession. But the possession of the purchaser could not by any reason of that act destroy the rights of others, nor justify him in appropriating other people's property; and it would make no difference to whom it belonged, as it did not belong to him.

The law recognizes the necessity of agriculture, and favors its promotion, and, as is said in *Houts v. Shoualter*, 10 Ohio St. 125, "under our system, frequent advertisements and offers for sale, and occasionally revaluations are necessary before a sale can be effected. When an appraisement is made, it cannot be foreseen when a sale will be effected. It is not for the interest of any party, nor for the public interest, that the land should thenceforth lie waste; then, there may have been no crop sown or planted." This failure to sow or plant is what the law discourages, and it can only encourage sowing and planting under circumstances like these by assuring a man that if he sow he shall reap.

The judgment of the court below is right, and we recommend that it be affirmed.

Barnes and Pound, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

Max ROSENBLOOM, Plff. in Err.,

v.

STATE of Nebraska.

(.....Neb.....)

*1. The law imposing a license tax upon peddlers (Comp. Stat. 1901, chap. 77, art. 1, §§ 152-154) has for its object the raising of revenue, and its enactment was

*Headnotes by SULLIVAN, Ch. J.

NOTE.—For an earlier case in this series holding that a statute very similar to the one discussed above is unconstitutional because the distinctions attempted to be made were no proper basis for classification, see *State ex rel. Luria v. Wagener* (Minn.) 38 L. R. A. 677.

As to necessity of uniformity in license or

an exercise of the taxing power, and not the police power.

2. It is settled doctrine that the courts will not declare an act of the legislature unconstitutional unless it is manifestly so.

3. The provision of § 154 of the general revenue law, authorizing fine and imprisonment as a means of enforcing a license tax, does not trench upon the Constitution, and is therefore valid.

4. An act entitled "An Act to Provide a System of Revenue" covers the entire subject of taxation, and comprehends whatever means or machinery the legislature may provide to enforce payment of taxes.

5. The provision of the Constitution (art. 9, § 1) authorizing the taxation of persons engaged in certain occupations, in such manner as the legislature shall direct by general law, uniform as to the classes upon which it operates, forbids partiality and favoritism, and makes equality before the law a rule of legislative action. It does not, however, forbid reasonable classification of persons for the purpose of taxation.

6. Classification, to be valid, must not be arbitrary. It must rest on some reason of public policy,—some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects or individuals classified.

7. There is such a real distinction between persons who go from house to house, and place to place, vending their own products, and those who sell in the same way the productions of others, that the legislature, acting on considerations of general policy, may make it the basis of classification for the purpose of taxation.

8. A particular classification may be valid if the object of the statute is to raise revenue, and invalid if the object is regulation.

9. The law imposing an occupation tax upon peddlers is sufficiently certain to be capable of enforcement.

(Holcomb, J., dissents.)

(April 2, 1902.)

ERROR to the District Court for Platte County to review a judgment convicting defendant of peddling without a license. Affirmed.

The facts are stated in the opinion.

Messrs. McAllister & Cornelius, for plaintiff in error:

There is nothing in the title of either the law of 1879 or the pernicious amendment of 1901 to direct the attention of the members of the legislature to the vicious law there enacted.

Ives v. Norris, 13 Neb. 254, 13 N. W. 276; *Ex parte Thomason*, 16 Neb. 238, 20 N. W. 312; *Holmberg v. Hauck*, 16 Neb.

privilege tax, see *Knisely v. Cotterel* (Pa.) 50 L. R. A. 86, and footnote thereto.

For discrimination as to peddlers and hawkers in requiring license, see *Carrollton v. Bazette* (Ill.) 31 L. R. A. 522, and *Re Haskell* (Cal.) 32 L. R. A. 527.

For a case holding that an ordinance im-

337, 20 N. W. 279; *Ryan v. State ex rel. Eller*, 5 Neb. 276; *Touzalín v. Omaha*, 25 Neb. 817, 41 N. W. 796; *Trumble v. Trumble*, 37 Neb. 340, 55 N. W. 869; *State ex rel. Patterson v. Douglas County*, 47 Neb. 428, 66 N. W. 434.

The business of peddling is just as honorable and as much entitled to the protection of the law as any other business; it makes no difference whether a man invests his all in a pack, horse, wagon, and a small stock of goods, or a five-story building with a million-dollar stock of goods, each is entitled to the same protection under the law, and should not be subjected to special enactments to destroy their investments and be driven out of business, as the amendment of 1901 would do.

Caldwell v. Lincoln, 19 Neb. 569, 27 N. W. 647.

Messrs. F. N. Prout, Attorney General, and *Norris Brown*, for defendant in error:

Under the Constitution the legislature has power to provide criminal penalties for the nonpayment of license taxes.

McCaskell v. State, 53 Ala. 510.

The law in question has a double purpose: (1) To raise revenue; (2) to protect society. Such a law can be enforced by criminal prosecution because it is grounded on both the police and taxing power of the state.

Cooley, Taxn. 2d ed. chap. 1; *Appleton v. Hopkins*, 5 Gray, 530; *Harris v. Wood*, 6 T. B. Mon. 641; *Charleston v. Oliver*, 16 S. C. 47; *McCaskell v. State*, 53 Ala. 511; *Com. v. Byrne*, 20 Gratt. 165; *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12; *Com. v. Alger*, 7 Cush. 84.

An act of the legislature, the title to which is comprehensive, does not violate the Constitution, provided its provisions are germane to the purpose of the law, and are necessary to make it effective.

Paxton & H. Irrig. Canal & Land Co. v. Farmers' & M. Irrig. & Land Co. 45 Neb. 884, 29 L. R. A. 853, 64 N. W. 343; *Kansas City & O. R. Co. v. Frey*, 30 Neb. 790, 47 N. W. 87; *State ex rel. Carey v. Cornell*, 50 Neb. 526, 70 N. W. 56; *Affholder v. State ex rel. McMullen*, 51 Neb. 91, 70 N. W. 544; *Poffenbarger v. Smith*, 27 Neb. 788, 43 N. W. 1150; *Nebraska Loan & Bldg. Assn. v. Perkins*, 61 Neb. 254, 85 N. W. 67.

The provision of the Constitution that taxation must be uniform is not applicable to license taxes.

Graffy v. Rushville, 107 Ind. 506, 57 Am. Rep. 128, 8 N. E. 609; *Cherokee v. Fox*, 34 Kan. 16, 7 Pac. 625; *Temple v. Sumner*, 51 Miss. 16, 24 Am. Rep. 615.

posing a license tax on transient persons other than citizens of the municipality, is unconstitutional and void, see *McGraw v. Marion* (Ky.) 47 L. R. A. 593.

As to license tax on peddlers or itinerant vendors generally, see *State v. Richards* (W. Va.) 3 L. R. A. 705, and *note*; *Com. v. Gardner* (Pa.) 7 L. R. A. 666, and *note*; *Wrought Iron Range Co. v. Johnson* (Ga.) 8 L. R. A. 57 L. R. A.

Mr. William O'Brien also for defendant in error.

Sullivan, Ch. J., delivered the opinion of the court:

Max Rosenbloom, defendant below, having been convicted of peddling in Platte county without a license, seeks by this proceeding to obtain a reversal of the sentence. The statutory provisions which we have occasion to consider in disposing of the questions presented for decision are found in the general revenue law (Comp. Stat. 1901, chap. 77, art. 1), and are here set out:

"Sec. 152. Peddlers plying their vocation outside of the limits of a city or town within any county in this state, and peddlers selling by sample outside of the limits of a city or town within any county in this state, shall pay, for the use of said county, an annual tax of twenty-five (\$25) dollars; those with a vehicle drawn by one (1) animal, fifty (\$50) dollars; those with two (2) and less than four (4) animals, seventy-five (\$75) dollars; those with four (4) or more animals, one hundred (\$100) dollars. Nothing in this section shall be held to apply to parties selling their own work or production, or educational, either by themselves or employees, nor to persons selling at wholesale to merchants, nor to persons selling fresh meats, fruit, farm produce, trees, or plants exclusively.

"Sec. 153. A certificate or license shall be issued to any such peddler by the county clerk, upon the presentation of a receipt showing the payment of the proper tax to the county treasurer, and such certificate or license shall be good only in the county where issued, and shall not authorize peddling in cities and towns.

"Sec. 154. Any person peddling outside the limits of a city or town in any county within this state, without such certificate, or license, or after the expiration thereof, shall be deemed guilty of a misdemeanor, and the person actually peddling is liable, whether he be the owner of the goods sold or carried by him or not, and upon conviction thereof shall be fined the sum of fifty (\$50) dollars and stand committed until the fine is paid, or he be discharged as provided by law; and if any peddler refuses to exhibit his license to any person requiring a view of the same, he shall be presumed to have none, and if he produces a license upon trial, such peddler shall pay all costs of prosecution."

It is conceded that the facts alleged in the information exist, but it is insisted that they do not constitute a crime. The argument is that the law taxing peddlers trenches in various ways upon the Consti-

273, and *note*; *State v. Emert* (Mo.) 11 L. R. A. 219; *Re Spain* (C. C. E. D. N. C.) 14 L. R. A. 97, with *note* on peddlers and drummers as related to interstate commerce; *South Bend v. Martin* (Ind.) 29 L. R. A. 531; *State v. Wheelock* (Iowa) 30 L. R. A. 429; *State v. Harrington* (Vt.) 34 L. R. A. 100; *Brownback v. North Wales* (Pa.) 49 L. R. A. 446; and *State v. Foster* (R. I.) 50 L. R. A. 339.

tution, and is therefore void. It is said in the first place that the object of the legislation is to raise county revenue, and that revenue measures cannot, in this state, be enforced by the infliction of fines or penalties. We agree with counsel in the view that the primary and paramount, if not the only, object of the law, is to obtain revenue, by imposing a tax upon the business of peddling. The only thing the peddler is required to do is to pay his tax, and exhibit the appropriate evidence of payment to any person who may wish to see it. The only thing he is forbidden to do is to pursue his calling without first having paid the tax. No police inspection or supervision is provided for. If the things commanded and forbidden are to be regarded as features of regulation or repression, they are not, to say the least, so pronounced or conspicuous as to suggest the idea that the law is referable to the police power, rather than the power of taxation. But granting the contention of counsel for defendant that the statute is a revenue measure, pure and simple, we are not able to discover any valid objection to the enforcement of it in the manner provided by the legislature. It is settled doctrine in this and in every other jurisdiction that courts will not adjudge statutes unconstitutional unless they are plainly so. Now, with what express provision of the higher law does the statute in question clash? We know of none. It may, perhaps, be said that imprisonment for debt has been abolished; but taxes are not debts, within the meaning of the Constitution, and, if they were, the provision with respect to a fine and that with respect to imprisonment are not so inseparably connected that they must stand or fall together. "The law abolishing imprisonment for debt," says Judge Cooley, "has no application to taxes; and the remedies for their collection may include an arrest, if the legislature shall so provide." Cooley, Taxn. 2d ed. 17. In speaking of license taxes, the learned author further remarks that it is still customary to enforce payment of them by arrest and imprisonment, adding that "a constitutional provision inhibiting imprisonment for debt has no application to the case of a license tax." Cooley, Taxn. 438. Among the many cases sustaining this view, we cite the following: *Appleton v. Hopkins*, 5 Gray, 530; *Daggett v. Everett*, 19 Me. 373; *McCaskell v. State*, 53 Ala. 511; *Com. v. Byrne*, 20 Gratt. 165; *Denver City R. Co. v. Denver*, 21 Colo. 350, 29 L. R. A. 608, 41 Pac. 826; *Campbell v. Anthony*, 40 Kan. 652, 20 Pac. 492; *St. Louis v. Sternberg*, 69 Mo. 289; *Bozeman v. Cadwell*, 14 Mont. 480, 36 Pac. 1042; *Cincinnati v. Buckingham*, 10 Ohio, 257; *Re Dassler*, 35 Kan. 678, 12 Pac. 130.

Limitations upon legislative power are to be found in written constitutions. It has not been customary to look for them in the opinions of the courts. When it pleased the people of this state to put an end to the ancient practice of seizing the person of a

debtor as a means of coercing payment of a debt, they put into the bill of rights this expression of their sovereign will: "No person shall be imprisoned for debt in any civil action on meane or final process unless in cases of fraud." Section 20, Bill of Rights. This language is terse and lucid. It means just what it says, and, when considered in the light of familiar history, it seems hardly possible to misunderstand it. It deals only with procedure in civil actions,—actions having for their object the collection of debts. It has no application to the civil liability created by the bastardy act (*Ex parte Cottrell*, 13 Neb. 193, 13 N. W. 174; *Ex parte Donahoe*, 24 Neb. 69, 38 N. W. 28), and it has certainly no relation whatever to criminal actions brought by the state to punish the violation of a public law. The just and humane policy of abolishing imprisonment for debt cannot be too highly commended, but an extension of that policy by judicial decision can be defended only on the theory that beneficent usurpation is justifiable. Three cases decided by this court (*State v. Green*, 27 Neb. 64, 42 N. W. 913; *Magneau v. Fremont*, 30 Neb. 844, 9 L. R. A. 786, 47 N. W. 280; and *Templeton v. Tekamah*, 32 Neb. 542, 49 N. W. 373) declare that penal provisions of an occupation tax ordinance are unenforceable. These decisions do not profess to rest in either reason or authority, and are, in our judgment, contrary to both. If they had become a rule of property, we should certainly adhere to them, but, since they have not, we think they should not be regarded as binding precedents; and they are accordingly overruled.

Another ground upon which the law is assailed is that § 154, which prescribes penalties for peddling without a license, is not embraced within the title of the act. The title is a very comprehensive one. It is "An Act to Provide a System of Revenue," and, *ex vi termini*, covers the entire subject of taxation. It comprehends the selection of the persons, property, and franchises to be taxed, the manner and method of revenue to be raised, the means or machinery by which the taxes are to be collected, and many other matters obviously germane to a general scheme or plan for providing funds with which to defray the necessary expense of maintaining a state and local government. A law to provide a system of revenue would be singularly weak and inefficient if it did not make adequate provision for the collection of taxes. In fact, every revenue law does contain such provision. The usual and appropriate method of enforcing payment of a property tax is by the addition of an increased rate of interest, which is in truth a penalty, and by the sale of the taxed property. But payment of taxes on occupations cannot be enforced in this way, and hence the ordinary, and often the only effective, method of compelling payment, is by fine and imprisonment of the person upon whom the tax is imposed. In the recent case of *Nebraska*

Loan & Bldg. Asso. v. Perkins, 61 Neb. 254, 85 N. W. 67, it is said: "If no portion of the bill is foreign to the subject of legislation, as indicated by the title, however general the latter may be, it is in harmony with the constitutional mandate." Tested by this rule, it is, we think, entirely manifest that the penal provision of § 154 is covered by the title of the act.

A further contention of counsel for defendant is that, by reason of the exceptions contained in § 152, the law lacks the essential requirement of uniformity. The Constitution (§ 1, art. 9) declares that the legislature may impose a tax upon persons engaged in certain occupations, "in such manner as it shall direct by general law, uniform as to the class upon which it operates." This provision undoubtedly contemplates that all persons pursuing the same business or calling under the same conditions and circumstances shall be treated alike, and subjected to the same burdens. In other words, partiality and favoritism are forbidden, and equality before the law is made a rule of legislative action. But as was said by the supreme court of Pennsylvania in *Seabolt v. Northumberland County*, 187 Pa. 318, 41 Atl. 22: "Classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones, used for the purpose of evading the constitutional prohibition." In the case of *State ex rel. Dawson County v. Farmers' & M. Irrig. Co.* 59 Neb. 4, 80 N. W. 53, we had occasion to consider this question, and reached the conclusion, after a pretty thorough examination of the authorities, that the "classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified." The real test of the validity of defendant's objection to this statute is not whether the classification is wise and just, but whether the legislature acted arbitrarily,—whether, without an adequate determining principle, it made a division of peddlers into two classes, and then sought to deprive one class of their constitutional right to the equal protection of the laws. If there is a genuine and substantial distinction between persons who go from house to house, and place to place, vending their own products, and those who sell in the same manner the productions of others, the classification is founded in the nature of things, and is therefore upon a basis everywhere recognized as lawful. Now, there is, in our opinion, such a marked and material difference between the two classes of peddlers as to make it entirely proper for the legislature, acting on considerations of general policy, to tax one class, and to permit the other to go free. The man who goes about the country selling what he has himself produced may be presumed to confer a benefit

upon the general public, by eliminating the profits of the retail merchant, and perhaps even those of the wholesaler and jobber. He has a fixed abode where he produces the things which he sells, and where he may be reached and required to make good his warranties. He is generally the owner of immovable property, which is subject to state and local taxation. It may be that he is required by the municipality in which he lives to pay a poll tax and a tax upon his business; to build and repair sidewalks, and keep the same free from snow, ice, and other obstructions. He contributes to the social, educational, and financial property of the community in which he resides. He bears a just share there of the burdens of government. And, in addition to all this, it must be remembered that the sale of his products is only incidental to the business of producing them. These characteristics, speaking generally, distinguish the untaxed peddler from the peddler who is taxed; and they are, it seems to us, quite sufficient to justify the classification which the legislature has made. In *State v. Stevenson*, 109 N. C. 730, 14 S. E. 385, a license tax upon merchants was upheld, although it exempted purchasers of farm products from the producers. The court, after observing that the law puts all merchants dealing in farm products purchased of the producers in one class, and all other merchants in another class, and treats all in each class alike, goes on to say: "There is no discrimination in either class. The power to select particular trades or occupations, and subject them to a license tax, cannot be denied to the legislature, nor the power to tax such trades according to different rules, provided the rule in regard to each business is uniform." The supreme court of Maine had before it in a recent case the question we are now considering. *State v. Montgomery*, 92 Me. 433, 43 Atl. 16. In delivering judgments sustaining the law, Savage, J., said: "It is contended that the exception which permits one to peddle without license 'the products of his own labor, or the labor of his family, any patent of his own invention, or in which he has become interested by being a member of any firm, or stockholder in any corporation which has purchased the patent,' is a discrimination in favor of some and against others. We do not think so. If one may peddle freely the products of his own labor, so may all. The products may be unlike, but the freedom to prosecute one's own business and to peddle his own products is free alike to all. So of the other exceptions. While it may happen that various producers may peddle each the product of his own labor without license, but not of the labor of another, still we think this fairly answers the requirements of uniformity. The legislature is the sole judge of the extent to which the business of peddling should be regulated, and its conclusions are final, so long as the burdens imposed do not bear unevenly upon citizens. *Ex parte*

Thornton, 12 Fed. 538." This decision is in conflict with *State ex rel. Luria v. Wagner*, 69 Minn. 206, 38 L. R. A. 677, 72 N. W. 67, referred to in the brief of counsel for defendant. In each case the statute construed was held to be a police regulation having for its object the protection of the public. In this case we have no occasion to determine which view of the matter is correct, because the classification in our statute was made for the purpose of taxation, and not for the purposes of regulating the business of peddling. It is plain, of course, that a particular classification may be valid if the object of the legislation is revenue, and invalid if the object is regulation.

The law is also assailed on the ground that it lacks definiteness and certainty, but we think there is so little merit in this objection that it may be overruled without discussion.

The judgment of the District Court is affirmed.

Holcomb, J., dissenting:

Although entertaining the profoundest respect for the legal ability, erudition, and discriminating judgment of my associates, I am unable to concur in the majority opinion formulated by the chief justice in this case, and will, as briefly as is consistent with reasonable clearness of expression of my views, give some of the reasons which impel me to dissent therefrom.

The conclusion reached necessitates the overruling of several prior decisions of this court, of many years' standing, which have become, and should be regarded as, the settled law of the state; and this I am unwilling to assent to, because the principle of *stare decisis* is, in my judgment, too lightly regarded, and the overturning of the adjudications referred to is without sufficient cause. The law as therein enunciated has stood unchallenged for over a decade, and should not now, except upon the most weighty and grave consideration, be overturned. The doctrine, as expressed in the overruled decisions, as to the power to enact laws providing for imprisonment to enforce collection of taxes, is itself sound in principle, and supported by both reason and authority. The soundness of these decisions has not been challenged since they were enunciated, and they should not now be overruled, unless unmistakably and radically unsound in principle. The course of legislation has been consistent with the Constitution as construed in these overruled decisions. The charters and ordinances of the cities and towns have been enacted and enforced in conformity with the law as thus construed. The whole history of the jurisprudence of the state lends color and support to the principle as announced therein, to the effect that the collection of taxes is to be enforced by the application of remedies civil only in their nature. It is aptly said by Mr. Justice White, in a dissenting opinion in *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 650, 39 L. ed. 759, 843, 15 Sup. Ct. 57 L. R. A.

(Rep. 673, 716 (and I can do no better than quote his words): "The conservation and orderly development of our institutions rests on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result. . . . The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court, without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value, and become a most dangerous instrument to the rights and liberties of the people.")

It is worthy of note that of the five eminent jurists who have graced the bench we now occupy, and who have all expressly concurred in the views as stated in the several decisions it is now proposed to overthrow, two of them were honored members of the constitutional convention which formulated the organic law of the state which they afterwards were by the people of the state called upon to interpret and expound. Who shall say that these men, not only because of their great learning, but also on account of their presence and participation in the work of that convention, were not in a peculiarly advantageous position, and well qualified to correctly interpret and construe the several provisions of that document? When it was held in the case of *State v. Green*, 27 Neb. 64, 42 N. W. 913, that an occupation tax is to be collected by distress and sale of the property of the tax debtor, in the same manner as the collection of debts generally, and not by imprisonment, the conclusion, I assume, was arrived at on the theory that by the adoption of the Constitution, with its provision against imprisonment for debt in any civil action, except in case of fraud, an occupation tax was a debt, within the meaning of the word as used in that instrument, and therefore collection thereof could be enforced only as other civil obligations. The language of the Constitution is fairly susceptible of this interpretation without doing violence to any well-recognized rule of construction. If a tax is treated as a debt as it is by all authorities, then the construction was proper, and the fact that no lengthy reasons were given in support of the decision in no way militates against its soundness. I am aware that in many jurisdictions a distinction is made between a debt created by the levy of taxes and those arising ordinarily between individuals on contract or otherwise. But the reason given for such construction is not free from imperfection, and is in some cases warranted, because of substantial difference in the language of the law which was being construed. The logic of the ma-

majority opinion is to hold that in a purely fiscal measure, enacted solely for the purpose of raising revenues, the enforcement of the provisions of the act, and the collection of dues levied thereunder, whether on property, person, or business, may be coerced by invoking the aid of the criminal law, and the infliction of fines and imprisonment on the person on whom the obligation rests, regardless of the question of his ability to meet the obligation, or the possession of property or means wherewith to satisfy the same. The doctrine, if extended to its legitimate scope and breadth, authorizes every municipality in the state to levy taxes on the person, property, and business of the inhabitants thereof, within the limits of the law, and to coerce payment by arrest and incarceration of the delinquent until the taxes are paid, or until a judgment of fine and imprisonment is satisfied. This, to me, is a startling doctrine, and thoroughly repugnant to our entire system of jurisprudence, and in conflict with the very letter of the Constitution itself. Such a construction, it seems to me, is contrary to the Constitution, as evidenced by the terms of that instrument, the course of judicial construction since its adoption, and the character of the legislation enacted with reference thereto. A tax, in this state, has always, so far as my knowledge extends, been regarded as a civil liability of the same general character as other debts, and so considered by both the courts and the legislature. With reference to real estate taxes even the personal civil liability has been eliminated, under the laws in relation thereto as construed by this court; and all such taxes are held to be only a charge against the real estate against which levied, to be satisfied by a sale of the property, and not by recourse to the personal liability of the owner of the property when assessed. A personal property tax, or a tax on a business or calling, has heretofore, I think, without exception, been treated as a civil liability against the person to whom assessed, for the enforcement of which the taxing authorities could resort only to remedies common to the collection of other civil liabilities. In a very recent suit we decided that a civil action was maintainable for the recovery of personal taxes in the same manner as for the recovery of debts generally. *Hoover v. Engles* (Neb.) 88 N. W. 869. In fact, the entire history of the state, both judicial and legislative, since the adoption of our present Constitution, so far as my knowledge extends, has treated the obligations imposed for revenue purposes on the same plane as debts generally, and the collection thereof to be enforced in a civil action, and not by punishment in a criminal proceeding, by fine and imprisonment. I venture to say that a search will be made in vain for an utterance either by the courts or the legislature of the state during the last quarter of a century indicative of the power of the legislature to authorize the coercion of the payment of the public revenues in a criminal action by fines and im-

prisonment. Is it not fairly inferable, since the legislature has made no attempt to authorize the enforcement of the collection of the revenues necessary for the expense of government, except by civil remedies, such as are common to the enforcement of all civil obligations, that it, too, has given a construction to the Constitution in harmony with the prior utterances of this court? Is it not reasonable to say that the legislature, enacting laws for the collection of the public revenues, would, in all probability, go as far as its powers were deemed to extend? The necessity for the speedy collection of all such taxes, and that all against whom the charge is made should bear the just proportion of these necessary public burdens, would naturally suggest to any legislative body the wisdom of making the payment of the obligations as certain and prompt as might be done under a full exercise of the powers belonging to the legislature in that regard. Can there exist any reasonable doubt that for over a quarter of a century the legislature and the courts of the state have deemed the power of coercing payment of the public revenues exhausted when all remedies for the collection permitted in actions civil in their nature had been provided for? I am not speaking of license taxes, but of measures purely fiscal, for the collection of revenues generally in support of government, and as the term is ordinarily understood. I shall speak of license taxes later on. If the legislature and the courts during this long period of time have so construed the force and effect of the constitutional provision referred to, then I submit that it is now too late to undertake to give to it an entirely inconsistent and contrary construction. But it is said in the majority opinion that it is not all civil liabilities that are included in the purview of this provision of the Constitution, and we are cited to authorities holding to the right of imprisonment under the bastardy act, which is denominated a "civil action." These authorities, however, expressly hold that while the action is in its nature civil, as distinguished from a criminal trial, yet the law, as enacted, is an exercise of the police powers of the state. *Ex parte Donahoe*, 24 Neb. 69, 38 N. W. 28. As a police regulation, the imprisonment is lawful, and it was competent for the legislature to provide for imprisonment as means to the desired end. It is not to be doubted that, in the exercise of the police powers of the state, imprisonment is justified and warranted for the preservation of public morals, good order, and the peace and welfare of society.

A similar constitutional provision against imprisonment for debt is found in the Constitution of Ohio, from which ours is adapted word for word, and which has existed in that state for over half a century. I have yet to learn of an authority in that jurisdiction, or an action by the lawmaking body, recognizing the power of the legislature to coerce payment of taxes levied for public revenues by fine and imprisonment

for failure to pay the obligation thus imposed. Surely this is some indication of the soundness of the construction heretofore given to an identical provision in our own Constitution. It is held there, as here, that the bastardy act, providing for a judgment against the putative father, and its enforcement by imprisonment, may be resorted to, and that such judgment is not a debt, within the meaning of the constitutional provision under consideration. *Musser v. Steward*, 21 Ohio St. 353. While the section has been construed in various ways by the court of last resort of that state, none of the decisions relating thereto give countenance or support to the construction adopted in the majority opinion in the case at bar. In a very early case in one of the inferior courts of that state that provision of the Constitution was under consideration, and it is there said: "The 15th section of the 1st article of the Constitution declares 'that no person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.' This provision is contained in the bill of rights, and is an explicit declaration that the people have reserved to themselves the sacred boon of personal liberty, and have denied to the government all control over their persons, except for the commission of crimes, and the isolated case of fraud in their business transactions. This declaration is regarded as an ample safeguard, without either legislative or judicial construction, and admits of no such thing by either the one or the other of the departments of the government." *Messenger v. Lockwood*, 9 West. L. J. 521. This construction appears reasonable and fairly supported by the language used. On the same point it is stated in the syllabus in *State v. Mace*, 5 Md. 337: "The term 'debt,' in that clause of the Constitution which provides that 'no person shall be imprisoned for debt,' is to be understood as an obligation arising otherwise than from the sentence of a court for the breach of the public peace or commission of a crime." I hope I may be pardoned for quoting at some length from the opinion of the court in the case last mentioned, because my own views are reflected therein quite as clearly as I could express them in language of my own choosing. The court says: "The 44th section of the 3d article of the Constitution declares: 'No person shall be imprisoned for debt;' and the court of common pleas have decided in this case that a fine imposed by a justice of the peace for a violation of the act of 1854, chap. 138, is a debt, within the constitutional meaning of the term. In this view we do not concur. We think the Constitution ought to have a common-sense interpretation, by which we mean the sense in which it was understood by those who adopted it; and if it receives such a construction, in our judgment, the term 'debt' is to be understood as an obligation arising otherwise than from the sentence of a court for the breach of the public peace or commission of a crime. Although it is a well-recognized

canon of construction that, where legal terms are used in a statute, they are to receive their technical meaning, unless the contrary plainly appears to have been the intention of the legislature, the principle, however, does not apply to the interpretation of the organic law, which is to be construed, according to the acceptance of those who adopted it, as the supreme rule of conduct both for officials and individuals; and, in conformity with this view, it has been habitual for the supreme judiciary of the United States to derive light and instruction from the commentaries of the framers of the Federal Constitution. . . . We cannot be insensible to the fact that, in all the struggles for the abolition of the law for imprisonment for debt, the advocates of the measure contended it was unjust and cruel to place the unfortunate debtor on the same footing with the disturber of the public peace, or the perpetrator of crimes punishable by fines. The evident intention of the Constitution was to relieve those who could not pay their debts, and not to shield from punishment persons who had violated the public law."

The supreme court of North Dakota, speaking on the same subject, though with reference to provisions unlike ours (*Granholm v. Sueigle*, 3 N. D. 476, 479, 57 N. W. 509, 510), says: "If not a tortious act (and we think it was not), the appellant would be protected from arrest and imprisonment by § 15 of the state Constitution, which provides that 'no person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases of tort, or where there is a strong presumption of fraud.' The term 'debt,' as employed in § 15, *supra*, is manifestly used in a broad sense, and hence will embrace such obligations to pay money as arise upon the law, as well as those which arise upon contract." The supreme court of Georgia, in *Cooper v. Savannah*, 4 Ga. 68, holds that where a tax had been imposed by a city ordinance upon free persons of color, and in case of nonpayment the act provided that such person should be arrested and committed to the common jail, and there confined until the same was paid, such imprisonment was repugnant to the laws of the state, and therefore void. In the authorities referred to the word "debt," when found in an organic law, is given a broad and popular meaning, as it occurs to me ought to be done. If, as is said, such a provision denied to the government control of the citizens of a state, except for the commission of crimes or in cases of fraud, or if the word "debt" is to be understood as an obligation arising otherwise than from the sentence of a court for a breach of the public peace or the commission of a crime, or if it embraces such obligations to pay money as arise upon the law, as well as those which arise upon contract, then may it not, in reason, be said that an obligation imposed by the levying of a tax for revenue purposes is a debt

fairly within scope and purview of the words as used in the Constitution, and that the decisions overruled have such support in principle and on authority as not to justify their condemnation in order to adopt a construction which is more technical and less liberal?

In all the authorities cited in the majority opinion, a tax is recognized as a debt, in its broad and comprehensive sense, but is held not to come within the purview of the word as used in the organic law, for different reasons,—some upon one ground, and some on others; but the tendency of all is to limit and restrict the meaning, rather than to use it in a popular sense. It is also to be noted that in many of the statutes and Constitutions the language used is altogether different in meaning from our own. In some states the exemption from imprisonment for debt is limited to contracts, either expressed or implied, and does not extend to obligations arising *ex delicto*. Surely it will not be contended that under our Constitution a civil action for a liability founded on tort can be enforced by imprisonment, and yet, to be consistent, my associates must so construe our Constitution, in order to justify the doctrine enunciated. In *Re Dassler*, 35 Kan. 678, 12 Pac. 130, cited in the majority opinion, the supreme court of that state holds that "road assessments or levies are not debts, within the meaning of the constitutional provision abolishing imprisonment for debt, as such provision applies only to liabilities arising upon contract." It is evident, by a reading of the opinion, that the right to imprison is also justified as an exercise of the police power. Says the court: "It was decided by this court in *Re Wheeler*, 34 Kan. 96, 8 Pac. 276, that 'the provision of the Constitution [§ 98] declaring "no person shall be imprisoned for debt except in cases of fraud," applies only to liabilities arising upon contract.' Therefore road assessments or levies are not debts, within the meaning of the constitutional provision abolishing imprisonment for debt. . . . The power to impose labor for the repair of public highways and streets has been exercised from time immemorial, and comes within the police regulation of the state or city. A commutation of such labor in money in lieu of work, while in the nature of a tax, is not, in common speech or in customary revenue legislation, understood as embraced in the term 'tax.' The power to impose this labor is exercised for public purposes, and the general good and convenience of the community." *Charleston v. Oliver*, 16 S. C. 47, was a case relative to the right of enforcing payment of a license tax by imprisonment, and it was there held that the abolishing of imprisonment for debt did not apply to debts due as taxes. This case supports the general proposition laid down by Judge Cooley, and is the only one directly in point which may be said to fully sustain the doctrine announced in the majority opinion. In that case, as a reason for adopting the construction which it did, 57 L. R. A.

the court says: "The manifest object was to deprive the citizen of the power to have his fellow citizen imprisoned for nonpayment of his debt. This power, in the hands of private individuals, has long been a subject of discussion, and had been previously circumscribed by the enactment of the insolvent debtors' and prison bounds acts, which had no application to taxes; and the object of the clause in question, undoubtedly, was still further to limit this power by confining its exercise to 'cases of fraud.'" Some of the authorities cited relate to an exercise of the right of regulation under the police powers of the state, and on decisions of that character I have no comment to offer. This power must be conceded, and is too firmly established in our system of jurisprudence to be regarded as other than one of its important branches, and necessary for the welfare and protection of society.

What I have heretofore said applies only to my conception of the duty of this court to adhere to the precedents already established, and what appear to me to be sufficient reasons therefor. I have only spoken of what, in my judgment, is a very proper construction of the scope and effect of the constitutional provision declaring against imprisonment for debt, when applied to measures for the collection of taxes of a purely fiscal character, and solely for the purpose of raising revenues for the support of government, whether of the state and its political subdivisions, or of any municipality therein. There is another and equally important view of the question, which is being decided when it is viewed and considered as imposing a license tax, as distinguished from the exercise of the taxing power generally. The majority opinion not only, in terms, overrules the three prior decisions mentioned, but in effect, and indirectly, overturns and repudiates the doctrine announced and adhered to in a long line of decisions, beginning with *State ex rel. Sage v. Bennett*, 19 Neb. 191, 26 N. W. 714, to the effect that an occupation or purely revenue producing tax cannot be levied and collected as a condition precedent to the issuance of a license to engage in the business taxed; that, when so levied and collected, the tax becomes license money, to be disposed of in the manner provided by § 5, art. 8, of the Constitution. In escaping the provisions of the Constitution against imprisonment for debt, my brothers have some in conflict with § 5, art. 8, which declares that all license moneys shall be paid into the common-school fund, when collected. This latter section of the Constitution by this decision has been restricted in its application, in my opinion, much more than is warranted by its unambiguous language, or than was the evident intent of its framers. It now must read, if I correctly understand the import of this decision, that all license moneys, if collected under an act or ordinance whose chief object and aim is regulation, must be paid into the common-school fund, but, if the main purpose appears to be the raising of revenues, then the

license moneys derived therefrom may be applied to any lawful purpose provided by such act or ordinance. To this construction I cannot assent. The section, in unmistakable terms, provides that all license moneys shall be paid into the common-school fund. There is no exception or qualification. And if the tax is a license tax, if it is required to be paid as a condition precedent to obtaining the license or engaging in the business, if it is made unlawful to engage in the business taxed without a license, then the fees thus derived, by whatever name the act or ordinance may be called, and whatever may appear to be its chief aim and object, is license money, and must go where the Constitution directs, or that instrument is violated. This section of the Constitution has made it impossible to raise revenue for general purposes by clothing an act in the garb of a license law, and providing for criminal prosecution and punishment as a means of coercing payment of the tax thus imposed. The section decrees, in unmistakable terms, that all moneys so derived shall be paid exclusively into the common-school fund. This court first fell into an error in this respect in the opinion in the case of *State ex rel. Auburn School Dist. v. Boyd* (Neb.) 89 N. W. 417, from which I dissented, where the rule was announced that, in construing ordinances providing for license taxes, if the purpose appeared to be to raise revenues, the money was a tax, but, if regulation was the end and object in view, the money results from an exercise of the police power, and is license money. The standard there set up by which the application of the moneys derived as a result of licensing a business is to be determined was an arbitrary one, and at variance with the intent and meaning of the language used in § 5, art. 8, of the Constitution, which neither makes nor warrants such distinction. The true rule, in my judgment, should be that if, in such an act or ordinance, there is any element of regulation, a license tax is justifiable, and its payment may be enforced by declaring the business taxed unlawful, and providing for punishment by fine and imprisonment for engaging in the business declared unlawful without procuring a license therefor. If the measure is solely a revenue producing act, without any element of regulation, and in substance an occupation tax, then it must be justified and enforced under the taxing power, and as a civil liability only. I understand the rule to be of quite general application that, if there is any element of regulation in a licensing tax act, then the act is valid as an exercise of the police power, even though the collection of revenues be one of the objects, and incidental thereto, and that it is not at all necessary that regulation shall be the paramount aim and object. This court has recognized the distinction between the two forms of taxation in *Peuler v. State*, 11 Neb. 566, 10 N. W. 486, where it is said: "By the Constitution of this state, the legislature, within certain specified inhibitions

57 L. R. A.

and limitations, is invested with full legislative power. And this power includes, as no one will deny, that of police regulation, which, being neither defined nor specially limited, is practically left by the Constitution to legislative discretion, so long as no right secured by that instrument is encroached upon. Taxation is also a legislative power, and is specifically mentioned in the Constitution, but always in connection with the subject of revenue for the support of the government generally, or some particular department or branch of it. And it is in such connection that we find the requirement of uniformity. This being so, we are led to conclude that this constitutional injunction has reference solely to taxation, pure and simple, according to the commonly accepted meaning of that term, for the purpose of revenue merely, and not those impositions made incidentally under the police power of the state, exerted either directly or by delegation, as a means of constraining and regulating what may be regarded as a pernicious or offensive act or business,"—citing and quoting from a large number of authorities.

The Supreme Court of the United States says: "The power to license is a police power, although it may also be exercised for the purposes of raising revenue. We cannot say, as a matter of law, that when a municipal corporation is authorized 'to regulate, tax, and license ferry boats,' the imposition of a license fee of \$100 per boat is not within the power to regulate and license, and is consequently not within the police power." *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257. In *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L. R. A. 269, 55 S. W. 629, it is observed: "In order to sustain legislation of the character of the act in question as a police measure, the courts must be able to see that its object to some degree tends towards the prevention of some offense or manifest evil, or has for its aim the preservation of the public health, morals, safety, or welfare." Many other authorities might be cited, but the above are deemed sufficient for present purposes.

Ordinarily, and I think it was so contemplated by the Constitution framers, a license tax arises from an act of regulation, and, as expressed by the United States Supreme Court, is an exercise of the police power of the state. It is the exaction of a fee for the privilege of engaging in a specified business or vocation. It is not a tax on the business, but is a condition precedent to the right to engage in it. The business is regarded as one requiring regulation, and the fee is exacted as an efficient means of accomplishing the desired result. It is made unlawful, and imprisonment provided as the punishment, not for failure to pay the tax, but for engaging in a business declared unlawful unless a permit is granted by the proper authorities to engage therein, and the required fee paid therefor. This is made manifest when it is considered that the of-

fending party becomes guilty by engaging in the prohibited act without a license, and no payment of the required license fee thereafter would purge him of such guilt. He is not imprisoned until he pays the license fee, but until he has paid the fine or served the term of imprisonment imposed for its violation. When a tax is levied solely for revenue purposes, and on different kinds of business or callings, it is properly denominated an occupation or business tax, and rests on the same general principles as the imposition of taxes generally for revenue purposes. The first is required for the privilege of engaging in the business which he is otherwise precluded from pursuing, and as a means of regulation, and the latter levied on the business he is already lawfully engaged in. With these distinctions kept clearly in mind, the validity of any law on either branch of the subject ought not to be very greatly difficult of determination. The doctrine has never heretofore gained a foothold in this state which authorizes the exaction and collection of a business tax for purely revenue purposes under the guise of an act to license the business taxed, and with authority to imprison the delinquent if the tax is not paid. And I cannot conceive of any state of affairs which would permit this to be done, without expressly violating the constitutional provision declaring that all moneys derived from licenses must be applied to the one specified purpose.

It is clear to my mind that the act, the validity of which is in question in the present case, is an act of regulation, and was so intended by the legislature, and not an act solely for the purpose of raising revenue, as held in the majority opinion. It seems to me almost too obvious for argument that the amendment of the act of the legislature of 1901 was chiefly for the purpose of better regulating the different kinds of business therein mentioned, and to prevent the indiscriminate peddling by wholly irresponsible parties, to the detriment of the different communities of the state, and to prevent imposition on the people generally. It bears on its face the stamp of regulation, protection to the inhabitants, and the preservation of the public welfare. Its tendency is to confine the business licensed in the hands of but a few persons in each county. It has features that would indicate an intent to, in a measure, prohibit, and can this be regarded as other than for the purpose of regulation? The very fact of requiring every person included in the provisions of the act to take out a license before engaging in the business, to have a record of the issuance of the same, and the name and residence or location of the party licensed, and to require an exhibition of the license when requested, are all well calculated to act as a regulation, and to dignify the calling in its importance, and to restrict it to the more responsible of those disposed to engage in the business. It is the same regulation and restraint that lie at the foundation of almost every act requiring a

license fee to be paid, and the issuance of a license to the person thereby authorized to engage in a business otherwise made unlawful. The statute prior to 1901 provided generally for a tax of \$30 on each peddler of watches, clocks, jewelry, or patent medicines, and all other wares and merchandise, for a license to peddle throughout the state for one year, and provided a penalty of \$50 for a violation of the act; the guilty party to stand committed until the fine was paid. By the amendment of 1901 the act was made to apply only to peddlers plying their vocation outside the towns and cities, and graduated the tax from \$25 on the walking peddler to \$100 on the one using a team and four horses, and excluded from the provision of the act those who sold their own work or production, or anything educational, and those selling at wholesale to merchants, and persons selling fresh meats, fruit, farm produce, trees, or plants, exclusively. Why these changes in the provisions of the original act, discriminations, and exceptions, if the raising of revenues was the aim and object in view? Who can doubt, in view of these amendments, that the intent of the legislature was to regulate the business of peddling by a certain class that was deemed detrimental to society, and consequently some form of regulation and restraint was required, and that such was the object in enacting the law, rather than that the sole purpose was to raise revenues? Peddling has from time immemorial been regarded as a subject justifying the exercise of the police power by regulating acts, and I entertain no doubt that such was the aim and object of the legislature when it amended, as it did in 1901, the act theretofore existing which related to the same subject. An instructive and interesting opinion on the point now being considered, and under a statute of the same character as ours, is found in *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12. It is there held: "Laws restricting the business of hawkers and peddlers, or providing for the licensing thereof, are an exercise of the police power of the state, and do not lose this character by requiring payment of the license fees into the state treasury." It is observed by Lyon, J., who wrote the opinion of the court: "The statute was doubtless enacted in the interest of merchants having fixed places of trade, on the theory that a sound public policy demands that they should be encouraged, and traveling merchants or peddlers discouraged, and for the further purpose of protecting honest and well-disposed citizens from the arts and importunities, and frequently from the dishonest practices, of a class of traders to whom they are usually strangers, and who are not as directly amenable to those legal and social restraints which must necessarily greatly influence the business conduct of a merchant having a fixed place of business, and depending for his patronage upon one and the same community." And further on: "The reasons (or at least some of them) why the legislature enacted the law of 1870 have al-

ready been stated. That they are stated correctly, and that the common law regarded hawkers and peddlers with disfavor, and their vocation opposed in some degree to public policy, will appear by reference to Jacob's Law Dictionary." After quoting from the authorities it is further stated: "We give the language of the author merely to show the grounds upon which, centuries ago, Parliament regulated and restricted the business, and that such regulation and restriction is an exercise of police power in the interest of the public. But with this disclaimer we must be permitted to add that undoubtedly resort is often had to this business for the sole purpose of obtaining admittance (which could not otherwise be obtained) into private dwelling houses in furtherance of some criminal or unlawful object. This is another reason why the restriction or regulation of the business is an exercise of police power."

The act under consideration in the case at bar, in my judgment, must be justified and upheld as an exercise of the police power. It is presumed to be constitutional and valid, and all intendments are to be taken in favor of the validity of the act, and the exercise of lawful powers by the legislature in its enactment. Whether it will, when thoroughly considered, square with all the express provisions of the fundamental law, I can express no opinion until a full investigation is made of the subject when it is considered in the light of an act of regulation. It would be a vain and unless effort for me alone to undertake the determination of that question; hence I must content myself with dissenting from the views of my associates in upholding the law as a valid exercise of the taxing power, and in overruling the several prior decisions mentioned in order to reach that conclusion.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

Edward S. SHARPE, *Piff. in Err.*,
v.
UNITED STATES OF AMERICA.

(50 C. C. A. 597, 112 Fed. 893.)

1. In awarding damage to one, a portion of whose land is sought to be condemned for public use, for injury to his remaining land, injury to tracts not connected with, and held under different titles from, although adjoining, that from which the parcel is taken, cannot be considered.
2. Evidence of merely possible uses to which land sought to be condemned by the government may be put, not founded on any clear, certain, or avowed obnoxious uses, is

not admissible to enhance the damages to be awarded for injury to the residue of the tract.

3. Upon the question of the value of land sought to be condemned by the government, testimony of the owner of offers which have been received for the land is not admissible, where there is nothing to show the conditions under which they were made or the circumstances influencing them.
4. Upon a trial de novo upon appeal from commissioners in an eminent domain proceeding the jury are not to consider the evidence produced before the commissioners, or be influenced by the commissioners' report.

(January 10, 1902.)

NOTE.—What lands are to be deemed part of the tract damaged by taking a portion thereof under eminent domain.

- I. Different holdings, 932.
- II. Property in city.
 - a. Separated by highways, railroads, or other property, 936.
 - b. Separated by plat lines, 938.
 - c. Separating and severing buildings, 941.
 - d. Part of lot or lots injured, 943.
- III. Farm lands in a contiguous body, 944.
- IV. Farm lands separated by highways, railroads, canals, or other property, 945.
- V. Lands in different counties, 948.
- VI. Summary, 948.

I. Different holdings.

The cardinal rule in determining whether damages should be limited to the piece of ground taken in eminent domain, or extend to other portions of land owned by the same party, seems to be that unity of use determines the question. It is also affected by purpose, and it may be affected by character of holdings and title. The question of derivation of title is an important factor in some cases, but is usually regarded as subordinate to the unity of use. Some stress is placed upon it in 57 L. R. A.

SHARPE v. UNITED STATES and in other cases. Where condemnation is anticipated by a party acquiring title, evidently for the purpose of increasing damages or speculating thereon, the question of title would probably be quite a factor.

In SHARPE v. UNITED STATES it was held that, in awarding damages to one, a portion of whose land is sought to be condemned for public use, for injury to his remaining land, injury to tracts not connected with, and held under different titles from, although adjoining, that from which the parcel is taken, cannot be considered. This was on the ground that the land taken constituted one of three several tracts of land consisting of three adjoining farms held by different titles and acquired at different times. The three separate farms were held and managed as such previous to the beginning of the condemnation proceedings, and the land in controversy was not purchased until ten days prior to the proceedings, and was not used in connection with the other farms until three months after the proceedings were begun, but was managed, as were the other two farms, as a distinct and separate holding, occupied by a different tenant, and was separated from the other two farms by public roads. The court said, in regard to the rule of "just compensation:" "In applying this rule, however, regard is had to the integ-

ERROR to the District Court of the United States for the District of New Jersey to review a judgment in favor of petitioner in a proceeding to condemn property for a military reservation. *Affirmed.*

The facts are stated in the opinion.

Argued before *Acheson, Dallas, and Gray*, Circuit Judges.

Mr. D. J. Fancoast for plaintiff in error.

Mr. David O. Watkins, for defendant in error:

Offers by third parties to purchase the land are no indication of its true market value.

10 Am. & Eng. Enc. Law, p. 1154.

Such testimony is easily manufactured. It is warranted neither on principle nor on authority, and is too dangerous to be tolerated.

ity of the tract as a unitary holding by the owner. The holding from which a part is taken for public uses must be of such a character as that its integrity as an individual tract shall have been destroyed by the taking."

A quarry used for quarry purposes alone, and a shipping lot having no connection with the quarry by contact of the lines, by railway, or any other private means of transportation, were held to be disconnected from each other, where the shipping lot was condemned for railroad purposes. *Potts v. Pennsylvania S. Valley R. Co.* 119 Pa. 278, 13 Atl. 291. In this case, part of the property was owned by two as tenants in common, part was owned by one individually, and a partnership used the three tracts for their partnership business. The court said: "They were not only different properties applied to different uses, but the fee was held and owned by different persons. Neither of them could be considered as appurtenant to, or part and parcel of, the other."

In *Ellsworth v. Chicago & I. W. R. Co.* 91 Iowa, 386, 59 N. W. 78, it was held that where a large body of land was wild, unimproved, and of diversified qualities, adapted for different purposes, and not used as an entirety, and not shown to have been designed for such use, the question whether the entire tract should have been considered as a whole, or portions of it separately, in estimating damages, was one of fact which should have been submitted to the jury. In this case the land was sold in 80-acre tracts, to three different persons, and all the contracts of purchase were assigned to the plaintiffs.

The rule that where a portion of an estate is taken by condemnation the damage not only to the particular portion taken, but also to the remaining portion of the land, is to be considered, was held not to apply where a leasehold estate was condemned, and the lessee claimed damages to property owned by him, separated by an alley, but used by him in connection with his business. *United States v. Inlots*, 2 Am. Law Record, 577, Fed. Cas. No. 15,441a.

In proceedings to condemn, for a railroad right of way, a strip of land wholly within a quarter section owned by one person in fee, the owner may not only recover damages for the injury to such section, but also for injury to his interest in an adjoining quarter section, consisting of a remainder in an undivided half after the termination of a life estate. But in ascertaining his interest in such section, great care must be exercised, and evidence of damages to a leasehold interest under a verbal lease from the life tenant is inadmissible, since 57 L. R. A.

St. Joseph & D. C. R. Co. v. Orr, 8 Kan. 419; *Minnesota Belt Line R. & Transfer Co. v. Gluck*, 45 Minn. 463, 48 N. W. 194; *Louisville, N. O. & T. R. Co. v. Ryan*, 64 Miss. 399, 8 So. 173; *Watson v. Milwaukee & M. R. Co.* 67 Wis. 332, 15 N. W. 468.

And in no case can bona fide offers for the property afford any test of value, when not confined to a period near the time at which the value is to be ascertained.

Muller v. Southern Pacific Branch R. Co. 83 Cal. 240, 23 Pac. 265; *Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224; *Louisville, N. O. & T. R. Co. v. Ryan*, 64 Miss. 399, 8 So. 173; *Keller v. Paine*, 34 Hun, 177; *Leale v. Metropolitan Elev. R. Co.* 61 Hun, 613, 16 N. Y. Supp. 419; *Kuh v. Metropolitan Elev. R. Co.* 26 Jones & S. 138, 9 N. Y. Supp. 710; *Young v. Atwood*, 5 Hun, 234; *Wood v. Firemen's F. Ins. Co.* 126 Mass. 319.

such lease is voidable and damages for interfering with the enjoyment of it would be uncertain and speculative. And, although the two tracts have been used as one farm, the damages to each must be estimated separately, and the jury, in fixing the compensation, cannot take into consideration the fact that the right of way will divide the section owned in fee from that in which the owner has a remainder interest only, and that on the latter tract are located the wells and buildings which have been used in connection with the other farm, and the enjoyment of which will be interfered with by the separation of the tracts. *Indiana, I. & I. R. Co. v. Conness*, 184 Ill. 178, 56 N. E. 402, 193 Ill. 464, 62 N. E. 221.

In *Gibson v. Fifth Ave. & H. Street Bridge Co.* 192 Pa. 55, 43 Atl. 339, it is held that a person who owns several lots forming one tract of land, but fronting on different streets and occupied by separate dwelling houses, is one of which streets a bridge approach is built, to the detriment of abutting property, may recover damages for the injury to the lot fronting on such street only, and not for injury to the properties fronting on the other streets, where the latter lots were acquired and held by a separate and distinct title from the lot fronting on the bridge improvement, and were wholly distinct in use. In this case the court said that if the building fronting on the street in which the bridge approach was built had been a manufactory, and the other lands were purchased to enlarge the factory as to make one plant of the whole, damages might have been awarded for the injuries caused to the property as a whole.

In *Greenwood v. Metropolitan Elev. R. Co.* 26 Jones & S. 482, 12 N. Y. Supp. 919, it was held that, where property located on the corner of two streets was divided by the owner into two lots, which were sold separately, and the two lots were subsequently reunited into one by a person who obtained title thereto through mesne conveyances from the original owner, and a single building constructed thereon, nevertheless damages for injuries from the construction of an elevated railroad in one of such streets must be limited to the lot abutting on that street. This was on the ground that the easements of light and air from that street once appurtenant to both lots, having been severed by the separate conveyances of the original owner, were not reunited by the subsequent conveyances whereby one person acquired title to the whole property. The proposition that severed easements cannot be reunited by a union of title seems to be new as applied to

Evidence even to show that the owner of the land had declined to sell or lease it, or to show what his reasons were for so doing, was not admissible.

Pennsylvania S. Valley R. Co. v. Cleary, 125 Pa. 442, 17 Atl. 468.

To entitle an owner to recover damages to the whole tract, when a part of his lands have been taken, there must have been a unity of contiguous parcels. The land must have been together. All of it must have been used as a single tract.

10 Am. & Eng. Enc. Law, p. 1166; *Peck v. Superior Short Line R. Co.* 36 Minn. 343, 31 N. W. 217.

Damages must be certain, not speculative, prospective, or contingent.

Page v. Chicago, M. & St. P. R. Co. 70 Ill. 324; *Chicago & P. R. Co. v. Hildebrand*, 136 Ill. 467, 27 N. E. 69; *Rhodes v. Baird*,

damages in eminent domain cases, especially where one building covers both lots.

But this case was distinguished and disapproved in *Stevens v. New York Elev. R. Co.* 180 N. Y. 95, 28 N. E. 667, in which it was held that property extending from one street to another, occupied by a single building, and which for many years had been owned, used, and conveyed as a single lot abutting on both streets, and the title to which was held by one person, must be treated as a whole in estimating the damages caused by the construction of an elevated railroad in one of such streets, although originally the property had consisted of two lots, one abutting on each street, and the lots had been owned by separate parties. The *Greenwood Case* was distinguished on the ground that there it was not shown whether the lots became the property of a single proprietor before or after the railroad was built, or whether the building which covered them was built before or after the construction of the road.

See *infra*, II. c, *Separating and severing buildings*, for a further discussion of this case.

Where the parcels are a part of the unit, adapted for a single use, making the enjoyment of a part depend on the use of the other, the whole will be considered in estimating damages to a part.

So, where a party occupied four lots in one tract as an entirety, and owned a portion of the lots and held the others under a lease, in proceedings by a railroad company to condemn the lots leased, it was held that the owner was entitled to recover for damage to the market value of the whole tract during the continuance of the lease. *Chicago & E. R. Co. v. Dresel*, 110 Ill. 89.

Where a volunteer corps obtained leases of certain ground, on which they formed a rifle range and built butts, and behind the butts was marsh land in the possession of another party, with whom the corps had a verbal agreement that they should have the privilege of shooting over such land, and should pay the owner a certain sum per year as compensation for any injury done by the shooting, and beyond this marsh land were meadow lands which the corps held under a lease, it was held in *Holt v. Gaslight & Coke Co.* L. R. 7 Q. B. 728, 41 L. J. Q. B. N. S. 351, 27 L. T. N. S. 442, that upon the condemnation of a part of such meadow lands by a gas company damages must be paid to the corps, notwithstanding the contention that there had been no actual severance of the land taken from the rifle range, since the corps did not own the intervening 57 L. R. A.

16 Ohio St. 573; *Patten v. Northern C. R. Co.* 33 Pa. 426, 75 Am. Dec. 612; *Sater v. Burlington & Mt. P. Pl. Road Co.* 1 Iowa, 386.

When the owner of the lands seeks compensation for injuries to the remainder of his land, resulting from a part having been taken, the injury cannot be considered, unless it was to land used with the part taken as a single, compact tract.

Keithsburg & E. R. Co. v. Henry, 79 Ill. 290; *Hartshorn v. Burlington, C. R. & N. R. Co.* 52 Iowa, 613, 3 N. W. 648; *Kansas City, E. & S. R. Co. v. Merrill*, 25 Kan. 421; *Cedar Rapids, I. F. & N. W. R. Co. v. Ryan*, 36 Minn. 546, 33 N. W. 35; *Wyandotte, K. C. & N. W. R. Co. v. Waldo*, 70 Mo. 629.

The damages must be special in their nature, and not such as are suffered in common with the rest of the public.

marsh land, but had only a precarious right of shooting over it. This was under land clauses consolidation act 1854, § 49 (8 Vict. chap. 18), providing that where an inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to lands "held therewith," the jury shall deliver their verdict separately for the land required, or of any interest therein belonging to the party or which he is unable to sell, and for money for damages sustained by the owner of lands by reason of the severing of them from other lands of such owner, or otherwise injuriously affecting such lands. The court said that, since the lands taken were used in connection with the other land as a rifle range, and since their condemnation rendered necessary the abandonment of the use of the remaining land as a rifle range, the condition of the statute on which compensation might be claimed—namely, that land held with the land taken is injuriously affected—was sufficiently satisfied, and that the fact that the rifle corps had only a precarious right of shooting over the intervening marsh land only went to the quantum of compensation.

Three quarter sections of land lying in a body being owned severally by three persons, who used the land in common for raising stock under a partnership agreement, and each section being more valuable as thus used than if used separately, it was held, in *Smith County v. Labore*, 37 Kan. 480, 15 Pac. 577, that where a public road was established over the three sections, separating the water for the stock, which was almost entirely on one section, from the pasture, and thereby rendering the use of the land as a whole less valuable, damages should be allowed to the owner of each quarter section for the loss of value caused to his land.

Where a farm of 730 acres was owned by one person, and a railroad company took about 12 acres out of it, dividing the wood, water, and timber from the balance of the farm, damages for injury to the whole farm were allowed, although part of the land was in one section and part in another, and some 230 acres had belonged to an estate, and were purchased by the present owner after the railroad track was laid. *Chicago & I. R. Co. v. Hopkins*, 80 Ill. 316. The question of the separation of tracts by acquiring title to a part is not discussed by the court.

In *Phillips v. St. Clair Incline Plane Co.* 166 Pa. 21, 31 Atl. 69, an incline plane company located its road on what appeared to be a single undivided, and unimproved tract of land. The

Keithsburg & E. R. Co. v. Henry, 79 Ill. 290; *Iam v. Wisconsin, I. & N. R. Co.* 61 Iowa, 716, 17 N. W. 157; *Rogers v. Kennebec & P. R. Co.* 35 Me. 319; *Presbrey v. Old Colony & N. R. Co.* 103 Mass. 1; *Gulf, O. & S. F. R. Co. v. Fuller*, 63 Tex. 467; *Chicago & M. O. R. Co. v. Ritter* (Tex.) 10 Am. & Eng. R. Cas. 202.

The measure of damages in the state of New Jersey is when the whole property is taken, its market value, and when a part only is taken, the difference in value before and after such taking, to be ascertained by the use to which such untaken part can be put.

Henderson v. Orange, 9 N. J. L. J. 71; *Builer Hard Rubber Co. v. Newark*, 61 N. J. L. 32, 40 Atl. 224; *Currie v. Waverly & N. Y. B. R. Co.* 52 N. J. L. 381, 20 Atl. 56.

tract was owned by tenants in common, who had in fact platted it into lots and blocks for the purpose of partition, but, although deeds were executed, neither they nor the plat had been put on record at the time the incline plane company entered on the land. The separate owners brought actions against the company for compensation. The court said that the joint owners, by virtue of the uncompleted partition and the continuing joint interest in the proposed streets in the plan, might have maintained a joint proceeding for compensation, and that damages might have been assessed with reference to the whole, but that they were not obliged to unite and might proceed separately, but, having proceeded separately, the right of each was as owner of a number of separate and disconnected pieces of land; that there were no streets, nor, in the ordinary meaning of the word, any lots; that all these were inchoate, existing only in intention, and subject to change or destruction, at the volition of the parties; and that therefore no damages could be claimed directly on account of any of the land which was not on the line of the incline plane, and of which no part was taken; that any direct damage that might accrue to such lots was recoverable, if at all, only for interference with rights of way possessed by the owner of them over the land actually taken. In this case the court said that a joint suit might be maintained, and "that the land might be treated, as in fact what it appeared to be when the appellant located its road, a single, undivided, and unimproved tract of 17 acres, and the damages for taking part of it assessed with reference to the whole."

In *Hetzel v. Baltimore & O. R. Co.* 7 App. D. C. 524, it was held that lots in the same block, partitioned among cotenants, with alleys between them reserved for their joint use, cannot be regarded as part of the same tract when all are afterwards acquired by one owner, so as to permit damages from an obstruction of a street on which some of the lots front to be recovered for the injury, not only to those lots, but to other lots fronting on other streets and formerly severed from them in ownership. In this case, inasmuch as the declaration proceeded as for an injury to the entire original lot, without any reference to the fact that there had been any division into the separate lots, the court deemed the proof showing such division and the former joint ownership contradictory to the pleading, and held that the plaintiff could not recover more than nominal damages. This decision, however, was reversed by the Supreme Court of the United

Gray, Circuit Judge, delivered the opinion of the court:

Proceedings were instituted by the United States in the district court for the district of New Jersey February 1, 1900, for the condemnation of about 40 acres of land of the plaintiff in error, Edward S. Sharpe, situate in Salem county, in the state of New Jersey, contiguous to a certain reservation of the United States, upon which Ft. Mott had theretofore been built, which land, as stated in the petition filed by the United States, was "needed for military purposes, for the location, construction, and prosecution of works for fortifications and coast defenses." They were authorized by the provisions of the act of Congress of August 18, 1890, and of those of March 7, 1898, and March 3, 1899, making appropriations therefor. The act of August 18, 1890, pro-

States (169 U. S. 26, 42 L. ed. 648, 18 Sup. Ct. Rep. 255), on the ground that, although the declaration claimed damages for the injury done to the entire lot, plaintiff could recover thereunder for such damage as she actually suffered, and that, even if she did not own the alleys, as alleged, she nevertheless was entitled to recover for any substantial diminution in the value of the land she did own, or any part thereof, arising from the nuisance in question. The court said: "In estimating the damages, the jury could take into consideration the subdivision of original lot 1, and eliminate from their calculation any subplot belonging to the plaintiff that was not damaged in salable or rental value by the nuisance in question. So, if the plaintiff did not own the alleys marked on the plat, that fact could be given proper weight in estimating the damages she was entitled to recover; that is, if damages were claimed in respect of more land than belonged to the plaintiff, the recovery could have been limited to the injury done to the part that she did own."

Damages for injury to the property as a whole, and not merely for the injury to the separate lots over which the railroad ran, were held to be recoverable in *Welch v. Milwaukee & St. P. R. Co.* 27 Wis. 108, where a party owned land within a city, which had been laid out into lots, the titles to which had been acquired by him at different times, and a railroad was laid across certain lots which were separated from the owner's dwelling house by a highway, but all the land was used as one piece for agricultural purposes.

Where children owned land in several different sections, subject to the life estate of their parents, and the father owned, in his own right, several tracts, intervening between the tracts owned in fee by the children, but had given a private right of way over his land for the use of the whole, and the tracts were all used together as one farm, it was held, in proceedings to condemn a right of way over a part of the land, that if the several parcels of real estate that were claimed to be injured as an entire farm had such a connection or relation of adaptation, convenience, and actual and permanent use, as to make the enjoyment of the parcels or tracts from which the right of way was taken reasonably and substantially necessary to the enjoyment of the parcels not so touched by the right of way, in the most advantageous manner in the business in which it was at the time used, and if such tracts were dependent upon each other in the use to which they were then put, they would constitute one

vided that the proceedings for condemnation should be "prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted." These proceedings accordingly were begun under the authority of an enabling act of the legislature of the state of New Jersey, passed in February, 1900, and were prosecuted in accordance with the laws regulating the condemnation of lands in that state at the time this enabling act was passed. Pursuant to the requirements of the laws aforesaid, three commissioners were duly appointed by the judge of the district court for the district of New Jersey to appraise the value of the land in question. The commissioners so appointed made due report of their proceedings to the said district court, which report was filed July 16, 1900. By it, it

appears that they fixed the value of the 41.75 acres of land required to be taken for the purposes aforesaid at the sum of \$20,875, and the damages sustained by reason of the taking of the said land "to the remainder of the tracts of land from which the above-mentioned tract is taken, and to its uses, and which the parties in interest will sustain by reason of the premises," at the sum of \$12,953. From the finding of the commissioners so made an appeal was taken in behalf of the United States to the United States district court for the district of New Jersey. Pursuant to the requirements of the statute of New Jersey, the said appeal was prosecuted in the said district court, and an order framing an issue and fixing a day for the striking of a jury and a day for the trial of the appeal was duly made by the judge of said court. A venire was there-

farm. *Westbrook v. Muscatine N. & S. R. Co.* (Iowa) 88 N. W. 202.

In *Charleston & S. Bridge Co. v. Comstock*, 38 W. Va. 263, 15 S. E. 69, it was said that two lots acquired at different times, separated by a street, where one lot was condemned for a bridge, might constitute but one tract for the purpose of ascertaining damages; and it was held that this was a question for the jury. In this case the owner of land opposite, on which was his residence, had acquired title to the lot on which the bridge was constructed, and had removed the buildings therefrom for the purpose of improving his residence, and the lot was used in connection therewith.

Likewise, in *Potts v. Pennsylvania S. Valley R. Co.* 119 Pa. 278, 13 Atl. 291, it was said: "So, if one buy a farm in separate contiguous portions from different persons, but occupy the whole in a body for farm purposes as one farm, the damages for the appropriation of a part, or even the whole, of one of the original pieces, will be assessed upon the injury done to the whole tract."

And, where a grantor conveyed some lots after condemnation proceedings were commenced, it was held that he could recover damages for all the lots, notwithstanding his conveyance and covenant of warranty. *Drury v. Midland R. Co.* 127 Mass. 571. The court said: "It is contended that these grantees took the right to damages which Alger had in these lots, and that they should have been cited in under Gen. Stat. chap. 43, § 53. But the answer to this is that the title acquired by the railroad was acquired when the location was filed. Alger was then sole owner in fee of all the land described in his petition. . . . It is contended that the subsequent conveyances of Alger with covenants of warranty operated as equitable assignments of his claim for damages, on account of the land conveyed; but, whether this is so or not, it is plain that these conveyances could not deprive him of the right to prosecute his claim for damages, and to recover the same in his own name, if he saw fit. The remedy of the grantees is at law upon Alger's covenants of warranty."

II. Property in city.

a. Separated by highways, railroads, or other property.

It seems hard to formulate a rule that will cover all cases where property in a city is divided by highways, railroads, or intervening property, and a portion of it is condemned or damaged. The general rule seems to be that

where the use of property is necessary for the maintenance and successful running of a plant, and a detached portion is injured, damages may be allowed for injuries to the whole. So where it is a homestead and used as a whole for agricultural purposes. On the other hand, where property has been purchased for the erection of a plant, on different blocks, or is separated by being on different blocks, and cannot be connected; or where the use of the detached property is temporary or disconnected, —it seems that damages to one piece will not be allowed to reach the other tract.

Where a party owned two lots separated by an alley, there being a malt house, pump, and pipe on the east lot, connected under the alley with a brewery on the west lot, and the east lot was condemned by a railroad company, damages were allowed for the injury to the west lot also, the owner of both lots owning the fee in the alley, but the damages were restricted to the expense of removing the plant from the east to the west lot. *Hannibal Bridge Co. v. Schaubacher*, 57 Mo. 582.

So, also, damages for injury to the property as a whole were allowed in *Union Elevator Co. v. Kansas City Suburban Belt R. Co.* 135 Mo. 358, 38 S. W. 1071, where one person owned three blocks, separated by streets, which were used for elevator purposes, all the blocks being necessary to the successful operation of the elevator, and a railroad right of way was condemned over one block. In this case it was said: "Whatever may be the ruling in other jurisdictions under similar conditions, the law as announced in this state is that the owner of land adjoining a street or alley owns the fee to the center of such street or alley, as the case may be, subject to an easement in the public."

And, where property consisted of several lots in different blocks, and the entire piece had been occupied for years as a brick yard, and was used as one tract of land for a common purpose, on which were machinery, buildings, dryhouse, sheds, and kilns, it was held that damages should be allowed for the whole. *Kansas City Suburban Belt R. Co. v. Norcross*, 137 Mo. 415, 38 S. W. 299.

A consolidated gas company owned two pieces of land in different blocks, one of which had been acquired by the consolidation of the companies, and on this was a plant for making coal gas, which had not been in use for several years but was maintained as a reserve for any exigency that might arise. The plant on the other tract was used for making water gas. The land covered by the coal-gas plant having

upon issued, with an order for view by the jury of the premises, and the matter came on for trial at the January term, 1901, of said court. After charging the jury, the court stated to them that by the consent of counsel they might bring in a verdict in a lump sum for the value of the land and the damages to the adjoining property. On March 11, 1901, judgment was entered of record, as follows:

"This matter coming on for trial at the January term, 1901, of this court, and being called, and both parties appearing, and the cause being moved by the said appellant, and a jury being impaneled and sworn, and having viewed the premises, and the evidence offered by the parties having been submitted, and the respective parties, by their counsel, being heard, and the judge having charged the jury, and the jury hav-

ing retired to consider their verdict, come again into court, and say that they find and assess the value of the said lands and damages sustained at the sum of \$12,000, to be paid to the said Edward S. Sharpe, by the said appellant, for the value of said lands and damages sustained. And it is hereby ordered and adjudged that the said assessment by the jury aforesaid be, and the same is hereby, confirmed, and that the said Edward S. Sharpe is entitled to have from the said United States the sum of \$12,000 for his said land and damages. Judgment signed this 11th day of March, A. D. 1901."

Bills of exception to the rulings of the court in regard to the admission of testimony and to the charge of the court were duly sealed, and, together with the record of the judgment, have been brought before us by writ of error.

been condemned, it was held that damages to the entire plant, as a whole, on both blocks, should be allowed, and it was also held that in estimating the damages the assessment would not be restricted to the simple value of the land and the owner required to remove the plant, but that the rule concerning fixtures, which obtains between vendor and vendee, would control in the assessment of the damages. *Re New York*, 39 App. Div. 589, 57 N. Y. Supp. 657.

Disconnected lots on different blocks were held to be a part of the same tract, where a railroad bridge was constructed destroying access to some lots, and all the lots were used in connection with a sawmill for stacking lumber thereon. *Chapman v. Oshkosh & M. River R. Co.* 33 Wis. 629. In this case the court said: "It seems to us that it was just as legitimate a subject for compensation as though the sawmill had been situated on some one of the lots on Pine street, and the lots on that street had been inclosed in the mill-yard for the storage of lumber manufactured at the mill."

So, lots separated by a highway and used for agricultural purposes were held to be one tract, in *Welch v. Milwaukee & St. P. R. Co.* 27 Wis. 108.

And whether lands separated by a street constitute but one tract was held to be a question for the jury. *Charleston & S. Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

On the other hand, unity of ownership and purpose has been held to be insufficient to extend the damages to other tracts where there is no actual unity of use. In some cases separation by an intervening highway has been held sufficient to limit the damages to the parcel taken. This seems to work a hardship sometimes, as when the only available property for a plant seems to be vacant lots opposite each other, separated by a street. If the plant is not constructed the damages may not extend across the street. If it is in operation, using both sides of the street, an injury to one lot may extend to the other also.

In estimating damages for the condemnation, by a railroad company, of a strip of land along one side of a strip already owned by it through a block owned by a gas company, which also owned two other parallel blocks separated by streets, it was held, in *Re New York C. & H. R. R. Co.* 6 Hun, 149, that the ownership by the railroad of the intervening strip on which its road existed was a complete severance of the block through which its road ran into two distinct parcels, and that no damages could be allowed for injury to that portion of

the block from which the new strip was not taken, also that damages could not be allowed for incidental injury to the other blocks separated by streets, but that the several blocks must be considered as distinct parcels, and that no parcel could properly be considered as injured except the parcel out of which the lots required by the railroad company were in fact taken. This was against the contention of the gas company that these blocks were all purchased with the intention of using them as a whole for the purposes of its business, and that it was entitled to prove the value of the whole of the several blocks for that purpose and the extent to which that value was diminished by the condemnation of the lots taken by the railroad company. This case was distinguished in *Currie v. Waverly & N. Y. Bay R. Co.* 52 N. J. L. 381, 20 Atl. 56 (*infra*, II. b), on the ground that it was determined by N. Y. act 1813, vesting the fee of the streets in the municipality.

Where proceedings are instituted to condemn a right of way through a block, the owner cannot claim damages for injuries to property in another block, separated therefrom by a street the fee of which is in the city, no portion of which has been taken; and the fact that he purchased the property to be used as a whole for a polytechnic institute can make no difference, where the tracts are not used for any common purpose as one tract of land when the condemnation proceedings are instituted. *White v. Metropolitan West Side Elev. R. Co.* 154 Ill. 620, 39 N. E. 270. The court said: "The two tracts of land must be considered as they existed when the proceeding was instituted. At that time they were separated by a public street. They were in no manner connected, and never could be connected without the consent of the city, which may never be obtained. They were not used for any common purpose as one tract of land. Two tracts of land might be so connected and used as to constitute but one tract, and in such a case, in a proceeding to condemn a part, it would be proper to consider the damages to the whole. But this record presents no such case." It was also said that, if by the construction and operation of the railroad the property on the other side of the street was specially damaged, and the damage sustained was not common to the public, there was a complete remedy in an action at law.

So, in condemnation proceedings for a right of way for an elevated railroad across a block, it was held that evidence of damages as to all lands separated from those taken by streets,

The first point of objection that arises out of the assignments of error is that the court overruled the defendant's offer to prove the probable use that the government would make of this land, and the further offer to prove that the use of this land for military purposes would injure and depreciate the value of Dr. Sharpe's remaining and adjoining land. We think the court were right in overruling these offers, on two grounds: First, the record discloses the fact that the land taken by these proceedings constituted one of three several tracts of land, consisting of three adjoining farms, owned by plaintiff in error, and held by different titles, and acquired at different times. The property first acquired was known as the "Dunham Farm," and was purchased in 1880, for \$5,800, by Mrs. Sharpe, wife of the plaintiff in error, and

afterwards transferred to the plaintiff in error. The property in question, the subject of these proceedings, was purchased by plaintiff in error in 1891, and is known as the "Gibbons Tract," consisting of 41.75 acres and 22 acres of meadow. These 22 acres of meadow were not adjoining or a part of the tract known as the 41.75 acres, nor was it used in connection therewith, but was such a considerable distance away, and of so little value, that no attention was paid to it by either the plaintiff in error or the defendant upon the trial of the cause, either as to value or damages. The purchase price paid for this tract, with the house and farm buildings thereon, was \$6,000. The third and remaining tract of land, known as the "White Farm," was purchased by plaintiff in error December 29, 1899, for \$5,200. The petition in this case

alleys, or lands owned by other parties was properly excluded. *Metropolitan West Side Elev. R. Co. v. Johnson*, 159 Ill. 434, 42 N. E. 871.

Whether a particular lot of land constitutes an independent parcel is a question which cannot be determined in the affirmative by the mere fact that it is separated from other land by a highway or street, or by paper lines, or by fences; nor can it be determined in the negative by the mere fact that it is all under one ownership, and is not divided by streets or by paper lines.

So, it was held that each lot would constitute a separate and distinct parcel, where there was an actual division by streets and use for travel and by recorded paper lines; and there was no evidence that any two of the lots were used together, or held for sale as one parcel; and "the only use shown was a separate and distinct use and holding of each lot by itself." *Wellington v. Boston & M. R. Co.* 164 Mass. 380, 41 N. E. 652, 158 Mass. 185, 33 N. E. 393.

Where lots in a town were used by the owner, in connection with other lots, in the same business, but they were separated by streets and alleys, it was held, in a condemnation proceeding by a railroad company, that damages could not be allowed on all the lots as an entirety. *Fleming v. Chicago, D. & M. R. Co.* 34 Iowa, 353.

In *Peck v. Superior Short Line R. Co.* 38 Minn. 343, 31 N. W. 217, the general rule is stated to be that in condemnation proceedings, to constitute unity of property between two contiguous, but prima facie distinct, parcels of land, there must be such a connection or relation of adaptation, convenience, and actual and permanent use between them as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used. In this case the owner of three lots condemned by a railroad company claimed damages also for injuries to a tract of land separated from the lots by a street, which was occupied and used partly as a mill site and partly for piling lumber. The three lots were not used in connection with the mill property at the time of the condemnation, though for a time a temporary blacksmith shop, used in connection with the mill, had been maintained on them, and lumber had been piled upon them. The court said that the separation of the lots from the mill property by the street did not necessarily prevent the whole of both tracts

from being regarded as one property, that they were contiguous in the sense of touching each other by embracing the soil of the street, but that there was no such connection as to render the enjoyment of these lots reasonably and substantially necessary to the enjoyment of the tract. This was held because the use which had been made of the lots in connection with the mill business was merely fugitive and temporary,—not in any proper sense permanent, nor reasonably or substantially necessary; a mere expedient for a short time; and because even such use was not continued, and had not been for a year and a half before the trial.

A party owned a homestead and a block of lots separated by lands of another party, having a right of way connecting the two tracts. The homestead was injured by a railroad laid in the street, and it was held that the owner was not entitled to recover damages for injury to the second tract. *Pennsylvania Co. for Ins. on Lives & G. A. v. Pennsylvania S. Valley R. Co.* 151 Pa. 334, 25 Atl. 107. In this case the court said: "It was clear upon the testimony that neither the larger tract, nor the private alley leading from it to Coal street, had been taken, injured, or destroyed by the defendant in the construction of its road, and the court was right in refusing to submit any question of damages done to said tract or way to the jury."

And where lots were sold with restrictions in the conveyance against the erection of engines, forges, and foundries, and with authority to any lot owner to enforce the same, it was held that a condemnation of lots by the government for fortifications would not authorize compensation for prospective damages to other lots, not owned by the same party, or contiguous, by reason of anticipated shops or necessary equipments to perfect and maintain the fortifications. It was held that persons by contract could not anticipate and prevent public use so as to enlarge or impose a greater value on their holdings. *United States v. Certain Lands*, 112 Fed. 622.

See *United States v. Inlota*, 2 Am. Law Record, 314, 513, 577, Fed. Cas. No. 15,441a, *supra*, I.

b. Separated by plat lines.

Where property is contiguous and separated merely by plat lines, and is owned and used as one tract, it is held, in a large proportion of the cases, that damages may be estimated as affecting the whole tract. In New Jersey it is held that this rule extends to blocks where no lots have been sold, as the platting of the street

was filed and proceedings begun January 9, 1900. The evidence shows that these were three separate farms held and managed as such previous to the beginning of these proceedings, and that the property here in question was not used in connection with the White farm until three months after they had begun, but was managed, as were the other two farms, as a distinct and separate holding, and by a different tenant, and that it was separated from the other two farms by public roads. It is this separate and distinct tract known as the Gibbons tract of 41.75 acres that the government is now seeking to condemn. It is not denied that in rendering the "just compensation" secured by the Constitution of the United States to the citizen whose property is taken for public uses it is right and proper to include the damages in the shape of deterior-

ation in value which will result to the residue of the tract from the occupation of the part so taken. In applying this rule, however, regard is had to the integrity of the tract as a unitary holding by the owner. The holding from which a part is taken for public uses must be of such a character as that its integrity as an individual tract shall have been destroyed by the taking. Depreciation in the value of the residue of such a tract may properly be considered as allowable damages in adjusting the compensation to be given to the owner for the land taken. It is often difficult, when part of a tract is taken, to determine what is a distinct and independent tract; but the character of the holding, and the distinction between a residue of a tract whose integrity is destroyed by the taking and what are merely other parcels or holdings of the same

in that state does not divest the owner of his title thereto. But where there is no unity of use which indicates permanency, it seems that damages will be limited to the immediate lot or block affected. Some cases hold that the platting of property will prevent extending the damages to other lots where the property is vacant, or where there is not an actual permanent use of the whole as a unit.

So, where a lot was appropriated by a railroad, it was held that the owner was entitled to damages to contiguous lots occupied as a whole. *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240, 51 N. W. 842, 45 Neb. 453, 63 N. W. 787.

And, a railroad company having condemned one of two lots which adjoined each other, and which were used and occupied by the owner as a whole, it was held that the owner was entitled to recover for damages caused to the remaining lot, as the two lots constituted but one tract. *Cummins v. Des Moines & St. L. R. Co.* 63 Iowa, 397, 19 N. W. 268.

Likewise, in a proceeding to condemn a corner of one of two city lots used as one tract, it was held that the owner was entitled "to recover the actual damages sustained to the whole property." *Reisner v. Atchison Union Depot & R. Co.* 27 Kan. 382.

And where a party owned and occupied a tract of land containing 30 acres, a part of which had, some years previously, been platted and laid out into village lots, but such lots had never in any way been separated from each other or from the rest of the tract, and the whole had been used as a farm or tract for residence and general farming purposes, it was held in condemnation proceedings that the whole land, being a compact body used as an entirety, constituted only one tract. *Sheldon v. Minneapolis & St. L. R. Co.* 29 Minn. 318, 13 N. W. 134.

In condemnation proceedings for an elevated railway across a block where the plaintiff owned all except eleven and one half lots, it was held that the court properly admitted evidence of damages to such lands as were merely separated by lot lines. *Metropolitan West Side Elev. R. Co. v. Johnson*, 159 Ill. 434, 42 N. E. 871. In this case the court said: "Here there is no physical obstruction between the lots taken and those claimed to be injured. There is no line of division between them not under the absolute control of the respondents. The lot lines were designated by them upon their plat of the subdivision merely for the purpose of their own convenience in selling the property."

57 L. R. A.

In *Cox v. Mason City & Ft. D. R. Co.* 77 Iowa, 20, 41 N. W. 475, it was held that, where a party owned the whole north half of a block, and also the whole of a block separated from the first tract by a street or alley, and a railroad was located across some lots in each of the blocks, the damages would not be limited to the lots on which the railroad was located. The case does not show, further than as stated, the existence of any other alley, but says: "The land in each of the blocks, as described, lay in a body, except that it was platted into lots for sale, and was a part of the town-site."

The damages to an owner for taking part of a block by a railroad company were held not to be confined to that particular block, where the owner had only made a plat, and had never sold the lots, and several blocks had been used as one tract of land. *Currie v. Waverly & N. Y. Bay R. Co.* 52 N. J. L. 381, 20 Atl. 56.

And a party owning lots contiguous to each other, and occupied as his homestead, was held entitled to damages for injury caused to lots not taken, where a part of one lot was condemned for railroad purposes. *Port Huron & S. W. R. Co. v. Voorhels*, 50 Mich. 508, 15 N. W. 882. In this case the lot taken was separated by a platted alley from the others, but the plat was not accepted by the city.

In estimating the damages caused by a railroad running diagonally through a tract of land, the property must be considered as a whole where the owner had platted it some twenty years previously, and divided it into lots and streets, but the map was not recorded, the streets never opened, no lot was ever sold, and the tract was used for pasture. *New York, L. & W. R. Co. v. Arnot*, 27 Hun, 151. In this case the court said: "If these defendants had owned another tract of land in the neighborhood through which the railroad did not run, we do not know of any principle which would permit the commissioners to take into account the depreciation to that other tract (*Re New York C. & H. R. R. Co.* 6 Hun, 149): unless, perhaps, the neighboring tract should be actually used in connection with that of which a part is taken, so that the two really formed one whole."

In *Hetzel v. Baltimore & O. R. Co.* 169 U. S. 26, 42 L. ed. 648, 18 Sup. Ct. Rep. 255, it was held that a party owning a whole block, which, before she acquired title, had been platted into lots, with a provision that the alleys should never be closed unless by common consent of all the lot owners, could recover for damages to such of the property as she owned, even if she did not own the fee in the alleys.

owner, must be kept in mind in the practical application of the requirement to render just compensation for property taken for public uses. How it is applied must largely depend upon the facts of the particular case and the sound discretion of the court. All the testimony in this case tends to show the separateness of this tract which was the subject of the condemnation proceedings. It had never been farmed or used in connection with either of the other farms owned by the plaintiff in error. It was in no way reasonably or substantially necessary to the enjoyment of the other two tracts. Separated from it by a public road, the White farm, so called, had only been purchased by plaintiff in error ten days before the proceedings for condemnation were begun. The authorities cited by the defendant in error fully support their contention

in this respect. In *Currie v. Wocerly & N. Y. B. R. Co.* 52 N. J. L. 392, 20 Atl. 56, cited by counsel for plaintiff in error for the proposition that, where a part of the tract is taken for condemnation, damages to the remaining land shall be given, the court also says: "It is an established rule in law, in proceedings for condemnation of land, that the just compensation which the landowner is entitled to receive for his lands and damages thereto must be limited to the tract a portion of which is actually taken. The propriety of this rule is quite apparent. It is solely by virtue of his ownership of the tract invaded that the owner is entitled to incidental damages. His ownership of other lands is without legal significance."

It is enough to say that, in our opinion, the two other farms or tracts of land owned

Where a railroad crossed the corner of a vacant lot by license, and subsequently parties acquired title to that lot and the adjoining lots, and built a factory on the other lots, and the railroad company condemned the lot which it crossed, it was held that the damages should not be restricted to that lot or the adjoining lot, where the whole was used and connected with the manufactory. *Driver v. Western U. R. Co.* 32 Wis. 569, 14 Am. Rep. 726.

In *Potts v. Pennsylvania S. Valley R. Co.* 119 Pa. 278, 13 Atl. 291, it was said: "Where a person resides upon one of a number of contiguous town lots, but uses all of them together as his homestead, as if the whole constituted but a single inclosure, and a railroad company appropriated a portion of one only of the lots, the damages will doubtless be assessed for the injury done to the whole property."

Peculiar and isolated cases may perhaps exist, also, where, although the lands are not in fact contiguous, yet the uses to which they are applied, respectively, are in their nature so intimate and dependent, one upon the other, that an injury to one must necessarily be taken as an injury to the whole taken together; for example, the land upon which a water mill is erected will ordinarily draw to it as an appurtenance, or rather will be regarded as embracing, the ground covered by the reservoir, so that the latter will be regarded as part and parcel of the former, although they are not contiguous." The land in this case was not occupied as a homestead, however, and the lot condemned was not contiguous to the other property for injury to which damages were also claimed. See *infra*, V., for a statement of the case.

In *Mix v. Lafayette, B. & M. R. Co.* 67 Ill. 319, the damages were limited on account of the pleadings. This was a proceeding to condemn a right of way on a street by a railroad, affecting four lots, where the party damaged also owned twenty-eight lots in the same blocks, adjoining upon and connecting with them as one lot or piece of ground. It was held that the damages to the two entire pieces of ground, of which the lots in question formed portions, could not be recovered, on the ground that the appellant should have filed his cross petition setting up that he was the owner of the other ground, not described in the petition, which would be damaged by the construction of the proposed side track. It was held that this would have entitled an assessment of damages to the entire piece of ground of which the lot in question formed a portion.

On the other hand, where property is vacant, 67 L. R. A.

or where there is no permanent unity of use, it seems that courts refuse to extend the award of damages to other adjacent lots.

This was held in the following cases.

Where city property was unoccupied, but was platted into blocks and lots, and a railroad company condemned lots 1 and 10 in a block, it was held error to allow damages to lots 2 to 9, inclusive, in the same block. *Wilcox v. St. Paul & N. P. R. Co.* 35 Minn. 439, 29 N. W. 148. In this case the court said: "It is perhaps impossible to establish any rule applicable to such cases which will not be subject to criticism. But in respect to city property, in fact unoccupied, but which appears to have been platted or divided into blocks and lots, nothing more being shown, the property should be treated as lots or blocks, intended for use as such, and not as one entire tract. Prima facie that character has been given to it by the proprietor. Presumably the division or platting was with a view to the use of the property, or to its disposal and ultimate use, in such subdivisions as have been made; and if any facts exist which might be considered sufficient to rebut this presumption, they should be disclosed."

A tract of land in a city having been platted and divided into lots, presumably with a view to its disposal and ultimate use in such subdivisions, each lot must be treated as a separate tract in ejectment proceedings by the owner to recover the property and damages from a railroad company which, in constructing its road in certain streets opposite two of such lots, had taken a portion thereof. The court held that, in the absence of evidence tending to overcome the prima facie character of the lots as separate tracts which had been given to them by the proprietors, the premises could not be treated as a whole in assessing damages, but the damages must be limited to the lots a part of which had been taken by the railroad company, and that the fact that the property was occupied by a lessee as one tract, for the purpose of piling lumber, could not affect the question, since this was a mere fugitive and temporary use, and not an actual and permanent one, such as would be necessary to constitute the whole premises one tract. *Koerper v. St. Paul & N. P. R. Co.* 42 Minn. 340, 44 N. W. 195. In this case the court said: "So far as the plaintiffs are concerned, they have offered no evidence reasonably tending to overcome the prima facie character of the lots as separate or distinct tracts, or tending to show that they have devoted

by plaintiff in error constituted such separate and independent parcels as regards the land in question that they cannot properly be spoken of as the residue of a tract of land from which the land in question was taken. The court, however, did allow the plaintiff in error to show what damage, if any, had resulted from separating these farms; that is, to show, if he could, that by reason of their severance they were made so small that it would be unprofitable to work them, and damage resulting from that the jury might so award. This certainly was as far as the court could be justified in going in favor of the contention of the plaintiff in error. We think the court were right, therefore, for the reasons stated, in refusing to allow the plaintiff in error to show what damage or inconvenience would probably result to these other tracts (otherwise than

what resulted from the mere severance in farming) from the taking of the Gibbons tract for the military purposes aforesaid.

A second sufficient ground for the court's action in this respect is that the testimony offered was too vague and speculative in character. It dealt with possibilities more or less remote, and was not founded upon any clear, certain, or avowed obnoxious uses to which the property in question was to be put. The tract in question nearly surrounds the reservation of the United States, upon which permanent fortifications have already been erected, and emplacements for heavy ordnance already built, with the magazines and other appurtenances for the firing of large guns. These already existed, and there was no suggestion that the additional land embraced within the tract in question was to be used for en-

them to actual and permanent use as one tract."

In proceedings for assessment of damages caused by building a railroad on a street intersecting diagonally a block of land, owned by a single person, which was laid out into lots extending across the block, two of which fronted on the diagonal street, it was held, in *Evansville & R. R. Co. v. Charlton*, 6 Ind. App. 56, 33 N. E. 129, that the owner of the block could recover damages only for those lots which abutted on the street appropriated.

For cases where a building or buildings which may or may not extend across plat lines are affected, see *infra*, II. c, *Separating and severing buildings*.

See also, as to effect of plat lines, *Phillips v. St. Clair Incline Plane Co.* 166 Pa. 21, 81 Atl. 69, *supra*, I.

c. *Separating and severing buildings.*

In regard to separating buildings where some are immediately affected by proximity to a railroad and the like, it seems that there is no inflexible rule in estimating damages. The property may be a unit although having several houses thereon. A New York case (*Cooper v. Manhattan R. Co.* 85 Hun, 217, 32 N. Y. Supp. 1054) went to the extent of refusing to separate the damages where several houses were on the corner property, taking judicial notice that property of that size and in that locality was adapted for a large single building. On the other hand, a partition wall dividing a building, with different tenants, may be sufficient to sever the damages. So, in *Keene v. Metropolitan Elev. R. Co.* 79 Hun, 451, 29 N. Y. Supp. 971, it was held that, notwithstanding apparent architectural unity, a block of apartment houses on a corner could be severed in estimating damages caused by an elevated railroad on a side street.

Where a party owned a lot at the corner of a street and alley on which were two houses, one on the street and one on the alley, and a bridge company obstructed the street, it was held that he was entitled to recover damages for the whole lot. *White v. Fifth Ave. & H. Street Bridge Co.* 189 Pa. 500, 42 Atl. 136. In this case the court said: "As a matter of fact the plaintiff's property was a unit. It was a lot of ground, held by one title, and undivided by any lines, with two buildings on it."

An elevated railroad station having been erected at the junction of the Bowery and Houston street in New York city, it was held, in *Cooper v. Manhattan R. Co.* 85 Hun, 217, 57 L. R. A.

32 N. Y. Supp. 1054, that a person who owned property on the corner of such streets, containing a three-story building fronting on the Bowery and some two-story stores fronting on Houston street, could recover for the damages to the property as a whole, notwithstanding the fact that the lots on Houston street did not abut on the railroad. The court said: "The only question necessary to be considered is the point made that Nos. 92, 94, and 96 East Houston street did not abut upon the elevated railroad, and, therefore, no damages could be awarded as to them. Under ordinary circumstances, of course, this would be a bar to recovery. But the improvements upon the lot in question are entirely different from those which would be suitable for the value of the lot; and when the lot comes to be improved, undoubtedly a single building will be erected covering the whole of the premises in question and fronting on the Bowery. The court may take judicial notice of the fact that lots in the city of New York are ordinarily at least 75 to 100 feet in depth, the buildings on corner lots frequently covering the whole lot in the business portion of the city. And although these premises may be divided in the manner stated, for the purpose of occupancy, yet in reality the buildings are upon the single lot fronting upon the Bowery. It would seem, therefore, that, in determining the question as to whether it had sustained fee damage, it should be treated as a single lot."

But where there are disconnected buildings, not depending on the same easements, and not used as a unit, the property may be severed in estimating damages.

This was held in *Mooney v. New York Elev. R. Co.* 16 Daly, 145, 9 N. Y. Supp. 522. In this case a lot ran through from street to street, and contained two disconnected buildings, one fronting on each street. In an action for damages for occupation of one street by an elevated railroad, it was held that damages to the building on the other side could not be estimated. In this case the court said: "The lot is 25 feet in width on Greenwich street, and 100 feet in depth on Beach street, and is covered by two buildings, one of which is built on the rear of the lot on Beach street, is 25 by 50 feet, is wholly unconnected with the building fronting on Greenwich street, and has its entrance and receives its light and air from Beach street. The elevated railroad structure does not extend in front of this rear building."

This case was distinguished in *Stevens v. New York Elev. R. Co.* 130 N. Y. 95, 28 N. E.

larging these permanent fortifications. No offer was made by the plaintiff in error to show for what purpose the land was to be used. "Military purposes" is a general description, and would cover its use as a parade ground, officers' quarters, barracks, etc. No proof was had showing that batteries were to be erected on this land. The only testimony actually offered by plaintiff in error was as to the batteries, emplacements, and magazines already erected within the permanent fortification, known as "Fort Mott." The court were right in refusing the offer to show possibilities or probabilities of damage from the use to which the land in question might be put. The court ruled that the offer was too broad. Under the circumstances of this case we are of opinion that it was right in so stating.

The second point of objection raised by the assignments of error is to the ruling of the court to the effect that the plaintiff in error could not be allowed to testify to offers of purchase made to him for the land in question for various uses. Such offers at best are unsatisfactory as a means of

proving value. Many circumstances must be taken into the account, to give them any weight at all,—such as the time and place at which the offer is made, the facts bearing upon the bona fides of the offer, and a consideration of whether the offer was based on exceptional grounds. The present market value is the true criterion of the value of land to be taken. This market value is "the price that would in all probability—the probability being based upon the evidence in the case—result from fair negotiations, where the seller is willing to sell and the buyer desires to buy." Mere offers to buy, without setting forth the conditions under which they were made, and unconnected with the circumstances influencing the same, do not necessarily throw light upon the market value here referred to. But, however this may be with respect to offers proved by the persons who made them, who can be subjected to cross-examination, or by others than the owner of the land himself, who is a party to the proceedings, we are of opinion that offers proved merely by the testimony of the owner are not competent

667, *infra*, on the ground that in the present case there were two independent and wholly unconnected buildings on the lot, fronting on different streets, and that the light, air, and access to the building fronting on the street in which the road was not built were not interfered with.

Where a party owned corner lots with different houses thereon, it was held in *Gibson v. Fifth Ave. & H. Street Bridge Co.* 192 Pa. 55, 43 Atl. 339, that the damages caused by the building of a bridge on one street could not be extended to the whole property. This was on the ground that the different portions of the lots were purchased without any contemplation of unity of use, and were rented to different parties, and it was dwelling-house property held for rental by its owners before the present owner purchased it, and was held by her for the same use after she acquired title.

So, in assessing damages for injuries caused by the construction of an elevated railroad, it is held, in *Keene v. Metropolitan Elev. R. Co.* 79 Hun, 451, 29 N. Y. Supp. 971, that premises covered by an apartment house, the different apartments in which are occupied as distinctly separate buildings, though connected on two floors, some of them having no frontage on the street in which the road is built, and having no easements of light, air, and access therefrom, cannot be treated as a whole, notwithstanding the unity of ownership and the unity in the construction of the buildings. The court said: "It has been urged that because of the fact of there being unity of construction in the building and unity of ownership a different rule should obtain. But it is apparent that, notwithstanding the unity of construction and unity of ownership, these premises are occupied as distinct and separate buildings, just as much as though there was no architectural unity and there was a division of ownership. It is difficult to see how mere architectural unity or single ownership can give an easement upon a street where none would exist, even if the occupation was the same and the interior arrangements were the same but the exterior appearance showed diversity." The case does not disclose whether or not there was more than one lot, but, as the ground was 100 by 120 feet, it must have contained several lots. The decision, however, 57 L. R. A.

is on the ground that the side of the building having the easement might have been separated from the balance of the building. The principle involved in this case is similar to that in *Greenwood v. Metropolitan Elev. R. Co.* 26 Jones & S. 482, 12 N. Y. Supp. 910, *infra*, although the case is not referred to.

This case was followed by *Reilly v. Manhattan R. Co.* 43 App. Div. 80, 59 N. Y. Supp. 335, in which it was held that where a building was situated on two lots on the corner of a street, in estimating damages for the taking of the side street by an elevated railroad the damages should be limited to that part of the building adjacent to the street railroad. This was because there was a partition wall in the building. Both sides of the building were used for apartments and stores, and the stores were actually walled off. It was not clear that the apartments were walled off, but they were architecturally distinct. The dissenting opinion says, however: "There were no such two independent and wholly unconnected buildings on those lots as would bring the case within the ruling in *Mooney v. New York Elev. R. Co.* 16 Daly, 145, 9 N. Y. Supp. 522 [*supra*] and similar cases."

It had been held in *Greenwood v. Metropolitan Elev. R. Co.* 26 Jones & S. 482, 12 N. Y. Supp. 919, that the severance of easements by a sale of two corner lots to different parties would prevent a unity in estimating damages from an elevated railroad on the side street, where the title to the property had become united in one owner, although one building covered both lots. But a similar case in the New York court of appeals (*Stevens v. New York Elev. R. Co.* 130 N. Y. 95, 28 N. E. 667) refused to apply that doctrine, and held that a building covering two lots on a corner would be treated as a unit in estimating the damages.

Land situated on the corner of two streets having been divided into two distinct lots and sold as such, it was held, in *Greenwood v. Metropolitan Elev. R. Co.* 26 Jones & S. 482, 12 N. Y. Supp. 919, that where the two lots subsequently passed by mesne conveyances to one owner, who constructed a single building thereon, damages for the impairment of easements of light, etc., by the construction of an elevated railroad in one of such streets must be limited to the diminution of light to the lot

for the purpose of proving market value. We think the court therefore was right in rejecting the testimony of the plaintiff in error in this regard.

The court was very liberal in allowing the jury to consider the testimony offered by the plaintiff in error, as to other criterions of value, and allowed testimony to show that the land in question was adapted to other purposes than agricultural purposes; that it was available as a hotel site; that projected trolley lines were likely to run near it, and enhance its value; that a railroad might be built in its neighborhood, which might have a like influence; stating to the jury that, if these or other purposes to which the land could be adapted add to the present value of the land, they might give the plaintiff in error the benefit of that in estimating the present worth of the property itself. There was considerable testimony of this kind, more or less vague, all of which was admitted for the reasons stated. In so admitting it, we think the court

was quite as favorable as it ought to have been to the plaintiff in error.

The last assignment of error is that the court instructed the jury, as follows: "The jury must be satisfied as to the value and damage by the testimony which is produced before it, without reference to any testimony which was produced before the commissioners, or influenced by the commissioners' report."

We think the court were quite right in this instruction. The case on the appeal from the commissioners' award was tried before the district court *de novo*. All the evidence necessary to a finding was produced on both sides, and this only could the jury properly consider, uninfluenced by the action of the commissioners, from which appeal was taken.

Upon a careful consideration of the whole case, we see no error, either in the charge of the court to the jury or in its rulings as to the admissibility of evidence, and the judgment of the court below is therefore affirmed.

abutting on that street only, and cannot include compensation for the diminution of light to the other lot, since, although originally both lots, when owned as an entirety, were entitled to an easement of light and air from such street, the conveyance of each lot separately had destroyed that easement so far as the lot which did not abut on that street was concerned, and the subsequent reunion of the two lots could not have the effect to restore such right.

This decision, however, was disapproved and in effect overruled in *Stevens v. New York Elev. R. Co.* 180 N. Y. 95, 28 N. E. 667, a case quite similar in its facts, in which it was held that, although a piece of property extending from one street to another originally consisted of two lots, one fronting on each street, and the lots had separate owners, damages for the construction of an elevated railroad in one of the streets will not be limited to the injuries occasioned to that part of the property abutting on such street only, but will be awarded for the injury done to the property as a whole, where for many years prior to the construction of the railroad the property had been owned, used, and conveyed as a single lot abutting on both streets, and was occupied by a single four-story building under one roof, having no transverse partition wall and with but a single flight of stairs between the first and second stories, and at the time of bringing the action to recover damages the property was owned by a single person. The court said, in discussing the *Greenwood Case*: "The characterization of these street rights as easements, and implying that they are governed by the rules, and are subject to the limitations, of common-law easements, tends to obscure the rights of abutting owners on the one hand, and of the corporations on the other."

The judgment in the *Greenwood Case* was rested on the ground that, the street rights once appurtenant to both lots having been destroyed as to 83 by the prior conveyances of 81, they could not be restored by the subsequent reunion of both lots. This conclusion, as applied to such rights as are under consideration, we think cannot be supported.

In *Meyer v. Newark* (N. J.) 6 Am. Law Rev. 576, where only a part (about one half) of a house was within the lines of the proposed 57 L. R. A.

street, the question was left for review before the court *in banc*, whether the city was compelled to take the whole, or merely to pay for the damages incident to the destruction of the half, of the house; the court, however, strongly intimated that in cases where the house was not entirely destroyed it was only necessary to pay damages sufficient to compensate the owner, and the whole need not be taken or paid for.

d. Part of lot or lots injured.

The rule of damages where a part of a lot or lots has been taken seems to be based upon the unity of use and purpose, taken in connection with the deprivation of easements.

So, where parts of three lots were taken by a railroad, it was held that the owner was entitled to have the damages assessed to the whole without regard to the division into lots. *Sherwood v. St. Paul & C. R. Co.* 21 Minn. 122, 127.

And where a triangular part of a lot was condemned, and notice was given to the owners, who were constructing a large building thereon, whereupon they changed their plans, abandoned the structure, and erected the building on the remainder of the lot, the commissioners, in assessing damages, treated the triangle as a vacant, separate lot. It was held that the owners were entitled to recover, as compensation, both the value of the land taken, and the injury, if any, done to the value of the remaining land. It was further held that the owners should be allowed the actual cost and expenditure incurred in changing the plan of their structure. *Re New York & B. Bridge*, 18 App. Div. 8, 45 N. Y. Supp. 484.

In *Haggard v. Independent School Dist.* 113 Iowa, 486, 85 N. W. 777, the two halves of a lot were separated by an alley. One half was used for residence and the other half was condemned for school purposes. It was held that the owner was entitled to damages for injury to that portion of the lot on which was situated the residence. In this case the rule as to damages caused by inconvenience to the residence was held to be the same as where a part of a farm is taken for railroad purposes. The case does not show what inconvenience would be caused to the residence, or to what uses the parts separated by the alley were put; but the court said: "Who can say in this case, for instance, how much the inconvenience due to

the proximity of the school building on the balance of this block would be increased by the fact that the half lot in question was included in the schoolhouse site?"

And where a party owned the south half of a lot, and there was appurtenant thereto a right of way across the north half, on which he owned an undivided half of a coal office, weighing scales, and switch, on condemnation of the south half of the lot it was held that the owner thereof was entitled to recover for his interest in the appurtenances, coal office, scales, and track situated on the north half. *Chicago, S. F. & C. R. Co. v. Ward*, 128 Ill. 349, 18 N. E. 828, 21 N. E. 562.

III. Farm lands in a contiguous body.

Government subdivisions of 40, 80, 160 acres, etc., are not to be taken into consideration in estimating the damages, where land is contiguous and is used as one tract for farm purposes. The general rule is that where several distinct lots or subdivisions are in fact united by being used for one purpose, so that they are practically one piece, the damages for the whole are to be allotted, although but one part is taken.

So, where a man owned six 40-acre tracts in one body, it was held that damages caused by the construction of a railroad should be estimated as to the whole tract, although the road was built on only two of them. *Parks v. Wisconsin C. R. Co.* 83 Wis. 413.

And in a proceeding to condemn a right of way for a railroad over a 40-acre tract which was part of 160 acres, it was held that the damages should not be limited to the 40-acre tract, but extended to the whole farm. *Bigelow v. West Wisconsin R. Co.* 27 Wis. 478.

Also, in *Robbins v. Milwaukee & H. R. Co.* 6 Wis. 636, it was held that damages to the owner of lands taken for railroad purposes are not limited to the particular strip taken, or to the particular parcel, inclosure, or lot, such as a 10, 20, or 40 acre tract, the court saying that the whole contiguous farm lying together in a body and cultivated as such may be considered, as to the effect thereon, the convenience or facility or its after use, the feasibility of communication and approach, as proper subjects in estimating the damages.

And where a number of tracts of land as described by the government surveys are used together as one farm or body of land, it was held that in determining the owner's damage by reason of the location of a railroad across one or more of the tracts the injury to the whole farm should be considered. *Omaha Southern R. Co. v. Todd*, 39 Neb. 818, 58 N. W. 289; *Northeastern Nebraska R. Co. v. Frasier*, 25 Neb. 42, 40 N. W. 604.

So, where a party owned 590 acres, all in one body, and a railroad ran diagonally over seven 40-acre tracts, it was held that the damages could be awarded to the bodies of land taken as a whole, and were not to be confined to the small government subdivisions over which the road might pass. *Chicago, M. & St. P. R. Co. v. Baker*, 102 Mo. 553, 15 S. W. 64.

Likewise, where several 40-acre pieces were contiguous to each other, and used as one farm, this was held to bring the case within the rule that where, in condemnation proceedings, several distinct lots or subdivisions are in fact united by being used for one purpose, so that they are practically one lot or piece,—as, for instance, one farm,—the damage for the whole is to be allowed, though but one part or subdivision is taken. *Cedar Rapids, I. F.* 57 L. R. A.

& N. W. R. Co. v. Ryan, 36 Minn. 546, 33 N. W. 35.

Three 40-acre tracts adjacent to each other being used as one farm, it was held that the owner was entitled to damages for injury to the whole, in condemnation proceedings for a railroad through two of the quarters. *Wilmes v. Minneapolis & N. W. R. Co.* 29 Minn. 242, 13 N. W. 39.

And where a farm was in one inclosure, and the land taken for a right of way was all in an 80-acre subdivision, it was held that damages to the entire farm could be allowed. *Chicago, K. & W. R. Co. v. Brunson*, 43 Kan. 371, 23 Pac. 495.

In *Peden v. Chicago, R. I. & P. R. Co.* 78 Iowa, 131, 4 L. R. A. 401, 42 N. W. 625, the grantor conveyed a right of way through an 80-acre tract of land to a railroad, the deed containing a covenant that the railroad company would restrict the running of a stream to one side of its track and not allow it to pass through cattle guards or culverts to the other side. He owned, also, other lands, and subsequently sold 135 acres including 29 of the 80 affected by the covenant. It was held that his grantee could claim the benefit of the covenant as to his whole 135 acres, applying the rule of condemnation that where tracts together constituting but a single farm are sought to be taken by statutory proceedings, the landowner's right of recovery is not limited to the subdivision through which the right of way is to pass, but extends to all the tracts as a whole.

Government subdivisions in condemnation for a railroad are held to be entitled to no consideration, and cut no figure in the determination of the damages sustained. *Hartshorn v. Burlington, C. & N. R. Co.* 52 Iowa, 613, 3 N. W. 648.

So, section lines were held not to constitute different tracts where the farm was in a compact body, and a railroad condemned 12 acres out of the farm. *Chicago & I. R. Co. v. Hopkins*, 90 Ill. 316.

And in a proceeding by a railroad to condemn a right of way over a quarter section of land, omitting another quarter section which adjoined it and on which were buildings, the two tracts constituting a farm, it was insisted that it was erroneous to allow evidence as to damages sustained to land not described in the petition, in consequence of a portion of that which was described being cut off by the railroad from the balance of the farm. But it was held that it was too late to raise the objection on appeal. *Galena & S. W. R. Co. v. Birkbeck*, 70 Ill. 208.

In a proceeding by a railway to condemn a right of way, it was held that the assessment of damages need not necessarily be restricted to the injury done to the legal subdivision of land described in the petition; that if the tract described is a part of a larger connected body of land, the owner might recover for the injury done to the tract as a whole; that if the tract traversed by the railroad is part of the farm, its use as such is notice to the company that an injury to a part impairs the value of the whole, for a farm is a unit. *Fayetteville & L. R. Co. v. Hunt*, 51 Ark. 330, 11 S. W. 418. In this case the tract over which the road was located was unfenced woodland, but it adjoined, and was part of, the owner's farm.

And where no division of a farm had been contemplated or was necessary, the fact that a portion of the tract was bottom land near a river, and a portion high upland, was held not to prevent awarding damages for the whole

tract in condemnation for a railroad right of way. *Doud v. Mason City & Ft. D. R. Co.* 76 Iowa, 488, 41 N. W. 65.

But where the land is not used as a unit, damages will not be extended to the whole, although the tracts may adjoin. This was held in *Minnesota Valley R. Co. v. Doran*, 15 Minn. 230, Gil. 179. In this case plaintiff owned two tracts of land, claiming that they constituted but one farm. The land was adjoining, and there was one tenant living on one tract and another on the other. The witnesses in the case spoke of the tracts as this farm and that farm. The plaintiff testified: "The bluff between the farms is not so steep but it can be passed. . . . I regard the farm in section 19 also injured." It was held that it was error for the court to refuse to instruct the jury to consider the land as two separate and distinct tracts.

IV. Farm lands separated by highways, railroads, canals, or other property.

The general rule seems to be that the division of farm lands by highways, railroads, canals, or other property will not of itself necessarily limit the damages to the piece of land condemned for public purposes. If the tract is used as a unit, it will be treated as a unit in estimating damages. On the other hand, if the use and enjoyment of the tract not taken do not depend on its connection with that taken, the damages will not be extended to the whole farm.

This latter rule was applied in *SHARPE v. UNITED STATES*, where farms severed by public roads, and occupied by different tenants, one portion being purchased ten days previous to condemnation, were held not to be a part of the same tract.

Where a railroad condemned a right of way along a highway wholly within a tract of land, it was held that damages could be allowed to the whole farm, constituting several tracts as fixed by the government survey and separated by a highway, and that the damages could not be restricted to one government subdivision on that side of the highway upon which the road was located. *Ham v. Wisconsin, I. & N. R. Co.* 61 Iowa, 716, 17 N. W. 157.

In estimating the damages to be recovered for the appropriation of a railroad right of way over an embankment built into a river by parties holding property fronting thereon under a lease, the road running between the mainland and a stone crib or pier erected by the lessees, the entire premises held by the lessees and necessarily and properly used in their business must be considered, notwithstanding the fact that the premises were divided by a street or highway. *Kenwick v. Davenport & N. W. R. Co.* 49 Iowa, 664. The state statutes provided that no railroad should be built between the lands of a riparian owner and the river, without compensation to the owner. On the leased property were located a sawmill, planing-mill, lumber yard, etc., and it was contended that the planing-mill, and perhaps other portions of the property, had no connection with the sawmill, and that it was therefore erroneous to direct the jury to take into consideration the whole premises; but the court held that, as there was evidence to the contrary, it was for the jury to decide whether or not the whole premises were "necessarily and properly" used by the lessees "in their business" and the extent of the damages, adding that for the purposes of their business the highway may have been an advantage, and that, if their leasehold interest was rendered less valuable by the construction of the rail-

way, the fact that the premises leased were traversed by a street should not be considered in reduction of damages.

A railroad company condemned a right of way across lands north of a public road. An 80-acre tract lay south of the road, and this last tract was bought as a tract, and when purchased was occupied as a separate farm with a farm house thereon, and had been cultivated by a tenant for two years. It was held that it was a question for the jury whether the 80 acres were a separate parcel, and not within the farm and not to be considered in estimating the damages; and that, if they were a part of the farm, the jury might consider the effect of the railroad upon the convenience and safety in cultivating it. *St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500, Gil. 438. In this case the court said: "And if the imposition of a public easement upon and over a body of land does not divide it into two distinct farms, certainly, in buying land subject to such easement, the existence of the easement does not, of itself, operate to keep the land a separate farm from that which it adjoins. And as to the cultivation by a tenant, it seems still more unreasonable to hold that it would, in law, make this 80-acre tract a 'separate farm occupied by a tenant.'"

This case was distinguished in *Cameron v. Chicago, M. & St. P. R. Co.* 42 Minn. 75, 43 N. W. 786, on the ground that in the *Murphy* Case the ownership was continuous. The court said: "The tracts were contiguous; the separation of the parts in question being not complete, but consisting only of the intervening public easement. The right to use the intervening land, to pass and repass, remained in the owner of the whole; and when, if ever, the public easement should be abandoned, the landowner's right in respect to the whole body of land would become unqualified." In the *Cameron* Case a farm was divided into two parts by an intervening strip of land occupied by a railroad, the fee of which had never been acquired by the owner of the farm, and the railroad company condemned a tract of 8¼ acres in one of these parts. The owner claimed the right to recover damages to the farm as a whole, but the court held that the land comprising the farm must be treated as two separate and distinct tracts for the purpose of the assessment of damages.

But in *New York, W. S. & B. R. Co. v. Le Fevre*, 27 Hun, 537, where a turnpike road ran through ten acres of land adjacent to and occupied in connection with a dwelling house, dividing the land into two parts, it was held that, in condemnation of part of the land for a railway, the owner was entitled to have the damages to the whole property estimated, including that on both sides of the turnpike.

So, where a highway ran through a tract of land, and a railroad company condemned a right of way through the strip between the highway and the river, it was held that damages to the whole tract on the other side of the highway could be considered in condemnation. *Colvill v. St. Paul & C. R. Co.* 19 Minn. 283, Gil. 240. In this case the court said: "It seems that the highway ran through this property; this strip lay between it and the river, and the railroad went through it. Certainly, upon principle, there can be no objection to arriving at the damages to the whole property by estimating the damage to different subdivisions of it, whether such portion be divided from the rest by a railroad, or a highway, or by its nature, as if one portion be upland, and another pasture, and another plowland."

In assessing the damages to two tracts of land owned by a manufacturing company, separated by a cattle drive 16 feet wide, over and under which the landowners had a right of way, with privileges to bridge over or tunnel under as they might see fit, it was held that damages could be awarded to both tracts for injuries caused by a right of way appropriated on one of them. *Union Terminal R. Co. v. Peet Bros. Mfg. Co.* 58 Kan. 197, 48 Pac. 860.

Land consisting of 960 acres, lying in a body, was used for the purpose of a stock yard. A railroad ran diagonally through a quarter section, and cut off the water, timber, houses, and corrals from the main body, but did not touch the other quarters of the ranch. A highway separated the quarter through which the railroad ran from the whole section. It was held that the landowner was entitled to recover damages for injuries to the whole property, and not merely for that quarter over which the railroad was built. *Kansas City, E. & S. R. Co. v. Merrill*, 25 Kan. 421.

A farm consisted of land in different sections separated by a highway. A railroad ran north and south parallel with the highway through a tract in one section, and crossed over and cut 3 acres off of the corner of the other tract. It was held that the owner was entitled to have the damages assessed to the farm as a whole, and that it was error to limit the damages to the part of the quarter section on which the railroad was located. *Lough v. Minneapolis & St. L. R. Co.* (Iowa) 89 N. W. 77.

In *Westbrook v. Muscatine N. & S. R. Co.* (Iowa) 88 N. W. 202, where a farm was divided into two parts by an intervening tract of land, over which a private way existed by license from the owner, and a portion of one tract was condemned for a railroad right of way, a finding by the jury that the two tracts constituted but one farm and should be treated as a whole in assessing damages was sustained, and the fact that the way over the intervening tract existed only by license, and could be revoked at any time, was held not to be sufficient to show that the two tracts did not constitute a single farm, especially where they were also connected by a highway.

So, where a sewer was condemned through one side of a tract, and the tract was divided by a right of way or street, it was held that the mere intervention of a plat legally established, but not visible on the surface of the ground, was not conclusive that the two portions were different parcels of land. *Lincoln v. Com.* 164 Mass. 368, 41 N. E. 489. In this case the court said: "If, as here, the whole estate was practically one, the petitioner is entitled to have the damages to the whole of it considered. As was said by Dixon, Ch. J., we are to look at the land, and not at the map, to ascertain the plaintiff's damages." The case does not show whether the land was within corporate limits or not. The condemnation was for an outlet for a sewer through a way which was claimed to have been a street laid out by the town, but this was disputed, and the rule laid down by the court was on the theory that the land was practically one tract.

In *Schuykill River E. S. R. Co. v. Stocker*, 128 Pa. 233, 18 Atl. 399, a farm was situated partly within the southern limits of a city. A road intersected the farm, and a parallel street was planned within the city limits. A railroad condemned a right of way along the street. The court treated the damages as applicable to the whole farm, but the chief point in controversy was as to the testimony of an expert witness, who based his assessment of damages on the value of the land north of the street

and road. This was held prejudicial error on the ground that the whole tract should have been considered in estimating the damages, as the jury might have inferred the remainder of the tract to be of the same value. The court said: "He does not give the depreciation of the whole, or even a view of the whole property, as affected by the road, but considers that one part has been depreciated by itself, and the other part has not been affected; and therefore his testimony might be used with the jury to show that the depreciation of the part is the representation of the effect of the building of the road upon the market value of the whole. This is certainly not in accord with the letter or spirit of the rule which has so long been the rule in this state, that the difference between the market value of the whole property, before and after the building of the railroad, is the measure of the damage to the owner."

In *Chicago & P. R. Co. v. Hildebrand*, 136 Ill. 467, 27 N. E. 69, after a railroad had condemned a strip across a tract, severing the land, it subsequently sought to condemn another strip for constructing an additional track on one side, and it was held that the lands on both sides should be regarded as contiguous to the land taken, and that the subsequent taking was fairly within the scope and design of the original taking. In this case the court said: "The farm may still be used, by means of crossings, as a unit, and therefore an injury to one part is an injury (because a depreciation of value) of the whole; and if contiguity to any part of it causes this depreciation, it will be sufficient."

And land leased for a rifle range was held to constitute one tract, although the leases were from different parties, and an intervening portion was held by a panel lease. *Holt v. Gaslight & Coke Co.* L. R. 7 Q. B. 728, 41 L. J. Q. B. N. S. 351, 27 L. T. N. S. 442. This was under land clauses consolidation act 1845, § 49 (8 Vict. chap. 18), providing that where an inquiry shall relate to the value of lands to be purchased and compensation for injury done to lands "held herewith," the jury shall give their verdict separately.

In *Essex v. Acton Local Board*, L. R. 14 A. C. 153, 58 L. J. Q. B. N. S. 594, 61 L. T. N. S. 1, 38 Week. Rep. 209, 53 J. P. 756, *Reversing Queen v. Essex*, L. R. 17 Q. B. Div. 447, *Affirming L. R. 14 Q. B. Div. 753*, a tract of land let on long building leases was condemned for sewerage works. This tract formed part of an estate laid out for building purposes, and damages were claimed, not only for the land taken, but also for other lands alleged to be injuriously affected. Part of the land alleged to be injured by the condemnation was separated from the lands actually taken by other land of the owner in respect of which no compensation was claimed, and the remainder was separated therefrom by a railroad. It was contended that the lands for which consequential damages were claimed were not lands that could be "injuriously affected" within the meaning of the land clauses consolidation act of 1845, because they were already severed from the land condemned, and were not "held therewith" for one and the same purpose. But it was held that it was not necessary that the lands claimed to be injuriously affected should be in contact with the lands taken; that it was sufficient if both parcels were held by one owner and the unity of ownership conduced to the advantage or protection of the property as one holding, and that the severance created by the railway was not in itself a bar to the claim for damages. *Essex v. Acton Local Board*, L. R. 14 A. C. 153, 58 L. J. Q. B. N. S.

594, 61 L. T. N. S. 1, 38 Week. Rep. 208, 53 J. P. 756, *Reversing Queen v. Essex*, L. R. 17 Q. B. Div. 447, *Amrming L. R. 14 Q. B. Div. 753*. In this case Lord Bramwell said: "My lords, I think it convenient to consider, first, whether the land injuriously affected, or which will be injuriously affected, by the works of the respondents on the lands taken, is land held with the land taken, within the meaning of 8 & 9 Vict. chap. 18, § 49. I think it is. . . . The lands have one owner. I cannot think it matters that they are separated by a railway. I suppose it would hardly be said that one part of a part separated from another part by a railway was not land held with that other part. Here the lands are close. What is done on one part must or might affect what would be done on the other. For example, what I mean is this: Houses of a particular class or character built on one part would influence the class or character of what would or might be built on the other. The class of occupants of one part would in like way influence the character of that on the other. On these considerations I am of the opinion that the land in respect of which the claim is made here was land held with the piece taken."

A party owned a tract of land used as a paper plant having a spring and reservoir thereon, separated by a grant of a right of way to a railroad that used anthracite coal, and that had covenanted not to pollute the water. Another railroad that used soft coal condemned a right of way through one of the tracts, destroying the use of the water. It was held that, both tracts being necessary for the use of the paper plant, they were both to be considered in estimating damages. *Rudolph v. Pennsylvania S. Valley R. Co.* 186 Pa. 541, 47 L. R. A. 782, 40 Atl. 1083.

A railroad company having acquired by prescription a strip 14 feet wide across 120 acres of land, in an action to condemn a strip 43 feet wide along this right of way it was held that it was not error to consider damages to the whole farm, although it had previously been severed by the railroad. *Hedmond v. St. Paul, M. & M. R. Co.* 39 Minn. 248, 40 N. W. 64. In this case the court said: "It is argued that the court also committed an error in charging that the jury might consider damages to the land west of the strip occupied by defendant; but upon a careful examination of the testimony we fail to discover that the part of the charge excepted to was erroneous. . . . The attention of each witness was specially called to the fact that the farm was already severed by defendant, and that by appropriating an additional 43 feet it merely widened its already acquired right of way. If these cases had been separately tried, the tracts upon the east and west of defendant's 14 feet could have been more clearly treated as distinct farms, and possibly better results attained; but the measure of damages would have been the same as that adopted, without objection, upon the examination of plaintiff's witnesses."

And where a 1000-acre tract was intersected by two railroads, it was held that it might still be treated as one farm in a subsequent proceeding by another railroad to condemn a right of way through a part of the same. *Chicago & W. M. R. Co. v. Hunccheon*, 130 Ind. 529, 30 N. E. 636.

A farm of 200 acres was divided into two nearly equal parts by the Erie canal, and connected by a farm bridge. One side was cultivated, and contained the farm buildings. The other side was hilly, and contained no buildings, but there was a never failing spring thereon. The water from which was conducted

under the canal to the buildings. A railroad condemned a strip along the canal which covered the spring. It was held that the owner was entitled to recover damages to the farm as a whole. *Re Boston, H. T. & W. R. Co.* 31 Hun, 461.

Where a canal intersected a farm, and a railroad company, by trespass, took possession of the canal bed, and occupied the same for many years, and the owner of the land sold a strip adjacent to this railroad to another railroad company,—it was held in condemnation proceedings subsequently brought by the railroad company occupying the canal bed that, although the land was separated into two tracts by the sale to another railroad company, yet damages to the farm as a whole should be allowed because at the time of the entry on the canal bed there had been no sale, and the condemnation proceedings should relate back, for assessing damages, to the time of the entry. *Graham v. Pittsburgh & L. E. R. Co.* 145 Pa. 504, 22 Atl. 983. In this case the court said: "This necessarily involves a knowledge and consideration of the condition of the land before the railroad was built. For, although the damages are to be computed as of the date of the divestiture of the plaintiff's title to the right of way, yet it is plain that the land must be valued, in the first instance, free from the obstructions of the plaintiff's road, and in the condition in which the defendant company found it upon their first entry."

In *Cameron v. Pittsburgh & L. E. R. Co.* 157 Pa. 617, 22 L. R. A. 443, 27 Atl. 668, a farm was intersected by a canal, the fee of which was not in the owner of the farm. The canal was bridged over by the state, and the two pieces were used as a whole. In condemnation proceedings for a right of way through one piece it was held that the damages were not limited to that tract, and that the two pieces were to be considered as one farm.

But in *Bergen Neck R. Co. v. Point Breeze Ferry & Improv. Co.* 57 N. J. L. 163, 30 Atl. 584, 31 Atl. 724, it was held error in condemnation of one tract to consider the damages caused to the other tract, where a canal divided land, and the access across the canal was the reservation of a draw-bridge right, and the bridge had long since fallen, and was not repaired, although the owner claimed that a railroad bridge could be built to unite the tracts.

Where a party owned property partly within and partly south of a village, the southern end of which was intersected by two railroads, cutting off 16 acres adapted and used for farming, it was held that upon the subsequent condemnation by another railroad company of a portion of the land between the two former railroads and the village, damages could not be recovered for the injury to the 16-acre tract, on the theory that it was adapted to be divided into suburban lots, and that its value for such purpose had been depreciated by the taking of the other lands. *Haines v. St. Louis, D. M. & N. R. Co.* 65 Iowa, 216, 21 N. W. 573. In this case the court said: "We are of the opinion that, on plaintiff's theory as to the use to which the portion of the land through which defendant's road is built is adapted, and its special value because of its adaptability to that use, she is not entitled to have the effect of the appropriation of the right of way on the value of the agricultural land lying south of the railroads considered in the assessment of her damages. . . . The different portions of the property being adapted to different uses, and being, in effect, devoted to different ob-

jects, they cannot, we think, be regarded as constituting one property."

In considering whether land taken in condemnation is part of a larger tract, it was held in *Ohio Southern R. Co. v. Snyder*, 5 Ohio N. P. 461, that only such land can be considered as remaining lands, for which damages may be allowed, as adjoins, and in its use and enjoyment is connected with, the lands taken; and that if any part taken is part of another farm, the remaining lands will not include the same.

Damages to the entire farm cannot be included in estimating the amount to be paid for the condemnation of a triangular piece of land at the junction of two intersecting lines of railroad crossing a farm, the fee in the strip covered by one of such lines having never been owned by the owner of the farm, and the land condemned being entirely within one of the two sections into which the farm was divided by such intervening strip, but the lands comprising the farm must be treated as two separate and distinct tracts for the purpose of the assessment of damages. *Cameron v. Chicago, M. & St. P. R. Co.* 42 Minn. 75, 43 N. W. 785. In this case the court said: "The case here presented did not justify treating the lands east of the railroad and those west of it as one entire body of land. The most significant and controlling fact is that these parcels are physically separated by the intervening fee. In this respect they are as really separate and distinct tracts of land as if they had been miles apart, instead of perhaps a hundred feet. Different tracts of land, being in fact and physically separate and distinct, cannot, in general at least, be reasonably regarded as constituting one entire body of land, or be treated as such, from the fact that they may be under one ownership, and be profitably and appropriately used together for the same purpose."

A quarry and a shipping lot, entirely disconnected except for business use, were held not to constitute one tract in *Potts v. Pennsylvania S. V. R. Co.* 119 Pa. 278, 13 Atl. 291. See *supra* I.

In *Harrisburg & P. R. Co. v. Moore*, 4 W. N. C. 532, it was said: "An independent and separate tract of land, not touched by the railroad, and constituting no part of the tract which the railroad passes upon, has the same separateness in the hands of the same person as it has in the hands of different owners. The law has regard to the land out of which the property is taken considered as a whole, and not to the person of the owner."

In *Sloan v. Baltimore & P. R. Co.* 181 Pa. 568, 18 Atl. 903, where a railroad right of way was condemned through an 8-acre tract of land and evidence was given, without objection, as to the value of a detached 16-acre tract owned by the same party and separated from the other tract by a public road, it was held that where the jury were properly instructed as to estimating the damages to the 8-acre tract, and not to award damages for the 16-acre tract, it was not error. In this case it was said that the latter tract would probably bring more if sold separately.

V. Lands in different counties.

Where a creek formed the boundary between two counties, and some 60 acres of a farm were in one county and the balance in the other county, it was held that damages to the farm as a whole, including that in both counties, was properly considered in rendering judgment in condemnation proceedings for land wholly in one county. *Atchison & N. R. Co. v. Gough*, 29 Kan. 94. The court said: "The statute only authorizes condemnation proceedings in a county in which the corporation pro-

poses to construct its road, and no part of his proposed road is shown to run through the county of Atchison. So that, unless Gough can recover in this action, he can recover only a partial amount of the injury to his farm. Still again, the district court is a court of general jurisdiction. Both Gough and the railroad company were parties to this action, and if by the proceedings it affirmatively appears that Gough has recovered all the damages done to his entire farm, such judgment would be a bar to any claim which he might hereafter make for damages to any particular portion.

The same rule of compensation exists in one county as another, and in view of the fact that the railroad tract did not touch any portion of the farm in Atchison county, and that the injury before the commissioners extended without apparent question to the damages to the entire farm, we think that the ruling of the district court must be sustained."

In *Potts v. Pennsylvania S. Valley R. Co.* 119 Pa. 278, 13 Atl. 291, it was held that a sales yard in another county was not a part of a shipping lot that was condemned. The court said: "An extensive business partnership may conduct a variety of operations, as distinct in their character as the location of its various departments; and if their different and disconnected properties are to be regarded as one property because they are used in one business, the assessment of damages for right of way would become liable to such complications as would greatly embarrass the administration of the law, in this form of proceeding."

This note is not intended to include the subject of damages in condemnation of railroad property by other railroads for crossings and the like.

VI. Summary.

The general rule is that where property is so situated that it is used as a unit, and each part is dependent upon the other, the damages will not be limited in eminent domain to the particular piece taken, but will extend to the whole. This seems to be the general rule whether applied to farm, to city property, or to a plant. In applying this rule it seems that a purchase of property in several parcels, that are separated by highways, will not be regarded as a unit where the use as a whole is only in contemplation. If tracts are held by different titles or estates, or if one parcel that is needed for public improvements is acquired shortly before condemnation, it seems that damages will not extend to the other pieces. Government subdivisions, section lines, and plat lines are of no consequence if the property is in a body and used as one tract. So, farms that are separated by highways, railroads, or other property, may still be treated as one farm where each piece is a necessary adjunct of the other; and so, even where a plant extends over several blocks that are divided by streets, if each piece is necessary for the actual operation of the plant, the whole plant will be regarded as damaged in condemning a part. If the use is only intended, or if the several pieces can be separated without affecting the value of the other, the damages will be limited to the particular piece taken or injured. It is held in some cases that a building divided by partition walls with independent entrances and easements may be severed in estimating damages on one side. Where a farm extended over into another county damages to the whole were allowed under a particular statute, as in that case it seemed to be the only remedy; but ordinarily in the absence of a statutory proceeding the damages will be limited to lands in the county in which the proceeding was had.

NEW HAMPSHIRE SUPREME COURT.

Elizabeth REYNOLDS, Admr., etc.,
v.
BURGESS SULPHITE FIBRE COMPANY.

(.....N. H.....)

1. A bill of discovery will lie to compel an employer to produce, for the inspection of plaintiff, the broken parts of machinery, defects in which are alleged to have caused a death, to recover damages for which an action has been instituted at law which cannot be satisfactorily prepared for trial without such inspection.
2. The production of broken machinery may be compelled for examination by persons intending to testify as experts in an action at law for personal injuries caused by its breaking.
3. That an action at law seeks damages for a personal tort will not defeat a bill for discovery in aid of it, if it does not involve moral turpitude or immoral conduct on the part of defendant.
4. Jurisdiction to grant discovery of broken machinery in aid of an action for injuries caused by its breaking is not ousted by statutes removing the disability of parties as witnesses, authorizing the taking of depositions before trial, or giving the court authority to order a view at the trial.

(April 1, 1902.)

EXCEPTIONS by plaintiff to a ruling of the Coos County Court sustaining a demurrer to a bill filed to obtain inspection of the fragments of machinery, defects in which were alleged to have occasioned the death of plaintiff's intestate. *Sustained.*

The case sufficiently appears in the opinion.

Mr. Crawford D. Hening for plaintiff.
Messrs. Chamberlin & Rich and Orville D. Baker, for defendant:

Bills of discovery were for the purpose of obtaining evidence, not to manufacture it. They were to discover evidence to be used in court, not for the purpose of making or qualifying witnesses.

1 Pom. Eq. Jur. § 205.

Under the practice of New Hampshire, at least, discovery was never based upon any necessity for preparation for trial, but, if used at all, it was based upon the principle of obtaining proof of the issues in the case at the trial.

Langdell, Eq. Pl. 2d ed. p. 242; 1 Pom. Eq. Jur. § 205.

The argument that because papers, documents, letters, writings, and other things are subjects of discovery, property must also be subject to like orders, has neither legal

reasoning, principle, nor authority for its support.

Narramore v. Clark, 63 N. H. 166; *Oorey v. Bath*, 35 N. H. 538; *Somers v. Emerson*, 58 N. H. 49.

There is a clear distinction between cases in which the production of documents is sought for the purpose of discovery, and cases in which the delivering up of documents alleged to be improperly withheld is the object of the suit.

Kerr, Discovery, chap. 1, p. 3, note.

It may happen that a suit is instituted for the purpose of obtaining possession of documents alleged to be improperly withheld from the plaintiff; and, if that be the object, and the discovery be not barred by demurrer or plea, the plaintiff is entitled to have them described in the answer, and to be informed whether they are in the defendant's possession.

Adams, Eq. 13; 2 Story, Eq. Jur. chap. 17, § 708, p. 23.

If an action is brought for the recovery of personal property wherein the title is in question, if the title is proved, or not denied, to be in the plaintiff, courts undoubtedly have power to order a surrender or an inspection of it for the purpose of bringing appropriate remedies for its recovery.

See 2 Story, Eq. Jur. chap. 17, §§ 708, 709, p. 23.

But, with respect to property not evidence in a case, where the title is not involved, there can be no right to discovery or inspection.

It is a great mistake to suppose that parties to a litigation have a promiscuous right to the production and inspection of the papers and documents in the possession of their adversary.

Ryder v. Bateman, 93 Fed. 31; *Kennedy v. Nichols*, 33 Misc. 726, 68 N. Y. Supp. 1053; *Ansen v. Tuska*, 1 Robt. 663; *Cooke v. Lalance Grojean Mfg. Co.* 29 Hun, 641; *Miner v. Gardiner*, 6 Thomp. & C. 343; *Martin v. Elliott*, 106 Mich. 130, 31 L. R. A. 169, 63 N. W. 998; *Newberry v. Carpenter*, 107 Mich. 567, 31 L. R. A. 163, 65 N. W. 530.

The action is for a mere personal tort, and discovery, unless authorized by statute, is never ordered in such cases.

Kerr, Discovery, 6; Bray, Discovery, 348; *Thorpe v. Macaulay*, 5 Madd. 218; *Macaulay v. Shackell*, 1 Bligh N. R. 96; *Glynn v. Houston*, 1 Keen, 329; *Robinson v. Craig*, 16 Ala. 50; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 624; *Potter v. Beal*, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. 860; *Union P. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000.

NOTE.—As to right to discovery by bill where the statutes provide for the examination of the party before trial, see also, in this series, *Cargill v. Kountze Bros.* (Tex.) 24 L. R. A. 183, and note.

As to right to compel the production of books or documents to aid in preparing for trial, 57 L. R. A.

see *Arnold v. Pawtuxet Valley Water Co.* (R. I.) 19 L. R. A. 602; and *Ex parte Clarke* (Cal.) 46 L. R. A. 835.

As to right to order of court to examine horse, see *Martin v. Elliott* (Mich.) 31 L. R. A. 169.

Chase, J., delivered the opinion of the court:

Whatever may have been the fact prior to 1842 (Laws 1832, chap. 89, § 9; *Dover v. Portsmouth Bridge*, 17 N. H. 200), there can be no doubt that ever since that date courts of this state have possessed full equity powers in respect to discovery. Rev. Stat. chap. 171, § 6; Gen. Stat. chap. 190, § 1; Gen. Laws, chap. 209, § 1; Pub. Stat. chap. 205, § 1. In the grant of equity powers by the last-named statute, which is now in force, discovery is specially mentioned. The jurisdiction of the court over the subject generally is not questioned, but it is said that this case does not fall within the jurisdiction. In considering the reasons that have been offered in support of this position, it is necessary to have in mind the origin, purpose, and general nature of this remedy. "The common law laid down as a maxim, *Nemo tenetur armare adversarium suum contra se*, and in furtherance of this principle it generally allowed litigant parties to conceal from each other, up to the time of trial, the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, parol or otherwise, to assist him in the conduct of his cause." Best, Ev. § 264; 1 Greenl. Ev. § 329. A different rule grew up in equity. The defendant there was obliged to answer under oath the allegations of the bill, and might be compelled to produce, for inspection by the plaintiff, documents that were in the defendant's possession and control, and were material to the issues involved in the suit. In such cases the discovery was incident to the equitable relief sought. But it was not limited to the issues arising in suits in equity. "Many cases existed in which the plaintiff had a legal title, or a legal right, or was pursuing a legal remedy, but wherein no redress could be actually obtained, simply because the plaintiff's evidence either rested in the breast of the defendant, or consisted, in whole or in part, of documents in the defendant's possession. Hence there was a failure of justice at common law, and hence there arose the equitable remedy of bills for discovery, which was made use of simply for the purpose of assisting or supplementing the plaintiff's remedy at common law." Bispham, Eq. § 557; 2 Story, Eq. Jur. §§ 1484, 1485; 1 Pom. Eq. Jur. §§ 191, 195. The law excepted from the testimony which a party might be compelled to furnish against himself in this way testimony tending to convict him of a violation of the criminal law, or to subject him to a penalty or forfeiture; also communications between him and his attorney relating to the matters in suit, and, if a public officer, testimony a publication of which would be prejudicial to the community. With these exceptions, a party could be compelled "to discover and set forth upon oath every fact and circumstance within his knowledge, information, or belief," and to produce and allow his adversary to inspect and copy every document in the party's possession material to the other's case. Adams, Eq. chap. 1.

57 L. R. A.

The defendant says that this case is not within this equitable jurisdiction, because the discovery and inspection sought is of articles of personal property belonging to it, in which the plaintiff has no right of property or possession. The gist of the action at law, in aid of which this suit was brought, is the negligence of the defendant in furnishing the plaintiff's intestate, an employee of it, with improper, unsuitable, and dangerous machinery for use in his employment. It is a necessary inference from the allegations of the bill that the "improper, unsuitable, and dangerous" element in the machinery existed in the strap on the connecting rod of the engine. This broke, and, it is alleged, caused the intestate's death. The alleged unsuitableness of the strap may be due to inadequacy of size, error in form, imperfection in construction, or inferiority of materials from which it was made. An inspection of the fragments will evidently aid in determining whether there was either of these defects in it, and, if so, which one. As matters of proof, the fragments would at least be ancillary to other testimony on the point. 3 Greenl. Ev. §§ 328, 329; Best, Ev. § 200. They may be the most reliable and weighty testimony, one way or the other. The bill alleges that the plaintiff cannot properly prepare her action at law for trial without an inspection and examination of them. By reason of the demurrer, this allegation must be taken as true. Unless the equitable remedy of discovery has been superseded by the provision of some plain, adequate, and complete remedy at law, or is not applicable to a case of tort like that alleged in the plaintiff's action at law,—points that are hereinafter considered,—it is certain that the defendant, through its officers and agents, might be compelled in a suit like the present one to discover the form in which the strap was constructed, the character of the workmanship by which and the materials from which it was made; in short, all the facts within its knowledge, information, or belief tending to show that it was defective. If it had in its possession a plan of the strap or of the broken pieces, it might be compelled to produce it for examination by the plaintiff. Why, then, may it not be compelled to produce the broken pieces themselves? Two reasons are suggested: One—positive, and, if well founded, substantial—that the defendant's right to possess and control the property, growing out of its ownership of it, cannot be infringed in this way; and the other—negative, and not applying to the merits of the question—that there is no precedent for a discovery and inspection of such property. It must be admitted that the defendant's right of property in the broken strap will be interfered with to some extent if it is required to produce it, and allow the plaintiff and others to examine it. But such interference will not differ in kind or degree from that which occurs when a party is required to produce his letters, deeds, plans, other documents, or books for inspection. The rights of the defendant arising from the ownership of the strap are no more as-

cred than would be its rights arising from the ownership of a plan of the strap, if it had one. The infringement of property rights in such cases is justified upon the ground that it is necessary to the administration of justice. Such necessity is alleged by the plaintiff and admitted by the defendant. It is apparent that an examination of the strap will afford a better means of ascertaining the truth in respect to its suitability or unsuitableness for the office it was to perform than any possible description or plan of it could afford, and the necessity for an inspection of it is correspondingly greater than the necessity for an oral description or a plan.

The following cases illustrate the application that has been made of the doctrine of discovery in aid of actions at law in respect to documents and books: *Anonymous*, 2 Ves. Sr. 620; *Moodalay v. Morton*, 1 Bro. Ch. 469; *Burrell v. Nicholson*, 1 Myl. & K. 680; *Storey v. Lennox*, 1 Myl. & C. 525; *Smith v. Beaufort*, 1 Hare, 507; *Chadwick v. Bowman*, L. R. 16 Q. B. Div. 561; *Peck v. Ashley*, 12 Met. 478. The documents, a discovery of which was sought in these cases, were not muniments of title, or documents containing evidence bearing upon an accounting between the parties, but were letters, books, and papers supposed to contain evidence in support of the plaintiff's case in actions at law. Indeed, no cases have been found in which it is held that the right to discovery in respect to documents depends upon the fact that the documents are muniments of title to property in dispute in the action at law, or that they are relevant to an accounting between the parties sought in such action. The right to the discovery of documents, etc., is as extensive as the right to discovery by oral testimony, and depends upon the same principles. *Marsden v. Panshall*, 1 Vern. 407, decided in 1686, is an authority that discovery may be had of personal property other than documents, etc. The plaintiff in the suit—a clothier—intrusted clothes to B. for sale in London, and B. pawned them to the defendant. The defendant confessed that B. pawned clothes to him, but did not admit that they were the plaintiff's. The report says: "Sergeant Maynard this day moved for the plaintiff that the defendant might be ordered to let the plaintiff, with two or more persons present, have a sight of the cloths pawned by Bumpus, which was ordered accordingly; the meaning of which was, and so it was taken by the court, that the plaintiff should thereby be enabled to bring an action at law." The defendant says that this was not an order compelling inspection of the defendant's property, as the title was alleged to be in the plaintiff, and this was not denied. But the title to the clothes was the fact to be determined in the action at law. It might turn out that they belonged to the defendant. *Macclesfield v. Davis*, 3 Ves. & B. 16, is to the same effect. These cases must be regarded as authorities for the plaintiff in this action. Occasion for the use of the remedy for the discovery of chat-

tels and for their inspection has undoubtedly arisen more frequently in patent cases than in others, but the remedy itself has no special features peculiar to such cases. Their peculiarity consists in the manner of affording relief. "It may be by an interlocutory injunction in the first instance. But much more frequently, unless the case is of the strongest possible kind, it is by merely putting the matter in train for determination of the right at law, and then at the hearing a perpetual injunction is granted, upon the plaintiff succeeding in the action at law." *Patent Type Founding Co. v. Walter*, Johns. V. C. (Eng.) 727, 730. It should be noted in this connection, also, that the same principles govern discovery, whether it be invoked in aid of other issues involved in the suit in equity or be invoked in aid of an action at law. *Drake v. Drake*, 3 Hare, 525; *Lyell v. Kennedy*, L. R. 8 App. Cas. 222; *Wigram*, Discovery, 123. If discovery of personal chattels may be had in the former case, it may be had in the latter. In *Bovill v. Moore*, 2 Coop. Ch. Cas. 56, Lord Eldon, in 1815, said: "There is no use in this court directing an action to be brought if it does not possess the power to have the action properly tried. The plaintiff has a patent for a machine used in making bobbin lace. The defendant is a manufacturer of that article, and, as the plaintiff alleges, he is making it with a machine constructed upon the principle of the machine protected by the plaintiff's patent. Now, the manufactory of the defendant is carried on in secret. The machine which the defendant uses to make bobbin lace, and which the plaintiff alleges to be a piracy of his invention, is in the defendant's own possession, and no one can have access to it without his permission. The evidence of the piracy at present is the bobbin lace made by the defendant. The witnesses say that the lace must have been manufactured by the plaintiff's machine, or by a machine similar to it in principle. This is obviously, in a great measure, conjecture. No court can be content with evidence of this description. There must be an order that the plaintiff's witnesses shall be permitted before the trial of the action to inspect the defendant's machine, and to see it work." It is true, as the defendants in this case say in their brief, that the order was placed "upon the general doctrine that without such inspection the case could not be properly tried." As has been seen, the remedy for discovery in aid of actions at law was introduced for the very purpose of securing proper trials therein. The application of the remedy to the case was in accordance with the general rule. An action for infringing the patent was brought,—probably by direction of the court after compliance with this order,—and was tried by a jury. *Id.*, 2 Marsh. 211. *Broune v. Moore*, 3 Bligh, 178 note, was a similar case, in which the plaintiff was permitted to inspect the machine which he alleged infringed his patent. *Russell v. Cowley*, 1 Webster Patent Cases, 457, was a bill for discovery as to the defendant's infringement of the plain-

tiff's patent right for making iron tubing, and for an accounting. The plaintiff's counsel acceded to terms proposed by the other side that an account should be kept, and two persons appointed on each side as inspectors of the defendant's works, for the purpose of giving evidence at the trial of an action at law to be begun forthwith. An order was made accordingly, and an action was thereupon brought, at the trial of which the inspectors testified, giving expert testimony. The defendants questioned the authority of this case on the point under consideration, on the ground that the order of inspection was made with the consent of the parties. Whether the consent was of the nature which the defendants infer it was, is at least doubtful. It may have resulted from a consciousness that the court had power to make the order sought, and may have been given merely to expedite the proceedings. The case is cited as a precedent for the jurisdiction of the court to order an inspection in such cases in *Patent Type Founding Co. v. Lloyd*, 5 Hurlst. & N. 192. In *Morgan v. Seaward*, 1 Webster Patent Cases, 167, an order of inspection of paddle wheels and machinery was ordered. *Patent Type Founding Co. v. Lloyd* was an action at law, in which the plaintiffs claimed to own a patent for type, the novelty being the use of a large proportion of tin, which made the type hard, tough, and enduring. They moved, under 15 & 16 Vict. chap. 83, § 42, for leave to inspect the defendant's type, and, if necessary, to take specimens for analysis, in order that they might produce evidence of the analysis at the trial. The court, being of opinion that the statute did not give them authority to grant an order for specimens, denied the motion. 5 Hurlst. & N. 192. A few days later the plaintiffs filed a bill in equity praying for an injunction, and for liberty to inspect the type and take samples. Liberty was granted,—the parties to make the inspection being named in the order,—and the defendant was ordered to furnish not exceeding 4 ounces of type for analysis. *Patent Type Founding Co. v. Walter* (the defendant in one of the two actions reported in 5 Hurlst. & N. 192), Johns. V. C. (Eng.) 727.

There is also a line of cases in which an inspection of real estate has been ordered. *Lonsdale v. Curwen*, 3 Bligh, 168; *Walker v. Fletcher*, 3 Bligh, 172; *United Co. v. Kynaston*, 3 Bligh, 153; *Atty. Gen. v. Chambers*, 12 Beav. 159; *Lewis v. Marsh*, 8 Hare, 97. In a note to the first-named case, Bligh, the reporter, says: "The practice in courts of equity of granting orders for inspection of mines, machinery, etc., is well settled. But no notice has ever been taken of the point in the books of practice, and no authorities are to be found upon the subject in the reports of cases in equity, except the case in the court below of *Kynaston v. East India Co.*, as reported 3 Swanst. 249, and upon appeal to the House of Lords, now reported in the text, and which case, as it relates to warehouses, is distinct from former authorities, and new in its kind. Two cases

of orders for inspection extracted from the register's book are therefore subjoined,"—being *Walker v. Fletcher*, 3 Bligh, 172, and *Broune v. Moore*, 3 Bligh, 178, note; the former providing for an inspection of mines, and the latter, as has already been stated, for an inspection of machinery in a case for an infringement of a patent. Story, after speaking of the defect in the administration of justice in courts of common law, arising from their want of power to "compel the production of deeds, books, writings, and other things" material to the issues on trial, says the defect is "remediable in courts of equity, which will compel the production of such books, deeds, writings, and other things." 2 Story, Eq. Jur. §§ 1484, 1485. See also 1 Pom. Eq. Jur. § 191. It would seem that these authors had in mind something besides books and documents. One reason suggested by the defendant why these cases do not support the plaintiff's claim is because, as it says in all of them the plaintiffs set up an interest in the property to be inspected. As has already been observed, it is not perceived how this affects the question. The inspection was ordered in each case while the interest was undetermined, and there was no presumption that it would be determined in favor of the plaintiffs. If determined in favor of the defendants, the inspection would in fact be of their property, the same as in the cases cited in which letters and other documents were subjected to inspection. The defendant in *United Co. v. Kynaston* had no interest whatever in the warehouse for the examination of which he sought an order. The facts of this case, at least, do not support the defendant's contention. It is also to be noticed that none of the cases places the right of discovery upon this circumstance. The right, as in all other cases, depends upon the necessity for discovery in the administration of justice. To warrant discovery, it is not necessary that there should be absolutely no means of proving the plaintiff's case without it. In *Bouill v. Moore* there were witnesses who would say that the lace made by the defendant was manufactured by the plaintiff's machine, or one constructed on the same principle. The plaintiff had some evidence to sustain his case, but it was not satisfactory. A party may maintain a bill for discovery "either because he has no proof or because he wants it in aid of other proof." 2 Story, Eq. Jur. § 1483; Merwin, Eq. §§ 853, 854: "Where the plaintiff has any case to make out, he has a right to discovery of anything that may assist him in proving his case, or even the smallest tittle of it." *Jenkins v. Bushby*, 35 L. J. Ch. N. S. 400.

The defendant cites three New York cases in support of its contention: *Kennedy v. Nichols*, 33 Misc. 726, 68 N. Y. Supp. 1053; *Ansen v. Tuska*, 1 Robt. 663, and *Cooke v. Lalance Grojean, Mfg. Co.* 29 Hun, 641. In the first case provisions of the Code and of general rules of practice adopted under the authority of the Code, relating to discovery upon a motion in an action at law, are construed, and what is said respecting discov-

ery is based upon *Ansen v. Tuska*. That was an action at law, in which there was a motion under the Code, by the defendant, for the production of the goods involved in the action, and an inspection of them by persons to be selected by him, to enable them to testify as experts. In denying the motion, the court refers to the equitable remedy of discovery, and says in general terms that there is no authority or principle for discovery, such as was asked for in the case. There is no discussion of the principles, and no authorities are cited relating to the matter. In *Cooke v. Lalante Grojean Mfg. Co.* the question is disposed of without an examination of authorities. The reasons given for the holding are that a discovery and inspection of the personal property of an adverse party would be a usurpation of authority to search and inspect his private premises, and that discovery of books and documents is discretionary with the court, and is exercised only where the party applying has some right or interest in the books and documents. While the defendant may be compelled to disclose whether he has the article in his possession and control, and, if he has, to produce it for inspection, the procedure is not a search in the sense indicated. It affords no just cause for the fear expressed by the court that "the dwellings of our citizens will be of small security to them if they may be invaded by their enemies, and searched for articles of personal property to be inspected under an order of a court." Neither does the right of discovery of books and documents depend upon the discretion of the court (*Wigram, Discovery*, 51; *Drake v. Drake*, 3 Hare, 525), nor upon the party's having some right or interest in them other than as items of testimony in his favor (*Wigram, Discovery*, 209, 210, 256; *Kerr, Discovery*, 202; 2 Story, Eq. Jur. § 1490; 1 Pom. Eq. Jur. § 205; *Atty. Gen. v. Thompson*, 8 Hare, 106; *Arnold v. Pawtucket Valley Water Co.* 18 R. I. 189, 19 L. R. A. 602, 26 Atl. 55). The slight infringement of the right of property that is involved in an inspection of it under an order of a court of equity is justified by "due process of law" or "the law of the land," and is in no sense a violation of the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. The origin of the equitable remedy for discovery, and its nature and purpose, lead to the conclusion that it may be employed to compel the production of personal chattels, as well as books, deeds, letters, and other documents, for inspection and examination, in aid of an action at law; and the foregoing cases confirm this conclusion.

The defendant's second objection is because the discovery and inspection are sought for the purpose of having the broken strap examined by persons with a view of enabling them to testify as experts in the action at law. This objection must also be overruled. It is evident that expert testimony may be competent upon the issue to be tried, whether it relate to the form of

the strap, the manner of its construction, or the character of the materials from which it was made. The defendant has ample opportunity to procure such testimony. Justice requires that the plaintiff shall also have an opportunity to have the strap examined by persons in whose skill and scientific knowledge she has confidence. There cannot be a fair trial of the case unless such opportunity is given to the plaintiff. Indeed, it may be that she cannot establish her right—if she have one—without having the opportunity. The necessity for it is alleged, and admitted by the demurrer. The object of the plaintiff's bill is the discovery of testimony for use at the trial, but the discovery must necessarily take place prior to the trial. In *Marsden v. Panshall*, 1 Vern. 407, the suit in equity was begun before the action at law, in order that "the plaintiff should thereby be enabled to bring an action at law." See also *Bovill v. Moore*, 2 Coop. Ch. Cas. 56; *Heathcote v. Fleete*, 2 Vern. 442; *Morse v. Buckworth*, 2 Vern. 443; 1 Story, Eq. Jur. § 1495; 1 Pom. Eq. Jur. § 197. In *Russell v. Cowley*, 1 Webster, Patent Cases, 457; *Patent Type Founding Co. v. Walter*, Johns. V. C. (Eng.) 727, 730, and apparently in the other patent cases cited, the inspection was ordered to enable witnesses to give expert testimony at the trial of the actions at law. See also *Burrell v. Nicholson*, 1 Myl. & K. 680; *Arnold v. Pawtucket Valley Water Co.* 18 R. I. 189, 19 L. R. A. 602, 26 Atl. 55.

The defendant places much reliance upon its third point, *viz.*, that the equitable remedy for discovery cannot be invoked in aid of an action at law for a personal tort. They do not question, and, in view of the authorities, cannot question, the proposition that discovery may be had in aid of actions of tort relating to property, such as trover, detinue, trespass, waste, etc. *East India Co. v. Evans*, 1 Vern. 307; *Marsden v. Panshall*, 1 Vern. 407; *Heathcote v. Fleete*, 2 Vern. 442; *Morse v. Buckworth*, 2 Vern. 443; *Sloane v. Heatfield*, Bunbury, 18; *Taylor v. Crompton*, Bunbury, 95; *Macclesfield v. Davis*, 3 Ves. & B. 16; *Burrell v. Nicholson*, 3 Barn. & Ad. 649, 1 Myl. & K. 680. But it says that a defendant cannot be called upon to implicate himself directly or indirectly in a personal tort, because it would tend to show moral turpitude, and so is inconsistent with principles of natural justice. It is true, as has already been stated, that a person cannot be called upon to furnish testimony in aid of such an action, or any other which tends to show that he has committed a crime or misdemeanor, or that he is liable to a penalty or a forfeiture of property. Testimony of this kind is excepted from the operation of the remedy in deference to the fundamental law that no subject shall be compelled to accuse or furnish evidence against himself in a criminal proceeding. It is said also that this equitable jurisdiction will not be exercised in controversies involving moral turpitude, and arising from acts clearly immoral, even though brought for the purpose of recovering pecuniary compensation. 1 Pom. Eq. Jur. § 197; 2 Story,

Eq. Jur. § 1404; Wigram, Discovery, 83; and authorities cited in notes. If this be so, this case is not thereby excluded from the jurisdiction, for, so far as appears, it does not involve moral turpitude or immoral conduct on the part of the defendant. It is charged with negligence, merely, consisting of a failure to perform its implied contractual obligation to provide the plaintiff with suitable machinery for the performance of his duties, or a suitable place in which to work. Although the action at law is in form tort, it is in fact based upon the failure to perform a duty arising from an implied promise. It is as distinguishable in this respect from an action of trespass to the person as an action against a common carrier for the loss of goods in his custody is distinguishable from an action for setting fire to one's house. *Morse v. Buckworth*, 2 Vern. 443. If the case is excepted from the equitable jurisdiction pertaining to discovery, it must be for some other reason than that a discovery would show moral turpitude or immoral conduct on the part of the defendant; and none has been suggested, excepting an absence of precedents supporting the jurisdiction. The plaintiff cites and relies upon *Macaulay v. Shackell*, 1 Bligh N. R. 96, as an authority in her favor upon this point. Macaulay brought an action at law against Shackell and others for libel, and the defendants pleaded the truth of the alleged libelous matter, and in aid of their defense filed a bill for discovery and a commission for examining witnesses abroad. Macaulay filed a demurrer to the bill, which was overruled by Lord Eldon, Ch., and Macaulay appealed to the House of Lords, where the judgment of the lord chancellor was affirmed, so far, at least, as it granted a commission for taking testimony abroad. There seems to be a difference of opinion regarding the scope of the decision, some holding that it required Macaulay to answer the bill and make the discovery sought, and others that it only granted a commission to take testimony abroad. See Redfield's note to 2 Story, Eq. Jur. § 1494. The decision was rendered in 1827, and Mr. Shadwell (presumably Sir Lancelot) was senior counsel for Macaulay. Four years later the case of *Wilmot v. Maccabe*, 4 Sim. 263, was before Sir Lancelot Shadwell as vice chancellor. This was also a bill for discovery in aid of a defense alleging the truth of the libelous matter with which the party was charged in an action at law. The vice chancellor, referring to *Macaulay v. Shackell*, said: "Lord Eldon, and the House of Lords on appeal, decided that, where a person brings an action for a libel, it follows, as commensurate with the right to bring the action, that the party who complains is bound to give the discovery which the defendant at law claims to have by his bill." The vice chancellor must have been familiar with the decision in the *Macaulay Case*, and, if the report of the case leaves a doubt regarding the decision, the statement of the vice chancellor would seem to be sufficient to remove the doubt. In an earlier case of the same 57 L. R. A.

kind (*Thorpe v. Macaulay*, 5 Madd. 218) the discovery sought was denied on the ground that it would show that the party had committed a misdemeanor, but the vice chancellor, Sir John Leach, used the following language in disposing of the question: "It was next argued that a court of equity would not lend its aid either for discovery or commission to either party in an action at law proceeding *ex delicto*. . . . No such limitation of the jurisdiction as to discovery is hinted at in any book of practice or by the *dictum* of any judge. Courts of equity exercise a direct jurisdiction in matters of waste and public nuisance, which are *ex delicto*. I am not, therefore, prepared to say that a court of equity will refuse its ordinary aid to parties in any action at law proceeding for a civil remedy." This cannot be regarded as authority on the point, but it is worthy of notice in this connection. Chancellor Walworth regarded these same cases as authorities in favor of the right of discovery in actions for libel unless the discovery would tend to incriminate the party or render him infamous. *March v. Davison*, 9 Paige, 580, 584-586. A *dictum* of Lord Langdale, M. R. (who, Lord Campbell, in his *Lives of the Lord Chancellors*, vol. 12, p. 351, says "is without vigor, and has not a judicial mind"), in *Glynn v. Houston*, 1 Keen, 329, decided in 1836, has added to the doubts regarding the decision in *Macaulay v. Shackell*. The case was a bill for the discovery of books and documents in aid of an action at law for an assault and false imprisonment. The discovery was denied on the ground that it would incriminate the party called on to make it. The *dictum* referred to is as follows: "I have looked into the authorities, which tend very much to confirm my opinion that a bill of discovery cannot be sustained in aid of an action for a mere personal tort. If it were necessary expressly to decide this point, I think it is clear what the course of my duty would be; but it is not here necessary; because a bill of discovery cannot be sustained in any case where the matter sought to be discovered may be made the subject of a criminal charge." The defendant says that this is a decision upon the point, but it is apparent that it is far from being such. If it had been necessary to decide the point, it is highly probable that *Macaulay v. Shackell* and *Wilmot v. Maccabe* would have been noticed, and either distinguished, overruled, or set right. There is no distinction between libel and assault, as personal torts, which would account for a difference in the application of the doctrine of discovery to them. There are similar *dicta*, by Cockburn, Ch. J., in *Pye v. Butterfield*, 5 Best & S. 829, 836, and by Lord Fitz Gerald in *Lyell v. Kennedy*, L. R. 8 App. Cas. 217, 233. These *dicta* certainly cannot be regarded as settling the law on the subject. Attention has not been called to any English case in which they have been adopted as the law. The industry of the counsel on both sides in searching for English and American authorities bearing upon the case, manifested by the numerous cita-

tions which they have made, justifies a conclusion that no such case exists. Wigram cites *Glynn v. Houston* three times, but makes no mention of the point in Lord Langdale's dictum. Wigram, *Discovery*, 5, 81, 85. Kerr says "it seems" that a bill for discovery will not be entertained in aid of an action for a mere personal tort, citing *Glynn v. Houston*. In the next paragraph he says: "It is no objection that the discovery be sought in aid of actions which sound in tort. Bills may also be brought for discovery in aid of or in defense to actions of trespass and trover; and, in general, there seems to be no civil right the trial of which will not be aided by a bill of discovery." Kerr, *Discovery*, 6, 7. Evidently Lord Langdale's dictum did not appeal to him as having much weight. One American case has been cited in which the point was decided in favor of the defendant's contention. *Robinson v. Craig*, 16 Ala. 50. The decision was based solely upon *Glynn v. Houston* and the absence of authorities the other way. There was no consideration whatever of the principles involved in the question. If the absence of authorities is entitled to any weight, it is, under the circumstances, very slight. Cases for personal torts arising from the action of the defendant,—willful torts, so to speak, — in which the defendant could make discovery without incriminating himself, must, from the nature of the case, be very rare. It is possible that there have been none excepting *Macaulay v. Shackell*, and cases of like nature that have been decided in accordance therewith without again raising the question. Cases for negligence were not common prior to the middle of the last century. The use of steam and electricity, and the commercial activity consequent thereon, have immensely multiplied cases of this kind. Lord Campbell's act for giving compensation to the families of persons killed by the negligence of others was enacted in 1846. Eight years later a procedure bill was passed, largely through the agency of Lord Campbell (17 & 18 Vict. chap. 125), by which, among other things, it was provided that either party to a civil action in the superior courts "shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute." Id. § 58. In speaking of this act, Lord Campbell says: "It brings about, as far as is now practicable, the fusion of law and equity, and establishes the principle on which our jurisprudence must henceforth be molded, 'one court for one cause,'—i. e., that the court in which the suit commences shall carry it through all its stages, and finally determine it and everything connected with it. Thus, parties will no longer be kept oscillating between law and equity till the subject-matter in controversy is wasted in costs." *Lives of the Lord Chancellors*, vol. 12, p. 395. In passing, it may be remarked that if the act and the reason of its enact-

ment do not show that its author understood that courts of equity had jurisdiction to order an inspection of real or personal property when such inspection was material to the proper determination of an issue, it certainly shows that he felt there was a necessity for such inspection in the administration of justice. The act relieved parties from the necessity of resorting to equity for discovery, and reasonably accounts for the absence, in England, of bill of discovery in aid of actions at law for negligence since that time. "Cases must arise from time to time which are new cases *in specie*, but which are not new cases with respect to the general principle by which they must be decided." 1 Bligh N. R. 133; *Walker v. Walker*, 63 N. H. 321, 56 Am. Rep. 514; *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794; *Gage v. Gage*, 66 N. H. 282, 28 L. R. A. 829, 29 Atl. 543. If *Macaulay v. Shackell* and *Wilmot v. Maccabe* are not authorities in favor of the maintenance of the plaintiff's bill, the general principles governing the remedy of discovery certainly justify its maintenance. The case may be a new case *in specie*, so far as discovery is concerned, but it belongs to a class to which the remedy of discovery is applicable.

It has been suggested that this is a "fishing bill," and should be dismissed for that reason. The plaintiff is not endeavoring to ascertain what defense the defendant contemplates making, nor facts that exclusively relate to the defendant's case, but is seeking discovery of facts that will enable her to prove her case. It is not a fishing bill.

The defendant further says that the statutes of the state removing the disability of parties as witnesses (Pub. Stat. chap. 224, § 13), authorizing the taking of depositions before trial (Id. chap. 225), and giving the court authority to order a view at the trial (Id. chap. 227, § 19), furnish a full, complete, and adequate remedy at law for obtaining the testimony which the plaintiff seeks, and so ousts the court of its equitable jurisdiction. If these statutes have such effect in cases where the testimony sought may be obtained under them, — which is doubtful (*Whceler v. Wadleigh*, 37 N. H. 55; *Howell v. Ashmore*, 9 N. J. Eq. 82, 57 Am. Dec. 371; *Shotwell v. Smith*, 20 N. J. Eq. 81; *Union Pass. R. Co. v. Baltimore*, 71 Md. 238, 17 Atl. 933; *Russell v. Dickeschied*, 24 W. Va. 61, 68; *Lovell v. Galloway*, 17 Beav. 1; 1 Story, Eq. Jur. § 64), — it does not appear that the plaintiff could obtain, by virtue of them, an inspection of the broken strap prior to the trial. The size and character of the strap are not stated, but it is reasonably certain that a subpoena *duces tecum* would be powerless to cause its production at the taking of depositions. A view of it at the trial would not answer the requirements of justice, according to the allegations of the bill.

The demurrer should be overruled.
Exceptions sustained.

All concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Thomas E. FRENCH, *Plff. in Err.*,
v.

Thomas ROBB, *Exr., etc.*, of William Oscar
Robb, Deceased, Impleaded, etc.

(.....N. J.....)

- *1. In an action of ejectment for land occupied by the defendant, a plea of not guilty admits such possession as excludes the plaintiff.
2. The owner of the soil in a street may maintain ejectment against any person wrongfully taking or claiming exclusive possession of the same.
3. A person occupying part of a street with poles and appliances for lighting the street, in pursuance of a contract made with the municipal authorities under act May 22, 1894 (P. L. p. 477), has such rightful, exclusive possession of the part so occupied as will support a plea of not guilty in an action of ejectment brought by the owner of the soil.
4. But the right of such a person to use the street in the immediate vicinity of his poles and appliances for the purpose of maintaining them is not capable of supporting such a plea.
5. If a person who has rightfully placed poles and wires in a street for the purpose of lighting the street uses them wrongfully for private lighting, he does not thereby lose his right to maintain them as against the owner of the soil.

(March 3, 1902.)

ERROR to the Supreme Court to review a judgment in favor of defendant in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

Mr. Samuel H. Richards, for plaintiff in error:

Poles cannot be erected for public lighting without consent in writing of the owner of the soil.

Meyers v. Hudson County Electric Co. 63 N. J. L. 573, 44 Atl. 713; *State, Roebbling, Proscutria, v. Trenton Pass. R. Co.* 58 N. J. L. 667, 33 L. R. A. 129, 34 Atl. 1090.

*Headnotes by DIXON, J.

NOTE.—As to ejectment by owner of fee of public street to recover possession thereof, subject to the public easement, from one who has placed an obstruction thereon, see *Thomas v. Hunt (Mo.)* 32 L. R. A. 857.

As to ejectment for land subject to easement of public street generally, see cases in note to *Hancock v. McAvoy (Pa.)* 18 L. R. A. 781.

For electric-light poles as additional burden on street, see *Palmer v. Larchmont Electric Co. (N. Y.)* 43 L. R. A. 672.

For telegraph or telephone poles as additional burden on highway, see *People v. Eaton (Mich.)* 24 L. R. A. 721, and note; *Cater v. Northwestern Teleph. Exch. Co. (Minn.)* 28 L. R. A. 310; *Postal Teleg. Cable Co. v. Eaton (Ill.)* 39 L. R. A. 722; *Magee v. Overshiner (Ind.)* 40 L. R. A. 870; and *Krueger v. Wisconsin Teleph. Co. (Wis.)* 50 L. R. A. 298, 57 L. R. A.

Ejectment is the proper remedy to get rid of a pole unlawfully on the land.

Bels v. American Teleph. & Teleg. Co. 143 N. Y. 133, 25 L. R. A. 640, 38 N. E. 202; *Postal Teleg. Cable Co. v. Eaton*, 170 Ill. 513, 39 L. R. A. 722, 49 N. E. 365.

If the defendant had a right to use the pole for public lighting by surcharging his easement, he has lost what he had.

Andreas v. Gas & Electric Co. 61 N. J. Eq. 69, 47 Atl. 555.

When the defendant uses the same wire both for a lawful and unlawful purpose, he has so intermingled his own property with that of the plaintiff that they cannot be separated or distinguished.

State ex rel. Newark & N. Y. R. Co. v. Goll, 32 N. J. L. 292; *Crane v. Decamp*, 22 N. J. Eq. 614; *Jewett v. Dringer*, 30 N. J. Eq. 291.

The remedy of the servient tenement is ejectment.

Burnet v. Crane, 56 N. J. L. 285, 28 Atl. 591.

If the doctrine of confusion of goods could not apply, the plaintiff would still be entitled to a verdict for part.

The fee is admittedly his. The use for private lighting is conceded to be an additional servitude upon his land. To this extent his rights are not challenged.

The statute provides for a verdict and judgment for whatever part is found to be in the plaintiff.

2 Gen. Stat. 1288, §§ 41, 42.

Mr. James M. E. Hildreth, for defendant in error:

The furnishing of water and light for private use is a public purpose.

Olmsted v. Morris Aqueduct, 47 N. J. L. 311; *Andreas v. Gas & Electric Co.* 61 N. J. Eq. 69, 47 Atl. 556; *Bonaparte v. Camden & A. R. Co.* Baldw. 205, Fed. Cas. No. 1,617.

It is unquestionably the duty of a municipality, for the safety and convenience of its inhabitants, to see that the streets and public places are properly lighted; and in such cases the public right must be paramount to individual interests, and the rights of the public are not limited to a mere right of way, but extend to all beneficial uses, as the public good or convenience may from time to time require.

2 Dill. Mun. Corp. p. 699.

Lamp posts and other appropriate instruments may be lawfully erected in the streets of the city for the purpose of lighting them at night.

Andreas v. Gas & Electric Co. 61 N. J. Eq. 69, 47 Atl. 556; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 395, 20 Atl. 859.

DIXON, J., delivered the opinion of the court:

The plaintiff brought an action of ejectment in the supreme court against the Delaware & Atlantic Telegraph & Telephone

Company, Joseph Q. Williams, receiver of the Franklin Electric Light Company, and Thomas Robb, executor of William P. Robb, deceased, for the possession of a plot of land 5 feet square within the limits of Washington and Jefferson streets in the city of Cape May. The receiver did not plead, but the telegraph company and Robb each pleaded not guilty. At the trial in the Cape May circuit of the issues thus raised the facts appeared as follows: The plaintiff, as owner of the land abutting upon the streets, owned also the *locus in quo*, subject to the public easement. Under an ordinance and a contract between the city of Cape May and the Franklin Electric Light Company, dated November 30, 1897, and running to July 23, 1902, the company became bound to light the streets of the city with electricity, and to furnish, erect, and maintain all necessary poles, wires, etc.; the location and erection of the appliances in the streets being subject to the approval of the city council. Accordingly a pole was placed about the center of the *locus in quo*, and wires strung thereon. In June, 1899, the electric company had passed into the hands of a receiver, and, the pole being then in poor condition, the receiver permitted the telegraph company to erect a new pole in its stead, and to string thereon a telephone wire; the pole, however, to be the property of the electric company. Afterwards, by virtue of an order of the court of chancery, the plant of the electric company was turned over by the receiver to the defendant Robb, and when this suit was brought he was carrying out the contract with the city for lighting the streets, and for that purpose he was in possession and use of the pole and some of the wires. Other wires on the pole were used by him for private lighting, and the telegraph company was using its wire for telephone purposes. On this state of facts the trial court directed a verdict for the plaintiff against the telegraph company, of which no complaint is now made; and also directed a verdict in favor of Robb for so much of the land as was occupied by the pole, and instructed the jury to find further in his favor for so much of the land around the pole as they should think reasonably necessary to be used in maintaining and taking care of the pole. To such direction and instruction the plaintiff excepted, and, the jury having found Robb not guilty, the plaintiff seeks to reverse the consequent judgment.

Before considering the special aspects of the controversy, it may be helpful to advert to the real nature of an action of ejectment. Originally it was designed to recover only damages for the wrongful ejection of the plaintiff from the possession of land in which he had a term of years. Later the recovery was extended to the possession of the land. To succeed, the plaintiff was required to prove a lease to himself for a term of years, made by a lessor entitled to the possession, and on the land when the lease was made, his entry under the lease, and 57 L. R. A.

oustery by the defendant. The action was usually instituted against a person not interested in the land, called the "casual ejector," who gave notice of the suit to the actual possessor, and he, on application to the court, was substituted as defendant. But, as a condition of such substitution, the court required him to stipulate that at the trial he would confess the lease, entry, and ouster alleged by the plaintiff, thus leaving the only fact to be proved by the plaintiff the title of his lessor. If, however, the claim of the applicant was such as would not warrant him in ousting the plaintiff, and yet would justify his own possession, as if he claimed only as joint tenant with the lessor, then he stipulated to confess ouster of the plaintiff only in case the plaintiff should prove actual ouster of the lessor. If, at the trial, the plaintiff showed such title in his lessor as made the confessed ouster wrongful, or if, when ouster was only conditionally confessed, he showed an actual ouster of the lessor, or a title against which any possession by the defendant was wrongful,—then he recovered damages and possession; otherwise his suit failed. Thus the technical issue in the case was always whether the defendant had wrongfully ousted the plaintiff. Under our statute the technical issue remains the same, although presented by a different procedure. The real claimant, the old lessor, is the plaintiff, and his complaint is that the defendant wrongfully deprives him of possession. The defendant is the real counterclaimant, and if he means to defend absolutely he pleads not guilty, and by that plea admits a possession or claim of title which should exclude or oust the plaintiff; while, if he means to defend only for a possession or claim of title which does not exclude the plaintiff,—e. g., as joint tenant with him,—he must give notice with his plea that he admits the right of the plaintiff to an undivided share of the land and denies actual ouster. *Brown v. Combs*, 29 N. J. L. 36. Then if, at the trial on the simple plea, the plaintiff shows a title against which the defendant's exclusive possession or claim would be wrongful, or, on the plea and notice, he shows an actual ouster, wrongful in view of his admitted right, or a greater right, which makes the defendant's possession a wrongful ouster, the plaintiff will be entitled to judgment; otherwise not. In the present case, the *locus in quo* being within the limits of public streets, a preliminary question arises whether the plaintiff, as owner of the soil, has such a right of possession as is capable of supporting the action of ejectment. In *Cincinnati v. White*, 6 Pet. 431, 8 L. ed. 452, Mr. Justice Thompson urged with much force the negative of this query; but in New Jersey the affirmative must be regarded as settled by the decision of this court reversing the judgment of the supreme court in *Wright v. Carter*, 27 N. J. L. 70. See *State v. Laverack*, 34 N. J. L. 207; *Burnet v. Crane*, 56 N. J. L. 288, 28 Atl. 591. The plea of the defendant Robb is simply not guilty; i. e., that he has

a possession or claim which rightly excludes the owner of the soil. It is established by express decision in this state that the public corporation, which represents the public right to the use of streets, may maintain ejectment against any person, even the owner of the soil, who occupies a street in a manner inconsistent with the public use. *Hoboken Land & Improv. Co. v. Hoboken*, 36 N. J. L. 540. From this it logically follows that the owner of the soil cannot maintain ejectment against such public corporation occupying the street within the limits of the public right. This was so adjudged by the Federal Supreme Court in *Cincinnati v. White*, 6 Pet. 431, 8 L. ed. 452, and *Barclay v. Howell*, 6 Pet. 498, 8 L. ed. 477, cases which are cited with evident approval by Mr. Justice Depue in *Hoboken Land & Improv. Co. v. Hoboken*, 36 N. J. L. 540. The same exemption from successful attack must be conceded to the agencies through which the public corporation exercises its rights, whether those agencies be designated by employment or by contract; for its rights would be fruitless if they could not be used to protect the individuals through whom they may be lawfully exercised, and without whose intervention the corporation could not enjoy them. One of the rights belonging to the corporation is to occupy the streets with poles and wires for public lighting. This right was expressly conferred by act May 22, 1894 (P. L. 1894, p. 477), according to which it may be exercised either directly by the city itself or indirectly through parties contracting with the city, and is not conditioned upon consent of the owner of the soil. *Meyers v. Hudson County Electric Co.* 63 N. J. L. 573, 44 Atl. 713. When the contract under which Robb claims was made, this statute was in complete force; and, although "An Act Concerning Townships," approved March 24, 1899 (P. L. 1899, pp. 372, 476), attempts to repeal it, yet, as the title of this act limits its operation to townships, the statute still remains effective in cities. So far, therefore, as Robb occupied the streets with poles and other appliances for public lighting, and thereby excluded the plaintiff, the ouster

was not tortious, and a verdict of not guilty was properly directed.

But the defendant pleaded not guilty for the entire *locus in quo*, and we must consider whether, outside of the space occupied by these appliances for public lighting, he has shown a right to the exclusive possession which his plea sets up. No color of right is shown for maintaining apparatus for private lighting, and as to the wire strung for that purpose the defendant was clearly guilty. The plaintiff urges that the wrongful use of the pole to sustain this wire should be visited with the forfeiture of the entire right; but we find no ground for such contention. Such a judgment would inflict a loss upon the public for the private fault of one of its instruments. The plaintiff does not need such rigor for his protection. So far as the appliances are not used for public purposes, this suit will result in abating them; so far as those required for public purposes have been wrongfully used, the plaintiff can be compensated by an action on the case for damages, and equity will restrain their misuse in the future.

There remains for consideration the defendant's claim to the land around the pole and appliances, found by the jury to be necessary for his use in maintaining them. The right to use that land for such a purpose did not justify the exclusive possession admitted by the plea. It was only the right enjoyed by every member of the community while in actual use of the street. It was discontinuous, and lacked the permanent and exclusive characteristics which are necessary to support or defend an action of ejectment. As a personal right, it was, in essence, like a private right of way, which cannot constitute a defense in an action of ejectment brought by the owner of the soil. *Burnet v. Crane*, 56 N. J. L. 285, 28 Atl. 591. The proper conduct of the trial at the circuit required a verdict that the defendant Robb was not guilty as to that part of the *locus in quo* which was actually occupied by the pole and other appliances used for public lighting, and that as to the residue he was guilty.

The present judgment should be reversed, and a venire de novo awarded.

NORTH CAROLINA SUPREME COURT.

B. W. HERRING

v.

W. H. ARMWOOD, Appt.

(130 N. C. 177.)

Damage from diminution of yield because of breach of contract to furnish fertilizer to assist in making a crop is not too remote to sustain an action for the breach.

(April 15, 1902.)

NOTE.—As to damages for failure of crop through breach of warranty that seeds will grow, see, in this series, *Shaw v. Smith* (Kan.) 11 L. R. A. 681, and *Reiger v. Worth Co.* (N. C.) 52 L. R. A. 362.
57 L. R. A.

APPEAL by defendant from a judgment of the Superior Court for Duplin County in favor of plaintiff in an action brought to recover possession of certain cotton. *Reversed.*

Statement by **Cook, J.:**

This is an action to recover, under claim and delivery proceedings, the possession of 2 bales of cotton, alleged by plaintiff to be his property and to be worth \$81, wrongfully withheld by defendant. Defendant denies plaintiff's ownership, and that his withholding possession is unlawful, and alleges that the cotton is worth greatly more than \$81; and for a second defense and

counterclaim alleges that he rented the farm, upon which the cotton was raised, from plaintiff in August, 1898, under the following written contract: "I, B. W. Herring, do hereby agree to rent my farm to Henry Armwood for the year of 1899 for 5 bales of cotton of the first picking, weighing 500 pounds, or the equivalent in money. I do also agree to dig marl to the amount of 2,000 bushels, more or less, and Henry Armwood agrees to haul the same and scatter on the land,"—and that it was understood and agreed that defendant was to use the marl, which was a valuable fertilizer, upon the crops in lieu of commercial fertilizers, and for the purpose of increasing the yield of the crops of cotton, corn, and other crops, and materially benefit the land, and that it would have increased the yield; that plaintiff failed and refused to dig the marl, and wholly failed to perform his part of the contract in this respect; that he was ready, able, and willing to perform his part of the contract at all times; that by reason of plaintiff's breach of contract he lost greatly in the decrease of the yield of his crops, and time and labor spent upon said land in cultivating said crops, to his damage \$150. Plaintiff admitted the written contract, but denied the other allegations set up in the second defense and counterclaim.

Upon the trial his honor submitted the following issues: (1) Is the plaintiff the owner and entitled to the possession of the 2 bales of cotton claimed by plaintiff? (2) Was the property in the possession of the defendant at the time of the seizure? And he refused to submit the following issues tendered by defendant: (1) Was it agreed between the plaintiff and the defendant that the plaintiff should dig and furnish 2,000 bushels of marl, more or less, and the defendant should haul the same on the land rented, to be used under the crops of 1899? (2) Did the plaintiff fail and refuse to perform his part of the contract? (3) Was the defendant able, ready, and willing to perform his part of the contract? (4) What damage has defendant sustained? To which defendant excepted. B. W. Herring, the plaintiff, then testified that "the defendant was to pay 5 bales of cotton as rent for the land, and that he had paid only 3 bales. The 2 bales in controversy were raised on the land rented from him by the defendant, and were carried by the defendant to Ruffin Cameron's gin to be ginned. The 2 bales were seized, at Cameron's gin, in this action. The defendant was present when the cotton was seized, and forbade Cameron to deliver it to me, and I forbade Cameron to deliver it to him. I did not agree to dig any marl for the crop of 1899. I wanted the marl dug and used, because I wanted to experiment. It takes twelve months for marl to do much good. The defendant did not use guano. He was to cultivate about 40 acres of land. The marl was on 16 acres of the land he rented in the year 1898. The land on which the marl was, was new ground cleared recently, and 57 L. R. A.

it only had three crops on it." And plaintiff rested. The defendant offered the following evidence, which was objected to by the plaintiff, and excluded. (Defendant excepts.) W. H. Armwood, the defendant, testified: "It was agreed that the 2,000 bushels of marl should be hauled on the crop for 1899. I lived on the plaintiff's land in 1898, and hauled marl on 15 or 16 acres. The crops were increased by the use of the marl 50 to 75 per cent. I hauled the marl from Mr. Dan Lee Flowers.' He had the bed, and furnished Mr. Faison Hicks, Mr. Ab Herring, Andrew Barfield, and others in the neighborhood. My crop was decreased by a failure to use the marl at least 50 per cent. I demanded of the plaintiff to dig the marl, and it was agreed he would dig it in September, 1898, so that I could use it on the crop for 1899." (All evidence of this witness in reference to the marl and its increase upon the crops was objected to by the plaintiff, upon the ground that it was too remote. Objection sustained. Defendant excepted.) 'Dan Lee Flowers testified: "I bargained to sell to the plaintiff 2,000 bushels of marl to be used by the defendant, and the same was to be dug in 1898. I have used marl from my bed for a number of years, and it always increases the production of my crops from 50 to 100 per cent; in other words, I make twice as much the year I use marl upon the same land as I do without it." Verdict and judgment for plaintiff. Defendant excepted, and assigned the following as error: (1) For that the court failed to submit an issue as to the value of the property; (2) for that the court erred in refusing to submit the issues tendered by the defendant; (3) for that the court erred in excluding the evidence of defendant, Armwood, and Flowers, tending to show the decreased yield of the crop by reason of the failure of the plaintiff to furnish the marl to be used thereon. Defendant appealed.

Messrs. Stevens, Beasley, & Weeks for appellant.

Messrs. Allen & Dortch for appellee.

Cook, J., delivered the opinion of the court:

The sole question involved in this appeal, when stripped of its technical paraphernalia, is whether an action for damages will lie for a breach of contract in failing to furnish fertilizers, whereby the yield of the crop was decreased, because such damage or failure in the yield would be too remote. His honor held in the negative, which we think was error. The rule as stated in *Hadley v. Baxendale*, 9 Exch., on page 353, is as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may

reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." This rule is substantially repeated, but more succinctly, by Pearson, J., in *Ashe v. De Rossett*, 50 N. C. (5 Jones L.) on page 301, 72 Am. Dec. 552, which is quoted verbatim in *Spencer v. Hamilton*, 113 N. C., on page 50, 18 S. E. 167. Recognizing the fact that the yield of crops is increased by the use of fertilizers, and applying this rule to the case at bar, the conclusion is irresistible that a lessening in the yield would be the natural result of a failure to use the marl, if marl be beneficial to the growth and development of the crops, and that the lessened yield would be incidental to such breach, and therefore plaintiff would be liable. It is common knowledge that the use of manure, manipulated fertilizers, and compost increases the yield of cotton, corn, peanuts, etc., and in some sections are considered absolutely necessary for the production of a profitable yield. It is likewise well known that the use of marl in some sections of the state greatly increases the production. And it appears from the contract set up by defendant, and admitted by plaintiff, that he (the plaintiff), in renting the farm, agreed to dig 2,000 bushels of marl to be hauled and scattered upon the land, and by his failure to do so it is alleged that the yield was greatly lessened. And it seems to have been within the contemplation of both parties that the use of the marl would be beneficial in raising the crops; and, if so, then the failure to use it would necessarily less-

57 L. R. A.

sen the yield, which would be the direct result of the breach of the contract in not furnishing it. How much that net additional yield, if any, would have been, according to the usual and natural course of things, was a question of fact to be found by the jury; and by the "net additional yield" we mean its value after deducting its necessary expenses in harvesting, etc., as is held in *Spencer v. Hamilton*, 113 N. C. 50, 18 S. E. 167. In the case last cited, our court held that the tenant could plead, as a counterclaim for damages, a breach of contract upon the part of the landlord in not draining the land as he had agreed to do, thereby decreasing the yield, in an action brought to recover the rent. So, it must necessarily follow that, if damages be recoverable for a breach of contract which decreased the yield, they can also be recovered for a breach of contract whereby the yield was not increased. It requires the same time, labor, and expense in preparing the land, and in plowing and hoeing crops, upon thin and unimproved land, as it does upon well improved, manured, and fertilized land; and we know that the products of the former are less than those of the latter, according to the usual and natural order of events. The defendant had a right to have the issues tendered by him submitted to the jury; and, if he could sustain them by proper proof, he would be entitled to recover such amount of damages as he might show had been done him by reason of the breach of the contract.

For the error above pointed out, a new trial will be awarded.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the First Quarter of the Judicial Year Beginning with October 1, 1903, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARY AND TRUST RELATIONS.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS: WILLS.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

A statute making a contract for the construction of a building, in which the contract price is payable with something besides money, so far invalid as to furnish the owner no protection from the claims of subcontractors and materialmen, is held to be an unconstitutional infringement of the owner's right to the possession and enjoyment of his property. (Cal.) 726.

Torrens law.

A statute providing for the Torrens system of registering land titles is held not to be unconstitutional. (Minn.) 297.

Eminent domain.

A statute requiring payment of damages for injuries to a business through the taking of property for public use is held not to be unconstitutional on the ground that taxes cannot be levied for such purpose. (Mass.) 292.

In awarding damage to one, a portion of whose land is sought to be condemned for public use, for injury to his remaining land, it is held that injury to tracts not connected with, and held under different titles from, although adjoining, that from which the parcel is taken, cannot be considered. (C. A. 3d C.) 932.

Public improvements.

The cost of a street improvement is held not to be lawfully assessable against abutting property, where the contractor is required by the ordinance to sustain all loss or damage arising from the nature of the work to be done under the specifications, since this requirement would tend to increase the cost of the work. (Cal.) 213.

Highways.

A person who has rightfully placed poles and wires in a street for the purpose of lighting the street is held not to lose his right to maintain them as against the owner of the soil because he uses them wrongfully for private lighting. (N. J. Err. & App.) 956.

Ordinance as to sidewalks.

An ordinance providing for the construction of a cement sidewalk 20 feet wide on each side of a street, at the expense of the abutting property, is held not to be unreasonable where the locality is one of residence and business, the property is worth from \$150 to \$300 per front foot, and the existing walks, varying from 6 to 20 feet in width, are in bad condition. (Ill.) 127.

Bicycles.

An ordinance requiring bicycle riders to carry lamps is held not to be unconstitutional as infringing the equal privileges and immunities of bicycle riders because not applying to other silently running vehicles. (Iowa) 243.

Probate judges.

A statute giving the probate judge of one county a salary, and requiring him to account for all fees received, while the judges of all other counties are permitted to retain the fees as their compensation, is held to be in violation of a constitutional provision requiring the general assembly, by a law uniform in its operation, to provide for and regulate the fees of all county officers. (Mo.) 659.

Foreign partnership.

A statute imposing a penalty on agents transacting business within the state for foreign partnerships which have not complied with conditions not required of local partnerships is held to be void as discriminating against such agents in favor of those of local firms. (Vt.) 666.

Foreign insurance companies.

Under a statute requiring insurance commissioners to issue a license to a foreign insurance company to do business in the state, if satisfied with its statement showing its financial condition and standing, it is held that the commissioners have no authority to question the method of computing the reserve set forth in the statement, or to enter upon an independent valuation of such reserve. (Vt.) 374.

Telegraph companies.

A statute rendering telegraph companies

liable for mental anguish caused by failure promptly to transmit and deliver a message is held not to deprive them of property without due process of law, or deny them the equal protection of the laws. (S. C.) 607.

A telegraph company is held not to be guilty of maintaining a common nuisance because it delivers, at a place not under its control, which is used and resorted to for selling pools and betting on horse races, to the common nuisance and annoyance of all good citizens in the neighborhood, messages containing the information necessary to such transactions. (Ky.) 614.

Rules of evidence.

A statute making the specification of weights in bills of lading issued by railroad companies for hay, grain, etc., shipped over their lines, conclusive evidence of the correctness of such weights, is held to be unconstitutional. (Kan.) 765.

Removal of garbage.

A city is held to have no right to grant a monopoly to one individual, by contract, to enter upon the private premises of the inhabitants of the city, and at their expense collect and remove those innoxious substances, such as ashes, cinder, and other substances not in themselves nuisances, though if allowed to accumulate they would become such, or which may be utilized for some beneficial purpose. (Neb.) 895.

Food laws.

Prohibiting the sale of dairy products containing any preservative other than salt, sugar, or spirituous liquors in specified cases, or the sale of preservatives for such use, is held to be beyond the power of the legislature, when the use of preservatives is not declared to be an adulteration, and the statute is not aimed at adulteration generally. (N. Y.) 178.

Statutes forbidding the manufacture or sale of any article in imitation of butter or of oleomargarine, which contains any coloring matter, or the sale of any substance not butter, but having the appearance of butter, unless sold under its true name and plainly marked, and requiring that all persons dealing in food shall, upon proper application and tender of price, furnish a sample for analysis, are held to be a proper exercise of the police power. (Ohio) 181.

Taxes.

The exemption of corporations which do not have any special privileges and franchises from the operation of a statute imposing a franchise tax on corporations which do have such franchises or privileges is held not to make the statute unconstitutional for lack of uniformity. (Ky.) 33.

An ad valorem tax upon the franchises of a street railway is held to be required by a constitutional provision which declares that all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value. (Ky.) 50.

The deduction from the value of the capital stock of a corporation, in assessing it for taxation, of the total amount of corpo-

rate indebtedness except indebtedness for current expenses, is held to be invalid because in violation of the constitutional requirement of equality and uniformity in taxation. (Minn.) 63.

The franchise of an electric light and power company which has a right to use streets and alleys of the city is held to be subject to taxation under laws authorizing in general terms the taxation of real and personal property, although there is no special provision for ascertaining the value of the franchise. (Wash.) 78.

The renting of a church parsonage, and using the rent to procure another residence for the parson, is held not to deprive it of its exemption from taxation, under a provision that exemption of parsonages shall not extend beyond the buildings and premises actually occupied as such. (S. C.) 606.

A tax on all remainders or reversions which vested prior to a certain date, but which shall not come into possession until after the passage of the act, even if it can be regarded as a tax on property, and not on transfers, is held to be invalid as not bearing equally upon the entire class to which the property belongs. (N. Y.) 540.

The privileges and immunities of citizens of other states are held not to be violated by a statute taxing the resident stockholders of certain corporations in the town in which they reside, deducting from the market value of the stock the value of the capital invested in real estate on which the company pays taxes, but imposing a state tax on nonresident shareholders on the market value of their shares, without any provision for deduction of capital invested in real estate. (Conn.) 481.

Local self-government.

The establishment and control of a water supply system is held to be a matter that pertains to the municipality, and the legislature is held to have no power to take the management of the system away from the appointees of the municipality, and vest it in persons for whose selection it provides. (Iowa) 244.

An act creating a board of police commissioners which shall have exclusive control of the police officers of the city, naming the first members of the board, prescribing the manner in which their successors shall be chosen, and setting forth their powers and duties, is held not to be an unconstitutional deprivation of local self-government. (Ga.) 230.

The legislature is held to have no power to fix the salaries of firemen employed by municipalities, although there is no limitation on such power in the Constitution, since that is a matter of local government never delegated to the legislature. (Ky.) 775.

License tax.

The exemption of real-estate dealers and contractors, whose business does not amount to \$1,000 per annum, from the operation of an ordinance imposing a license tax for the privilege of transacting business is held to be unconstitutional and void as class legislation, where such contractors and

dealers are classified with other persons effecting sales, to whom a similar exemption is not allowed. (Pa.) 348.

The exemption of persons who go from house to house, or place to place, vending

their own products, from the payment of a license tax imposed by statute on peddlers, is held not to render the act invalid as in violation of the uniformity clause of the Constitution. (Neb.) 922.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

The validity of a sale of land by a husband to his wife is held to be determined by the law of the state where the land is situated. (La.) 353.

Repudiation of contract.

An intention to repudiate the contract, by a buyer of scrap iron who is to pay for each 100 tons as delivered, justifying a rescission by the seller, is held to be shown where, after receiving 100 tons, he insists on having two or three carloads more delivered before remitting for the 100 tons. (Del.) 225.

Validity; public policy.

An accepted offer to sell or deliver articles at specified prices during a limited time, in such amounts or quantities as the acceptor may want or desire in his business, without any statement of the amount or quantity, is held to be without consideration, and void. (C. C. A. 8th C.) 696.

A contract between a sheriff and his deputy, providing that the deputy as such shall collect all the taxes and do all the work of the sheriff's office in one district, and that he shall have all the fees and commissions allowed by law upon the work done by him, and in consideration thereof shall pay the sheriff \$100 a year, is held to be in violation of the state statutes prohibiting the sale or farming of any office under the laws of the state. (W. Va.) 417.

Married woman's contract.

A married woman is held to be liable on her guaranty of a promissory note owned by her and made payable to her order, and the purchaser of such a note is held not to be driven to an inquiry of the purpose to which she intends to devote the proceeds of a sale thereof. (Neb.) 914.

The contract of a married woman as surety on a note is held to be governed by the law of the place where her signature is affixed and the instrument delivered to the payee, although the note is payable in another state, and, as against the makers, has no valid inception until its negotiation in the latter state, if the surety has no knowledge that it is to be negotiated there, or intention that her contract shall be governed by the laws of that state. (N. Y.) 513.

Infant's contract.

An infant is held not to be bound by his warranties in a contract for life insurance. (R. I.) 496.

Insurance.

An insurance company is held not to be able to defeat liability on its policy because of misrepresentations in the application as to the title to the property or the encumbrances thereon, if they were correctly stated to the agent, and he failed to make out the application in accordance with the information given. (Iowa) 328.

57 L. R. A.

An agreement by an applicant for life insurance, that the medical examiner appointed and paid by the insurer shall be the agent of the applicant in recording the medical examination, is held to be prohibited by public policy. (N. Y.) 318.

A policy insuring a railroad company against loss from liability to persons who should accidentally "sustain personal injuries" on its road under circumstances which impose upon the insured a common-law or statutory liability for the injuries is held not to cover cases of instantaneous death without conscious suffering through injuries for which insured is responsible, where the statutes give a new right of action to the personal representatives in case of death, and not a right of action to deceased which survives. (Mass.) 629.

The loss to be made good under a policy of fire insurance is held not to be limited to the cost of replacing the structure described in the survey, if, when the fire occurs, the statutes require, as a condition of rebuilding, more substantial and expensive structural work. (Pa.) 510.

The surrender of an insurance policy to the insurer for its cash value is held not to be a sale which can be disaffirmed by the administrator of the insured, on the ground of the latter's infancy, but to be merely a rescission of the contract. (N. C.) 505.

A life insurance agent is held to have no implied authority to accept as payment of a premium on a policy an agreement to give him credit upon his individual account, which he shall trade out with the insured in the ordinary course of business. (Wis.) 455.

Insurance against loss through liability for personal injuries is held not to constitute a trust fund for the benefit of the injured person, and he is held to have no right to maintain an action against the insurer to reach such fund, where, before his claim against the insured is established, the insurer satisfies its obligation to him under the policy, although by reason of the insolvency of the insured the claim will be otherwise unenforceable. (Mass.) 791.

A clause in a policy of fire insurance requiring the assured to keep the books and inventories of his business securely locked in a fire-proof safe at night and at all times when the building is not actually open for business, is held not to apply to a suspension of business caused by a fire raging in the vicinity and threatening the consumption of the building, the same not being actually shut up, and business operations being interrupted because of the threatened danger. (Ga.) 752.

An insurer which receives an assignment of the mortgagee's claims against the mortgagor upon paying him the amount due by

it under its policy on mortgaged property is held to have no right, in an accounting of all sums received from the various policies on the property by the mortgagee, who is seeking to enforce his mortgage for an unpaid balance, to insist that he should be charged with the portion of the sum received under another policy which he is charged to have wrongfully permitted to have gone to the mortgagor, where the amount kept by him out of such payment was more than the share of the mortgage indebtedness chargeable to that policy. (C. C. A. 8th C.) 692.

Banks.

False representations by a defaulting bank president as to his liability to the bank and the value and condition of securities already furnished by him, are held not to be binding upon the bank, so as to enable a person furnishing securities at his request, with knowledge of the purpose for which he intends to use the same, to rely upon such representations as a defense in a subsequent action by the bank to foreclose its lien on such securities. (Neb.) 811.

A depositor who, by negligence in failing to detect forgeries among the vouchers returned by the bank, and to give the bank notice thereof, causes loss to the bank, either by enabling the forger to repeat his fraud, or by depriving the bank of an opportunity to obtain restitution, is held to be responsible for the damage caused by his default. (N. Y.) 529.

The payee of a cashier's check indorsed in payment of chips to be used in gambling may enforce payment thereof against the maker, notwithstanding the check has already been paid to the indorsee, where payment was made to the latter after notice of the invalidity of the consideration for the indorsement. (N. D.) 341.

Bills and notes.

A note given to reimburse a surety on a fidelity bond for what it has been compelled to pay because of the principal's embezzlement, on condition that the surety would not prosecute the principal for the defalcation, is held to be void. (Ala.) 212.

Bonds.

A county treasurer and sureties on his bond are held to be liable for the loss of money by the failure of a bank in which it was deposited for safe keeping, in good faith, in the belief that the bank was solvent. (Neb.) 303.

Bills of lading.

Money paid by the drawee upon a draft drawn against "indorsed bills of lading" which are in fact fictitious, and accepted "against" such bills in ignorance of the fraud, is held to be recoverable from the payee. (C. C. A. 2d C.) 689.

Judicial sales.

Annual crops growing on the land are held not to pass to a purchaser at judicial sale. (Neb.) 920.

An executor offering land for sale at public outcry is held to have the right to withhold. 57 L. R. A.

draw the same at any time before the hammer falls. (Ga.) 784.

Brokers.

Refusal to comply with a contract to purchase real estate, by reason of which the broker who negotiated the sale is deprived of his commission, is held to render the intending purchaser liable for the damages thereby inflicted on the broker, although he had agreed to look to the seller for his commission. (Wash.) 401.

Warehousemen.

The value of wheat stored in a public warehouse at the owner's risk of fire is held not to be recoverable by the owner from the warehouseman in case of a subsequent fire, where the identical wheat stored was sold according to the custom of the warehouseman, known to the owner, to commingle grain so deposited for storage with like quality belonging to him, and from such mass to sell from time to time and replenish with such other grain as should be brought to him for storage or he should buy, and when the warehouse burned it contained enough wheat of the quality stored to replace the same, and the warehouseman had at all times kept on hand sufficient in quantity and quality to replace all wheat stored with him. (Kan.) 287.

For the deterioration of goods while in cold storage the warehouseman is held to be responsible notwithstanding a stipulation, in the receipt issued for the goods, to the effect that he will not be responsible for "damage" to the goods. (La.) 271.

Gas.

A natural gas company having authority to lay its mains in a public street and supply gas to consumers, charging a flat rate by the month, or a certain meter rate per thousand feet, is held to have no right to enforce the latter rate against a single consumer if it makes an unjust discrimination against him. (Ind.) 761.

Principal and agent.

One purchasing a piano from an agent is held to be bound to take notice that, unless it is expressly given, the agent has no authority to take a note for the purchase price payable to himself, and that no title can be acquired to the instrument in exchange for such note, unless the transaction is ratified by the principal, or a custom to take such notes is shown. (Ky.) 451.

Carriers.

A carrier is held not to be obliged to honor a coupon from a commutation book of tickets intended for passage between designated points, and which provide that they are not "good unless detached by the conductor," when the coupon has been detached by the commuter and the book left with a member of his family, so that it is not present when he tenders the coupon in payment of fare. (Md.) 275.

A passenger who leaves his car of his own volition, for some purpose of his own not incident to the journey he is pursuing, and at a place not designed for the discharge of

(CORPORATIONS AND ASSOCIATIONS.—DOMESTIC RELATIONS.—FIDUCIARY AND TRUST RELATIONS.)

passengers, is held not to be entitled to the protection of a statute making a carrier liable for all personal damage inflicted on a passenger being transported over its road. (Neb.) 890.

An agreement by a passenger, when procuring a mileage ticket at a reduced rate, not to hold the railway company liable for injuries received while riding on freight trains, is held to be unenforceable with respect to such freight trains as are designated by the carrier to carry passengers generally. (Or.) 616.

A carrier's contract limiting liability for loss to a specified amount is held to have no application to the damages to be recovered for its failure to comply with a notice of stoppage *in transitu* after it had agreed to do so. (N. Y.) 527.

Holidays.

The owner of an option which matures on a holiday is held to have no right to exercise the option on the succeeding day, where the statutes make no provision for the suspension of general business on the holiday. (N. Y.) 173.

Guaranty.

A written guaranty of the salary and expenses of a detective in working up a murder case is held not to continue after conviction of a suspect, and settlement of the bill for services to that time, although the guaranty is not canceled or recalled. (Wyo.) 468.

Landlord and tenant.

Keeping the keys for five days after the expiration of a monthly period, and remaining in possession of the leased property

for the purpose of cleaning up rubbish, after the refusal of the landlord to accept the keys at the expiration of the month, are held to render the tenant liable for another month's rent. (Conn.) 222.

A covenant in a lease against assigning or subletting is held not to be violated by placing a care taker in possession during the tenant's absence. (N. Y.) 317.

A tenant is held to have no right to remove fixtures annexed to the freehold, which are placed on leased land, in the absence of a contract giving him the right to do so. (Ga.) 669.

Usury.

Whether or not a loan by a foreign building and loan association to a resident of the state, secured by mortgage on land within the state, is usurious, is held to be determined by the local laws, notwithstanding the notes are payable at the domicile of the corporation, if it has localized its business by establishing boards throughout the state to which payments on loans are to be made. (Miss.) 793.

Where a debtor executes a note and mortgage for a loan of money at a lawful rate of interest, and at its maturity enters into a new contract with the lender for a further extension of the loan, which is tainted with the vice of usury, and the lender by agreement retains the note and mortgage as collateral security to the usurious contract, it is held that, in a suit to enforce the mortgage security, the lender is restricted in his recovery to the amount due on the indebtedness at the time of making the usurious contract, after which all interest is by force of the suit forfeited. (Neb.) 910.

III. CORPORATIONS AND ASSOCIATIONS.

As to taxation of corporate franchises, and discrimination against foreign corporations, see *supra*, I.

IV. DOMESTIC RELATIONS.

As to contracts of married women, see *supra*, II., *infra*, VIII.

The validity of a marriage is held to be determined by the law of the place where the marriage is solemnized; and a marriage legal where solemnized is held to be valid everywhere. (Neb.) 155.

Although the beginning of a cohabitation was meretricious, each of the parties having a lawful spouse then living, it is held that there is sufficient evidence of a lawful marriage where, after the obstacles thereto were removed by decree of divorce, the parties continued for a long term of years to live together as husband and wife, and continuously represented themselves to the public as such, and five children were born of the union, whom the parents unitedly

represented to the public and caused to be baptized into church as the children of lawful wedlock. (Neb.) 917.

A man who receives property in trust for the support of his wife and children is held to have no right, after mingling the income with his own funds for a period of years, without keeping or stating an account, and making improvements on the trust property, to go back, charge himself with the income received, and credit the account with the costs of the improvements, leaving himself debtor to the beneficiaries, on the theory that it was his personal duty to support his family, for the purpose of preventing his creditors from reaching the improvements. (Va.) 728.

V. FIDUCIARY AND TRUST RELATIONS.

In order to obtain a preference over general creditors of an insolvent trustee, it is held that the *cestui que trust* must show 57 L. R. A.

that the estate out of which he claims such preference has been increased to some extent by the misappropriation of trust prop-

RÉSUMÉ OF DECISIONS.
(TORTS; NEGLIGENCE; INJURIES.)

erty, and he is held to be entitled to a preference to the extent of such increase only. (Neb.) 885.

The title of land sold and deeded by a guardian to her husband is held not to pass

to a purchaser who has notice of their relationship; and ejectment for its recovery is held to be maintainable by the ward. (Kan.) 575.

VI. TORTS; NEGLIGENCE; INJURIES.

A bank falsely certifying that an insurance company has its authorized capital on deposit, for the purpose of inducing the insurance commissioner to grant it a license, is held to be liable to persons who are damaged by the purchase of the stock in reliance thereon. (C. C. A. 6th C.) 108.

Vacation or obstruction of street.

Damages for injury to property by discontinuing a portion of the street on which it is situated, so that traffic is diverted from it, trade diminished, and its value lessened, although access to it still exists by a longer route, are held not to be recoverable under a statute providing for the payment of damages sustained by the discontinuance of a highway. (N. H.) 282.

One whose property is cut off from access to markets, and from communication with his fellow men, by neglect of the county commissioners to keep the highway leading to it in repair, is held to suffer a special injury which will entitle him to maintain an action against the commissioners. (Md.) 279.

The permanent obstruction of a street within 200 feet of the property of an abutting owner, cutting him off from his usual and only direct access to the business portion of the town, thereby depreciating the value of his property, is held to inflict special injury on him, for which he may recover damages. (Ind.) 508.

Liability of municipal corporations.

The operation of a stone-crushing machine to prepare material for constructing and repairing its highways is held to be a governmental act of a municipality, so that it will be exempt from liability for injury to an employee through a defect in the machine, although the machine is located several miles from the place where the material is to be used. (Conn.) 218.

The mere fact of an explosion of gas in a sewer is held not to be sufficient to charge the municipality with liability for the injury caused thereby. (Mo.) 136.

An unorganized assemblage of merry-makers to the number of 1,000 in the main street of a city, exploding fireworks, obstructing the use of the street, and endangering life and property, is held to be a "riotous or tumultuous assemblage of people," within the meaning of a statute making the municipality liable for injuries done by such an assemblage. (Ky.) 130.

Injury to servants.

Injury received by a young man seventeen years old while helping brakemen, at their request, to load a piano, is held to be within the rule which exempts the master from liability to one who is injured while helping his servants, at their request, by reason of their negligence. (Ky.) 266.

57 L. R. A.

The negligent act of a foreman with general control and authority to employ and discharge workmen, in ordering a subworkman upon an elevator, and himself operating the elevator with negligence, to the workman's injury, is held not to be the act of a fellow servant, but of a vice principal. (Neb.) 147.

The duty of using a fender provided by the owner of a vessel to aid in docking it is held not to rest upon him, and he is therefore held not to be liable for injuries to an employee resulting from the neglect of the mate to use it in bringing the vessel into the dock, although the injured employee works under the immediate orders of the mate. (Conn.) 494.

The death of a servant, caused by criminal violence of a mob of strikers, is held to impose no liability on the master, under a statute making him liable for death resulting from injuries inflicted by his negligence or wrongful act. (Ky.) 447.

Using a switch engine without a handhold on the tender is held not to constitute an assumption of the risk of such defect by the employee, where the statute makes railroad companies liable for injuries to employees from "any defect in the machinery, ways, or appliances," and makes void any agreement to waive the benefit of the statute. (N. C.) 817.

A servant having authority to direct and control others is held to be a vice principal of the master, for whose negligence the master is liable, although he is not engaged in performing the absolute duties of the master, when he commits a negligent act causing injury to one under his control, and is not actually engaged in exercising his power of superintendence over the injured servant, under a statute making all servants who have authority to direct and superintend other servants vice principals of the master. (C. C. A. 8th C.) 707.

A railroad company running its trains over another road by permission is held to be liable to its employees for the negligence of the servants of the licensing corporation in the discharge of the absolute duties of the master, but not to be liable for their negligence in discharge of their duties as servants. (C. C. A. 8th C.) 712.

Injury to passengers.

A carrier is held to be liable for nervous shock to a passenger, resulting from a jar to the nervous system which accompanies a blow to the person, caused by being thrown from the seat through the carrier's negligence; and it is held not to be necessary to show that the shock is the consequence of the blow. (Mass.) 291.

The voluntary exposure of the body beyond the sides of a moving train, by a pas-

senger riding on the platform, is held to be such negligence as will preclude recovery for his death, caused by coming in contact with an iron post near the track. (Minn.) 639.

Injury to a passenger by reason of the unsafe condition of the depot premises, which the passenger must use to reach his train, is held to render the carrier liable, notwithstanding the fact that the premises are used by, and are in possession of, a union depot company or its receiver, with whom the railroad company contracts for terminal facilities. (Wash.) 390.

One who enters and rides upon a train which he knows, or by the exercise of reasonable diligence could know, is prohibited from carrying passengers, is held to be a trespasser, and not a passenger; and the only duty of the railroad company toward him is held to be to abstain from wanton or reckless injury to him. (C. C. A. 8th C.) 700.

Railroads.

A railroad company operating a portion of its railroad bridge as a toll bridge for travelers with horses is held to be under a duty to keep a lookout for the purpose of discovering whether or not teams on the bridge have become so frightened by trains also on it as to become unmanageable and dangerous. (Ky.) 781.

Elevated railroads.

The owner of an apartment house is held to have no right to recover damages from an electric elevated railroad company whose tracks cross the highway within 19 feet of his property, where the injury differs from that suffered by the general public only in the proximity of the tracks. (Ill.) 237.

Street railways.

The removal, by a street railway company, of snow from its tracks to the adjacent roadway in such a manner as to leave a deep ditch and render the street unsafe and dangerous for public travel, is held to render the company liable for injuries to travelers caused thereby. (Wis.) 465.

Turntables.

A railroad company is held to be liable to infants of tender years for injuries inflicted by a turntable maintained by it in an unfenced lot so near a public way as to be likely to attract children to play on it, unless it exercises reasonable care to have it safely fastened. (Iowa) 561.

Explosion of boiler.

Liability for damages to a neighbor, caused by the explosion of a steam boiler, is held not to arise where one places the boiler upon his premises, and operates it in a lawful business, with care and skill. (W. Va.) 410.

Falling walls.

The owner of walls left standing after the destruction of the building by fire is held to be under no obligation to adjoining property owners to remove or protect the walls, until he has had a reasonable time to make necessary investigation and take such precautions as are required. (Mass.) 132.
57 L. R. A.

Libel.

A communication transmitted by a commercial agency, that a certain person had made an assignment for the benefit of creditors, when the information received by it was that he had made an assignment to secure the indorser of a note, is held not to be privileged as a matter of law. (C. C. A. 1st C.) 475.

Fright.

One frightening a woman so as to cause nervous prostration, by stealthily entering her home in the night-time and committing a trespass on her husband's property, is held to be liable to her in damages therefor. (Iowa) 559.

Injury by horse.

From the fact that a quiet, gentle horse was left standing untied in the public street, free from the presence of anything which might frighten or disturb him, it appearing that the driver had been accustomed to use the horse in that way for many years without an accident, it is held that no inference can arise that the act was negligent. (N. J. Err. & App.) 627.

Druggists.

One who by mistake sells to a person a poisonous drug for a harmless medicine is held to be liable to a third person who without negligence takes the drug for medicine, for damages resulting to him therefrom. (W. Va.) 428.

Ice on sidewalk.

A landlord is held not to be liable for injury received by a person from falling on ice which had been allowed by the tenant to accumulate and remain on a sidewalk abutting the rented premises, although the ice resulted from water flowing from the landlord's property through a ditch placed there by the landlord for the purpose of carrying off the refuse water across the sidewalk. (Ga.) 749.

Negligence of infants.

Negligence of an infant in performance of his contract to thresh grain, which results in the destruction of the grain and the shed covering it by fire set by sparks from the engine, is held not to render him liable for the loss. (Tenn.) 673.

Dangerous premises.

The liability of one who by express invitation induces a person to make use of a portion of premises for an expressed purpose is held to be confined within the limits of the invitation, and not to extend to injuries received by the person invited while using the premises for a purpose not expressed, and not authorized by the invitation. (N. J. Err. & App.) 307.

A boy six years old, knowing that hot water will burn, is held to have no right to recover damages for injuries received from voluntarily or carelessly walking into a pool of it formed by emptying a boiler on premises upon which he is trespassing. (Ark.) 724.

Fraudulent conveyance.

A wife who takes a conveyance of prop-

erty from her husband with knowledge that he intends thereby to hinder and defraud his creditors, and who, in order to procure a loan to herself, conveys the property as security to one ignorant of the fraud, is held to be personally liable to a judgment cred-

itor of her husband for the amount of the loan, or a sufficiency thereof to satisfy such judgment, although the property was conveyed to her in payment of an alleged debt due her by her husband. (Ga.) 754.

VII. PROPERTY RIGHTS; WILLS.

The vendor's interest in a partially performed contract to purchase land of which the vendee has been put in possession is held to pass to his personal representative on his death, and not to be subject to execution for the debts of his heir. (Mich.) 643.

Revocation of license.

The revocation of a parol license to construct a dam and ditch on the land of the licensor is held not to be prevented by the fact that large expenditures had been made on the faith of it, or that it was given with knowledge that such expenditures would be made. (Ala.) 720.

Fixtures.

Heating apparatus bought by a man under a contract reserving title to the seller, and permanently placed in a building owned by himself and his wife by entirety, is held not to become a fixture so as to prevent its removal for nonpayment of the purchase money, if removal will not materially injure it or the building. (Mich.) 632.

Partition.

Including the husband as grantee in a

deed to partition to the wife her share of property in which she has an undivided interest is held to give him no greater interest than though the deed had been to the wife alone. (Tenn.) 332.

Wills.

Revocation of a will is held to be effected by adopting its mutilation as such. (N. C.) 209.

The negligent placing of a will so that its existence is not known for several years after testator's death, and the laches of the devisee in not producing it, are held not to estop him from asserting his claim against one who has acquired title from the heir, at any time before the right to probate or register the will is barred. (Ky.) 253.

The widow of a beneficiary is held not to be entitled to share under a will directing that, in case of the death of a beneficiary before the time for distribution arrives, his share shall be paid over to his next of kin, as, according to the statute of distributions, his personal estate would be divided and distributed. (N. Y.) 536.

VIII. CIVIL REMEDIES.

A judgment for plaintiff in an action for injury to his vehicle through negligent obstruction of a highway is held to be no bar to another action for injury to his person, arising out of the same accident. (N. Y.) 176.

For the purpose of determining the proper recipient of a pension due the widow of a deceased person, it is held that the court will inquire into the validity of a divorce which he had obtained. (Iowa) 583.

Damage from diminution of yield because of breach of contract to furnish fertilizer to assist in making a crop is held not to be too remote to sustain an action for the breach. (N. C.) 958.

Limitation of actions.

The fact that a mortgage is given to secure payment of an entire sum which is payable in instalments is held not to prevent the running of the statute of limitations against each instalment as it becomes due. (Wash.) 396.

Estoppel.

The owner of a piano who leases it to a retail dealer in musical instruments is held not to be estopped to claim it from one who first hired and then purchased it from the retail dealer, who held it only under a lease providing that it should be kept in the purchaser's house, although the lessor failed to notify such purchaser of his claim to the instrument for nearly two years, during which time the latter bought and paid for 57 L. R. A.

it, believing it to belong to the retail dealer. (Mass.) 289.

The enforcement of taxes against property by a city is held not to be restrainable by injunction, on the ground of equitable estoppel, because the city treasurer erroneously marked taxes paid on the tax records, and a third party, relying on the record and believing the taxes were paid, loaned money on the property and acquired title thereto by foreclosure. (Neb.) 150.

Garnishment.

The right to garnish a debtor is held not to be limited to the situs of the chose in action; and the garnishment, by a citizen of one state, of a debtor of the same state, whose creditor resides, and whose debt was contracted and is payable, in another state, is held to be such an attachment of the chose in action as will authorize the court to obtain jurisdiction to dispose of it by publication of the summons against the defendant. (C. C. A. 8th C.) 120.

Injunction.

A combination of mercantile dealers to compel another dealing in similar goods to sell at prices fixed by it, or, upon his refusal to do so, to prevent those of whom its members are purchasing customers from selling goods to him, is held to be void; and an injunction is held to be properly granted to restrain the members of such combination from carrying into effect their purpose. (Ga.) 547.

The maintenance of a tower by a land-owner on his land in such a way that ice formed on it, from freezing rain or spray from a cataract, falls on to adjoining property so as to injure it and endanger human life, is held to be properly enjoined. (N. Y.) 545.

Specific performance.

In case of an agreement to convey an interest in land to one for services in securing the location of a railroad depot thereon, it is held that specific performance will not be enforced where the grantee has agreed to divide with certain officials of the road all money received by him from sales of land during the construction of the road. (Wash.) 404.

Evidence.

A declaration by a motorman running an electric car, in regard to the cause of the accident, made while the car was still on the body of a child whom it had run down, is held to be admissible in evidence as a part of the *res gesta*, in an action for the injury. (W. Va.) 186.

A presumption of negligence on the part of an electric company is held to arise when injury results to a traveler in a public street from one of its live wires, which has broken and is hanging so near the ground as to be within reach therefrom. (Or.) 619.

Proof that an electric-light wire controlled by a private corporation, and normally suspended upon poles along a public street, was trailing broken on the sidewalk, is held to afford a presumption of negligence, in a suit against such corporation by a person injured through electric shock by coming in contact with such wire. (N. J. Err. & App.) 624.

The admission of testimony of physicians appointed by the court to examine plaintiff in an action for negligent injuries, as to the result of an examination made after defendant's motion for such examination was withdrawn, is held to be erroneous. (Ky.) 875.

Discovery.

The production of broken machinery is held to be compellable for examination by persons intending to testify as experts in an action at law for personal injuries caused by its breaking. (N. H.) 949.

Equity.

In case of a conveyance by an aged parent to his son to secure support for himself for the remainder of his life, and the failure of the son to comply with his agreement, rendering impossible of realization the purpose of the grantor, it is held that if the grantor elects to rescind the transaction a court of equity will take jurisdiction to give a protective remedy to him by establishing his status as owner of the property. (Wis.) 458.

A suit in equity to reach assets included in a general assignment for creditors, and also included within the terms of prior deeds of trust purporting to cover such assets as after-acquired property of the debtor, is held not to be maintainable by an 57 L. R. A.

execution creditor who had levied on the property before possession was taken by the assignee, on the ground that the deeds of trust were void as to such property. (W. Va.) 869.

Subrogation.

One who furnishes money for the purpose of discharging a mortgage lien upon real estate is held to have no right to be subrogated to the rights of the mortgagee, in the absence of an agreement or understanding that the mortgage is to be kept alive for his benefit, or that he shall be given a lien on the premises in lieu of the one which has been discharged. (Neb.) 901.

Execution.

The interest of the assured in a twenty-year distribution policy of insurance on his life, which will cease on his failure to pay premiums, is held not to be an estate within the meaning of a statute making an execution a lien, from the time it is placed in the hands of the officer, on all the personal estate of or to which the judgment debtor is, or may afterwards and before the return date of the writ become, entitled. (Va.) 380.

A bicycle used by a painter, paper hanger, and billposter to earn a livelihood is held to be within the provisions of a statute exempting from execution the team of a laborer who is the head of a family, and the wagon or other vehicle, by the use of which he earns his living, although the bicycle was not known when the statute was enacted. (Iowa.) 764.

An equitable life estate created by a wife in favor of her husband, which shall be free from the debts of the beneficiary, is held to be void where the statute provides that estates of every kind, holden or possessed in trust shall be subject to debts and charges of the persons for whose benefit they are holden, as they would be if those persons owned the like interest in the things holden or possessed, as in the uses or trusts thereof. (Va.) 384.

Damages.

The measure of damages for breach of warranty of the capacity of a kiln for drying lumber, when there is no kiln of the agreed capacity on the market, is held not to be the difference between the value of the kiln sold and one of the required capacity, but the difference between the value of the apparatus delivered and the contract price. (N. C.) 193.

Damages for the death of the child are held not to be allowable in an action by husband and wife for the physician's abandonment of the wife during her confinement. (Cal.) 215.

Damages for mental anguish caused by breach by a telegraph company of its contract to transmit money promptly are held not to be recoverable. (Ky.) 611.

Substantial damages are held to be recoverable for breach of a contract to transmit promptly a telegram which the company knew to be addressed to a physician directing him to come to the sender's house at once. (Neb.) 905.

RÉSUMÉ OF DECISIONS.
(CRIMINAL LAW AND PRACTICE.)

In assessing the damages against a carrier for breach of its contract to transport a corpse, it is held that mental suffering may be considered. (Ky.) 771.

The liability of a municipality to damages for permitting a drainage ditch to become obstructed and filled with filth and offal, so that the water flows onto adjoining land and causes sickness in the family of its owner, is held to be limited to the injury to the property, and not to include injury

by sickness or death, or by loss of time, etc., resulting from sickness. (N. C.) 207.

In an action of tort, if it be impossible, in the nature of the case, to distinguish between the damage arising from the actionable injury, and damage which has another origin, it is held that the jury should be left to make from the evidence the best estimate in their power as reasonable men, and award to the plaintiff compensatory damages for the actionable injury. (N. J.) 309.

IX. CRIMINAL LAW AND PRACTICE.

The adoption of a new Constitution reserving the right of trial by jury "as heretofore enjoyed" is held not to include the right, which had existed by statute for many years, of having the jury assess the punishment in criminal cases whenever there is an alternative or discretion in regard to it. (Mo.) 846.

The granting of a reprieve and the fixing of a date for the execution of a convicted criminal is held to be by the common law a judicial power, and not to be exercised by the governor except in so far as it is expressly permitted by the Constitution. (N. J. L.) 312.

In case of a conviction of selling intoxicating liquors without a license in violation of a statute forbidding such sale, and providing that the punishment therefor shall be a fine and, at the discretion of the court, imprisonment in the county jail, it is held that the court has no power, in addition to imposing a fine and costs, to require of the defendant sureties for good behavior. (W. Va.) 426.

The carrying of deadly weapons, being an offense fully provided for and punished by state law, it is held to be beyond the power of a municipal corporation to make it an offense punishable under a city ordinance, unless such power is expressly conveyed by the municipal charter. (W. Va.) 413.

Forgery.

To add to a canceled check the words "in full of account to date," with intent to alter its effect as a receipt, is held to constitute forgery. (Va.) 744.

Jeopardy.

One accused of a capital offense is held
57 L. R. A.

not to have been in jeopardy, so as to bar a subsequent trial, where, after the jury had been impaneled and the trial begun, the judge discharged them after ascertaining, by independent investigation, that some of them were so prejudiced in favor of the accused as to be incompetent, and had endeavored to prejudice other jurors, belittled the state's evidence, procured the intoxication of the bailiff, and obtained communication with persons not jurors. (Mich.) 808.

Robbery.

Grabbing a purse from one's hand so quickly that he has no opportunity to resist is held to involve sufficient force to constitute robbery. (Ky.) 432.

Self-incrimination.

Merely exempting a witness in a criminal case from liability to have his testimony used against him in case he is subsequently prosecuted for an offense to which it relates is held not to be sufficient to prevent his claiming the protection of a constitutional provision that no person shall be compelled to testify against himself in any criminal case. (Mo.) 654.

Extradition.

A prisoner charged with violation of the Federal laws, who is transferred from one state to another for trial under process from a Federal court, is held to be properly turned over to the authorities of the latter state for trial upon a charge of violation of its laws, without being afforded an opportunity to return to the former state. (Mich.) 295.

INDEX TO NOTES.

(The General Index follows this.)

Auctions.		Conflict of Laws.—continued.	
Right to withdraw property from an auction sale after it has been offered:—		II. As between <i>lex loci contractus</i> and <i>lex fori</i> ; remedy	520
I. Scope	784	III. As between <i>lex loci contractus</i> , or <i>lex domicilii</i> , and <i>lex rei sitæ</i>	
II. In England and Canada		a. Personal property	523
a. Withdrawal after bids	784	b. Real property	524
b. Withdrawal before bids	787	Contracts.	
III. In the United States		Of married women; conflict of laws as to	518
a. In general	787	Nature of interest of vendor or vendee in a land contract as real or personal property:—	
b. Judicial and official sales	789	I. Application of the doctrine of equitable conversion	
IV. Summary	789	a. In general	643
Banks.		b. Where judgment has been entered against one of the parties to the contract	
Taxation of franchise of	33	1. Against the vendee	644
Bridges.		2. Against the vendor	645
Taxation of franchise of	33	c. Where one of the parties to the contract subsequently dies	646
Conflict of laws.		d. For purpose of determining who must bear losses and receive accessions	647
As to validity of marriage:—		II. Effect of provisions of contract	647
I. Manner or form of solemnization; preliminaries	155	III. The contract must be one which equity will specifically enforce	648
II. Polygamous marriages; temporary marital unions	159	IV. Time at which conversion takes place	
III. Matrimonial capacity of the parties		a. In general	649
a. In general; <i>lex loci</i> or <i>lex domicilii</i> ; public policy	161	b. Effect of vendee's failure to take possession	650
b. Incestuous marriages	166	c. Optional contracts	651
c. Marriages between members of different races	167	V. Reconversion	652
d. Remarriage of divorced person	169	VI. Application of doctrine in actions at law	653
e. Former husband or wife living	171	VII. Conclusion	654
f. Nonage; consent of parents or guardian	172	Corporations.	
IV. Summary	173	Taxation of corporate franchises	33
As to matrimonial property:—		Courts.	
I. Introduction	353	Power of court to call and examine witnesses:—	
II. When <i>lex domicilii</i> is opposed to the <i>lex rei sitæ</i> or <i>lex fori</i>		I. Power of court to call witnesses	875
a. Real estate, or immovables	353	II. Power of court to examine witnesses	
b. Personal property, or movables	354	a. To elicit facts or supply evidence	878
c. What law determines character of property as real or personal	359	b. In order that the questions or answers may be understood	880
III. When law of matrimonial domicile is opposed to that of place where marriage celebrated	359	c. To keep witnesses within bounds	880
IV. How original matrimonial domicile ascertained	360	d. Where they are reluctant	881
V. Change of matrimonial domicile		e. Leading and improper questions	881
a. Property acquired prior to change	363	f. Suggesting a change in the form of questions	882
b. Property acquired after the change	366	g. Cross-examination of witnesses	882
c. Tacit mortgages or liens	367	h. Showing partiality or prejudice	882
VI. Marriage settlements	368	i. Objection and exception to action of trial court	884
VII. Summary	373	j. Summary	884
As to capacity of married woman to contract:—		Damages.	
I. As between <i>lex loci contractus</i> and <i>lex domicilii</i>		For breach of contract on sale of article that has no market price:—	
a. General rule	513	I. Scope and purpose	198
b. Exceptions; when domicile is at forum	517		971

Damages.—continued.

II. Breach by vendor	
a. General rules as to recovery	198
b. Measure of damages	
1. In case of total absence of market	195
2. When goods were obtainable at other markets	197
3. When goods were obtainable at other times	198
4. When purchased for special purpose	
(a) The general rule	198
(b) For resale	198
(c) To be sent to a market at another place	200
(d) For use	201
5. Duty of vendee to avoid or reduce injury	202
III. Breach by vendee	
a. Rule in the entire absence of a market	204
b. Rule where neighboring market may be reached	205
IV. Determination as to existence or condition of market	205
V. Damages measured by profits lost	206
VI. Conclusion	206
Deeds.	
Effect of deed in partition as distinguished from ordinary deed:—	
I. Deed to person other than cotenant	332
II. Warranty	
a. In general	333
b. Implied warranty between those holding by descent	334
c. Implied warranty between those holding by purchase	336
III. Estoppel to set up after-acquired title	337
IV. Estates acquired by partition deed between parties holding different estates	337
V. Words of inheritance as necessary to vest fee	338
VI. Rights of subsequent purchasers	338
VII. Changing title from descent to purchase	339
VIII. Effect as revoking previous will	339
IX. Failure of wife to join in deed	340
X. Deed by person under disability	340
XI. Execution of deed	
a. Deed not executed by all the parties to it	340
b. Defective execution	340
XII. Effect on judgment and mortgage liens	340
XIII. Parol evidence to show nature of deed	341
Divorce.	
See HUSBAND AND WIFE.	
Eminent domain.	
What lands are to be deemed part of the tract damaged by taking a portion thereof under eminent domain:—	
I. Different holdings	332
II. Property in city	
a. Separated by highways, railroads, or other property	336

Eminent Domain. II.—continued.

b. Separated by plat lines	339
c. Separating and severing buildings	341
d. Part of lot or lots injured	343
III. Farm lands in a contiguous body	344
IV. Farm lands separated by highways, railroads, canals, or other property	345
V. Lands in different counties	348
VI. Summary	348
Estoppel.	
By laches in probating will	253
Husband and wife.	
Conflict of laws as to validity of marriage	155
Conflict of laws as to matrimonial property	353
Right to contest the validity of a divorce decree after the death of one or both of the parties	583
Infants.	
Insurance on life of minor	496
Liability of an infant for torts:—	
I. General liability of an infant for torts	672
II. Tort in inducing a contract	
a. By fraudulent representations	675
b. By false warranty	680
III. Tort in the performance of a contract	
a. Contract of bailment	
1. Damage to property by negligence	680
2. Damage to property by wilful act	681
3. Refusal to deliver property	682
b. Contracts other than bailment	
1. By negligence	683
2. By other acts	683
IV. Other torts arising from contracts	683
V. Estoppel of an infant by his fraud	
a. When estopped to plead infancy, in an action on contract	684
b. When estopped to reassert title or to demand a second payment	685
c. When compelled in equity to make satisfaction for his fraud	687
VI. Liability of an infant as trustee or officer	688
VII. Summary	688
Parent's duty to support	728
Insurance.	
On the life of a minor:—	
I. Policies taken out by minors	496
II. Insurance to secure creditors	497
III. Policies taken out by others on infant's life	499
IV. Insurance in benefit societies	502
V. Surrender or disaffirmance of policy on infant's life	504
VI. Summary	506
Judgment.	
Right to contest the validity of a divorce decree after the death of one or both of the parties:—	
I. Introduction	583
II. Attack by surviving party	

Judgment II.—continued.

a. In direct proceeding to set aside or vacate decree	
1. Appeal	588
2. Motion or petition filed in the original cause	584
3. Writ of error	587
4. New suit	588
b. In collateral proceeding	593
III. Attack by stranger to the decree	
a. In direct proceeding	599
b. In collateral proceeding	600
IV. Death of one party pending appeal	608
V. Conclusion	605
Judicial sale.	
See AUCTIONS.	
Leases.	
In probating will	253
Master and servant.	
Statutory liability of employers for defects in the condition of their plant:—	
I. Introductory remarks	817
II. Effect of these statutory provisions as to defects; generally	818
III. Master not liable unless the defect alleged was the proximate cause of the injury	818
IV. What instrumentalities are covered by the terms "ways," etc.	
a. Two or more descriptive terms used in combination	819
b. "Ways"	820
c. "Works"	820
d. "Machinery"	821
e. "Plant"	821
V. Significance of the qualifying phrase, "connected with or used in the business of the employer"	
a. Instrumentalities temporarily used by servants in the transaction of the business	821
b. Structures, etc., in course of erection or demolition	826
c. Instrumentalities not yet brought into use, or disused	827
VI. What constitutes a defect	827
VII. Specific examples of defects	
a. Defects in the condition of the ways	830
b. Defects in the condition of the works	830
c. Defects in the condition of the machinery	830
d. Defects in the condition of the plant	831
VIII. Conditions not amounting to defects	832
IX. Defective system, employer liable for	835
X. Not discovered or remedied owing to negligence, etc.	
a. Generally	836
b. Not discovered	837
c. Not remedied	838
d. Persons intrusted with the duty, etc.	833
XI. Abnormal conditions resulting from the use of the appliances furnished by the master, how far regarded as defects	839

Master and Servant.—continued.

XII. Defects in temporary appliances constructed by the servants themselves, not deemed to be chargeable to the employer	841
XIII. Duty of servant to report defects	
a. Statutory and common-law doctrines compared	842
b. Position of a servant who fails to report a defect	843
c. Position of a servant who has reported a defect	844
Parent and child.	
Parent's duty to support child as affected by child's interest in trust estate or other property:—	728
I. Introductory	729
II. Obligation of parent who has ability to support	729
III. Application of child's property	
a. In general	730
b. In particular cases	
1. Contract	731
2. Express trust for maintenance	733
3. Gift to parent for maintenance	733
4. Where trustees have discretion	734
5. Where there is a direction for accumulation, or no express authority for use of income	735
6. Where infant's rights are contingent	736
c. To what extent	
1. Need of child	738
2. Past and future maintenance	739
3. Income and principal	740
IV. Rights of creditors	741
V. Summary	743
Partition.	
Effect of deed in partition as distinguished from ordinary deeds	832
Railroads.	
Taxation of franchise of	83
Real property.	
Nature of interest of vendor or vendee in a land contract as real or personal property	643
Robbery.	
What force is sufficient to constitute robbery:—	
I. Introductory	432
II. Actual force	
a. Snatching	
1. When there is resistance	432
2. When there is no resistance	433
3. When property is attached to the person so as to afford resistance	437
b. When the taking is without knowledge of the person robbed	438
III. Constructive force	
a. In general	439
b. Demand with overwhelming numbers or demonstrations of force	439

Robbery.—continued.

c. Threatening to charge with <i>crimen innotinatum</i>	440
d. Other threats of prosecution	441
IV. Force used to obtain property under color of right or claim of ownership	443
V. Force employed as a means of escape or to prevent a recaption of property taken without force	443
VI. Decisions under special statutes	445
VII. Miscellaneous cases	446
VIII. <i>Résumé</i>	447

Taxes.

Taxation of corporate franchises in the United States:—

I. Froem	33
a. Scope of note	34
b. Definitions of terms employed	34
II. Power and jurisdiction of a state to tax	34
III. Some general principles	35
IV. What are franchises	35
a. In general	35
b. Within tax laws	36
c. Nature as subjects of taxation	37
V. Taxability of franchises	38
a. When taxable	38
b. When not taxable	39
1. Generally	40
2. By the state	40
3. Locally	40
c. Exemptions	42
d. Property exempt as part of franchise	45
VI. Franchise taxes	48
a. What taxes are such	51
b. What taxes that seem to be such are not	53
c. Taxes on capital stock	53
d. Interference with Federal agencies and burdens on Federal grants	55
1. Franchises	55
(a) Railroads	56
(b) Telegraphs	56
(c) Bridges	56
(d) Banks	56
2. United States bonds	57
3. Patents and copyrights	57
e. Taxes on passenger traffic	59
f. Taxes on receipts, income, etc.	59
1. Corporations engaged in interstate or foreign commerce	59
2. Railroad, steamship, navigation, express, and telegraph companies generally	64

Taxes, IV.—continued.

3. Miscellaneous corporations	69
4. Local taxes on receipts of local corporations	69
g. Taxes on insurance premiums	69
1. In general	70
2. Domestic companies	71
3. Foreign companies	72
h. Taxes on bank deposits	72
VII. Organizations subject to franchise taxes	73
a. Generally	75
b. Domestic corporations	75
1. In general	79
2. Engaged in interstate commerce	80
3. Possessed of other franchises	80
c. Foreign corporations	80
1. In general	83
2. Conditions upon the privilege of exercising corporate franchises	83
3. What is doing business or employing capital within the state and the meaning of tax laws	92
4. Engaged in interstate commerce	92
VIII. Limitations on franchise taxation	93
a. Constitutional	97
b. Double taxation	98
IX. Valuation of franchises for the purposes of taxation	104
X. Administration and relief	108
XI. Conclusion	108
Telegraphs.	33
Taxation of franchise of	51
Torts.	673
Liability of infant for	253
Wills.	255
Effect of delay in probating wills:—	257
I. Generally	258
II. Where the estate is sold or mortgaged by the heirs	260
III. Where the devisees are under disabilities	261
IV. Where the will is concealed, lost, or destroyed	262
V. Estoppel	263
VI. Second wills and codicils	264
VII. Suspension of probate proceedings	266
VIII. Probate in solemn form and second probate	266
IX. Wills from other states	266
X. Statutory limitations	266
XI. Summary	266
Witnesses.	875
Power of court to call and examine	

GENERAL INDEX

TO

OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes precedes this.)

ABATEMENT.

Of Action against Master for Death of
Servant, see ACTION OR SUIT, 2.

ABUTTING OWNER.

Right of Action by, for Obstructing
Street, see HIGHWAYS, 2.

ACCORD AND SATISFACTION.

NOTES AND BRIEFS.

As defense to claim for usury. 801

ACCOUNT.

Conclusiveness of, see PLEADING, 11.

ACCOUNTING.

Between Sheriff and Deputy, Jurisdic-
tion of, see EQUITY.

ACTION OR SUIT.

Parties to Creditors' Bill, see CREDIT-
ORS' BILL, 1.

By Third Person Taking Poisonous
Drug Sold for Harmless Medicine,
see DRUGGISTS.

Abatement of, for Death of Servant, see
MASTER AND SERVANT, 12.

1. An action against a county treasurer
and his bondsmen for the recovery of mon-
eys alleged to have been converted by such
treasurer is not prematurely brought, if
commenced after the termination of office
of such treasurer, and after he has given a
bond and qualified as his own successor in
office. *Thomasen v. Hall County (Neb.)*
303

2. A cause of action against a master for
injuries inflicted on a servant by a mob of
strikers does not survive the servant's
death, under a statute providing that no ac-
tion for personal injury shall die with the
person except actions for assault, etc.
Foreman v. Taylor Coal Co. (Ky.) 447

3. Adult heirs of a deceased person are
not necessary parties to a proceeding by his
former wife to contest the validity of a di-
vorce which he had obtained from her, for
the purpose of establishing her right to a
pension as his widow. *Lawrence v. Nelson*
(Iowa) 583

57 L. R. A.

NOTES AND BRIEFS.

Election of remedy. 122
Separate actions for injuries to person
and to property by same act of negligence. 176

By injured person on policy indemnifying
against loss by injury. 791

ACT OF GOD.

Nothing less than such a fortuitous
gathering of circumstances as prevents the
performance of a duty, and such as could
not have been foreseen by the exercise of
reasonable prudence, or overcome by the ex-
ercise of reasonable care and diligence, con-
stitutes an act of God which will excuse the
discharge of a duty. *Southern P. Co. v.*
Schoer (C. C. App. 8th C.) 707

ADMISSIONS.

See EVIDENCE, 24.

ADVERSE POSSESSION.

Under Torrens Law, see JUDGMENT, 6.

AFFIDAVIT.

Of Juror to Impeach Verdict, see NEW
TRIAL, 1.

AMENDMENT.

Of Pleading, see PLEADING, 4.

ANIMALS.

NOTES AND BRIEFS.

Negligence in leaving horse untied in
street. 627

ANTI-TRUST ACT.

As Denial of Equal Protection of Laws,
see CONSTITUTIONAL LAW, 10.

APPEAL AND ERROR.

1. A constitutional provision for the
transfer of criminal cases from a division
of the appellate court to the court in banc
on motion of the losing party when a judge
dissents from the opinion applies in favor
of the state; and the rule that in such cases
the state is not entitled to a review of a
judgment of the trial court, except in spe-

975

cial cases allowed by statute, is not applicable. *State v. Hamey* (Mo.) 846

Assignments of error.

2. An assignment of error upon the refusal of the court to allow a witness to answer a specified question propounded by the party calling him is not properly made unless it states what evidence was thus sought to be elicited, and that the court was informed thereof at the time of the ruling. *Bigby v. Warnock* (Ga.) 754

Bill of exceptions.

3. In the absence of a bill of exceptions the findings of the trial court on a question of fact will not be reviewed. *University of Michigan v. McGuckin* (Neb.) 917

4. The statement of facts in a bill of exceptions is conclusive in an appellate court, unless it is excepted to and the exceptions are recorded in the bill when it is settled. *Purple v. Union P. R. Co.* (C. C. App. 8th C.) 700

Exceptions.

5. An exception covering several distinct propositions of the charge to the jury is insufficient if either proposition is correct. *Hindman v. First Nat. Bank* (C. C. App. 6th C.) 108

6. An exception "to the court's measure of damages" is sufficient if the charge on the measure of damages constitutes a single subject, and the circumstances are such that the judge could not have misapprehended the scope of the exception. *Id.*

7. Preserving an exception to the refusal by the trial court of a peremptory instruction to find for defendant on the whole evidence requires the appellate court to review the evidence as a whole. *Fuchs v. St. Louis* (Mo.) 136

Hearing and determination.

8. A defendant in a criminal case cannot complain of error in the admission of evidence which he himself draws out. *State v. Hamey* (Mo.) 846

9. Objections to the form of hypothetical questions addressed to expert witnesses must be made in the trial court. *Western U. Teleg. Co. v. Church* (Neb.) 905

10. Objection to the overruling of a demurrer to plaintiff's evidence is waived by the introduction of evidence on behalf of defendant. *Fuchs v. St. Louis* (Mo.) 136

11. The question whether or not a petition to recover damages for injuries to the person and for wrongful death, to which a demurrer was sustained, states a cause of action, may be reviewed on appeal, although the causes of action were improperly joined, where no motion to require plaintiff to elect on which he would proceed was made. *Foreman v. Taylor Coal Co.* (Ky.) 447

12. Defects in a motion for a new trial, caused by the failure to properly assign error upon the rulings of which complaint is made, cannot be cured by setting out in the bill of exceptions the various grounds of the motion, and specifically assigning error upon the overruling of each ground. *Phoenix Ins. Co. v. Schwartz* (Ga.) 752

57 L. R. A.

Grounds for reversal.

13. Error without prejudice is no ground for reversal. *Southern P. Co. v. Schoer* (C. C. App. 8th C.) 707

14. The admission of testimony of physicians appointed by the court to examine plaintiff in an action for negligent injuries, as to the result of an examination made after defendant's motion for such examination was withdrawn, is erroneous. *South Covington & C. Street R. Co. v. Stroh* (Ky.) 875

15. The rejection of evidence that a car in which goods were shipped was sealed at the loading point and remained under seal until the delivery of the goods to the consignee is error, where the issue is whether the railroad company delivered to the consignee all the goods it received. *Missouri, K. & T. R. Co. v. Simonson* (Kan.) 765

16. Remarks by the court in the presence of the jury, in a colloquy with counsel as to the propriety of submitting a special finding, will not require reversal because they indicate the court's opinion upon the defense of contributory negligence, if the jury have been fully instructed on that question, and the remarks are not intended for their guidance, and do not prejudice defendant's case. *Boyd v. Portland General Electric Co.* (Or.) 619

17. The court's telling the jury the legal effect of their answers to questions submitted to them for a special verdict is ground for reversal. *Gerrard v. La Crosse City R. Co.* (Wis.) 465

18. An instruction in an action for personal injuries, that defendant's answer denied the lameness of plaintiff, is prejudicial error, where the answer really denied that the lameness was caused by defendant, and by the means alleged, and there was evidence tending to show a previously existing lameness. *Swift v. Bleise* (Neb.) 147

19. The refusal of an instruction in an action for personal injuries, to the effect that defendant was not responsible for damage caused by want of reasonable care on plaintiff's part after the alleged injury, is erroneous, where evidence has been admitted, without objection, tending to show that plaintiff's condition, expense, and suffering were in part due to his failure to exercise reasonable care after the hurt was received. *Id.*

20. Insufficient finding upon certain issues in the case does not require reversal unless the finding of those issues in favor of appellant would entitle him to a judgment. *Blochman v. Spreckels* (Cal.) 213

Judgment.

21. A judgment in plaintiff's favor on his appeal from an involuntary nonsuit granted at the close of his evidence is not conclusive on an appeal by defendant from a judgment in plaintiff's favor at the close of all the evidence, which differs in many essential particulars from that introduced at the first trial. *Fuchs v. St. Louis* (Mo.) 136

22. A verdict for an entire sum to be

awarded to a man and wife for injury to her by a physician's abandonment of her during confinement will be set aside if the court's instructions authorized a consideration of the fact of the child's death in fixing the damages. *Lathrope v. Flood* (Cal.) 215

NOTES AND BRIEFS.

Appeal and error; waiver by failing to object to evidence; estoppel to claim that instruction erroneous. 216

Prejudicial remarks by counsel. 772

Reversal for insufficiency of evidence. 848

ASSESSMENT.

For Public Improvement, see PUBLIC IMPROVEMENTS.

ASSIGNMENT.

Of Lease, Covenant against, see LANDLORD AND TENANT, 1.

Of Uurious Mortgage, see USURY, 3.

ASSIGNMENT OF ERROR.

See APPEAL AND ERROR, 2.

ASSUMPSIT.

Recovery Back of Money Paid on Draft Drawn against Fictitious Bill of Lading, see BILLS OF LADING.

ASSUMPTION OF RISK.

See MASTER AND SERVANT, 14.

ATTACHMENT.

Of Property Conveyed to Debtor's Wife, see EVIDENCE, 7.

NOTES AND BRIEFS.

Attachment; conclusiveness of judgment against officer on party procuring. 123

ATTESTING WITNESS.

To Will, see WILLS, 2.

ATTORNEYS' FEES.

Discrimination as to, see CONSTITUTIONAL LAW, 13, 14.

See also INSURANCE, 23.

NOTES AND BRIEFS.

Attorneys' fees; imposition of, against railroad companies, as denial of equal protection. 766

AUCTIONS.

NOTES AND BRIEFS.

Auctions; right to withdraw property from an auction sale after it has been offered:—(I.) Scope; (II.) in England and Canada: (a) withdrawal after bids; (b) withdrawal before bids; (III.) in the United States: (a) in general; (b) judicial and official sales; (IV.) summary. 784

BAILMENT.

See also WAREHOUSEMEN.

1. Storage charges may be recovered, although the goods stored are damaged through the negligence of the storer, where 57 L. R. A.

he has been compelled to make good the loss by paying damages. *Marks v. New Orleans Cold Storage Co.* (La.) 271

2. The owner of a cold-storage warehouse may retain possession of goods stored until the storage charges are paid; and the amount due for storage cannot be compensated by an unliquidated claim for damages suffered by the goods. *Id.*

3. A cold-storage company may by contract limit its liability, provided such limitation does not contravene rules and laws enacted on grounds of public policy; but the limited liability clause should be specific, and include in its terms all damages and acts for which the cold storer does not hold himself responsible. *Id.*

4. The undertaking of the owner of a cold-storage warehouse being to preserve goods liable to undergo or actually undergoing deterioration through the development in them of insect life, it is not necessary, in order to recover against him for damage to goods, to prove more than that the goods, when delivered into his cold storage, were, according to the usual and ordinary test of commerce, sound. *Id.*

5. For the deterioration of goods while in cold storage the cold storer is responsible, notwithstanding that in the heading of the receipt issued for the goods there is printed a limited-liability clause to the effect that goods are not examined when received, and therefore the warehouseman will not be responsible for the contents or damage, or for leakage, depreciation, or damage by rats. *Id.*

6. While the holder of a warehouse receipt is entitled to delivery of the property stored, upon tender of payment of charges on the particular property for which the receipt calls, under La. act No. 156 of 1886, and payment of charges on other property which has been withdrawn cannot be required as a condition of delivery, there must be an actual tender, in due form, of the charges, in order to enable the holder of the receipt to recover damages for delay in not delivering the goods. *Id.*

NOTES AND BRIEFS.

Bailment; of grain in public warehouse. 268

Bailee's duty as to preserving property bailed. 271

Law of, applicable to custodian of public moneys. 303

BANK EXAMINER.

See BANKS, 4, 5.

BANKS.

Removal of Cause from Division to Court in Banc, see APPEAL AND ERROR, 1.

Invalid Contract by Defaulting Officer of, see CONTRACTS, 11.

County Treasurer's Liability for Loss of Money by Failure of, see COUNTY TREASURER.

Liability for False Representations by Cashier, see FRAUD AND FRAUDULENT CONVEYANCES, 3, 4.

Imputing Knowledge of Clerk to Bank Depositor, see NOTICE, 2, 3.

Liability of Officer for Loss Through, see OFFICERS, 4.

See also EVIDENCE, 34; PLEADING, 12.

1. A statement by the cashier of a bank to one inquiring into the condition of one of its corporation customers, dividing its deposit into capital and surplus, is binding on the bank. *Hindman v. First Nat. Bank* (C. C. App. 6th C.) 108

2. A bank is liable for the act of its cashier in falsely certifying that the capital of an insurance company is all paid in and on deposit in the bank, if made in the general course of the bank's business from facts supposed to be known to him, although the giving of such a certificate is *ultra vires* the bank, if it is not sufficiently so to carry notice to all of its *ultra vires* character. *Id.*

3. A bank falsely certifying that an insurance company has its authorized capital on deposit, for the purpose of inducing the insurance commissioner to grant it a license, is liable to persons who are damaged by the purchase of the stock in reliance thereon, if it is intended for the information of all who shall be disposed to deal in the company's stock, or to one who, desiring to purchase stock, applies to the bank for information and is referred to the certificate, and who purchases in reliance thereon. *Id.*

4. A bank examiner who takes charge of the assets of a national bank under the directions of the comptroller is not the agent for the bank in such negotiations as it may be permitted to enter into with a view to the resumption of business. *Teumseh Nat. Bank v. Chamberlain Bkg. House* (Neb.) 811

5. Statements by a bank examiner who takes charge of the assets of a national bank under the direction of the comptroller, as to the liabilities of, and the value and condition of securities already furnished by, a defaulting officer of such bank, who, for the purpose of replenishing its assets and enabling it to resume business, is allowed to furnish collateral securities for his indorsements upon paper previously sold by him to the bank,—are not binding upon the bank; and one who furnishes collateral securities to such defaulting officer, to be so used by him, cannot rely upon such representations of the examiner as a defense in an action by the bank to foreclose its lien upon such securities. *Id.*

6. False representations by a defaulting bank president as to his liability to the bank and the value and condition of securities already furnished by him are not binding upon the bank, so as to enable a person furnishing securities at his request, with knowledge of the purpose for which he intends to use the same, to rely upon such representations as a defense in a subse-

quent action by the bank to foreclose its lien upon such securities. *Id.*

Cashier's check.

See also CHECKS.

7. A cashier's check, being merely a bill of exchange drawn by a bank upon itself, and accepted in advance by the act of its issuance, is not subject to countermand like an ordinary check; and the relations of the parties to such an instrument are analogous to those of the parties to a negotiable promissory note payable on demand. *Drinkall v. Movius State Bank* (N. D.) 341

8. The payee of a cashier's check indorsed in payment of chips to be used in gambling may enforce payment thereof against the maker, notwithstanding the check has already been paid to the indorsee, where payment was made to the latter after notice of the invalidity of the consideration for the indorsement. *Id.*

9. A bank has sufficient notice of the invalidity of an indorsement on a cashier's check to render it liable for paying it to the indorsee, where it knows that the latter is the keeper of a gambling establishment, and he presents the check the day after it is drawn, before the regular hour for opening the bank, and the indorser is present at the time, and repeatedly protests against the payment of the check and demands its cancellation. *Id.*

Forged checks.

See also EVIDENCE, 17; NOTICE, 3.

10. The drawer of a check is not bound to prepare it so that no one else can successfully tamper with it, to charge the bank with the loss in case it pays it after its amount has been fraudulently raised. *Critten v. Chemical Nat. Bank* (N. Y.) 529

11. The drawer of a check owes no duty to detect a fraudulent alteration of it, to a bank in which it is deposited for collection, and to which the proceeds are paid by the drawee. *Id.*

12. By failing to discover forgeries among the vouchers returned by the bank on balancing the depositor's account, and to notify the bank thereof, the depositor does not adopt the checks as genuine, ratify their payment, or estop himself from asserting that they are forgeries. *Id.*

13. A depositor who, by negligence in failing to detect forgeries among the vouchers returned by the bank, and give the bank notice thereof, causes loss to the bank, either by enabling the forger to repeat his fraud, or by depriving the bank of an opportunity to obtain restitution, will be responsible for the damage caused by his default. *Id.*

14. A depositor owes the bank the duty to exercise reasonable care to verify the vouchers returned by the bank on balancing the account by the record of issued checks, if he has kept one. *Id.*

15. Whether or not the drawer of a check was negligent in signing it in the condition in which it was prepared is a question of fact to be determined largely by an inspection of the check itself. *Id.*

16. A bank which pays to a clerk of the drawer a plainly altered check without requiring an explanation of the alteration from his employer cannot throw the loss occasioned by subsequent payment of a series of such checks upon the employer, on the ground that he negligently failed to detect the frauds when the vouchers were returned to him. Id.

NOTES AND BRIEFS.

Banks; scope of cashier's duties; false representations by cashier as to capital of insurance company on deposit in; bank's liability for. 110

Cashier's check; bank's duty to pay payee or indorsee; effect of bare indorsement or assignment of. 342

Forgery of check by raising amount; depositor's negligence in failing to discover; intrusting examination of vouchers to clerk; bank's liability for paying; presumption of negligence from failure to know signature; bank's cashing check after notice that forged check presented. 530

Ratification of unauthorized acts of agents; pledge to secure excessive loan to officers of; consideration for transfer of stock in; guaranty by third person of payment of debt of director. 812

Cashier's authority to release surety. 911

Insolvency; rights of creditors in trust fund. 886

Taxation of franchise of. 33

BEST EVIDENCE.

See EVIDENCE, 18.

BICYCLES.

Discrimination against Riders, see CONSTITUTIONAL LAW, 11, 12.

Requiring Lights for, see MUNICIPAL CORPORATIONS, 10.

Title of Ordinance Regulating, see MUNICIPAL CORPORATIONS, 5.

NOTES AND BRIEFS.

Bicycle; exemption of, from levy. 764

BIGAMY.

Wife as Witness against Husband in Prosecution for, see WITNESSES, 2.

NOTES AND BRIEFS.

Bigamy; crime against wife; sufficiency of information for; proof of first marriage by defendant's admission. 156

BILLS AND NOTES.

Negotiation of Cashier's Check, see BANKS, 7.

Guaranty of, by Married Woman, see HUSBAND AND WIFE, 1.

Indorsee's Right to Attack Fraudulent Conveyance, see FRAUD AND FRAUDULENT CONVEYANCES, 8.

Recovery Back of Money Paid on Draft Drawn against Fictitious Bill of Lading, see BILLS OF LADING.

Conflict of Laws as to, see CONFLICT OF LAWS, 4.

Given to Prevent Criminal Prosecution, see CONTRACTS, 12.

Checks, see BANKS, 7-16; CHECKS.

The mere possession of a negotiable instrument indorsed by the payee in blank is prima facie evidence of the holder's right to demand and receive payment; and payment to such holder will discharge the instrument, when made in good faith and in ignorance of facts which impair the holder's title. *Drinkall v. Movius State Bank* (N. D.) 341

NOTES AND BRIEFS.

Bills and notes; executed by wife as surety for husband; conflict of laws as to. 514

Draft drawn against fictitious bill of lading; whose duty to pass upon genuineness; holder's right to insist on unconditional acceptance; right of recovery where acceptance conditional; effect of payment. 689

BILLS OF EXCEPTIONS.

See APPEAL AND ERROR, 3, 4.

BILLS OF LADING.

Money paid by the drawee upon a draft drawn against "indorsed bills of lading" which are in fact fictitious, and accepted "against" such bills in ignorance of the fraud, may be recovered back from the payee. *Guaranty Trust Co. v. Grottrian* (C. C. App. 2d C.) 689

NOTES AND BRIEFS.

See also CARRIERS.

Bill of lading; accepting draft drawn against; construction of acceptance; whose duty to pass upon genuineness of bill of lading; delivery of forged bill of lading as compliance with contract to deliver bill of lading. 689

BONDS.

Prematurity of Action on, see ACTION OR SUIT, 1.

Of County Treasurer, Liability on, see COUNTY TREASURER.

Of Deputy Sheriff, Action on, see EXECUTORS AND ADMINISTRATORS, 3.

Of Clerk of Court, Liability on, see OFFICERS, 4.

Interest on, see INTEREST, 2.

Requiring from Foreign Partnership, see STATUTES, 8.

The bond of a deputy sheriff conditioned for the faithful performance of his duty, and containing a reference to a contract between him and the sheriff which is illegal because in violation of W. Va. Code, chap. 7, § 5, prohibiting the sale or farming out of any office under the laws of the state, is void as to the private interest of the sheriff and his deputy, and no recovery can be had against the latter for a sum which he has agreed to pay to the sheriff in consideration of such illegal contract; but the sheriff may recover thereon for taxes, fines,

etc., received by the deputy by virtue of his office, since such funds have come into his hands as a *de facto* officer, and belong primarily to the public and innocent private individuals. *White v. Cook* (W. Va.) 417

NOTES AND BRIEFS.

Bond; by deputy sheriff in consideration of illegal contract; liability on. 418

Of clerk of court; liability on; principal's failure to pay over money. 634

BRIDGES.

Operating Railroad Bridge as Toll Bridge, see RAILROADS; TRIAL, 14.

NOTES AND BRIEFS.

Taxation of franchise of. 33

BROKERS.

Discrimination in License of, see CONSTITUTIONAL LAW, 22.

Exemption of, from Levy, see LEVY AND SEIZURE.

Refusal to comply with a contract to purchase real estate, by reason of which the broker who negotiated the sale is deprived of his commissions, will render the intending purchaser liable for the damages thereby inflicted on the broker, although he had agreed to look to the seller for his commissions. *Livermore v. Crane* (Wash.) 401

NOTES AND BRIEFS.

Brokers; commissions; under contract with seller; right as to, against purchaser refusing to complete purchase; sufficiency of contract for purchase. 402

BUILDING AND LOAN ASSOCIATION.

Conflict of Laws as to Usury by, see CONFLICT OF LAWS, 6, 6.

Usury by, see USURY, 1, NOTES AND BRIEFS.

A foreign building and loan association which localizes its business in a state cannot complain of a provision of its laws making foreign associations subject to the usury laws, but exempting domestic associations therefrom. *Shannon v. Georgia State Bldg. & L. Asso.* (Miss.) 800

BUILDINGS.

Liability for Fall of Walls, see NEGLIGENCE, 2, 3.

NOTES AND BRIEFS.

Building liable to fall, as nuisance. 133

BURDEN OF PROOF.

See EVIDENCE, 1-17.

CARRIERS.

Requiring Payment of Attorney's Fee by Carrier, see CONSTITUTIONAL LAW, 13.

Act Making Specification of Weights in Bills of Lading Conclusive Evidence of Correctness, see CONSTITUTIONAL LAW, 24.

57 L. R. A.

Damages for Breach of Contract to Transmit Corpse, see DAMAGES, 6, 7.

Failure to Forward Corpse, see TRIAL, 13.

Notice Chargeable to Passenger, see NOTICE, 1.

See also COMMERCE.

Of passengers.

See also EVIDENCE, 10.

1. A railroad company is not relieved from liability for injury to its passenger by reason of the unsafe condition of the depot premises which the passenger must use to reach its trains, by the fact that the premises are used by, and in possession of, a union depot company or its receiver, with whom the railroad company contracts for terminal facilities. *Herrman v. Great Northern R. Co.* (Wash.) 390

2. While it is the absolute duty of a railway carrier of passengers to provide a safe and secure place for its patrons to ride within its cars, when such duty is performed the passenger has no right to voluntarily extend his person beyond the line of a moving car, or ride upon its platform; and if he does so, and injury follows, no recovery can be had therefor. *Benedict v. Minneapolis & St. L. R. Co.* (Minn.) 639

3. The voluntary exposure of the body beyond the sides of a moving train by a passenger riding on the platform is such negligence as will preclude recovery for his death caused by coming in contact with an iron post near the track, although he was forced to ride on the platform because of the overcrowded condition of the car, and the carrier would have been liable for injury resulting to him therefrom, in the absence of any negligence on his part. Id.

4. A youth sixteen years of age, traveling alone, cannot be held, merely on account of his immature years, to have been incapable in law of exercising sufficient discretion and judgment to avoid incurring the risk of a voluntary exposure of his person beyond the sides of a moving train. Id.

5. A passenger who leaves his car while the train is standing on a side track awaiting the arrival of another train, at a place not designed for the discharge of passengers, and crosses the track to a pump to get a drink of water, but, on hearing the whistle of the incoming train, starts back on a rapid run to regain his car, and attempts to cross in front of the train when it is about 50 feet distant from him, and is struck and killed, is guilty of such negligence as will preclude recovery for his death from the railroad company. *Chicago, R. I. & P. R. Co. v. Sattler* (Neb.) 890

6. A passenger who leaves his train before the completion of his trip must assume all the ordinary risks incident to his action, where the train is run upon a switch to allow the passage of another train, or is stopped at a place other than that used by the carrier for receiving and discharging passengers, and the stoppage is not for the

purpose of allowing passengers to board the train or alight therefrom. Id.

Who are passengers.

See also EVIDENCE, 9.

7. A passenger on a railroad train does not lose his character as such by leaving his car at a regular station from motives of either business or curiosity, where he has not yet arrived at the terminus of his journey. Id.

8. A passenger who leaves his car of his own volition, for some purpose of his own, not incident to the journey he is pursuing, as, for instance, to get a drink of water while the train is standing on a side track, and at a place not designed for the discharge of passengers,—cannot claim the protection of Neb. Comp. Stat. chap. 72, art. 1, § 3, making a carrier liable for all personal damage inflicted on a passenger being transported. Id.

9. All passengers actually on a train, whether the same is moving or not, and passengers who have left the train at the express or implied invitation of the carrier, for any necessary purpose incident to their journey, are passengers "being transported over the road," within the meaning of Neb. Comp. Stat. chap. 72, art. 1, § 3, making a carrier liable for all personal damage inflicted on a passenger while being transported over its road. Id.

10. One who enters and rides upon a car or train which he knows, or by the exercise of reasonable diligence would know, is prohibited from carrying passengers, is a trespasser, and not a passenger; and the only duty of the railroad company toward him is to abstain from wanton or reckless injury to him. *Purple v. Union P. R. Co.* (C. C. App. 8th C.) 700

11. No one who, knowing that a conductor has no authority to grant free transportation, enters and rides upon his train, with the deliberate intention not to pay his fare, under an agreement, or under a tacit understanding, with the conductor that he shall ride free, commits a fraud upon the railroad company, and is not a passenger, but is a mere trespasser, to whom the only duty of the company is to abstain from wilful or reckless injury. Id.

Tickets.

See also *infra*, 16.

12. A person on a street car does not acquire the right to be carried to his destination by the fact that the conductor rings up his fare on taking from him a void coupon ticket. *United Railways & Electric Co. v. Hardesty* (Md.) 275

13. A carrier is not obliged to honor a coupon from a commutation book of tickets intended for passage between designated points and which provide that they are not "good unless detached by the conductor," when it has been detached by the commuter and the book left with a member of his family, so that it is not present when he tenders the coupon in payment of fare. Id.

14. A second demand for fare need not be made by a street-car conductor before
57 L. R. A.

ejecting from the car a person who, in response to his first demand, tendered a worthless ticket, and was informed that it was insufficient. Id.

Limitation of liability.

15. A carrier's contract limiting liability for loss to a specified amount has no application to the damages to be recovered for its failure to comply with a notice of stoppage *in transitu* after it had agreed to do so. *Rosenthal v. Weir* (N. Y.) 527

16. An agreement by a passenger when procuring a mileage ticket at a reduced rate, not to hold the carrier liable for injuries received while riding on freight trains, is unenforceable with respect to such freight trains as are designated by the carrier to carry passengers generally. *Richmond v. Southern Pacific Co.* (Or.) 616

NOTES AND BRIEFS.

Carriers; power to relieve from liability for torts of lessees or their receivers. 390

Bill of lading limiting liability; effect of accepting bill; duty to stop *in transitu* on notice. 527

Bill of lading; limiting loss to one line; imposition of attorneys' fee against; regulation of transportation within police power; omission of Congress to provide regulations. 765

Who are passengers; person not paying fare; one riding on freight train; extent of duty towards passenger. 701

Who are passengers; person leaving car at intermediate station; contributory negligence of passenger; failure to look and listen for train while crossing track; carrier's duty toward passenger at intermediate station; absolute liability of carrier, regardless of negligence; carrier's negligence in managing other train at station. 890

Passengers on freight train; limiting liability for injury to. 614

Contributory negligence of passenger; riding on platform; extending body beyond car line. 639

CARRYING WEAPONS.

Ordinance against, see MUNICIPAL CORPORATIONS, 7.

Prohibition against imposing fine for, see PROHIBITION

CASHIER.

See BANKS, 1, 2.

Cashier's Check, see BANKS, 7-9; CHECKS.

NOTES AND BRIEFS.

Cashier; authority of, to release surety. 911

Scope of duties of; bank's liability for false representations by, as to capital of insurance company on deposit. 110

CERTIORARI.

On a writ of certiorari allowed with the writ of habeas corpus to bring up a warrant for the execution of a prisoner,

purporting to be issued by the executive department of the state government under authority of N. J. act April 16, 1846, the court will adjudge whether such warrant is valid. *State, Clifford, Prosecutor, v. Heller* (N. J. Sup.) 312

CHATTEL MORTGAGE.

See MORTGAGE.

CHECKS.

Tender of, as Compliance with Telegraph Company's Contract to Transmit Money, see CONTRACTS, 4.

Forged, Burden of Proof as to, see EVIDENCE, 17.

Forgery of, see NOTICE, 3.

What Constitutes Forgery of, see FORGERY.

See also BANKS, 7-16, NOTES AND BRIEFS.

The indorsement and delivery of a cashier's check by the payee to a gambler in payment for chips to be used in gambling does not make such gambler a holder in due course; and his title so acquired is defective, where the statutes of the state expressly prohibit gambling. *Drinkall v. Movius State Bank* (N. D.) 341

CLERK.

Imputing Knowledge of, to Employer, see NOTICE, 2, 3.

Liability of, for Loss through Bank Failure, see OFFICERS, 4.

NOTES AND BRIEFS.

Clerk of court; liability on bond; loss of money paid into court. 634

CLOUD ON TITLE.

Quieting Grantor's Title to Land after Breach of Contract for His Support, see REAL PROPERTY, 2.

An action to quiet title to real property and remove a cloud therefrom, directed against an apparent lien by way of tax or special assessment, is only maintainable in case such tax or assessment itself is absolutely void, under Neb. Comp. Stat. 1901, chap. 77, art. 1, § 144, providing that no injunction shall be granted to restrain the collection of any tax, unless the tax be levied for an illegal or unauthorized purpose. *Philadelphia Mortg. & T. Co. v. Omaha* (Neb.) 150

NOTES AND BRIEFS.

Cloud on title; legislative power to provide for quieting title to land. 299

COLD STORAGE.

See BAILMENT.

COLLATERAL INHERITANCE TAX.

See TAXES, 17-19.

COMBINATION.

See CONSPIRACY, NOTES AND BRIEFS.

COMMERCE.

The interstate commerce clause of the 57 L. R. A.

Federal Constitution is not violated by Kan. Laws 1893, chap. 100, requiring railroad companies to provide track scales for weighing car-load lots of hay, grain, etc., and to issue duplicate bills of lading for a shipment, and making the company responsible for the full amount of such shipment, less $\frac{1}{4}$ of 1 per cent of its weight, since the statute is an exercise of the police power, and does not impose restrictions of any kind on commerce between the states. *Missouri, K. & T. R. Co. v. Simonson* (Kan.) 765

COMMERCIAL AGENCY.

Damages against, for False Publication by, see DAMAGES, 13.

Liability for Incorrect Statements, see LIBEL AND SLANDER; TRIAL, 15.

COMPOUNDING CRIME.

See CONTRACTS, 12.

CONDITION.

See REAL PROPERTY.

CONFESSION.

See EVIDENCE, 23.

CONFINEMENT.

Damages for Death of Child during, see DAMAGES, 9, 10.

CONFLICT OF LAWS.

See also EVIDENCE, 5.

1. The validity of a marriage is to be determined by the law of the place where the marriage is solemnized; and a marriage legal where solemnized is valid everywhere. *Hills v. State* (Neb.) 155

2. The validity of a sale by a husband to his wife, of land situated in Louisiana, is to be determined by the law of Louisiana. *Rush v. Landers* (La.) 353

3. Whether a husband becomes the debtor of his wife by receiving and using money which she has received from her first husband must be determined by the law of their domicile. Id.

4. The contract of a surety on a note is complete when his signature is affixed and the instrument delivered to the payee, and is therefore governed by the law of the place where those transactions occur, although the note is payable in another state, and as against the makers has no valid inception until its negotiation in the latter state, if the surety has no knowledge that it is to be negotiated there, or intention that his contract shall be governed by the laws of that state. *Union National Bank v. Chapman* (N. Y.) 513

Usury.

5. Whether or not a loan by a foreign building and loan association to a resident of the state, secured by mortgage on land within the state, is usurious, will be determined by the local laws, notwithstanding the notes are payable at the domicile of the corporation, if it has localized its business by establishing boards throughout the state to which payments on loans are to be made.

National Mutual Bldg. & L. Asso. v. Brahan (Miss.) 793

6. Whether or not a loan by a foreign building and loan association to a resident of the state, secured by mortgage on land within the state, is usurious, will be determined by the local laws, notwithstanding the notes are payable at the domicile of the corporation if it has localized its business by establishing boards throughout the state to which payments on loans are to be made. Shannon v. Georgia State Bldg. & L. Asso. (Miss.) 800

NOTES AND BRIEFS.

Conflict of laws; wife's capacity to become surety for husband; contract void where made. 513

As to validity of marriage:—(I.) Manner or form of solemnization; preliminaries; (II.) polygamous marriages; temporary marital unions; (III.) matrimonial capacity of the parties: (a) in general; *lex loci* or *lex domicilii*; public policy; (b) incestuous marriages; (c) marriages between members of different races; (d) remarriage of divorced person; (e) former husband or wife living; (f) nonage; consent of parents or guardian; (IV.) summary. 155

As to capacity of married woman to contract:—(I.) As between *lex loci contractus* and *lex domicilii*; (a) general rule; (b) exceptions; when domicile is at forum; (II.) as between *lex loci contractus* and *lex fori*; remedy; (III.) as between *lex loci contractus*, or *lex domicilii*, and *lex rei sitæ*; (a) personal property; (b) real property. 524

As to matrimonial property:—(I.) Introduction; (II.) when *lex domicilii* is opposed to the *lex rei sitæ* or *lex fori*: (a) real estate, or immovables; (b) personal property, or movables; (c) what law determines character of property as real or personal; (III.) when law of matrimonial domicile is opposed to that of place where marriage celebrated; (IV.) how original matrimonial domicile ascertained; (V.) change of matrimonial domicile: (a) property acquired prior to change; (b) property acquired after the change; (c) tacit mortgages or liens; (VI.) marriage settlements; (VII.) summary. 353

What statute of distribution governs distribution of decedent's property. 537

Usury; by foreign building and loan association. 801

CONSPIRACY.

A combination of mercantile dealers to compel another dealing in similar goods to sell at prices fixed by it, or, upon his refusal so to do, to prevent those of whom its members are purchasing customers from selling goods to him, is, upon general legal principles, contrary to public policy and void, and the members of such a combination may be restrained collectively or individually, by appropriate injunction, from carrying into effect such purpose. Brown v. Jacobs Pharmacy Co. (Ga.) 547

57 L. R. A.

NOTES AND BRIEFS.

Conspiracy; fraudulent; verdict against single defendant in civil action for. 110

Combination in legitimate purposes of lawful business. 548

CONSTITUTIONAL LAW.

Imprisonment for Debt, see IMPRISONMENT FOR DEBT.

As to Eminent Domain, see EMINENT DOMAIN.

For Title of Statute, see STATUTES, 2, 3.

General and Special Legislation, see STATUTES, 4, 5.

1. The written Constitution will be construed in the light of the right of municipal self-government. State *ex rel.* White v. Barker (Iowa) 244

2. A statute making a contract for the construction of a building, in which the contract price is payable with something besides money, so far invalid as to furnish the owner no protection from the claims of subcontractors and materialmen, is an unconstitutional infringement of the owner's right to the possession and enjoyment of his property. Stimson Mill Co. v. Braun (Cal.) 728

Separation and delegation of powers. See also *infra*, 24; COURTS, 1; CRIMINAL LAW, 2.

3. The power of choosing the managers of a municipal water-supply system cannot be vested by the legislature in the judges of a court created by the Constitution. State *ex rel.* White v. Barker (Iov a) 244

4. The power to appoint examiners of titles, given to the district courts by Minn. Laws 1901, chap. 237, providing for the Torrens system of registering land titles, is not in violation of Minn. Const. art. 3, vesting the powers of government in three distinct departments. State *ex rel.* Douglas v. Westfall (Minn.) 297

5. Judicial duties are not conferred on registrars of land titles, in violation of Minn. Const. art. 3, by Minn. Laws 1901, chap. 237, providing for the Torrens system of registering land titles, since the act expressly provides that all acts performed by registrars shall be performed under rules and instructions established and given by the district court having jurisdiction of the county in which they act. Id.

6. The power to appoint public officers is not purely an executive function, but this power may be exercised by the general assembly, when not otherwise provided in the Constitution, either by naming a given person for the office, or providing the manner in which the officer shall be chosen; and the general assembly also has authority to provide for the appointment of a number of officers to discharge a given duty, and to provide that vacancies in such number may be filled by those remaining in office, thus creating a self-perpetuating body. Americus v. Perry (Ga.) 230

Local self-government.

See also MUNICIPAL CORPORATIONS, 3, 4.

7. The legislature cannot fix the salaries of firemen employed by municipalities, although there is no limitation on such power in the Constitution, since that is a matter of local government never delegated to the legislature. *Lexington v. Thompson* (Ky.) 775

8. The establishment and control of a water-supply system is a matter that pertains to the municipality, and the legislature cannot take the management of the system away from the appointees of the municipality, and vest it in persons for whose selection it provides. *State ex rel. White v. Barker* (Iowa) 244

9. An act creating a board of police commissioners which shall have exclusive control of the police officers of a city (Ga. Acts 1889, p. 961), naming the first members of the board, prescribing the manner in which their successors shall be chosen, and setting forth their powers and duties, is not an unconstitutional deprivation of local self-government, but is a proper exercise of legislative power. *Americus v. Perry* (Ga.) 230

Equal protection or privileges.

Uniformity in Taxes, see TAXES, 1, 2.

See also *infra*, 23; BUILDING AND LOAN ASSOCIATIONS.

10. The exemption of agricultural products and live stock from the provisions of the Georgia anti-trust act (Ga. Acts 1896, p. 68) renders the act void because in violation of U. S. Const. 14th Amend., declaring that no state shall deny to any person the equal protection of the laws. *Brown v. Jacobs Pharmacy Co.* (Ga.) 547

11. The equal privileges and immunities of a bicycle rider are not infringed by requiring him to carry a light after dark. *Des Moines v. Keller* (Iowa) 243

12. An ordinance requiring bicycle riders to carry lamps is not unconstitutional because not applying to other silently running vehicles. *Id.*

13. The provision for an attorneys' fee for the successful prosecution of an action under Kan. Laws 1893, chap. 100, for failure of a carrier to safely transport and deliver goods committed to its charge, is constitutional. *Missouri, K. & T. R. Co. v. Simonson* (Kan.) 765

14. The allowance of damages and attorneys' fees to plaintiff in an action upon an insurance policy, provided for by Ga. Civ. Code, § 2140, in case of the refusal of an insurance company to pay a loss within sixty days after demand has been made, where it shall appear to the jury that the refusal to pay was in bad faith, is in violation of U. S. Const. 14th Amend., as a denial of the equal protection of the laws. *Phoenix Ins. Co. v. Schwartz* (Ga.) 752

15. The mere organization of a partnership under the laws of another state is not sufficient to justify the imposition of conditions upon its doing business within the 57 L. R. A.

state not required of local partnerships. *State v. Cadigan* (Vt.) 666

16. A statute imposing a penalty on agents transacting business within the state for foreign partnerships which have not complied with conditions not required of local partnerships discriminates against such agents in favor of those of local firms so as to be void under the Federal Constitution and those provisions of a state Constitution protecting equal rights and privileges. *Id.*

17. The classification of counties according to population, for the purposes of Minn. Laws 1901, chap. 237, providing for the Torrens system of registering land titles, does not render the act void as special legislation in violation of Minn. Const. art. 4, §§ 33, 34. *State ex rel. Douglas v. Westfall* (Minn.) 297

18. The probate judge of one county cannot be given a salary and required to account for all fees received, while the judges of all other counties are permitted to retain the fees as their compensation, under a constitutional provision requiring the general assembly, by a law uniform in its operation, to provide for and regulate the fees of all county officers. *Henderson v. Koenig* (Mo.) 659

19. An ordinance authorizing a license tax for revenue purposes, which classifies the different subjects of taxation according to the amount of business transacted, providing a graduated rate for the various classes, and which places wholesalers in a separate class from retailers, and imposes on them a lower rate, is not in violation of U. S. Const. 14th Amend., or Pa. Const. art. 9, § 1, providing that all taxes shall be uniform upon the same class of subjects, where no discrimination is made between the different members of the same class. *Com. use of Titusville v. Clark* (Pa.) 348

20. The provision in an ordinance requiring a license tax from all dealers or vendors of merchandise, that no manufacturer who is a citizen of the municipality shall be considered a dealer or vendor unless he sells goods not of his own manufacture, is a proper classification and a valid exercise of legislative power. *Id.*

21. The exemption of persons who go from house to house or place to place, vending their own products, from the payment of the license tax imposed by Neb. Comp. Stat. 1901, chap. 77, art. 1, § 152, on peddlers, does not render the act invalid as in violation of the uniformity clause of the Constitution, since there is such a real distinction between the two classes that the legislature, acting on considerations of general policy, may make it the basis of classification for the purpose of taxation. *Rosenbloom v. State* (Neb.) 922

22. The exemption of real-estate dealers and contractors, whose business does not amount to \$1,000 per annum, from the operation of an ordinance imposing a license tax for the privilege of transacting business is unconstitutional and void as class legislation, where such contractors and dealers

are classified with other persons effecting sales, to whom a similar exemption is not allowed. *Com. use of Titusville v. Clark* (Pa.) 348

Due process of law.

23. A statute rendering telegraph companies liable for mental anguish caused by failure to promptly transmit and deliver messages does not deprive them of property without due process of law, or deny them the equal protection of the laws. *Simmons v. Western U. Teleg. Co.* (S. C.) 607

24. The provision of Kan. Laws 1893, chap. 100, making the specification of weights in bills of lading issued by railroad companies for hay, grain, etc., shipped over their lines, conclusive evidence of the correctness of such weights, is unconstitutional because denying to the companies due process of law, and because wrongfully depriving the courts of the judicial power to determine the weight and sufficiency of evidence. *Missouri, K. & T. R. Co. v. Simonson* (Kan.) 765

25. The Torrens system of registering land titles, provided for by Minn. Laws 1901, chap. 237, is not unconstitutional as a taking of property without due process of law, where the adjudication is made after an investigation as to the title and as to whether the land is occupied or not, and after personal service of summons on resident parties, and service upon nonresidents and unknown parties by publication, and mailing a copy of the publication notice to nonresidents whose address is known, and a right of appeal is given and reimbursement provided for anyone sustaining loss by the operation of the act out of an assurance fund raised by a percentage charge upon all property adjudicated; although the act provides that a decree confirming a title and ordering registration shall be forever binding and conclusive, and shall not be opened by reason of any disability, and that no proceedings shall be had for reversing the judgment, except that any person having an interest in the land who has not been actually served or notified of the application for registration may, within sixty days from the entry of the decree, appear and assert his rights, provided no innocent purchaser for value has acquired an interest. *State ex rel. Douglas v. Westfall* (Minn.) 297

Police power.

See also COMMERCE.

26. The legislature cannot prohibit the sale of dairy products containing a preservative other than salt, sugar, or spirituous liquors in specified cases, or the sale of preservatives for such use, when the use of preservatives is not declared to be an adulteration, and the statute is not aimed at adulteration generally, regardless of whether or not their effect is to render the products unwholesome. *People v. Biesacker* (N. Y.) 178

27. Statutes forbidding the manufacture of any article in imitation of butter, which is not pure butter, or the manufacture or sale of oleomargarine which contains any

coloring matter, or the sale of any substance which is not butter, but has the appearance of butter, unless it is sold under its true name and has its true name plainly marked thereon; and requiring that all persons dealing in food shall, upon proper application and tender of price, furnish a sample for analysis; the purpose of which is to prevent deception in the sale of dairy products and preserve the public health,—are a proper exercise of the police power, and do not violate the constitutional right to liberty and the enjoyment of property. *State ex rel. Monnett v. Capital City Dairy Co.* (Ohio) 181

NOTES AND BRIEFS.

Constitutional law; police power; prohibiting sale of preservatives or products containing the same. 179

Prohibiting sale of oleomargarine. 182

Discrimination against citizens of other states; immateriality of extent of discrimination; upholding as exercise of police power. 666

Due course of law; legislative declaration as to what shall be conclusive proof; equal protection; imposition of attorneys' fees against railroad company; police power; laws regulating transportation by carriers. 766

Due process of law; hearing allowed before street-assessment lien becomes final. 213

Equal protection of laws; meaning of. 352

Equal protection of laws; statute making telegraph company liable for mental anguish from delay in delivering telegram; justification of, under police power; unauthorized classification by; due process of law; act operating legally on all subjects to which it relates. 807

Equal protection; classification for taxes; vested rights in exemption from taxation. 541

When law declared unconstitutional; local self-government; selecting administrative and police officers of a city. 775

Division of government into three separate departments; appointment to office an executive function; delegation to court of legislative power; local self-government in municipal affairs. 245

Right of local self-government; legislature appointing police commission for city; law within inhibition of Constitution by implication. 231

CONSTRUCTION.

Of Contract, see CONTRACTS, 6, 7.

Of Insurance Policy, see INSURANCE, 2.

Of Statute, see STATUTES, §, 7.

CONTRACTS.

Statute Infringing Right of, see CONSTITUTIONAL LAW, 2.

Right of Action of Third Person Taking Poisonous Drug Sold as Harmless Medicine, see DRUGGISTS.

By Infants, see INFANTS.

To Furnish Protection to Servant from Violence of Mob of Strikers; Liability for Breach, see MASTER AND SERVANT, 12.

For Removal of Garbage, see MUNICIPAL CORPORATIONS, 9.

Question for Jury as to, see TRIAL, 7.

1. A contract for the future delivery of personal property is void for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise, with reasonable certainty. *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.* (C. C. App. 8th C.)

696

2. An accepted offer to sell or deliver articles at specified prices during a limited time, in such amounts or quantities as the acceptor may want or desire in his business, without any statement of the amount or quantity, is without consideration and void because the acceptor is not bound to want, desire, or take any.

Id.

3. Accepted orders for goods under a contract which is void because of uncertainty as to the quantity constitute sales of the goods thus ordered, on the terms of the contract; but they do not validate the agreements as to articles which the one refuses to purchase or the other refuses to sell or deliver, under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder.

Id.

4. Tender of a check is not a compliance with a contract by a telegraph company to promptly transmit and deliver money. *Robinson v. Western U. Teleg. Co.* (Ky.)

611

Option.

5. The nonexercise of an option at the appointed time is not waived by a reply, by the one who offered it, to a belated demand that he comply with his offer, asking time to consider, and a subsequent offer of a compromise, which is rejected. *Page v. Shainwald* (N. Y.)

173

Construction.

6. The intention of parties cannot be imported into a contract, where its terms are plain and unambiguous, and they do not express it. *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.* (C. C. App. 8th C.)

696

7. If an aged parent conveys his property to his son to secure support for himself during the remainder of his life, whether the agreement calls for support generally, or by paying to the grantor money or property in specific amounts at specified times, the contract must be construed to require personal performance by the grantee of the obligations incurred by him. *Glocke v. Glocke* (Wis.)

458

57 L. R. A.

Validity.

Failure to Plead Illegality, see PLEADING, 2.

Giving Validity to Illegal Contract by Estoppel, see ESTOPPEL.

See also BONDS.

8. No recovery can be had for losses which have arisen under an illegal contract. *Reed v. Johnson* (Wash.)

404

9. Specific performance will not be enforced of an agreement to convey an interest in land to one for services in securing the location of a railroad depot thereon, where he has agreed to divide with certain officials of the road all money received by him from sales of land during the construction of the road, since its tendency is to induce the officers of the corporation to disregard their duties to it, and it is therefore against public policy.

Id.

10. A contract between a sheriff and his deputy, providing that the deputy shall collect all the taxes, with slight exceptions, and do all the work of the sheriff's office in one district, and attend the sessions of the court during stated portions of the time each year, and that he shall have all the fees and commissions allowed by law upon the work done by him, and shall pay the sheriff \$100 a year,—violates W. Va. Code, chap. 7, § 5, prohibiting the sale or farming, in whole or in part, of any office under the laws of the state. *White v. Cook* (W. Va.)

417

11. The contract of a defaulting bank officer to furnish collateral security for his indorsement upon paper previously sold to the bank by him, so as to replenish the assets of the bank and enable it to resume business, is not illegal; and after such securities have been furnished and the bank has resumed business, the person furnishing such securities at the request of such defaulting officer, with knowledge of the use to be made thereof by him, cannot be heard to say that there was no consideration for furnishing the same. *Tecumseh Nat. Bank v. Chamberlain Bkg. House* (Neb.)

811

12. A note given to reimburse a surety on a fidelity bond for what it has been compelled to pay because of the principal's embezzlement, on condition that the surety would not prosecute the principal for the defalcation, is void. *United States Fidelity & G. Co. v. Charles* (Ala.)

212

Rescission.

13. An intention to repudiate the contract by a buyer of scrap iron who is to pay for each 100 tons as delivered, justifying a rescission by the seller, is shown where, after receiving 100 tons, he insists on having two or three car loads more delivered before remitting for the 100 tons. *Johnson Forge Co. v. Leonard* (Del.)

225

14. The question whether or not a letter by a purchaser of scrap iron to be paid for as each 100 tons was delivered, stating that he would not remit until he had enough of the balance of the contract in his hands to know that he would receive the amount

purchased, and that as soon as he had two or three cars above the 100 tons he would remit, amounts to a repudiation of the contract justifying a rescission on the part of the seller, is for the court. Id.

NOTES AND BRIEFS.

Contract; option; time of essence; last day falling on holiday; waiver of lateness in accepting. 175

Illegal; agreement to compound felony; parties to, without remedy; unenforceability of contracts which are entire, if part illegal. 212

Illegal; gambling or wagering contract; consideration immoral, illegal, or contrary to public policy; refusal of court to aid either party to; right to repudiate and recover back money or goods paid or delivered under. 342

Illegal; nonenforceability of; setting up defense of illegality without specially pleading it; giving validity to, by stoppel; contract to influence action of corporate officers; time as essence of. 404

Illegal; by sheriff to transfer part of powers to deputy as consideration for bond given by deputy. 418

Involving violation of penal law; nonenforceability of. 448

For support and maintenance of grantor of land; right to rescind; necessity of foreclosing. 459

Disaffirmance of; how shown; avoidance of, by infant; power to ratify after disaffirmance. 506

Mutuality; necessity that both parties be bound; consideration; promise by one party without obligation by other; thing done by one as consideration for promise by other; upholding when possible; indefiniteness of quantity or amount; implied agreement as to quantity; adopting construction given by parties even when varying from plain terms. 697

Statute of frauds; parol license not creating easement or interest in land. 721

Consideration; sufficiency of; detriment to promisee; extension of time. 812

Of married women; conflict of laws as to. 513

Nature of interest of vendor or vendee in a land contract as real or personal property.—(I.) Application of the doctrine of equitable conversion: (a) in general; (b) where judgment has been entered against one of the parties to the contract: (1) against the vendee; (2) against the vendor; (c) where one of the parties to the contract subsequently dies; (d) for purpose of determining who must bear losses and receive accessions; (II.) effect of provisions of contract; (III.) the contract must be one which equity will specifically enforce; (IV.) time at which conversion takes place: (a) in general; (b) effect of vendee's failure to take possession; (c) optional contracts; (V.) reconversion; (VI.) application of doctrine in actions at law; (VII.) conclusion. 643

57 L. R. A.

CORPORATIONS.

False Certificate as to Amount of Capital on Deposit in Bank, see BANKS, 2, 3.

False Representations as to Capital of, see FRAUD AND FRAUDULENT CONVEYANCES, 2-5.

License to Foreign Insurance Company, see INSURANCE, 7.

Foreign Loan Associations, see BUILDING AND LOAN ASSOCIATIONS.

Damages for Fraud Inducing Purchase of Stock of, see DAMAGES, 14; EVIDENCE, 34.

Compelling Grant of License to Foreign Company, see MANDAMUS.

Ousting from Right to Manufacture Oleomargarine, see QUO WARRANTO, 1, 2.

Taxation of, see TAXES, 2-10.

NOTES AND BRIEFS.

Liability for tort of agent. 112

When chargeable with knowledge of, or bound by, acts of officer. 813

Tax on franchise of. 33, 50, 64, 79

CORPSE.

Damages for Breach of Contract to Transmit, see DAMAGES, 6, 7.

Negligence in Failing to Forward, see TRIAL, 13.

NOTES AND BRIEFS.

Negligence in failing to forward. 771

COUNTIES.

Who are County Officers, see OFFICERS, 1, 2.

NOTES AND BRIEFS.

Counties; powers of county commissioners as to repairing or discontinuing highway. 280

Legislative authority to classify. 297

COUNTY TREASURER.

Premature Action on Bond of, see ACTION OR SUIT, 1.

Interest on Bond of, see INTEREST, 2.

A deposit of public money by a county treasurer, without authority of law, in a bank that has not given bond and become an authorized depository, renders him liable for the loss of the money by bank failure, under Neb. Comp. Stat. 1901, chap. 18, art. 3, § 21, making such unauthorized deposit a felony, where other statutes provide that the treasurer shall pay out money only on warrant, except where special provision otherwise is made, and provide generally that an officer shall be responsible on his bond for monies received by him, and make no provision for his exemption from liability for the loss of the money except where it is deposited in a bank which has given bond and become an authorized depository. *Thomassen v. Hall County (Neb.)* 303

NOTES AND BRIEFS.

County treasurer; duty of county board

to remove; authority to receive money until removal; loss of public money by failure of bank; liability on bond for. 303

COUPONS.

Tickets, see CARRIERS, 12, 13.

COURTS.

Removal of Case from Division to Court in Banc, see APPEAL AND ERROR, 1.

Jurisdiction to Require Surety for Good Behavior on Conviction, see CRIMINAL LAW, 4-6.

See also CONSTITUTIONAL LAW, 3-5.

1. The duty of determining what is a wise and fair mode of distributing the burden of taxation is a purely legislative power, which the judicial department of the government cannot exercise. *State v. Travelers' Ins. Co. (Conn.)* 481

2. It is settled doctrine that the courts will not declare an act of the legislature unconstitutional unless it is manifestly so. *Rosenbloom v. State (Neb.)* 922

3. A court will not inquire into the validity of a divorce obtained by a man since deceased, for the mere purpose of satisfying a sentiment as to who is his widow. *Lawrence v. Nelson (Iowa)* 583

4. For the purpose of determining the proper recipient of a pension due to the widow of a deceased person, the court will inquire into the validity of a divorce which he had obtained. *Id.*

NOTES AND BRIEFS.

Courts; interference with other departments of government. 230

Legislative power to confer power on judiciary to appoint officers. 298

When statute pronounced unconstitutional by. 666, 775

Resolving doubts in favor of constitutionality of statute. 298

Criminal; jurisdiction of. 426

Power of court to call and examine witnesses:—(I.) Power of court to call witnesses; (II.) power of court to examine witnesses: (a) to elicit facts or supply evidence; (b) in order that the questions or answers may be understood; (c) to keep witnesses within bounds; (d) where they are reluctant; (e) leading and improper questions; (f) suggesting a change in the form of questions; (g) cross-examination of witnesses; (h) showing partiality or prejudice; (i) objection and exception to action of trial court; (j) summary. 875

COVENANT.

In Lease, see LANDLORD AND TENANT, 1.

In Mortgage, Effect of Running of Limitations, see LIMITATION OF ACTIONS, 2.

CREDITORS' BILL.

Sufficiency of, see PLEADING, 8, 9.

1. A bill filed in behalf of all creditors 57 L. R. A.

"who are entitled to become parties to this suit," to reach the interest of a beneficiary in a spendthrift trust, is not open to the objection that it embraces nonlien creditors as complainants. *Hutchinson v. Maxwell (Va.)* 384

2. A suit in equity to reach assets included in a general assignment for creditors, and also included within the terms of prior deeds of trust purporting to cover such assets as after-acquired property of the debtor, cannot be maintained by an execution creditor who levied on the property before possession was taken by the assignee, on the ground that the deeds of trust are void as to such property, since in that case he has an adequate remedy at law, while in equity such deeds may be sustained. *Horner-Gaylord Co. v. Fawcett (W. Va.)* 869

CRIMINAL LAW.

Habeas Corpus Proceedings, see HABEAS CORPUS.

Municipal Ordinance Making Punishable Acts Made Criminal by Statute, see MUNICIPAL CORPORATIONS, 7, 12.

Assessment of Punishment by Jury, see TRIAL, 3-5.

Privilege of Witness, see WITNESSES, 3.

1. One accused of a capital offense has not been in jeopardy which will bar a subsequent trial, where, after the jury has been impaneled and the trial begun, the judge discharges them after ascertaining by independent investigation that some of them are so prejudiced in favor of the accused as to be incompetent, and have endeavored to prejudice other jurors, belittled the state's evidence, procured the intoxication of the bailiff, and obtained communication with persons not jurors. *Re Ascher (Mich.)* 806

2. The granting of a reprieve and the fixing of a day for the execution of a convicted criminal is by the common law a judicial power, and cannot be exercised by the governor, or person administering the government, except in so far as it is expressly permitted by the Constitution. *State, Clifford, Prosecutor, v. Heller (N. J. Sup.)* 312

3. A warrant by the governor for the execution of a reprieved criminal cannot be lawfully issued more than ninety days after conviction, under N. J. act April 16, 1846, providing that where a reprieve is granted by the governor he shall issue his warrant to the sheriff of the proper county, fixing a time for execution of the sentence, since N. J. Const. 1844, art. 5, cl. 9, gives the executive power to grant a reprieve to extend until the expiration of a time not exceeding ninety days after conviction, and art. 3 prohibits the exercise by the governor of any legislative or judicial power except as expressly provided in the Constitution. *Id.*

4. In case of conviction for a statutory misdemeanor, or a common-law misde-

meanor for which punishment is prescribed by statute, courts of record have no jurisdiction to require of the defendant sureties for good behavior. *State v. Gillilan* (W. Va.) 426

5. Courts of record have a discretionary jurisdiction, in case of conviction for a gross common-law misdemeanor, punishment for which has not been prescribed by statute, to require of the defendant sureties for good behavior. *Id.*

6. In case of a conviction of selling intoxicating liquors without a license in violation of W. Va. Code, chap. 32, §§ 1, 3, forbidding such sale and providing that the punishment for such an offense shall be a fine and, at the discretion of the court, imprisonment in the county jail, the court has no power, in addition to imposing a fine and costs, to require of the defendant sureties for good behavior. *State v. Gillilan* (W. Va.) 426

NOTES AND BRIEFS.

Right to Jury Trial in Criminal Cases, see TRIAL.

Criminal law; former conviction or acquittal; raising question of, on habeas corpus; former jeopardy by discharge of jury; question of legal necessity of discharge for court; common-law principle of, prevailing in Michigan. 806

CROPS.

Title to, on Judicial Sale of Land, see JUDICIAL SALE.

Mortgage of, see MORTGAGE, NOTES AND BRIEFS.

DAIRY PRODUCTS.

Police Power as to, see CONSTITUTIONAL LAW, 26, 27.

NOTES AND BRIEFS.

Dairy products; containing preservative; prohibiting sale of. 179

DAMAGES.

Erroneous Instruction as to, see APPEAL AND ERROR, 19.

For Bailee's Delay in Delivering Goods, see BAILMENT, 6.

Act Making Telegraph Company Liable for Mental Anguish, see CONSTITUTIONAL LAW, 23.

In Condemnation Proceedings, see also EMINENT DOMAIN, 2; EVIDENCE, 32, 33.

For Fright, see FRIGHT.

For Discontinuance of Highway, see HIGHWAYS, 4.

Allegations as to, see PLEADING, 7.

1. Damage from diminution of yield because of breach of contract to furnish fertilizer to assist in making a crop is not too remote to sustain an action for the breach. *Herring v. Armwood* (N. C.) 958

2. The measure of damages for breach of warranty of the capacity of a kiln for drying lumber is not, when there is no kiln of the agreed capacity on the market, the 57 L. R. A.

difference between the value of the kiln sold and one of the required capacity, but is the difference between the value of the apparatus delivered and the contract price. *Huyett-Smith Mfg. Co. v. Gray* (N. C.) 193

3. Substantial damages may be given for breach of a contract to transmit promptly a telegram which the company knew to be addressed to a physician and to direct him to come to the sender's house at once. *Western U. Teleg. Co. v. Church* (Neb.) 905

4. Damages for breach of a contract promptly to transmit and deliver a telegram from a sick person summoning his physician "at once" may include an allowance for the pain and suffering endured during the physician's absence because of such breach. *Id.*

5. Damages cannot be recovered for mental anguish caused by breach by a telegraph company of its contract to transmit money promptly. *Robinson v. Western U. Teleg. Co.* (Ky.) 611

6. Mental suffering may be considered in assessing the damages against a carrier for breach of its contract to transport a corpse. *Louisville & N. R. Co. v. Hull* (Ky.) 771

7. The sum of \$1,640 is excessive damages for failure to forward a corpse by a certain train, whereby its interment was delayed from afternoon until the next morning, where its condition did not render speedy interment necessary, and the person complaining was treated with proper courtesy. *Id.*

8. A carrier is liable for nervous shock to a passenger resulting from a jar to the nervous system which accompanies a blow to the person caused by being thrown from a seat through the carrier's negligence, and it is not necessary to show that the shock is the consequence of the blow. *Homans v. Boston Elevated Ry. Co.* (Mass.) 291

9. Damages for the death of the child cannot be allowed in an action by husband and wife for a physician's abandonment of the wife during her confinement. *Lathrope v. Flood* (Cal.) 215

10. An award of \$950 damages is not excessive where, on account of the failure of a telegraph company to transmit and deliver a telegram summoning a physician, a woman was left in labor for thirty minutes, with the child partly born, which resulted in the death of the child and great pain of body and mind to the woman. *Western U. Teleg. Co. v. Church* (Neb.) 905

11. The general rule is that damages for which a party is liable in tort are such, and only such, as are the reasonable and probable consequence of his acts. *Peters v. Jackson* (W. Va.) 428

12. In an action of tort, if it be impossible, in the nature of the case, to distinguish between the damage arising from the actionable injury and damage which has another origin, the jury should be left to make

from the evidence the best estimate in their power as reasonable men, and award to the plaintiff compensatory damages for the actionable injury. *Jenkins v. Pennsylvania R. Co.* (N. J. Err. & App.) 309

13. Instances of loss of particular customers need not be alleged or proved to warrant an assessment of damages for diminution of business and loss of credit by reason of a false publication by a mercantile agency. *Douglass v. Daisley* (C. C. App. 1st C.) 475

14. The damages for fraudulent representations inducing the purchase of corporate stock cannot be limited to the difference in the value of the stock on the day the representations were made and on the day of purchase, if at both dates it was of much less intrinsic value than the price paid for it, but should represent the difference between the price paid and the intrinsic value of the stock as ascertained by events in the subsequent history of the corporation, and not by the market price. *Hindman v. First Nat. Bank* (C. C. App. 6th C.) 108

15. In an action to recover damages for injuries to property from the negligent operation of railroad locomotives in such manner as to cause them to emit smoke denser and more offensive in quality and greater in volume than reasonably required for the proper operation of the railroad, where the evidence shows such negligent operation, and substantial damage to the plaintiff's property directly attributable thereto, recovery cannot be limited to nominal damages, on the ground of inherent impossibility of determining how much of the damage was caused by smoke necessarily emitted in the careful operation of the railroad, and how much was caused by the smoke that was due to negligent operation. *Jenkins v. Pennsylvania R. Co.* (N. J. Err. & App.) 309

16. The damage for injury to one "owning a business on land within a town" by the taking of property for public use for which a statute requires compensation to be made is not limited to the decrease in market value of the business. *Earle v. Com.* (Mass.) 292

Punitive.

17. Exemplary damages may be awarded for wilfully attempting to enjoy a parol license to maintain a ditch over another's land after the license has been revoked. *Hicks Brothers v. Swift Creek Mill Co.* (Ala.) 720

18. The damages for a personal injury caused by negligence may be the "present cash value" of the injury to the injured person, taking into consideration pain and mental suffering, and not allowing anything as a punishment, or punitive damages. *Coley v. North Carolina R. Co.* (N. C.) 817

NOTES AND BRIEFS.

Damages; for false representations inducing purchase of corporate stock; limit between direct and indirect. 111
57 L. R. A.

For breach of contract on sale of article that has no market price:—(I.) Scope and purpose; (II.) breach by vendor: (a) general rules as to recovery; (b) measure of damages: (1) in case of total absence of market; (2) when goods were obtainable at other markets; (3) when goods were obtainable at other times; (4) when purchased for special purpose: (a) the general rule; (b) for resale; (c) to be sent to a market at another place; (d) for use; (5) duty of vendee to avoid or reduce injury: (III.) breach by vendee: (a) rule in the entire absence of a market; (b) rule where neighboring market may be reached; (IV.) determination as to existence or condition of market; (V.) damages measured by profits lost; (VI.) conclusion. 193

For death of child by physician's abandonment of mother during confinement; excessiveness; mental suffering as element of; in actions for personal torts. 216

For fright or mental distress; for injury to nerve tissues. 291

For delay in delivering telegram; mental and bodily suffering; damages within contemplation of parties. 906

For mental suffering without physical injury; for failure to deliver telegram; excessive. 771

For mental suffering without physical injury; statute making telegraph companies liable for, from delay in delivering message. 607

For mental suffering, humiliation, and mortification; telegraph company's failure to transmit or pay over money order. 611

For fright unaccompanied by personal injuries. 560

Necessity of certainty; in eminent domain case; where part of land taken; unity of contiguous parcels; necessity of damages being special. 934

For consequential injuries from operation of railroad; recovery for, when same in kind as that suffered by general public. 237

For destruction of business. 293

For injury to property; from operation of railroad; necessity as to exact proof of injury. 310

For breach of contract. 402

From false publication by mercantile agency. 475

DAMAGES.

Revocation of License to Construct, see LICENSE, 2.

DEATH.

Of Servant, Survival of Action for, see ACTION OR SUIT, 2.

Of Child during Confinement, Damages for, see DAMAGES, 9, 10.

Of Insured, see INSURANCE, 20.

From Obstruction of Drainage Ditch, Municipal Liability for, see MUNICIPAL CORPORATIONS, 20.

Removal of Action for Causing, see REMOVAL OF CAUSES.

NOTES AND BRIEFS.

Death; of child by physician's abandonment of mother during confinement; damages for. 215

Right of action for causing. 448

Occurring instantly; liability at common law for. 629

DEEDS.

Notice from Recitals of, see NOTICE, 4.

Including the husband as grantee in a deed to partition to the wife her share of property in which she has an undivided interest will give him no greater interest than though the deed had been to the wife alone. *Cottrell v. Griffiths* (Tenn.) 332

NOTES AND BRIEFS.

Effect of deed in partition, as distinguished from ordinary deed:—(I.) Deed to person other than cotenant; (II.) warranty: (a) in general; (b) implied warranty between those holding by descent; (c) implied warranty between those holding by purchase; (III.) estoppel to set up after-acquired title; (IV.) estates acquired by partition deed between parties holding different estates; (V.) words of inheritance as necessary to vest fee; (VI.) rights of subsequent purchasers; (VII.) changing title from descent to purchase; (VIII.) effect as revoking previous will; (IX.) failure of wife to join in deed; (X.) deed by person under disability; (XI.) execution of deed: (a) deed not executed by all the parties to it; (b) defective execution; (XII.) effect on judgment and mortgage liens; (XIII.) parol evidence to show nature of deed. 332

DELEGATION OF POWERS.

See CONSTITUTIONAL LAW, 3-6.

DEPOSITION.

See also APPEAL AND ERROR, 14; DISCOVERY, 3.

The answers of a wife to interrogatories on facts and articles propounded to her by creditors of her husband, who have seized by attachment land alleged to belong to him, but which the wife, having intervened in the proceedings, claims to belong to her, are entitled to no greater effect, as against such creditors, than her oral testimony given in her own behalf. *Rush v. Landers* (La.) 353

DEPOT COMPANY.

Burden of Proving Negligence of, see EVIDENCE, 16.

Liability for Negligence of Servants of, see MASTER AND SERVANT, 7, 8.

DEPUTY.

Unlawful Contract between Sheriff and Deputy, see CONTRACTS, 10.

Bill in Equity by Sheriff for Account against, see EQUITY.

Who may Maintain Action on Bond of, see EXECUTORS AND ADMINISTRATORS, 3.

See also SHERIFF, NOTES AND BRIEFS.

57 L. R. A.

DESCENT AND DISTRIBUTION.

See also WILLS, 3.

The vendor's interest in a partially performed contract to purchase land of which the vendee has been put in possession passes to his personal representative upon his death, and is not subject to execution for the debts of his heir. *Bowen v. Lansing* (Mich.) 643

NOTES AND BRIEFS.

Descent and distribution; who are next of kin; what statute of distribution governs. 537

To whom property descends; in case of contract for purchase of land. 644

DETECTIVE.

Guaranty of Salary of, see GUARANTY.

DISCONTINUANCE.

See HIGHWAYS, 4, NOTES AND BRIEFS.

DISCOVERY.

1. The production of broken machinery may be compelled for examination by persons intending to testify as experts in an action at law for personal injuries caused by its breaking. *Reynolds v. Burgess Sulphite Fibre Co.* (N. H.) 949

2. That an action at law seeks damages for a personal tort will not defeat a bill for discovery in aid of it, if it does not involve moral turpitude or immoral conduct on the part of defendant. Id.

3. Jurisdiction to grant discovery of broken machinery in aid of an action for injuries caused by its breaking is not ousted by statutes removing the disability of parties as witnesses, authorizing the taking of depositions before trial, or giving the court authority to order a view at the trial. Id.

4. A bill of discovery will lie to compel an employer to produce, for the inspection of plaintiff, the broken parts of machinery, defects in which are alleged to have caused a death, to recover damages for which an action has been instituted at law which cannot be satisfactorily prepared for trial without such inspection. Id.

NOTES AND BRIEFS.

Discovery; purpose of bills of; to procure delivery up of papers and documents; promiscuous right to inspection of papers and documents in adversary's possession; in action for personal tort. 949

DISCRIMINATION.

See CONSTITUTIONAL LAW, 10-22; EVIDENCE, 4; GAS.

DITCH.

Parol License to Construct, see LICENSE, 1, 2; TRESPASS.

Parol License to Maintain, see DAMAGES, 17.

DIVORCE.

Parties to Action to Contest Validity of, see ACTION OR SUIT, 3.
 Inquiry by Courts into Validity of, see COURTS, 3, 4.
 Setting aside Judgment for, see JUDGMENT, 1.
 See also HUSBAND AND WIFE, NOTES AND BRIEFS.

DOCUMENTARY EVIDENCE.

See EVIDENCE, 19, 20.

DRAINS AND SEWERS.

Explosion of Gas in Sewer, see EVIDENCE, 22, 29.
 Municipal Liability for Explosion of Gas in, see MUNICIPAL CORPORATIONS, 14-17.
 Municipal Liability for Permitting Obstruction of, see MUNICIPAL CORPORATIONS, 20.

NOTES AND BRIEFS.

Drains and sewers; explosion of gases in sewer; municipal liability for. 137
 City's liability for neglect with reference to. 207

DRUGGISTS.

One who by mistake sells to a person a poisonous drug for a harmless medicine is liable to a third person who without negligence takes the drug for medicine, for damages resulting to him therefrom, notwithstanding there is no privity of contract between the seller of the drug and such third person. *Peters v. Jackson* (W. Va.) 428

NOTES AND BRIEFS.

Druggists; implied warranty that drug sold of character asked for. 428

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 23-25.

EJECTMENT.

Plea of Not Guilty in, see PLEADING, 10.

1. The title of land sold and deeded by a guardian to her husband does not pass to a purchaser who has notice of their relationship; and ejectment for its recovery may be maintained by the ward. *Frazier v. Jeakins* (Kan.) 575

2. The owner of the soil in a street may maintain ejectment against any person wrongfully taking or claiming exclusive possession of the same. *French v. Robb* (N. J. Err. & App.) 956

3. A person occupying part of a street with poles and appliances for lighting the street, in pursuance of a contract made with the municipal authorities under N. J. act May 22, 1894 (P. L. p. 477), has such rightful, exclusive possession of the part so occupied as will support a plea of not guilty in an action of ejectment brought by the owner of the soil; but the right of such a person to use the street in the immediate 57 L. R. A.

vicinity of his poles and appliances for the purpose of maintaining them will not support such a plea. Id.

NOTES AND BRIEFS.

Ejectment; nature of suit. 576
 To get rid of electric-light pole unlawfully erected. 956

ELECTRICAL USES AND APPLIANCES.

Right to Maintain Poles and Wires in Street, see HIGHWAYS, 1.
 Ejectment against Person Maintaining Poles in Street, see EJECTMENT, 3.
 Presumption of Negligence as to, see EVIDENCE, 12-14.
 Question for Jury as to, see TRIAL, 9.

An electric-light company is not relieved from liability for injuries by wires broken by a storm, unless it was one which could not reasonably have been anticipated. *Boyd v. Portland General Electric Co.* (Or.) 619

NOTES AND BRIEFS.

Electrical uses and appliances; poles for public lighting; necessity of obtaining owner's consent to erection of; ejectment to get rid of. 956

Broken wire in street; presumption of negligence from; company's liability for. 621, 626

ELECTRIC LIGHTS.

Right to Maintain Poles and Wires for, in Streets, see HIGHWAYS, 1.
 Ejectment against Person Occupying Street with Poles for Purpose of, see EJECTMENT, 3.
 Taxation of, see TAXES, 9.

ELECTRIC LIGHT COMPANY.**ELEVATED RAILROADS.**

Liability for Damages from Construction of, see EMINENT DOMAIN, 4.

EMINENT DOMAIN.

Damages in Proceedings in, see DAMAGES, 16.

Evidence on Appeal from Commissioners, see EVIDENCE, 28, 32, 33.

1. A statute requiring payment of damages for injuries to a business through the taking of property for public use is not unconstitutional on the ground that taxes cannot be levied for such purposes. *Earle v. Com.* (Mass.) 292

2. In awarding damage to one, a portion of whose land is sought to be condemned for public use, for injury to his remaining land, injury to tracts not connected with, and held under different titles from, although adjoining, that from which the parcel is taken, cannot be considered. *Sharpe v. United States* (C. C. App. 3d C.) 932

3. A doctor having an office in, and a practice extending throughout, a town in which land is taken for a public purpose, is within the protection of a statute pro-

viding for compensation to any individual owning an established business on land within the town, which is injured by the taking. *Earle v. Com.* (Mass.) 292

4. The owner of an apartment house cannot recover damages from an electric elevated railroad company whose tracks cross the highway within 19 feet of his property, where the injury differs from that suffered by the general public only in the proximity of the tracks, even under a constitutional provision that private property shall not be damaged for public use without compensation. *Aldrich v. Metropolitan West Side Elevated R. Co.* (Ill.) 237

NOTES AND BRIEFS.

Eminent domain; measure of damages for taking part of land. 934

Consequential damage from construction of railroad. 237

Destruction of business, not taking of property. 293

What lands are to be deemed part of the tract damaged by taking a portion thereof under eminent domain:—(I.) Different holdings; (II.) property in city: (a) separated by highways, railroads, or other property; (b) separated by plat lines; (c) separating and severing buildings; (d) part of lot or lots injured; (III.) farm lands in a contiguous body; (IV.) farm lands separated by highways, railroads, canals, or other property; (V.) lands in different counties; (VI.) summary. 948

ENTIRETIES.

Tenancy by, see HUSBAND AND WIFE, NOTES AND BRIEFS.

EQUAL PROTECTION.

See CONSTITUTIONAL LAW, 10-22.

EQUITABLE CONVERSION.

NOTES AND BRIEFS.

Vendee in possession after part payment for land. 643

EQUITY.

Jurisdiction of, in Particular Actions, see CREDITORS' BILL.

See also SUBROGATION, 1.

A sheriff cannot maintain a bill in equity for an account against his deputy without showing, by sufficient allegations, special circumstances entitling him to discovery as necessary to complete and adequate relief, or that the accounts are complicated and intricate. *White v. Cook* (W. Va.) 417

ESTOPPEL.

Of Depositor, by Failure to Discover Forgery of Checks, see BANKS, 12.

As Ground for Injunction, see INJUNCTION, 3.

Of Applicant for Insurance, see INSURANCE, 11-13.

Of Insurance Company, see INSURANCE, 14-19.

By Judgment, see JUDGMENT.

To Object to Constitution of Board of Equalization, see TAXES, 14.

1. Validity cannot be given to an illegal contract by estoppel. *Reed v. Johnson* (Wash.) 404

2. The negligent placing of a will so that its existence is not known for several years after testator's death, and the laches of the devisee in not producing it, will not estop him from asserting his claim against one who has acquired a title from the heir, at any time before the right to probate or register the will is barred. *Reid v. Benge* (Ky.) 253

3. The owner of a piano who leases it to a retail dealer in musical instruments is not estopped to claim it from one who first hired and then purchased it from the retail dealer, who held it only under a lease providing that it should be kept in the purchaser's house, although the lessor failed to notify such purchaser of his claim to the instrument for nearly two years, during which time the latter bought and paid for it, believing it to belong to the retail dealer. *Oliver Ditson Co. v. Bates* (Mass.) 289

4. One who removes a case from a state to the Federal court is estopped from attacking the jurisdiction of the latter upon any ground except that the court from which it was removed had no jurisdiction. *Tootle v. Coleman* (C. C. App. 8th C.) 120

NOTES AND BRIEFS.

Estoppel; when arises; to take advantage of own negligence; by silence. 290

By laches in probating will. 253

By special appearance to remove cause to Federal court; against removal of cause; in defense of suit to which party estopped not a party. 121

Of municipal corporation by acts of officer. 151

To revoke executed parol license. 720

To claim or sue for usury; as defense to claim for usury. 801

Only by facts within knowledge of person against whom estoppel claimed. 813

Applicability of, to married woman. 915

EVIDENCE.

Review of Errors as to, see APPEAL AND ERROR, 14, 15.

Presumptions and burden of proof. See also DAMAGES, 13.

1. Preliminary evidence is not necessary of the truth of warranties in an application for life insurance, in a suit on the policy. *O'Rourke v. John Hancock Mut. L. Ins. Co.* (R. I.) 496

2. The burden is upon a *cestui que trust* seeking a preference over general creditors of an insolvent trustee to show that the trust money did in fact increase the estate out of which he seeks a preference, or is represented therein in some form. *Lincoln Sav. Bank & S. D. Co. v. Morrison* (Neb.) 885

3. It is presumed that moneys drawn out of a fund wherein a trustee has mingled his own money and that of the *cestui que trust* are his own, and, so long as any portion of the fund so constituted remains it may be followed, and the charge of the *cestui que trust* thereon may be asserted. *Id.*

4. To entitle a consumer to an order requiring a gas company having authority to charge flat or meter rates to supply him at the flat rate the same as all other consumers are supplied, he must show that the enforcement of the meter rate against him will be an unjust discrimination. *Indian Natural & Illum. Gas Co. v. State ex rel. Ball (Ind.)* 761

5. In order to sustain a conveyance of land by a husband to his wife, both being domiciled in another state, which is claimed to have been made in consideration of an indebtedness of the husband to the wife for money said to have belonged to her, and to have been received and used by the husband, it must be shown that by reason of such receipt and use the husband became the debtor of the wife, that the debt existed at the time of the conveyance, and that the property was conveyed in satisfaction, or in part satisfaction, of such debt. *Rush v. Landers (La.)* 353

6. Where answers of a wife to interrogatories propounded to her by creditors of her husband show that property in another state has been conveyed by the husband to her for a particular consideration arising under the laws of that state, the court will not assume, even though it should be made to appear that such consideration was inadequate, that a different consideration, testified to as moving in the matter of the conveyance of property in the state, was therefore included and exhausted for the purposes of the conveyance in such other state. *Id.*

7. If a sale of property by a husband to his wife is attacked by a party in interest, and the conveyance appears on its face to be invalid because the consideration expressed is not within the exceptions of La. Civ. Code, art. 2446, prohibiting sales between husband and wife except in certain cases, the burden of proof is on the party seeking to maintain the validity of the conveyance to show that the real consideration was different from that expressed, and was within the exceptions provided by the law. *Id.*

8. When a will produced from the testator's custody is mutilated and the signature destroyed the burden is on proponents to account for the mutilation, and not on the caveators to show that the mutilation was purposely done. *Cutler v. Cutler (N. C.)* 209

9. In the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that one riding for his own convenience on a freight train, an engine, a hand car, or any other carriage of a common carrier not designed for the transportation of passengers, is unlawfully
57 L. R. A.

there, and is a trespasser. *Purple v. Union P. R. Co. (C. C. App. 8th C.)* 700

10. A person resorting to a railroad depot to purchase a ticket for transportation over a railroad which makes use of the depot to receive and discharge passengers is not bound to show that the person at the ticket window is the agent of the company, and not a mere broker, to avoid the application of the rule that a railroad company is not liable for the condition of premises where its tickets are sold by a broker in whose hands they have been placed. *Herrman v. Great Northern R. Co. (Wash.)* 390

11. A presumption of negligence does not arise from the mere fact of the explosion of a steam boiler used by one engaged in lawful business. *Vieth v. Hope Salt & Coal Co. (W. Va.)* 410

12. A presumption of negligence on the part of an electric company arises when injury results to a traveler in a public street from one of its live wires, which has broken and is hanging so near the ground as to be within reach therefrom. *Boyd v. Portland General Electric Co. (Or.)* 619

13. An allegation in an action to recover for injuries to a passerby from a broken live electric wire, that it was weak and defective, and insufficiently stretched and fastened, does not require proof of these facts, since the happening of the accident is presumptive evidence of negligence in that regard. *Id.*

14. Proof that an electric-light wire controlled by a private corporation, and normally suspended upon poles along a public street, was trailing broken on the sidewalk, affords a presumption of negligence, in a suit against such corporation by a person injured through electric shock by contact with such wire. *Newark Electric Light & P. Co. v. Ruddy (N. J. Err. & App.)* 624

15. No presumption of negligence arises from the fact that a quiet, gentle horse was left standing untied in the public street, free from the presence of anything which might frighten or disturb him; the driver being within 5 to 8 feet of the wagon to which the horse was hitched; and it appearing that the driver had used the horse in that way for many years without an accident. *Belles v. Kellner (N. J. Err. & App.)* 627

16. The presumption is that a depot company has promulgated reasonable rules for, and exercised proper supervision over, the operation of its railroads and yards, and in an action to recover for injuries received while using the yards the burden is on plaintiff to prove a failure of the company to comply with its duty in this respect. *Brady v. Chicago & G. W. R. Co. (C. C. App. 8th C.)* 712

17. To relieve itself from liability to make good the amounts which it has paid on raised checks, a bank must affirmatively establish negligence on the part of the drawer which facilitated the commission of the fraud. *Critten v. Chemical Nat. Bank (N. Y.)* 529

Best and secondary evidence.

18. Although a written rule regulating the running of railway trains is the best evidence of its terms, it is competent for a witness to testify whether or not the rule applied to all the trains of the company or only to a portion thereof. *Southern P. Co. v. Schoer* (C. C. App. 8th C.) 707

Documentary evidence.

19. A writing which contains competent evidence upon a material issue cannot be lawfully rejected because it also contains evidence which is incompetent and irrelevant. *Id.*

20. In an action by one claiming title, for possession of property which defendant had purchased from a third person, a lease from plaintiff to such third person is admissible in evidence to show the nature of such person's right to possession of the property, and to rebut any presumption of agency on his part to sell it. *Oliver Ditson Co. v. Bates* (Mass.) 289

Opinions.

When Objection to Form of Hypothetical Question Made, see *APPEAL AND ERROR*, 9.

21. A physician may state his opinion as to the probable further duration of a confinement case had he reached the mother at a time when all but the head and one arm of the child had been delivered. *Western U. Teleg. Co. v. Church* (Neb.) 905

22. Testimony of a mining engineer who has never investigated the ventilation of sewers, as to a method of preventing an explosion in a sewer, is not admissible in an action to recover for loss caused by such explosion, where he states that he never saw any practical attempt made to utilize the method suggested, and never knew of such attempt, and has made no experiments himself. *Fuchs v. St. Louis* (Mo.) 136

Confessions.

23. A confession of a prisoner, voluntarily made, is admissible when not prompted by any inducement of hope or fear. *Hills v. State* (Neb.) 155

Admissions.

24. An admission as to what an absent witness will testify to, made for the purpose of securing a speedy trial, is not admissible at a subsequent term when the presence of the witness has been secured. *Cutler v. Cutler* (N. C.) 209

Declarations.

25. Evidence of statements to the agent taking an application for insurance, different from those written therein, are not admissible in an action on the policy, where he is the agent of the applicant. *O'Rourke v. John Hancock Mut. L. Ins. Co.* (R. I.) 496

26. A declaration by the motorman running an electric car, made while the car was still on the body of one it had run down, that "I saw the child, but thought I could pass it;" or, "This is a terrible thing."

I saw the child, but thought I could run past it,"—is admissible in evidence as a part of the *res gestæ* in an action for the injury. *Sample v. Consolidated Light & R. Co.* (W. Va.) 186

Privileged communications.

27. A communication to a minister of the gospel or a priest is not privileged, where it is shown that it was not made in confidence of the relation, or was not to be kept as a secret. *Hills v. State* (Neb.) 155

Former testimony.

28. Upon a trial *de novo* upon appeal from commissioners in an eminent domain proceeding the jury are not to consider the evidence produced before the commissioners, or be influenced by the commissioners' report. *Sharpe v. United States* (C. C. App. 3d C.) 932

Relevancy and materiality.

29. Under an allegation of negligence on the part of a municipality in failing to prevent the formation and accumulation of gases in a sewer, and in failing to open the vents to permit their escape, which resulted in an explosion, evidence is not admissible that the explosion might have been prevented by the use of ventilating apparatus. *Fuchs v. St. Louis* (Mo.) 136

30. Evidence of the defective condition of an engine thirty days before the happening of an accident is admissible, since, in the absence of other evidence, there is at least a reasonable probability that a defect existing at that time was not remedied before the casualty occurred. *Southern P. Co. v. Schoer* (C. C. App. 8th C.) 707

31. Evidence as to directions which the sendee had given a telegraph company as to delivery of telegrams for him is admissible in an action by a third person against the company for failure promptly to deliver a message to him. *Western U. Teleg. Co. v. Church* (Neb.) 905

32. Upon the question of the value of land sought to be condemned by the government, testimony of the owner of offers which have been received for the land is not admissible, where there is nothing to show the conditions under which they were made or the circumstances influencing them. *Sharpe v. United States* (C. C. App. 3d C.) 932

33. Evidence of merely possible uses to which land sought to be condemned by the government may be put, not founded on any clear, certain, or avowed obnoxious uses, is not admissible to enhance the damages to be awarded for injury to the residue of the tract. *Id.*

34. To show the intrinsic value of the stock of an insurance company, the purchase of which was induced by fraud, the history of bank certificates of deposit representing notes of agents which are to be repaid out of the business done, and which certificates have been placed with the bank as part of the capital stock, may be shown. *Hindman v. First Nat. Bank* (C. C. App. 6th C.) 108

Weight; sufficiency.

Sufficiency to Submit to Jury, see TRIAL, 7-16.

See also CONSTITUTIONAL LAW, 24; DEPOSITIONS; WITNESSES, 1.

35. The proper measure of proof necessary to a verdict in civil cases is such as will reasonably satisfy the jury. *United States Fidelity & G. Co. v. Charles* (Ala.) 212

36. A paper admitted in evidence without objection will be taken as the commencement of proof of a particular fact. *Marks v. New Orleans Cold Storage Co. (La.)* 271

NOTES AND BRIEFS.

Evidence; burden of proof as to intent in making false representations. 113

Presumption; of continuance of meretricious relations between man and woman; of lawful marriage after removal of impediment. 917

Presumption; of negligence from injury; necessity of proving negligence after presumption overcome; burden of proof as to injury by broken electric wire. 621

Presumption; from leaving broken electric wire on sidewalk. 626

Presumption; from carrier's failure to stop goods in transit after notice. 527

Presumption; of validity of state law. 775

Presumption of infant's capacity to exercise due care for safety. 640

Presumption; from annexation of heating apparatus; judicial notice as to fixtures. 632

Privileged communication to priest; defendant's admission of former marriage on trial for bigamy. 156

Of interference with light, air, and view by operation of railroad; of vibration of neighboring property, and of noise. 238

To show conveyance fraudulent as to creditors. 755

By physician as to probable result of certain treatment. 905

Of value of land. 933

Legislative declaration as to what shall be conclusive proof. 765

Sufficiency of; contrary to daily experience or physical facts; as to act of criminal intercourse; effect of delay in making complaint. 847

EXCEPTIONS.

See APPEAL AND ERROR, 5-7.

EXCLUSIVE PRIVILEGE.

For Removal of Garbage, see MUNICIPAL CORPORATIONS, 8, 9.

Exemption from Franchise Tax as, see TAXES, 3.

EXECUTION.

Liability of Deceased Vendor's Interest in Land Contract to, see DESCENT AND DISTRIBUTION.

57 L. R. A.

Against Paid-up Insurance Policy, see INSURANCE, 5.

Of Repleved Criminal, see CONSTITUTIONAL LAW, 3.

The interest of the assured in a twenty-year distribution policy of insurance on his life, which will cease on his failure to pay premiums, is not an estate within the meaning of a statute making an execution a lien from the time it is placed in the hands of the officer on all the personal estate of or to which the judgment debtor is, or may afterwards and before the return day of the writ become, entitled. *Boisseau use of Robinson v. Penn. (Va.)* 380

NOTES AND BRIEFS.

Execution; lien of, on insurance policy. 381

Other remedies suspended by lien of. 385

EXECUTOR AND ADMINISTRATOR.

1. It is the right of an executor offering land for sale at public outcry to withdraw the same at any time before the hammer falls. *Tillman v. Dunman (Ga.)* 784

2. Although the motive of an executor offering land for sale at public outcry in withdrawing the property from sale before the bid was accepted was the result of collusion between himself and another who had bargained for the premises at a private sale, and the withdrawal was made with the design of completing the private sale, nevertheless the person who made the last and highest bid before the same was withdrawn could not insist upon the right to take the land as a purchaser. While such collusion between the executor and another would be open to inquiry by legatees and creditors, it is not open to inquiry at the instance of a stranger. *Id.*

3. The personal representative of a deceased sheriff may maintain an action on the bond of a deputy to compel him to pay over money received by him by virtue of his office, notwithstanding the fact that no order has been made by the county court or board of education, to whom the money ultimately belongs, requiring the deputy to pay over the balances due. *White v. Cook (W. Va.)* 417

NOTES AND BRIEFS.

Executor and administrator; proper party to enforce specific performance of land contract. 644

Private sale by; sale to best and highest bidder; successful bidder's right to compel performance. 784

EXEMPLARY DAMAGES.

See DAMAGES, 17, 18.

EXEMPTION.

From Levy, see LEVY AND SEIZURE.

From Taxation, see TAXES, 3, 4, 11.

EXPERT.

Evidence of, see EVIDENCE, 21, 22.

EXPLOSION.

Presumption of Negligence from, see EVIDENCE, 11.

Of Gas in Sewer, see EVIDENCE, 22, 29.

Of Gas in Sewer; Municipal Liability for, see MUNICIPAL CORPORATIONS, 14-17.

No liability for damages to a neighbor, caused by the explosion of a steam boiler, arises where one places the boiler upon his premises, and operates it in a lawful business, with care and skill, so that it is no nuisance, and there is no proof of fault or negligence. *Vieth v. Hope Salt & Coal Co.* (W. Va.) 410

NOTES AND BRIEFS.

Explosion; of gases in sewer; municipal liability for. 137

Within doctrine of *res ipsa loquitur*. 411

EXTRADITION.

A prisoner charged with violation of the Federal laws, who is transferred from one state to another for trial under process from a Federal court, may be turned over to the authorities of the latter state for trial upon a charge of violation of its laws, without being afforded an opportunity to return to the former state. *Re Little* (Mich.) 295

NOTES AND BRIEFS.

Extradition; holding for trial for different offense; inducing to come into state by falsehood, stratagem, or kidnapping; court administering law in regard to, as it exists. 295

FALSE CERTIFICATE.

By Bank, see BANKS, 2, 3.

FALSE REPRESENTATIONS.

See FRAUD AND FRAUDULENT CONVEYANCES.

FARES.

On Street Car, see CARRIERS, 12-14.

FELLOW SERVANT.

See MASTER AND SERVANT, 4-9, NOTES AND BRIEFS.

FENDER.

For Vessel, Duty to Use, see MASTER AND SERVANT, 10.

FERTILIZER.

Damages for Breach of Contract as to, see DAMAGES, 1.

FINDINGS.

See APPEAL AND ERROR, 20.

FIRE DEPARTMENT.

Firemen; Legislative Power to Fix Salaries of, see CONSTITUTIONAL LAW, 7.

FIREWORKS.

Municipal Liability for Injury by, see MUNICIPAL CORPORATIONS, 18.

57 L. R. A.

FIXTURES.

Tenant's Right to Remove, see LANDLORD AND TENANT, 1; STATUTES, 7.

1. A servant's room, metallic gutters attached to the roof of a house, and water pipes laid under the ground by a tenant on leased premises, become, when constructed and attached, a part of the freehold, and cannot be lawfully severed from the land by the tenant against the will of the landlord, even though at the time of their erection the tenant intended to remove them at the expiration of his term. *Wright v. Du Bignon* (Ga.) 669

2. Domestic or ornamental fixtures which a tenant has a right to remove during his term are such only as may be easily severed and made equally useful to him in another house, and do not extend to such as are substantial additions to the house, or the removal of which would be injurious to the freehold. *Id.*

3. Heating apparatus bought by a man under contract reserving title in the seller, and permanently placed in a building owned by himself and his wife by entireties, does not become a fixture so as to prevent its removal for nonpayment of the purchase money, if removal will not materially injure it or the building, since there is no unity of title in it and the real estate. *Schellenberg v. Detroit Heating & Lighting Co.* (Mich.) 632

NOTES AND BRIEFS.

Fixtures; what constitutes; effect of permanent annexation; rule as to, as between landlord and tenant. 669

Heating apparatus as; necessity of unity of title; presumption arising from annexation; judicial notice as to. 632

FOOD.

Police Power as to, see CONSTITUTIONAL LAW, 26, 27.

NOTES AND BRIEFS.

Food; prohibiting sale of preservative or dairy products containing same. 179

Validity of law prohibiting sale of oleomargarine. 182

FOREIGN CORPORATIONS.

License to Foreign Insurance Company, see INSURANCE, 7.

Compelling Grant of License to, see MANDAMUS.

FOREIGN PARTNERSHIP.

Discrimination against, see CONSTITUTIONAL LAW, 15, 16; STATUTES, 8.

FORGERY.

Of Check, see BANKS, 10-16; NOTICE, 3. Indictment for, see INDICTMENT.

1. The addition to a check of the words, "in full of account to date," may constitute a forgery if made at any time after the check is delivered to the payee. *Gordon v. Com.* (Va.) 744

2. Although a check is so irregular in

form that the bank would be justified in refusing payment of it, yet it may be the subject of forgery as to its effect as a receipt, after it has passed through the hands of several indorsers, and has been paid by the bank and returned to the hands of the drawer. *Id.*

3. To add to a canceled check the words, "in full of account to date," with intent to alter its effect as a receipt, constitutes forgery. *Id.*

4. That one who forges a receipt in full on a payment on account has in fact paid his indebtedness in full will not prevent his liability to indictment for the forgery. *Id.*

NOTES AND BRIEFS.

Of Check, see **BANKS**.

What subject to forgery; check irregular in form; addition to canceled check; writing affirmatively invalid on face; writing of questionable validity. 744

FORMER JEOPARDY.

See **CRIMINAL LAW, NOTES AND BRIEFS**.

FRANCHISE.

Tax on, see **TAXES, 3-10, 12-15**.

NOTES AND BRIEFS.

Franchise; tax on. 50, 64, 79

FRAUD AND FRAUDULENT CONVEYANCES.

False Certification by Bank, see **BANKS, 2, 3**.

False Representations by Defaulting Bank President, see **BANKS, 6**.

Damages for, see **DAMAGES, 14**.

In Life Insurance Contract, see **INSURANCE, 9**.

In Chattel Mortgage, see **MORTGAGE**.

1. A representation of fact made with the intent to influence the conduct of another implies necessarily the belief of the person making it that it is true. *Hindman v. First Nat. Bank* (C. C. App. 6th C.) 108

2. One who knowingly makes false representations in respect to the capital of a corporation, for the purpose of inducing another to buy its stock, is liable to him for the loss sustained by the purchase of the stock in reliance upon the truth of the statement. *Id.*

3. The jury may find that a statement by a bank cashier, that one of its corporation depositors had its entire authorized capital on deposit, made with no knowledge of the fact, is knowingly false, for the purpose of holding the bank liable for the results of the misrepresentation in case it is false and causes injury to one relying on it. *Id.*

4. That the discount of subscribers' notes indorsed by an insurance company, by the bank in which they were deposited as capital, was genuine and real, does not prevent its certificate that the company's capital and surplus had been paid in, in cash, from being false and misleading. *Id.*

57 L. R. A.

5. That one taking stock in a corporation in reliance on representations as to its condition was partly induced to purchase by the desire to secure an agency will not defeat his right to recover against the one making the representations. *Id.*

Fraudulent conveyances.

6. A conveyance of property, with intention to delay or defraud creditors, known to the party taking, is void as to them, though made in payment of a debt which in amount approximates the value of the property so conveyed. *Bigby v. Warnock* (Ga.) 754

7. A wife who takes a conveyance of property from her husband, with knowledge that he intends thereby to hinder and defraud his creditors, and who, in order to procure a loan to herself, conveys the property, as security, to one ignorant of the fraud, is personally liable as a trustee *ex maleficio* to a judgment creditor of her husband, as to whom the conveyance to her is void, for the amount of the loan, or sufficient thereof to satisfy such judgment, and, to reduce the recovery, cannot plead, in an action brought by the judgment creditor against her, a debt due her by her husband; nor is it material what she does with the borrowed money, provided she does not apply it to her husband's debts. *Id.*

8. An indorsee of a note is not precluded from attacking a voluntary conveyance of property by a remote indorser on the note by the fact that it occurred before the note came into possession of the indorsee. *National Valley Bank v. Hancock* (Va.) 728

NOTES AND BRIEFS.

Fraud and fraudulent conveyances; conveyance in discharge of debt, with intent to defraud creditors; effect of fraudulent purpose; conveyance between husband and wife. 754

Fraudulent conspiracy; verdict against single defendant in civil action for; false representations by cashier as to amount of capital of insurance company in bank; bank's liability for; action for false representations not directly made to person injured. 110

FRIGHT.

One frightening a woman so as to cause nervous prostration, by stealthily entering her home in the nighttime and committing a trespass on her husband's property, is liable to her in damages therefor. *Watson v. Dilts* (Iowa) 559

NOTES AND BRIEFS.

Fright; right to recover for. 291

Unaccompanied by physical injury; liability for causing; proximate cause of. 559

GAMING.

Recovery on Cashier's Check for Use in Gambling, see **BANKS, 8, 9; CHECKS**.

See also **CONTRACTS, NOTES AND BRIEFS; NUISANCES**.

GARBAGE.

Monopoly as to, see **MUNICIPAL CORPORATIONS**, 9.

NOTES AND BRIEFS.

Regulating removal of; exclusive contract for removal. 896

GARNISHMENT.

The right to garnish a debtor is not limited to the situs of the chose in action; and a garnishment by a citizen of one state of a debtor of the same state, whose creditor resides, and whose debt was contracted and is payable, in another state, is such an attachment of the chose in action as will authorize the court to obtain jurisdiction to dispose of it by publication of the summons against the defendant. *Tootle v. Coleman* (C. C. App. 8th C.) 120

NOTES AND BRIEFS.

Garnishment; service by publication in action in; situs of debt for purpose of. 122

GAS.

See also **EVIDENCE**, 4.

A natural gas company having authority to lay its mains in a public street and supply gas to consumers, charging a flat rate by the month or a certain meter rate per 1,000 feet, cannot enforce the latter rate against a single consumer if it makes an unjust discrimination against him. *Indiana Natural & Illum. Gas Co. v. State ex rel. Ball* (Ind.) 761

GIFT.**NOTES AND BRIEFS.**

Gift; of public money to individual for private use. 293

GOVERNOR.

Power to Grant Reprieve, see **CRIMINAL LAW**, 2, 3.

Upon the resignation of the governor of the state the president of the senate does not become governor in the constitutional sense, under N. J. Const. art. 5, cl. 12, providing that in case of the death, resignation, or removal of the governor the powers, duties, and emoluments of the office shall devolve upon the president of the senate, and in case of the death, resignation, or removal of the latter, then upon the speaker of the house of assembly, until another governor shall be elected and qualified; and if the president of the senate resigns his office as senator he can no longer exercise the functions pertaining to the executive office, and thereupon the powers, duties, and emoluments of that office devolve upon the speaker of the house of assembly. *State, Clifford, Prosecutor, v. Heller* (N. J. Sup.) 312

GUARANTY.

By Married Woman, see **HUSBAND AND WIFE**, 1.

A written guaranty of the salary and expenses of a detective in working up a 57 L. R. A.

murder case will not continue after conviction of a suspect and settlement of the bill for services to that time, although the guaranty is not canceled or recalled; and the guarantor cannot be held liable for services rendered in connection with a retrial of the accused. *Blyth v. Pinkerton* (Wyo.) 468

NOTES AND BRIEFS.

Guaranty; construction of contract of; considering previous and contemporary circumstances; when continuing; necessity of explicit language to revoke. 468

By third persons of payment of debt of director to bank; when guarantor's liability fixed. 813

GUARDIAN AND WARD.

Ejectment by Ward for Land Sold by Guardian, see **EJECTMENT**, 1.

Conclusiveness of Confirmation of Guardian's Sale, see **JUDGMENT**, 4.

A guardian's sale to her husband of land of her ward is void, although it is made for a fair consideration and is free from actual fraud. *Frazier v. Jeakins* (Kan.) 575

NOTES AND BRIEFS.

Guardian's right to purchase; ward's right to recover land unlawfully sold; guardian's duty on reporting sale. 576

HABEAS CORPUS.

See also **CERTIORARI**.

The legality of the proceedings at the trial of a prisoner convicted of a crime by a court of competent jurisdiction cannot be challenged or reviewed by habeas corpus. *State, Clifford, Prosecutor, v. Heller* (N. J. Sup.) 312

NOTES AND BRIEFS.

Habeas corpus; taking advantage of former acquittal or conviction by. 806

HEIRS.

As Parties to Action to Contest Validity of Divorce from Ancestor, see **ACTION OR SUIT**, 3.

NOTES AND BRIEFS.

Heirs; descent of decedent's real estate to; of contract for purchase of land. 644

HIGHWAYS.

Ejectment by Abutting Owner against Person Using, see **EJECTMENT**, 2, 3.

Improvement of, see **PUBLIC IMPROVEMENTS**.

Landlord's Liability for Ice on, see **LANDLORD AND TENANT**, 3.

Negligent Removal of Snow from Street Railway Track, see **STREET RAILWAYS**, 2.

Negligence in Crossing Street-Car Track, see **TRIAL**, 11.

1. If a person who has rightfully placed poles and wires in a street for the purpose of lighting the street uses them wrongfully for private lighting, he does not thereby lose his right to maintain them as against the owner of the soil; but the owner may re-

cover compensation for such wrongful use by an action for damages, and equity will restrain their misuse in the future. *French v. Robb* (N. J. Err. & App.) 956

2. The permanent obstruction of a street within 200 feet of the property of an abutting owner, cutting him off from his usual and only direct access to the business portion of the town, thereby depreciating the value of his property, inflicts special injury on him for which he may recover damages. *O'Brien v. Central Iron & Steel Co.* (Ind.) 508

3. One whose property is cut off from access to markets and from communication with his fellow men by neglect of the county commissioners to keep the highway leading to it in repair suffers a special injury which will entitle him to maintain an action against the commissioners. *Bembe v. Commissioners of Anne Arundel County* (Md.) 279

4. Damages for injury to property by discontinuing a portion of the street on which it is situated, so that traffic is diverted from it, trade diminished, and its value lessened, although access to it still exists by a longer route, cannot be recovered under a statute providing for the payment of damages sustained by the discontinuance of a highway. *Cram v. Laconia* (N. H.) 282

NOTES AND BRIEFS.

Highways; rights of adjoining owner in; right of municipality to abandon and close. 280

Discontinuance; legislative power as to; necessity of awarding damages to abutting owner. 282

Discontinuance of; rights of abutting owner; trouble and inconvenience resulting from. 508

City's duty to remove ice from sidewalk; abutting owner's liability for injury from ice. 749

HOLDING OVER.

See **LANDLORD AND TENANT**, 4-6.

HOLIDAY.

The exercise of an option which matures on a holiday cannot be lawfully made on the succeeding day, where the statutes make no provision for the suspension of general business on that day. *Page v. Shainwald* (N. Y.) 173

NOTES AND BRIEFS.

Holiday; last day of option occurring on. 175

HOMESTEAD.

NOTES AND BRIEFS.

Mortgage by survivor; death of owner; life estate in survivor. 901

HORSE RACE.

See **NUISANCES**.
57 L. R. A.

HUSBAND AND WIFE.

Parties to Action to Contest Validity of Divorce, see **ACTION OR SUIT**, 3.
Conflict of Laws as to, see **CONFLICT OF LAWS**, 1-3; **EVIDENCE**, 5, 6.

Inquiry by Court into Validity of Divorce, see **COURTS**, 3, 4.

As Grantees in Partition Deed, see **DEEDS**.

Fraudulent Sale by Husband to Wife, see **EVIDENCE**, 7.

Fraudulent Conveyances to, see **FRAUD AND FRAUDULENT CONVEYANCES**, 7.

Sale by Guardian to Husband, of Ward's Land, see **GUARDIAN AND WARD**.

Setting aside Judgment for Divorce, see **JUDGMENT**, 1.

Notice from Deed of Relationship of, see **NOTICE**, 4.

Trust for Support of Wife, see **TRUSTS**, 2.

Wife as Witness against Husband, see **WITNESSES**, 2.

1. A married woman is liable on her guaranty of a promissory note owned by her and made payable to her order, and the purchaser of such a note is not driven to an inquiry as to the purpose to which she intends to devote the proceeds of a sale thereof. *Kitchen v. Chapin* (Neb.) 914

2. Land sold by a husband to his wife is liable to seizure by the husband's creditors, where the title is invalid on its face because the expressed consideration is not within the exceptions provided by La. Civ. Code, art. 2446, as essential to the validity of a sale in such case. *Rush v. Landers* (La.) 353

Marriage.

Allegations of, see **PLEADING**, 5.

3. A marriage solemnized in good faith is not void merely because the contracting parties may at some prior time have entered into an agreement or understanding that the marriage should be invalid. *Hills v. State* (Neb.) 155

4. All that is essential to establish the marriage relation in Nebraska is that the parties, being of legal capacity, freely consent thereto; and their consent need not be expressed in any especial manner or by any prescribed form of words, but may be sufficiently evidenced by any clear and unambiguous language or conduct. *University of Michigan v. McGuckin* (Neb.) 917

5. Although the beginning of a cohabitation was meretricious, each of the parties having a lawful spouse then living, there is sufficient evidence of a lawful marriage where, after the obstacles thereto were removed by decrees of divorce, the parties not only for a long term of years continued to live together as husband and wife, and to enjoy the repute of that relation, but continuously represented themselves to the public as such, and five children were born of the union, whom the parents unitedly represented to the public and caused to be baptized into church as the children of lawful wedlock; and the fact that no explicit ver-

bal agreement to marry was made after obtaining the divorces is immaterial. Id.

NOTES AND BRIEFS.

Husband and wife; proof of first marriage of defendant charged with bigamy. 156

Marriage; presumption of continuance of meretricious relationship; effect of removal of impediment to marriage; sufficiency of common-law marriage. 917

Conflict of laws as to validity of marriage. 155

Tenancy by entireties; when created. 333

Property held by entireties; wife's right to possession of. 632

Wife's capacity to become surety for husband; conflict of laws as to; note signed by wife. 513

Wife as surety for husband; sufficiency of consideration for. 813

Wife's liability on note and mortgage signed with her husband; married woman's right to bind separate property; applicability of estoppel to married woman. 915

Conflict of laws as to matrimonial property. 353

Fraudulent conveyances between. 754

Divorce; suit to set aside decree after husband's death; right to disregard void decree. 584

Right to contest the validity of a divorce decree after the death of one or both of the parties. 583

Death of child by physician's abandonment of wife during confinement. 215

HYPOTHETICAL QUESTION.

When Objection to Form of, Made, see APPEAL AND ERROR, 9.

ICE.

On Sidewalk, Landlord's Liability, see LANDLORD AND TENANT, 3; HIGHWAYS, NOTES AND BRIEFS.

IMPRISONMENT FOR DEBT.

The imposition of a fine and imprisonment as a means of enforcing the license tax imposed by Neb. Comp. Stat. 1901, chap. 77, art. 1, §§ 152-154, upon peddlers, does not render the act invalid as a violation of the Nebraska Bill of Rights, § 20, prohibiting imprisonment for debt. *Rosenbloom v. State* (Neb.) 922

INDICTMENT.

The averment of extrinsic circumstances to give efficiency to an instrument so as to make it the subject of forgery is not necessary in an indictment for that offense, where it is sufficient to enable the court to perceive judicially that it might be made the vehicle of fraud and prejudice as charged. *Gordon v. Com.* (Va.) 744

NOTES AND BRIEFS.

Indictment; for bigamy. 156
57 L. R. A.

INFANT.

Contributory Negligence of Youth on Railroad Train, see CARRIERS, 4.

Negligence of, or Towards, see NEGLIGENCE, 4-8; RAILROADS, 10.

Damage for Death of, during Mother's Confinement, see DAMAGES, 9, 10.

Surrender of Insurance Policy by, see INSURANCE, 3, 4.

1. An infant is not bound by his warranties in a contract for life insurance. *O'Rourke v. John Hancock Mut. L. Ins. Co.* (R. I.) 496

2. Negligence of an infant in performance of his contract to thresh grain, which results in the destruction of the grain and the shed covering it by fire set by sparks from the engine, will not render him liable for the loss, since the gravamen of the action is not a tort independent of the contract, but is an injury which can be made out only by proving the contract, and showing negligence in its performance. *Lowery v. Cate* (Tenn.) 673

NOTES AND BRIEFS.

Negligence of, see NEGLIGENCE.

Infants; death of, by physician's abandonment of mother during confinement; damages for. 215

Parent's negligence contributing to death of. 186

Insurance on life of minor. 496

Insurance of life of; validity of warranties by, in application; power to contract as agent, act as trustee, or execute power. 497

Power to avoid contracts; ratification of, after disaffirmance. 506

Right to recover land unlawfully sold by guardian; commencement of suit as disaffirmance of contract. 576

Liability of an infant for torts:—(I.) General liability of an infant for torts; (II.) tort in inducing a contract: (a) by fraudulent representations; (b) by false warranty; (III.) tort in the performance of a contract: (a) contract of bailment: (1) damage to property by negligence; (2) damage to property by wilful act; (3) refusal to deliver property; (b) contracts other than bailment: (1) by negligence; (2) by other acts; (IV.) other torts arising from contracts; (V.) estoppel of an infant by his fraud: (a) when estopped to plead infancy, in an action on contract; (b) when estopped to reassert title or to demand a second payment; (c) when compelled in equity to make satisfaction for his fraud; (VI.) liability of an infant as trustee or officer; (VII.) summary. 673

Parent's duty to support. 728

INHERITANCE TAX.

See TAXES, 17-19.

INJUNCTION.

Against Collection of Taxes, see CLOUD ON TITLE.

Against Unlawful Combination of Dealers, see CONSPIRACY.

Former Jeopardy, see **CRIMINAL LAW**, 1.

Against Maintaining Poles and Wires in Street, see **HIGHWAYS**, 1.

1. Equity will enjoin municipal authorities from carrying into effect an *ultra vires* ordinance providing for the election of certain public officers, at the instance of citizens and taxpayers of the city, for the reason that if such officers are elected they will have an apparent demand against the municipality for compensation, which will have to be resisted at the expense of the taxpayers, or illegally paid out of the funds of the corporation. *Americus v. Perry* (Ga.) 230

2. An injunction will not be granted to restrain the collection of taxes, unless the assessment is void or is levied for an illegal or unauthorized purpose, under Neb. Comp. Stat. 1901, chap. 77, art. 1, § 144. *Philadelphia Mortg. & T. Co. v. Omaha* (Neb.) 160

3. The enforcement of taxes against property by a city will not be restrained by injunction, on the ground of equitable estoppel because the city treasurer erroneously marked the taxes "paid" on the tax records, and a third party, relying on the record, and believing the taxes were paid, loaned money on the property and acquired title thereto by foreclosure, where the taxes had been lawfully levied and assessed and were actually due and unpaid. *Id.*

4. A landowner will be enjoined from maintaining a tower on his land in such a way that ice formed on it from freezing rain or spray from a cataract falls onto adjoining property so as to injure and endanger human life. *Davis v. Niagara Falls Tower Co.* (N. Y.) 545

NOTES AND BRIEFS.

Injunction; against maintaining tower constituting a nuisance. 546

INSOLVENCY.

Of Trustee, Following Trust Fund, see **TRUSTS**, 5-11.

INSTRUCTIONS.

Review of Error as to, see **APPEAL AND ERROR**, 18, 19.

See also **TRIAL**, 17-20.

INSURANCE.

False Certificate as to Amount of Capital Deposited in Bank, see **BANKS**, 2, 3.

Allowance of Attorneys' Fees against Company, see **CONSTITUTIONAL LAW**, 14.

Lien of Execution on Interest of Assured, see **EXECUTION**.

Insurance Company as Surety, see **INSURANCE**, 22.

Mandamus to Compel Commissioners to Grant License to Foreign Company, see **MANDAMUS**.

Agents.

See also **EVIDENCE**, 25.

1. A life insurance agent has no implied 57 L. R. A.

authority to accept as payment of a premium on a policy an agreement to give him credit upon his individual account, which he shall trade out with the insured in the ordinary course of business, and a policy providing that it shall not take effect until the first premium is paid will not become effective under such agreement, no credit being actually given to the agent, or by him to the company, in the usual course of business. *Tomsecek v. Travelers' Ins. Co.* (Wis.) 455

Construction.

2. Entirety of premium in a policy insuring a dwelling house and live stock as separate items, with a specified amount on each, will not prevent the policy from being severable; but a recovery may be had for loss on the house, although the policy has been avoided as to the live stock by placing encumbrances thereon, where the property is so situated that both classes are not exposed to the same risks. *Taylor v. Anchor Mut. F. Ins. Co.* (Iowa) 323

Surrender.

3. An infant's surrender of a policy on his life for a cash value, fairly made without undue influence, cannot be avoided by his administrator and the insurance contract enforced, although the infant did not receive the whole amount to which the contract entitled him. *Pippen v. Mutual Benefit L. Ins. Co.* (N. C.) 505

4. A surrender of an insurance policy to the insurer for its cash value is not a sale which can be disaffirmed by the administrator of the insured on the ground of the latter's infancy, but it is merely a rescission of the contract. *Id.*

Paid-up policy.

5. A provision in a life-insurance policy for the issuance of a paid-up policy proportioned to the premiums paid, upon its surrender before default in payments, cannot be enforced at the instance of a judgment creditor of the assured after the latter's death and the right to the proceeds has passed to his personal representative, so as to make his execution available against the policy. *Boisseau, use of Robinson v. Penn.* (Va.) 380

Reserve.

See also **MANDAMUS**.

6. A statute forbidding a life insurance company to discriminate between insureds of the same class in premiums, rates, dividends, other benefits or terms and conditions, does not prevent the issuing of one-year term policies with the privilege of taking a whole life policy at the end of the first year, for the purpose of appropriating a larger portion of the premium to expenses and less to the reserve fund. *Bankers' Life Ins. Co. v. Howland* (Vt.) 374

7. Under a statute requiring insurance commissioners to issue licenses to a foreign insurance company to do business in the state, if satisfied with its statement showing its financial condition and standing, they have no authority to question the method of computing the reserve set forth

in the statement, or to enter upon an independent valuation of such reserve. *Id.*

8. In computing the reserve of a life insurance company under a statute requiring it, in order to be entitled to do business in the state, to have, in addition to its capital, assets equal in amount to its outstanding liabilities, reckoning the premium reserve on its life risks based on the actuaries' tables of mortality, with interest at 4 per cent, as a liability, the expenses of securing the first year's business may be deducted from the amount it receives as premiums for that year by providing that a policy shall be valued as a term policy for one year and a life policy afterwards. *Id.*

Warranties.

Preliminary Evidence as to Truth of, see EVIDENCE, 1.

See also INFANTS, 1.

9. The beneficiary in an insurance policy on the life of a minor is not prevented from recovery thereon because of false warranties in the contract, if he did not procure the insurance with knowledge of them. *O'Rourke v. John Hancock Mut. L. Ins. Co. (R. I.)* 496

Iron-safe clause.

10. A clause in a policy of fire insurance, requiring the assured to keep the books and inventories of his business "securely locked in a fireproof safe at night, and at all times when the building (in which the stock insured is located) is not actually open for business, or, failing in this," to "keep such books and inventories in some place not exposed to a fire which would destroy . . . the building,"—does not apply to a suspension of business caused by such an emergency as a fire raging in the vicinity and threatening to consume the building, the same not being actually shut up, and business operations being interrupted because of the threatened danger, though under such circumstances the insured is required to exercise reasonable diligence to preserve the books and inventories. *Phoenix Ins. Co. v. Schwartz (Ga.)* 752

Estoppel of insured.

11. An agreement by an applicant for insurance that no information not contained in the application, received by any person at any time, shall be binding on the insurer, will not prevent him from showing that his answers to the questions of the medical examiner were not properly recorded. *Sternaman v. Metropolitan Life Ins. Co. (N. Y.)* 318

12. Public policy prohibits an agreement by an applicant for life insurance that the medical examiner appointed and paid by the insurer shall be the agent of the applicant in recording the medical examination; and such agreement will not prevent a showing that the answers written were not those given by the applicant. *Id.*

13. One taking a policy of life insurance which provides that it shall, for the purpose of computing the reserve, be valued as a term policy for one year and a life policy afterwards, is estopped from repudiating

that provision of the contract. *Bankers' Life Ins. Co. v. Howland (Vt.)* 374

Estoppel of company.

14. An insurance company cannot defeat liability on its policy because of misrepresentations in the application as to the title to the property or the encumbrances thereon, if they were correctly stated to the agent and he failed to make out the application in accordance with the information given. *Taylor v. Anchor Mut. F. Ins. Co. (Iowa)* 328

15. An insurer cannot rely on a warranty by the applicant that the answers to the questions in the medical examination were properly recorded, to forfeit the policy, if it knew at the time through its medical examiner that they were not. *Sternaman v. Metropolitan Life Ins. Co. (N. Y.)* 318

16. Statements of an insurance solicitor to one making an application for insurance, as to the immateriality of facts brought to his attention, do not bind the insurer, where he is the agent of the applicant. *O'Rourke v. John Hancock Mut. L. Ins. Co. (R. I.)* 496

17. An insurance company which has rejected and retained an application cannot take advantage of a warranty in a subsequent application by the same applicant that an application by him for insurance had never been rejected. *Id.*

18. A statement in a rejected application for insurance that applicant has consulted a physician for rheumatism does not charge the company with knowledge that he has that disease, so that its acceptance of a subsequent application in which applicant states that he has never had it will constitute a waiver of the falsity of the statement. *Id.*

19. An insurance company will be bound to know that an applicant for insurance is the same as the maker of a prior rejected application, where not only the name of the applicant, but the date of birth, age, town, occupation, and parents' names are the same in both applications. *Id.*

Cause of death.

20. A policy insuring a railroad company against loss from liability to persons who should accidentally "sustain personal injuries" on its road under circumstances which impose upon the insured a common-law or statutory liability for the injuries does not cover cases of instantaneous death without conscious suffering through injuries for which insured is responsible, where the statutes give a new right of action to the personal representatives in case of death, and not a right of action to deceased which survives. *Worcester & S. Street R. Co. v. Travelers' Ins. Co. (Mass.)* 829

Extent of recovery.

21. The loss to be made good under a policy of fire insurance is not limited to the cost of replacing the structure described in the survey, if, when the fire occurs, the statutes require, as a condition of rebuilding, more substantial and expensive struc-

tural work. *Pennsylvania Co. v. Philadelphia Contributionship (Pa.)* 510

Subrogation of company.

22. A provision in one of several insurance policies on mortgaged property, that, in case the insurer is compelled to make payment to the mortgagee when it is under no liability to the mortgagor, it shall be subrogated to the mortgagee's security, does not make the insurer a surety for the mortgage debt, so as to entitle it to challenge settlements made, while it was contesting its liability on its own policy, by the mortgagee with other insurers, or charge him with sums which he might have received, but failed to receive, from such policies. *New Hampshire F. Ins. Co. v. National L. Ins. Co. (C. C. App. 8th C.)* 692

23. One of several insurers of mortgaged property, who pays the amount due on its policy to the mortgagee, and becomes subrogated to his security, cannot charge, in satisfaction of the mortgagee's demands against the security, a sum allowed by a court of competent jurisdiction to the mortgagor's attorney out of recovery on other policies, either on the ground that the mortgagor had parted with his interest so as not to be entitled to an allowance for attorneys' fees, since that question was settled by the order, or on the ground that the mortgagee was at fault in not appealing from the order, where the insurer's interest had attached before the order was passed, and it failed to object to the allowance, or to indemnify the mortgagee against the expense of appealing. *Id.*

24. An insurer which receives an assignment of the mortgagee's claims against the mortgagor upon paying him the amount due by it under its policy on the mortgaged property cannot, in an accounting of all sums received from the various policies on the property by the mortgagee, who is seeking to enforce his mortgage for an unpaid balance, insist that he should be charged with the portion of the sum received under another policy which he is charged to have wrongfully permitted to go to the mortgagor, where the amount kept by him out of such payment was more than the share of the mortgage indebtedness chargeable to that policy. *Id.*

Right of action.

25. Insurance against loss through liability for personal injuries does not constitute a trust fund for the benefit of the injured person, and he cannot maintain an action against the insurer to reach such fund, where, before his claim against the insured is established, the insurer satisfies its obligation to him under the policy, although, by reason of the insolvency of the insured, the claim will be otherwise unenforceable. *Bain v. Atkins (Mass.)* 791

NOTES AND BRIEFS.

Insurance; false representation by bank cashier as to amount of capital of company on deposit. 110

57 L. R. A.

On the life of a minor:—(I.) Policies taken out by minors; (II.) insurance to secure creditors; (III.) policies taken out by others on infant's life; (IV.) insurance in benefit societies; (V.) surrender or disaffirmance of policy on infant's life; (VI.) summary. 506

Of railroad company against loss from liability for personal injuries; liability for death of person killed instantly; liberal construction of policy. 629

Against loss through liability for personal injuries; injured employee's right to sue company; effect of settlement with employer; insurance as trust fund. 971

Iron-safe clause; necessity of complying with condition to produce books and inventories. 752

Medical examiner as agent of insured. 320

Agent to solicit applications and collect money; verbal communications to; false answers shown by copy of application on back of policy; effect of annulling application; validity of warranty by infant insured; validity of insurance of life of infant. 497

Right to stipulation as to manner of estimating loss; extent of recovery. 512

Policy; delivery subject to payment of premium; promise to pay; necessity of actual payment or waiver of premium; presumption of payment of; provision against agent's power to waive or modify conditions. 455

Policy void in all if void in part; court's power to change. 329

Policy as chose in action; assignment to one without insurable interest; assignee as trustee; lien of execution on. 380

Construction of policy; policy as personal property; surrender of policy. 505

INTENT.

Importing into Unambiguous Contract, see **CONTRACTS**, 6.

INTEREST.

Allowance of, as Grounds for New Trial, see **NEW TRIAL**, 2.

See also **USURY**.

1. A purchaser of mortgaged property cannot, in the absence of express contract, be charged, in a proceeding to foreclose the mortgage against him, with the interest provided for by the notes, where the rate named in the recorded mortgage is much less. *George v. Butler (Wash.)* 396

2. In an action by a county against a county treasurer and his bondsmen to recover funds alleged to have been converted by the treasurer, it is not error to compute interest on such funds from the date at which, under the terms of the statute and the official bond, the funds should have been accounted for and turned over to his successor in office. *Thomssen v. Hall County (Neb.)* 303

NOTES AND BRIEFS.

Interest; rate of; against purchaser of mortgaged premises. 397

INTERROGATORIES.

See DEPOSITIONS; TRIAL, 6.

INTOXICATING LIQUORS.

Requiring Surety for Good Behavior on Conviction for Selling, see CRIMINAL LAW, 6.

IRON-SAFE CLAUSE.

See INSURANCE, 10.

JUDGE.

Discrimination against Judge of One County, see CONSTITUTIONAL LAW, 18.

Probate Judge as County Officer, see OFFICERS, 2.

Special Statute as to, see STATUTES, 5, 9.

NOTES AND BRIEFS.

Judge; special act regulating fees of.

665

JUDGMENT.

On Appeal, see APPEAL AND ERROR, 21, 22.

See also CONSTITUTIONAL LAW, 25.

1. Where the statute requires plaintiff's residence in the county for one year, in good faith, and not for the purpose of obtaining a divorce, to give jurisdiction of a divorce proceeding, the decree may be set aside after plaintiff's death if the record shows that the residence was not in good faith, but merely to obtain the divorce. *Lawrence v. Nelson* (Iowa) 583

2. One who instigates another to do a wrongful action, and, when the wrongdoer is sued, takes upon himself and conducts the defense of the case, is estopped from again litigating with the plaintiff in that action the issues there decided. *Tootle v. Coleman* (C. C. App. 8th C.) 120

3. A creditor who indemnifies an officer against damages for seizing and converting property, and defends an action against the officer individually for the conversion, is estopped by the judgment against him from again litigating with the plaintiffs in that action the issues there decided. *Id.*

4. The confirmation of a guardian's sale is *res judicata* as to irregularities only, and not as to matters of substance. *Frazier v. Jenkins* (Kan.) 575

5. A judgment for plaintiff in an action for injury to his vehicle through negligent obstruction of a highway is no bar to another action for injury to his person arising out of the same accident. *Reilly v. Sicilian Asphalt Paving Co.* (N. Y.) 176

6. The provision that a decree confirming title to land and ordering registration thereof under Minn. Laws 1901, chap. 237, providing for the Torrens system of registering land titles, shall be forever binding

and conclusive upon all persons, and shall not be opened by reason of any disability, nor any proceedings had for reversing the judgment, except that any person having an interest in the land who has not been actually served or notified of the application for registration of the title may within sixty days after entry of the decree appear and assert his rights, providing no innocent purchaser for value has acquired an interest,—does not apply to an adverse claimant in actual possession of the land upon whom the summons is not served. *State ex rel. Douglas v. Westfall* (Minn.)

297

7. The unchallenged findings of fact by a referee, when confirmed by the court, are binding on the party against whom they operate, and from the legal consequences flowing therefrom he cannot escape. *Chicago Lumber Co. v. Bancroft* (Neb.) 910

NOTES AND BRIEFS.

Judgment; against single defendant in civil action for fraudulent conspiracy. 110

Conclusiveness of judgment against officer on party procuring attachment. 123

Conclusiveness of, only as to claims which might have been litigated. 176

Right to contest the validity of a divorce decree after the death of one or both of the parties:—(I.) Introduction; (II.) attack by surviving party: (a) in direct proceeding to set aside or vacate decree: (1) appeal; (2) motion or petition filed in the original cause; (3) writ of error; (4) new suit; (b) in collateral proceeding; (III.) attack by stranger to the decree: (a) in direct proceeding; (b) in collateral proceeding (IV.) death of one party pending appeal; (V.) conclusion. 606

JUDICIAL SALE.

Sale by Executor, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Annual crops growing on the land do not pass to a purchaser at judicial sale; and for the purpose of saving the debtor's rights thereto, these annual crops will be regarded as personality. *Aldrich v. Bank of Ohio* (Neb.) 920

NOTES AND BRIEFS.

See also AUCTION.

Judicial sale; to highest and best bidder; successful bidder's right to compel performance; duty to accept bids. 785

JURY.

Impeaching. Verdict by Affidavit of Juror, see NEW TRIAL, 1.

Argument to, see TRIAL, 1, 2.

Assessment of Punishment by, see TRIAL, 3-5.

In General, see TRIAL, NOTES AND BRIEFS.

LACHES.

See ESTOPPEL, 2, 3.

NOTES AND BRIEFS.

Laches, in probating will.

253

LANDLORD AND TENANT.

Rights of, as to Fixtures, see **FIXTURES**, 1, 2.

Tenant's Right to Remove Fixtures, see **STATUTES**, 7.

1. A covenant in a lease against assigning or subletting is not violated by placing a care taker in possession during the tenant's absence. *Presby v. Benjamin* (N. Y.) 317

2. A tenant cannot lawfully remove fixtures annexed to the freehold, which he has placed on leased land, in the absence of a contract giving him the right to do so, though an exception to this rule exists in the case of trade fixtures. *Wright v. Du Bignon* (Ga.) 669

3. A landlord is not liable for injury received by a person from falling on ice which had been allowed by the tenants to accumulate and remain on a sidewalk abutting the rented premises, notwithstanding that the ice resulted from water which had flowed from the landlord's property through a ditch placed there for the purpose of carrying off the refuse water across the sidewalk; the ice not being on the sidewalk when the tenants entered into possession, although the ditch was on the property at that time, and was put there for the purpose above indicated. *Gardner v. Rhodes* (Ga.) 749

Holding over.

4. Holding over after the expiration of any month renders a tenant from month to month liable for the rent of the ensuing month, whether the tenancy was created by express agreement or by the mere acceptance for a long period of time of monthly rentals. *Byxbee v. Blake* (Conn.) 222

5. Keeping the keys for five days after the expiration of a monthly period, and remaining in possession of the leased property for the purpose of cleaning up the rubbish after the refusal of the landlord to accept the keys at the expiration of the month, render the tenant liable for another month's rent. *Id.*

6. A tenant who has placed a manager in charge of his business on the leased property is bound by his acts in retaining possession after the expiration of the term, so as to be chargeable with another term's rent. *Id.*

NOTES AND BRIEFS.

Landlord and tenant; liability for rent; tenant holding over; retention of keys after end of term; effect of tenant's notice of intention not to occupy after expiration of term. 223

Tenant's right to place care taker in charge of premises; occupancy of care taker not that of subtenant. 317

What constitutes fixtures as between. 669

Liability of landlord; for nuisance maintained on premises by tenant. 749
57 L. R. A.

LEASE.

Of Piano, Estoppel of Lessor to Take Back, see **ESTOPPEL**, 3.

Admissibility of, in Evidence, see **EVIDENCE**, 20.

Lessee's Right to Sell Leased Instrument, see **SALE**.

Question for Jury as to Lessee's Authority to Sell Leased Instrument, see **TRIAL**, 8.

LEGISLATURE.

Constitutional Powers of, see **CONSTITUTIONAL LAW**.

Power to Appoint Public Officers, see **CONSTITUTIONAL LAW**, 6.

Judicial Interference with Powers of, see **COURTS**, 1, 2.

Power as to Taxation, see **TAXES**, 1.

NOTES AND BRIEFS.

Legislature; powers of; delegating power of, to courts. 245

Power to vacate highway. 232

Power to confer on judiciary authority to appoint examiners of titles; power to provide for quieting title to land. 298

LEVY AND SEIZURE.

On Interest of Deceased Vendor in Land Contract, see **DESCENT AND DISTRIBUTION**.

On Land Sold by Husband to Wife, see **HUSBAND AND WIFE**, 2.

A bicycle used by a painter, paper hanger, and billposter to earn a livelihood is within the provisions of a statute exempting from execution the team of a laborer who is the head of a family, and the wagon or other vehicle by the use of which he habitually earns his living, although the bicycle was not known when the statute was enacted. *Roberts v. Parker* (Iowa) 764

NOTES AND BRIEFS.

Levy; what subject to; equitable estate; legal title of vendor in land contract. 644

Property exempt; bicycle used by laborer in earning living. 764

LIBEL AND SLANDER.

By Commercial Agency, Question for Jury as to, see **TRIAL**, 15.

1. A mercantile agency is not liable for sending out by mistake information concerning a merchant variant from that received by it, if it exercises reasonable care and prudence in the matter. *Douglass v. Daisley* (C. C. App. 1st C.) 475

2. No privilege attaches, as matter of law, to a communication transmitted by a commercial agency that a certain person had made an assignment for benefit of creditors, when the information received by or known to it was that he had made an assignment to secure the indorser of a note. *Id.*

NOTES AND BRIEFS.

Libel and slander; by mercantile agency; when communication privileged; inadver-

tence or negligence as to; necessity of allegation as to loss of custom from. 475

LICENSE.

Discrimination as to, see CONSTITUTIONAL LAW, 19-22.

Damages for Attempting to Enjoy, after Revocation of, see DAMAGES, 17.

To Insurance Company, see MANDAMUS.

To Foreign Insurance Company, see INSURANCE, 7.

For Peddler, see IMPRISONMENT FOR DEBT; STATUTES, 2.

Trespass against Licensee, see TRESPASS.

1. A conveyance of land upon which a third person has been given a parol license to construct a ditch operates as a revocation of the license. *Hicks Brothers v. Swift Creek Mill Co.* (Ala.) 720

2. The revocation of a parol license to construct a dam and ditch on the land of the licensor is not prevented by the fact that large expenditures have been made on the faith of it, or that it was given with knowledge that such expenditures would be made. *Id.*

3. The object of Neb. Comp. Stat. 1901, chap. 77, art. 1, §§ 152-154, imposing a license tax on peddlers, and prescribing a penalty for peddling without a license, but containing no provision for police inspection or supervision, is the raising of revenue, and its enactment is an exercise of the taxing power, and not of the police power. *Rosenbloom v. State* (Neb.) 922

NOTES AND BRIEFS.

License tax for general revenue purposes; classifying subjects of. 351

Of peddler; validity of law for licensing; necessity of uniformity in license taxes. 923

Parol, when irrevocable; estoppel to revoke; when within the statute of frauds; effect of lessor's transfer of land. 720

LIENS.

Invalid Law as to Medium of Payment, see CONSTITUTIONAL LAW, 2.

In Favor of *Cestui Que Trust*, see TRUSTS, 9.

Of Execution, see EXECUTION.

NOTES AND BRIEFS.

Of Execution, see EXECUTION.

Liens; of subcontractor; acquiring rights against owner in violation of terms of original contract; enforcing only as to amount due from owner to principal contractor. 726

LIGHTS.

Ordinance Requiring Bicyclists to Carry, see CONSTITUTIONAL LAW, 11, 12; MUNICIPAL CORPORATIONS, 10.

LIMITATION OF ACTIONS.

See also JUDGMENT, 6.

1. The fact that a mortgage is given to 57 L. R. A.

secure payment of an entire sum which is payable in instalments does not prevent the running of the statute of limitations against each instalment as it becomes due. *George v. Butler* (Wash.) 396

2. A covenant in a mortgage to pay the whole debt will not prevent the statute of limitations from running against each instalment as it becomes due, if the covenant is to pay according to the terms of the notes secured. *Id.*

3. A grantee of mortgaged premises who is not obliged to pay the debt secured is not precluded from pleading the statute of limitations against foreclosure by the fact that the mortgagor has been continuously absent from the state, so that as to him the limitation period has not run. *Id.*

NOTES AND BRIEFS.

Limitation of actions; to foreclose mortgage; when statute begins to run; when action barred; suspension of statute. 397

LIMITATION OF LIABILITY.

By Cold-Storage Company, see BAILMENT, 3.

By Carrier, see CARRIERS, 15, 16.

LOCAL SELF-GOVERNMENT.

See CONSTITUTIONAL LAW, 7-9, NOTES AND BRIEFS; MUNICIPAL CORPORATIONS, 3, 4.

MANDAMUS.

Mandamus is a proper remedy to compel insurance commissioners to grant a license to do business in the state to a foreign insurance company which has complied with the statutory requirements, which license they refuse because they require a reserve computed on a wrong basis. *Bankers' Life Ins. Co. v. Howland* (Vt.) 374

MARRIAGE.

What Law Governs, see CONFLICT OF LAWS, 1.

See also HUSBAND AND WIFE, 3-5.

MASTER AND SERVANT.

Survival of Action for Death of Servant, see ACTION OR SUIT, 2.

Best Evidence as to Rule Regulating Running of Train, see EVIDENCE, 18.

Municipal Liability for Injury to Employee, see MUNICIPAL CORPORATIONS, 13.

Allegations as to Foreman's Authority, see PLEADING, 6.

Question for Jury as to Employer's Negligence, see TRIAL, 12.

Duty and Liability of master.

1. The legislature may lawfully charge railroad companies with liability to employees for injuries caused by defects in machinery, ways, or appliances, and forbid the waiving of this liability by contract. *Coley v. North Carolina R. Co.* (N. C.) 817

2. The duty of so operating a safely constructed and equipped railroad, subject

to the rules and general supervision of the master, as to keep it reasonably safe for those employed upon it, is not a positive duty of the master, but a primary duty of the servant. *Brady v. Chicago & G. W. R. Co.* (C. C. App. 8th C.) 712

3. A master is not excused from liability for the negligence of an engineer upon the second section of a train, in following too closely the first section and running his engine too rapidly as he approached the railroad yards, thereby causing a collision, by the fact that the night was so dark and foggy that the proximity of the first section could not be discovered by the employees of the second section in time to stop the latter, since reasonable care required that if the engineer could not discover the first section as he neared the yards he should have sent forward his fireman to ascertain its location, or should have run his engine so slowly and carefully that he could stop at any moment. *Southern P. Co. v. Schoer* (C. C. App. 8th C.) 707

Fellow servants.

4. The power of the alleged master or principal to command or direct the alleged servant or agent is the test of the liability of the former for the acts of the latter, under the maxim, *Respondent superior*; and if the master or principal has no power to command or direct the alleged servant or agent, he is not responsible for his acts, because there is no superior to respond. *Brady v. Chicago & G. W. R. Co.* (C. C. App. 8th C.) 712

5. A servant having authority to direct and control others need not be engaged in performing the absolute duties of the master when he commits a negligent act causing injury to one under his control, nor be actually engaged in exercising his power of superintendence over the injured servant, in order to render the master liable under Utah Rev. Stat. 1898, § 1342, making all servants who have authority to direct and superintend other servants vice principals of the master. *Southern P. Co. v. Schoer* (C. C. App. 8th C.) 707

6. The negligent act of a foreman with general control and authority to employ and discharge workmen, in ordering a subject workman upon an elevator, and himself operating the elevator with negligence, to the workman's injury, is not the act of a fellow servant, but of a vice principal. *Swift v. Bleise* (Neb.) 147

7. A railway company running its trains over another road by permission is liable to its employees for the negligence of the servants of the licensing corporation in the discharge of the absolute duties of the master, but is not liable for their negligence in the discharge of their duties as servants. *Brady v. Chicago & G. W. R. Co.* (C. C. App. 8th C.) 712

8. The ordinary contracts between a depot corporation and several railroad companies for the use of a depot and transfer yards do not establish a partnership relation between the companies, nor make the 57 L. R. A.

depot corporation the servant or agent of the railroad companies, so that they become liable for the negligence of its servants, under the maxim, *Respondent superior*. Id.

9. The employees of a depot company are not the servants of a railroad company operating a train through the yard of the former, within the meaning of Minn. Stat. 1894, § 2701, making every railroad company owning or operating a railroad in the state liable for all damages sustained by any servant thereof through the negligence of any other servant thereof, without contributory negligence on his part, so as to render the railroad company liable for an injury to one of its employees through the negligence of a servant of the depot company in failing to throw a switch, where the railroad company uses the station and yard of the depot company under a contract providing that the latter shall have the exclusive management and control of the station grounds, tracks, etc., and of the business conducted thereon, and the exclusive right and power to make rules and regulations for their operation, and that it shall furnish the employees to carry on the business, notwithstanding a clause that, since the employees of the depot company are in fact employed for and in furtherance of the business of the companies using such grounds, the railroad company shall indemnify the depot company against claims for damages arising out of the acts and omissions of the latter's servants while acting in furtherance of the business of the railroad company, or as the mutual servant of both. Id.

10. The duty of using a fender provided by the owner of a vessel to aid in docking it does not rest upon him, and therefore he is not liable for injuries to an employee resulting from the neglect of the mate to use it in bringing the vessel into the dock, although the injured employee works under the immediate orders of the mate. *Kelly v. New Haven Steamboat Co.* (Conn.) 494

Volunteers.

11. Injury received by a young man seventeen years old while helping brakemen to load a piano, at their request, is within the rule which exempts the master from liability to one who is injured while helping his servants at their request, by reasons of their negligence. *Cincinnati, N. O. & T. P. R. Co. v. Finnell* (Ky.) 286

Injury to servant by mob.

12. The master owes no duty to protect his servant from the criminal violence of a mob of strikers; hence no liability is imposed upon him for death resulting from such violence by a statute making him liable for death resulting from injuries inflicted by his negligence or wrongful act. *Foreman v. Taylor Coal Co.* (Ky.) 447

13. Breach of contract by a master to furnish protection to his servant from violence of a mob of strikers will not give a right of action under statutes making the master liable for the death of the servant through his negligence or wrongful act, and providing that actions for injury to the per-

son, except by assault, shall not abate on the death of the person injured. Id.

Contributory negligence.

14. The defense of contributory negligence is not destroyed by a statute making railroad companies liable to employees for injuries caused by defects in machinery, ways, or appliances, and forbidding the waiving of this liability by contract. *Coley v. North Carolina R. Co.* (N. C.) 817

Assumption of risk.

15. Using a switching engine without a hand-hold on the tender does not constitute an assumption of the risk of such defect by the employee, where the statute makes railroad companies liable for injuries to employees from "any defect in the machinery, ways, or appliances," and makes void any agreement to waive the benefit of the statute. Id.

NOTES AND BRIEFS.

Master and servant; delegation of master's duties; higher officers, agents, or servants as vice principals. 484

Injury to employee by stone crusher; city's liability for; city's liability for negligence of servant. 219

Duty to maintain safety of tracks and switches; to prevent collision with unguarded cars at night; partnership agreement between railroad companies; employees of different roads as fellow servants; who are fellow servants; liability for acts of servant under co-employee statute; master's liability for act of stranger. 712

Liability for unauthorized acts of servant within apparent scope of employment. 308

Injured employee suing on policy indemnifying employer against loss through liability for personal injuries. 791

Assumption of risk; servant's opportunity to ascertain danger; dangers known to servant or plain and obvious; master's promise to repair; risk undertaken through fear of losing employment; fellow servants; statutory removal of defense that injury due to negligence of; contributory negligence; statutory abrogation of defense of; servant selecting unsafe way to perform act. 817

Statutory liability of employers for defects in the condition of their plant:—(I.) Introductory remarks; (II.) effect of these statutory provisions as to defects; generally; (III.) master not liable unless the defect alleged was the proximate cause of the injury; (IV.) what instrumentalities are covered by the terms "ways," etc.: (a) two or more descriptive terms used in combination; (b) "ways;" (c) "works;" (d) "machinery;" (e) "plant;" (V.) significance of the qualifying phrase, "connected with or used in the business of the employer:" (a) instrumentalities temporarily used by servants in the transaction of the business; (b) structures, etc., in course of erection or demolition; (c) instrumentalities not yet brought into use, or disused; (VI.) what constitutes a defect; (VII.) 57 L. R. A.

specific examples of defects; (a) defects in the condition of the ways; (b) defects in the condition of the works; (c) defects in the condition of the machinery; (d) defects in the condition of the plant; (VIII.) conditions not amounting to defects; (IX.) defective system, employer liable for; (X.) not discovered or remedied owing to negligence, etc.: (a) generally; (b) not discovered; (c) not remedied; (d) persons intrusted with the duty, etc.; (XI.) abnormal conditions resulting from the use of the appliances furnished by the master, how far regarded as defects; (XII.) defects in temporary appliances constructed by the servants themselves, not deemed to be chargeable to the employer; (XIII.) duty of servant to report defects: (a) statutory and common-law doctrines compared; (b) position of a servant who fails to report a defect; (c) position of a servant who has reported a defect. 817

Allegations of negligence of superior servant; vice principal representing master. 147

Declarations of employees admissible as *res gestæ*. 180

MAXIMS.

1. *Id certum est quod certum reddi potest.* *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.* (C. C. App. 8th C.) 696

2. *In pari delicto potior est conditio possidentis.* *Drinkall v. Movius State Bank* (N. D.) 341

3. *Lex neminem cogit ad impossibilia.* *Southern P. Co. v. Schoer* (C. C. App. 8th C.) 707

4. *Nemo tenetur armare adversarium suum contra se.* *Reynolds v. Burgess Sulphite Fibre Co.* 949

5. *Respondet superior.* *Brady v. Chicago & G. W. R. Co.* (C. C. App. 8th C.) 712

MENTAL ANGUISH.

Law Making Telegraph Company Liable for, see CONSTITUTIONAL LAW, 23.

Damages for, see DAMAGES, 5, 6, 18.

NOTES AND BRIEFS.

See also DAMAGES.

Mental suffering; as element of damage. 216

MERCANTILE AGENCIES.

Damages against, for False Publication by, see DAMAGES, 13.

Liability for Incorrect Statements, see LIBEL AND SLANDER; TRIAL, 15.

NOTES AND BRIEFS.

Mercantile agency; liability for false publication by. 475

MILEAGE TICKET.

See CARRIERS, 16.

MINISTER.

Privileged Communication to, see EVIDENCE, 27.

MISTAKE.

By Mercantile Agency, Liability for, see LIBEL AND SLANDER, 1.

MOB.

Survival of Action against Master for Servant Killed by, see ACTION ON SUIT, 2.

Liability for Death of Servant by, see MASTER AND SERVANT, 11, 12.

MONOPOLY.

In Removal of Garbage, see MUNICIPAL CORPORATIONS, 8, 9.

MORTGAGE.

Subrogation of Insurance Company to Mortgagee's Security, see INSURANCE, 22-24.

Interest Chargeable against Purchaser of Mortgaged Premises, see INTEREST, 1.

Subrogation to Rights of Mortgagee, see SUBROGATION, 2.

Usury in, see USURY, 2, 3.

A deed of trust executed in good faith to secure a bona fide debt, on a stock of goods, and extending to cover after-acquired property, duly recorded, is not fraudulent *per se*, or prima facie fraudulent, as to subsequent creditors with notice, in equity. *Horner-Gaylord Co. v. Fawcett (W. Va.)* 869

NOTES AND BRIEFS.

Limitation of Action to Foreclose, see LIMITATION OF ACTIONS.

Mortgage; as lien on land; presumption of payment from running of limitation; when limitation begins to run; when action barred; suspension of statute; purchaser with notice of mortgage; interest recoverable from subsequent purchaser. 396

Of homestead by survivor of owners; subrogation to rights of mortgagee. 901

Of growing crops; mortgagee's right to possession of premises for purpose of harvesting; title to growing crop on sale of land. 920

MULTIFARIOUSNESS.

See PLEADINGS, 1.

MUNICIPAL CORPORATIONS.

Appointment of Managers of Water Supply System, see CONSTITUTIONAL LAW, 3, 8.

Testing Validity of Appointment of Manager of Water Supply, see QUO WARRANTO, 3, 4.

Estoppel of, see INJUNCTION, 3.

1. Erroneously marking taxes "paid" on city tax records is an act performed by the city in the exercise of its public, governmental functions, and is not the act of the corporation in its private or individual capacity. *Philadelphia Mortg. & T. Co. v. Omaha (Neb.)* 150

2. The exclusive control of police matters being vested in a board of police commissioners by one clause of a city charter, 57 L. R. A.

so long as the commissioners discharge their duty, and do not fail or refuse to provide the city with an efficient police, the mayor and council have no authority to appoint a police force under another clause of the charter giving them power to make regulations to protect the property and persons of citizens and preserve peace and good order in the city, and for this purpose to appoint, when necessary, a police force to assist the marshal in the discharge of his duty. *Americus v. Perry (Ga.)* 230

Local self-government.

See also CONSTITUTIONAL LAW, 7-9.

3. There is no inherent right of local self-government in municipal corporations, and how far they shall be given this right is a matter addressed solely to legislative discretion. *Id.*

4. No guaranty of the right of municipal corporations to local self-government is made by those sections of the Georgia bill of rights which declare that all government originates, of right, with the people; that public officers are the servants of the people and at all times amenable to them; that the people of the state have the inherent, sole, and exclusive right of regulating their internal government and the police thereof; and that the enumeration of rights in the Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed,—although prior to the adoption of the Constitution municipal corporations had been given and were exercising the right to control their own affairs through officers chosen by them. *Id.*

Ordinances.

Requiring Bicyclists to Carry Lights, see CONSTITUTIONAL LAW, 11, 12.

For Public Improvements, see PUBLIC IMPROVEMENTS.

Injunction against, see INJUNCTION, 1.

See also PROHIBITION.

5. The title "An Ordinance to Regulate Bicycles" is sufficient to cover a provision requiring the use of lamps by bicyclists using the streets of the city after dark. *Des Moines v. Keller (Iowa)* 243

6. The unconstitutionality of a portion of an ordinance does not render the entire ordinance void. The unconstitutional part falls, but the act stands. *Com. use of Titusville v. Clark (Pa.)* 348

7. The carrying of deadly weapons, being an offense fully provided for and punished by law, and being an act not in itself amounting to a breach of the peace, cannot be made an offense and punished by a municipal ordinance, unless expressly authorized by the municipal charter. *Judy v. Lashley (W. Va.)* 413

Powers.

8. An exclusive privilege to one person to collect and remove those noxious and unwholesome substances which are nuisances *per se* and a menace to public health may be granted by a city as an exercise of the police power, and is not an invasion of personal rights or an unlawful creation of a monopoly. *Iler v. Ross (Neb.)* 895

9. A city cannot grant a monopoly to one individual, by contract, to enter upon the private premises of the inhabitants of the city, and at their expense collect and remove those innocuous substances, such as ashes, cinders, stable manure, or other substances not in themselves nuisances, though, if allowed to accumulate in unreasonable quantities, they would become such, or which may be utilized for some beneficial purpose, since such an attempted exercise of power is an invasion of the personal and property rights of the citizens, in restraint of trade, and unnecessarily creates a monopoly. *Id.*

10. Authority to provide for the safety of its inhabitants will give a municipality power to require bicyclists using its streets after dark to carry lights. *Des Moines v. Keller (Iowa)* 243

11. The police power of a municipal corporation depends upon the will of the legislature, and a city, town, or village can only exercise such police power as is fairly included in the grant of powers by its charter. *Judy v. Lashley (W. Va.)* 413

12. No power to punish acts made criminal by the state law, and fully covered thereby, is conferred by W. Va. Code, chap. 47, § 28, vesting in the councils of municipal corporations the power and duty "to protect the persons and property of the citizens of such city, town, or village, and to preserve peace and good order therein," except such as would be attended with circumstances of aggravation not included in the state law. Such power must be specifically and expressly given by the legislature, before it can be exercised by such corporation. *Id.*

Liability.

See also EVIDENCE, 29.

13. The operation of a stone crushing machine to prepare material for constructing and repairing its highways is a governmental act of a municipality, so that it will be exempt from liability for injury to an employee through a defect in the machine, although the machine is located several miles from the place where the material is to be used. *Colwell v. Waterbury (Conn.)* 218

14. The mere fact of an explosion of gases in a sewer is not sufficient to charge the municipality with liability for the injury caused thereby. *Fuchs v. St. Louis (Mo.)* 136

15. The explosion of gases in a sewer to the injury of abutting property owners cannot reasonably be anticipated from the fact of the escape of a quantity of crude petroleum into it, so as to charge the municipality with negligence in failing to provide for the escape of the gases generated thereby. *Id.*

16. A city is not bound to open vents and manholes leading to its sewers, to permit the escape of gases which are generated therein, as a means of avoiding an explosion, although it may have notice that a quantity of crude petroleum has found its

way into the sewer as a result of a fire at the refinery. *Id.*

17. No recovery can be had against a city for injuries caused by an explosion in a sewer, which is alleged to have resulted from negligently permitting petroleum to be turned into it, where the evidence shows that the explosion might have resulted from another cause, and there is nothing to show that it did not do so. *Id.*

18. An unorganized assemblage of merry-makers to the number of 1,000 in the main street of a city, exploding fireworks, obstructing the use of the street, and endangering life and property, is a "riotous or tumultuous assemblage of people," within the meaning of a statute making the municipality liable for injuries done by such an assemblage. *Madisonville v. Bishop (Ky.)* 130

19. That a part of the expense of a street improvement is to be paid by assessment upon property benefited does not make the duty of making it any less a governmental duty, within the rule exempting the municipality from liability for injuries caused by its performance, than if the entire expense were to be paid by general city tax. *Colwell v. Waterbury (Conn.)* 218

20. The liability of a municipality to damages for permitting a drainage ditch to become obstructed and filled with filth and offal so that the water flows onto adjoining land and causes sickness in the family of its owner is limited to the injury to the property, and does not include the injury by sickness or death, nor by loss of time, increase of family expenses, nor by doctor's bills and medicines, resulting from the sickness. *Williams v. Greenville (N. C.)* 207

NOTES AND BRIEFS.

Municipal corporations; ordinance; when held unreasonable; presumption in favor of validity of; for local improvement. 127

Right to local self-government; legislature appointing police commission for. 231

Powers of; right to local self-government; appointment to an office an executive function. 245

State's power to enlarge or contract powers of; local self-government; selection of administrative and police officers. 775

Duty to exercise power conferred on. 279

Liability for explosion of gases in sewer. 137

Liability of, for neglect as to drainage system. 207

Liability for negligence of officers and servants; injury to employee by stone crusher; negligence in keeping fire engines in repair; powers and duties delegated to, by state. 219

Estoppel of, by acts of officer. 151

Duty of city treasurer in marking taxes "paid," ministerial. 151

NATURAL GAS.

See GAS.

NEGLECT.

- Act of God Excusing Discharge of Duty, see ACT OF GOD.
 Of Bailee, see BAILMENT.
 Of Bank or Depositor, see BANKS, 10-16.
 Of Carrier, see CARRIERS.
 Of Druggist, see DRUGGISTS.
 As to Electrical Appliances, see ELECTRICAL USES AND APPLIANCES.
 Of Devisee Preventing Probate of Will, see ESTOPPEL, 2.
 Presumption and Burden of Proof as to, see EVIDENCE, 11-17.
 Admissibility of Evidence as to, see EVIDENCE, 29-31.
 As to Explosion, see EXPLOSION.
 Liability of Infant for Injury by, see INFANTS, 2.
 Of Master or Servant, see MASTER AND SERVANT.
 Of Municipal Corporation, see MUNICIPAL CORPORATIONS, 13-21.
 Of Street Railway, see STREET RAILWAYS.
 Question for Jury as to, see TRIAL, 9-15.
 Instruction as to, see TRIAL, 20.
1. Where the owner or occupier of lands by express invitation induces a person to make use of a portion of the premises for an expressed purpose, his liability is confined within the limits of the invitation, and does not extend to injuries received by the person invited while using the premises for a purpose not expressed, and not authorized by the invitation. *Ryerson v. Bathgate* (N. J. Err. & App.) 307
 2. The owner of walls left standing after the destruction of the building by fire is under no obligation to adjoining property owners to remove or protect the walls, until he has had a reasonable time to make necessary investigation and take such precautions as are required. *Ainsworth v. Lakin* (Mass.) 132
 3. The owner of walls left standing by a fire, which cannot be used for rebuilding, owes adjoining owners the duty, after a reasonable time for investigation, to exercise such care in the maintenance of walls likely to fall on their property as will absolutely prevent injuries except from causes over which he would have no control, such as *vis major*, acts of public enemies, or wrongful acts of third persons which human foresight could not reasonably be expected to anticipate and prevent. *Id.*
 4. A railroad company is not relieved from liability to a child injured by an improperly fastened turntable by the fact that the fastenings were undone, and the table put in motion, by playmates of the injured child. *Edgington v. Burlington, C. R. & N. R. Co.* (Iowa) 561
 5. A railroad company is liable to infants of tender years for injuries inflicted by a turntable maintained by it in an unfenced lot so near a public way as to be likely to attract children to play on it, un-

less it exercises reasonable care to keep it safely fastened. *Id.*

Contributory negligence.

6. A child cannot be held to any greater degree of care than may reasonably be expected from its years, experience, and intelligence. *Id.*
7. A child seven years and eight months old cannot be held to be negligent, as matter of law, in playing on an unfastened turntable. *Id.*
8. A boy six years old, knowing that hot water will burn, cannot recover damages for injuries received from voluntarily or carelessly walking into a pool of it formed by emptying a boiler on premises on which he is trespassing. *Brinkley Car Works Mfg. Co. v. Cooper* (Ark.) 724

NOTES AND BRIEFS.

- As to Electric Wire, see ELECTRICAL USES AND APPLIANCES.
 Of Municipal Corporations, see MUNICIPAL CORPORATIONS.
 Of Street Railway, see STREET RAILWAYS.
 See also BANKS; CARRIERS.
- Negligence; explosion of gas in sewer; city's liability for. 137
 In causing fright; liability for. 560
 Railroad turntable; injury to young child by; sufficiency of fastening for; contributory negligence of child. 562
 Contributory; of parent causing death of child. 186
 Contributory; failure to secure property against apprehended danger; leaving walls standing after fire; injurious consequences to another from lawful act on own premises. 132
 Of infant more than fourteen; presumption as to capacity to exercise care. 640
 In leaving horse untied in street. 627
 In use of machinery; guaranty of safety; injury by explosion; injury from lawful act on own premises. 410
 Of physician in abandoning woman during confinement. 216
 Of bailee. 271
 Estoppel to take advantage of. 290
 Presumption of, from injury; necessity of alleging negligent act or omission; burden of proof as to; extent of care required. 621
 Duty towards person invited to enter premises; recovery by mere licensee for wilful injury; question of, for jury. 308
 Gross negligence as crime. 891

NERVOUS PROSTRATION.

Liability for Causing, see FREIGHT.

NERVOUS SHOCK.

Damages for Causing, see DAMAGES, 8.

NEW TRIAL.

Curing Defects in Motion for, see APPEAL AND ERROR, 12.

1. A verdict cannot be impeached by the affidavit of a juror that he was induced to

assent to a verdict of guilty on the understanding that the jury would recommend the pardon of accused. *Gordon v. Com.* (Va.) 744

2. A new trial will not be granted for permitting the jury to allow interest upon the amount allowed for injury to property from falling walls from the time of the injury, instead of instructing them to put the plaintiff in as good a position as if the damages had been paid at the time of the injury, in the absence of anything to show that defendant was injured thereby. *Ainsworth v. Lakin* (Mass.) 132

NOTES AND BRIEFS.

New trial; grounds for; verdict in conflict with instruction. 329

NOTICE.

To Insurance Company of Identity of Insured, see *INSURANCE*, 19.

Of Agent's Lack of Authority, see *PRINCIPAL AND AGENT*, 2.

To Traveler of Railroad Company's Rights on Bridge, see *RAILROADS*, 1.

1. One about to board a train, who has knowledge of facts which would put a person of ordinary prudence and diligence upon inquiry to ascertain whether or not the train is permitted to carry passengers, is charged with knowledge of all the facts which a reasonably diligent inquiry would discover. *Purple v. Union P. R. Co.* (C. C. App. 8th C.) 700

2. The knowledge of the clerk of a bank depositor that he has made fraudulent alterations for his own benefit in checks drawn by his employer is not to be imputed to the latter. *Critten v. Chemical Nat. Bank* (N. Y.) 529

3. A depositor who delegates to his clerk the verification of canceled checks returned as vouchers by the bank is chargeable with notice of fraudulent alterations which a mere comparison of the vouchers with the stubs in the check book would have disclosed, as that the name of the payee had been erased and the word "cash" substituted therefor, although the clerk himself made the alteration. *Id.*

4. A deed that recites that the grantors are husband and wife, the names of which grantors are identical with those of the grantor and grantee in a recent guardian's deed of the same land, imparts notice to the purchaser that his grantors were also husband and wife at the date of the former deed. *Frazier v. Jenkins* (Kan.) 575

NOTES AND BRIEFS.

Notice; to purchaser of land from contents of title papers. 576

To purchaser of land of contents of mortgage. 397

From vendee's possession under land contract. 644

To corporation from knowledge of officer of. 813

57 L. R. A.

Imputing agent's knowledge while acting in hostility to principal. 531

NUISANCES.

A telegraph company is not guilty of maintaining a common nuisance because it delivers at a place not under its control, which is used and resorted to for selling pools and betting on horse races, by idle and evil-disposed persons, to the common nuisance and annoyance of all good citizens of the neighborhood, messages containing the information necessary to such transactions. *Com. v. Western U. Teleg. Co.* (Ky.) 614

NOTES AND BRIEFS.

Nuisance; liability of grantee or licensee for continuing; building liable to fall as. 133

Mode of using own land; tower as. 545

Common gaming house as; distinction between acts amounting to and not amounting to; necessity of showing defendant's control of. 614

Summary abatement of; regulating removal of garbage. 896

OFFICERS.

Validity of Bond of, see *BONDS*.

Appointment by General Assembly, see *CONSTITUTIONAL LAW*, 6.

Discrimination against Officers of One County, see *CONSTITUTIONAL LAW*, 18.

Liability of County Treasurer for Loss of Money by Bank Failure, see *COUNTY TREASURER*.

Bill in Equity for Account by, see *EQUITY*.

Who may Maintain Action on Bond of, see *EXECUTORS AND ADMINISTRATORS*, 3.

Enjoining *Ultra Vires* Ordinance for Election of, see *INJUNCTION*, 2.

Interest on Bond of, see *INTEREST*, 2.

1. Examiners of titles appointed by the judges of the district courts under Minn. Laws 1901, chap. 237, providing for the Torrens system of registering land titles, are not county officers within the meaning of Minn. Const. art. 11, § 4, requiring county offices to be filled by popular election, but are subordinate officers or assistants of the courts. *State ex rel. Douglas v. Westfall* (Minn.) 297

2. Where under the statutes a particular city is denominated "a territorial division of the state," treated as a county, and provided with a probate judge the same as other counties, he is a county officer within the meaning of constitutional provisions regulating the compensation of such officers. *Henderson v. Koenig* (Mo.) 659

3. Where a statute, either in direct terms or by its general tenor, imposes the duty upon a public officer to pay over moneys received and held by him in his official capacity, the obligation thus imposed is an absolute one, unless it is limited by the statute imposing the duty, or by the con-

ditions of his official bond. Northern P. R. Co. v. Owens (Minn.) 634

4. The loss, through failure of a bank in which it was deposited, of money received by the clerk of the district court in his official capacity, renders the clerk and the sureties on his bond liable, although the bank was solvent at the time the money was deposited, and the clerk in making the deposit acted in good faith and with reasonable care and diligence. Id.

NOTES AND BRIEFS.

Officers; quo warranto to test right to office; power to appoint executive. 244

Legislature conferring power to appoint, on judiciary. 298

Extent of care required to preserve funds turned over to; liability for loss of. 634

Necessity of uniformity in law regulating fees of. 665

Contract by sheriff transferring part of powers to deputy. 418

OLEOMARGARINE.

Police Power as to, see CONSTITUTIONAL LAW, 27.

Ousting Corporation from Right to Manufacture, see QUO WARRANTO, 1, 2.

NOTES AND BRIEFS.*

Oleomargarine; validity of law prohibiting sale of. 182

OPINION EVIDENCE.

See EVIDENCE, 21, 22.

OPTION.

Last Day of, Falling on Holiday, see HOLIDAY.

See also CONTRACTS, 5.

NOTES AND BRIEFS.

Option; waiver of lateness in accepting; last day falling on holiday; time for exercising. 175

ORDINANCE.

See MUNICIPAL CORPORATIONS, 5-7, NOTES AND BRIEFS.

PAID-UP POLICY.

See INSURANCE, 5.

PARENT AND CHILD.

Contract for Support of Parent, see CONTRACTS, 7; REAL PROPERTY, 2.

Trust for Support of Children, see TRUSTS, 2.

NOTES AND BRIEFS.

Parent and child; provision for father's maintenance out of trust property; rights of creditors; father's right to apply trust funds to support of infant child. 729

Parent's duty to support child as affected by child's interest in trust estate or other property:—(I.) Introductory; (II.) obligation of parent who has ability to support. 57 L. R. A.

port; (III.) application of child's property; (a) in general; (b) in particular cases: (1) contract; (2) express trust for maintenance; (3) gift to parent for maintenance; (4) where trustees have discretion; (5) where there is a direction for accumulation, or no express authority for use of income; (6) where infant's rights are contingent; (c) to what extent: (1) need of child; (2) past and future maintenance; (3) income and principal; (IV.) rights of creditors; (V.) summary. 728

PARSONAGE.

Exemption of, from Taxation, see TAXES, 11.

PARTIES.

See also ACTION OR SUIT.

Waiver of Defect of, see PLEADING, 3.

PARTITION.

Effect of Including Husband as Grantee in Deed in, see DEEDS.

NOTES AND BRIEFS.

Effect of deed in partition as distinguished from ordinary deeds. 332

PARTNERSHIP.

Discrimination against Foreign Partnership, see CONSTITUTIONAL LAW, 15, 16; STATUTES, 8.

Between Depot Company and Railroad Companies, see MASTER AND SERVANT, 7.

PASSENGERS.

See CARRIERS.

PAYMENT.

NOTES AND BRIEFS.

Payment; of draft drawn and accepted against fictitious bill of lading; effect; right to recover back money paid. 689

PEDDLERS.

Discrimination in License of, see CONSTITUTIONAL LAW, 21.

License of, see IMPRISONMENT FOR DEBT; LICENSE, 3; STATUTES, 2.

NOTES AND BRIEFS.

Peddling; protection of business of. 923

PETROLEUM.

NOTES AND BRIEFS.

Petroleum; in sewer; explosion of; city's liability for. 137

PHYSICIAN.

Abandonment by, of Woman during Confinement, Damages for, see DAMAGES, 9.

Compensation to, for Injuring Business of, see EMINENT DOMAIN, 3.

NOTES AND BRIEFS.

Physicians; malpractice; burden of proof; presumption from failure to cure. 215

PLEADING.

Review of Errors as to, see **APPEAL AND ERROR**, 10, 11.

Necessity of Proving Allegations, see **EVIDENCE**, 13.

Reference to, in Argument, see **TRIAL**, 2.

Confining Jury to Allegations of Complaint, see **TRIAL**, 18.

See also **TRIAL**, 16.

Multifariousness.

1. A bill to reach an execution debtor's interest in a spendthrift trust is not rendered multifarious by allegations in an amendment tending to show that the property originally belonged to the judgment debtor, and was conveyed and reconveyed under a plan to defraud creditors, where the whole frame and scope of the amendment show, not an effort to have the deeds set aside as a fraud on creditors, but to subject the debtor's interest in the trust to the payment of his debts. *Hutchinson v. Maxwell* (Va.) 384

Waiver by failure to plead.

2. The right to insist on the illegality of a contract of which specific performance is sought is not waived by failure to plead it. *Reed v. Johnson* (Wash.) 404

3. A defect of parties plaintiffs or defendants through misjoinder or nonjoinder is waived by a failure to suggest the same by demurrer or answer. *Tootle v. Coleman* (C. C. App. 8th C.) 120

Amendments.

4. Amended notices and pleas seeking to inject a Federal question into a case nearly two years after it has been at issue and ready for hearing may be stricken from the files. *National Mutual Bldg. & L. Asso. v. Brahan* (Miss.) 793

Plaintiff's pleadings.

5. The mere allegation or averment of a marriage as a fact implies that the marriage was legal. *Hills v. State* (Neb.) 155

6. An allegation that defendant corporation did certain things by its foreman is a sufficient allegation of the latter's authority, as against an objection to all evidence at the trial. *Swift v. Bleise* (Neb.) 147

7. Allegations that plaintiff "was made sick, forced to take her bed, and call in the services of a physician, and expended large sums of money in medicines, care, and nursing," are not irrelevant in an action to recover damages for neglect to promptly transmit and deliver a telegram. *Simmons v. Western U. Teleg. Co.* (S. C.) 607

8. An allegation of the return of the execution "No property found" is not necessary to support a bill in equity to reach assets of the execution debtor. *Hutchinson v. Maxwell* (Va.) 384

9. A bill to reach assets of a judgment debtor is sufficient if, when read in connection with exhibits filed, it will enable defendant to make defense, and the court to decree upon the case made. *Id.*

Defendant's pleadings.

10. In an action of ejectment for land oc-

cupied by the defendant, a plea of not guilty admits such possession as excludes the plaintiff. *French v. Robb* (N. J. Err. & App.) 956

11. A verified account must be taken as true, against a denial and an offset pleaded in an unverified answer, under Kan. Gen. Stat. 1897, chap. 95, § 108. *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.* (C. C. App. 8th C.) 696

Reply.

12. An action on contract to recover a balance from a banker is not converted into an action in tort by a reply setting up defendant's negligence to defeat a defense that the money was paid out according to what the bank believed to be plaintiff's directions. *Critten v. Chemical Nat. Bank* (N. Y.) 529

NOTES AND BRIEFS.

Pleading; sustaining demurrer to petition stating cause of action; sufficiency of petition stating cause of action at common law. 130

Waiver of joinder or want of special plea by failure to demur or object by answer. 216

Necessity of alleging negligent act or omission. 621

Allegations of negligence of superior servant. 147

Sufficiency of allegation as to loss of custom from false publication by mercantile agency. 475

POLES.

See **ELECTRICAL USES AND APPLIANCES**, **NOTES AND BRIEFS**.

POLICE.

Validity of Act Creating Board of Police Commissioners, see **CONSTITUTIONAL LAW**, 9.

Power of Municipal Authorities to Apportion, see **MUNICIPAL CORPORATIONS**, 2.

NOTES AND BRIEFS.

Police; appointment of police commission by legislature as interference with municipal right of local self-government. 231

POLICE POWER.

Of Municipality, see **MUNICIPAL CORPORATIONS**, 8, 11.

See also, **COMMERCE**; **CONSTITUTIONAL LAW**, 26, 27.

POWERS.

NOTES AND BRIEFS.

Powers; of appointment; inconsistent with property interest in person clothed with power. 385

PREFERENCES.

To *Cestui Que Trust*, see **EVIDENCE**, 2, 3.

To Beneficiary where Trustee Insolvent, see **TRUSTS**, 5-11.

PRESERVATIVE.

Police Power as to, see CONSTITUTIONAL LAW, 26.

NOTES AND BRIEFS.

Preservative; prohibiting sale of, or of dairy products containing. 179

PRESIDENT OF SENATE.

Rights on Resignation of Governor, see GOVERNOR.

PRESUMPTIONS.

See EVIDENCE, 1-17.

PRIESTS.

Privileged Communication to, see EVIDENCE, 27.

PRINCIPAL AND AGENT.

Discrimination against Agents of Foreign Partnership, see CONSTITUTIONAL LAW, 16.

Insurance Agent, see INSURANCE, 1.

Licence Bound by Agent's Retention of Premises, see LANDLORD AND TENANT, 6.

1. When a principal is represented by a duly authorized agent, and some third person who may also be benefited by the transaction assumes, without the knowledge or consent of the principal or his agent, to make representations and statements to promote the transaction, the principal will not be bound thereby, although he accepts the benefits of the transaction negotiated by his agent. *Tecumseh Nat. Bank v. Chamberlain Bkg. House (Neb.)* 811

2. One purchasing a piano from an agent is bound to take notice that, unless it is expressly given, the agent has no authority to take a note for the purchase price payable to himself, and that no title can be acquired to the instrument in exchange for such note unless the transaction is ratified by the principal, or a custom to take such notes is shown. *Baldwin v. Tucker (Ky.)* 451

NOTES AND BRIEFS.

Insurance Agent, see INSURANCE.

Authority of agent to take note for purchase price to himself. 451

PRINCIPAL AND SURETY.

Conflict of Laws as to, see CONFLICT OF LAWS, 4.

See also CONTRACTS, 12.

NOTES AND BRIEFS.

Wife's capacity to become surety for husband; conflict of laws as to. 513

PRIVATE ACTION.

By Abutting Owner for Obstructing Street, see HIGHWAYS, 2.

PRIVILEGE.

To Witness, see WITNESSES, 3.

57 L. R. A.

PRIVILEGED COMMUNICATIONS.

To Minister, see EVIDENCE, 27.

Communications Transmitted by Commercial Agency, see LIBEL AND SLANDER, 2.

PROBATE.

See WILLS, NOTES AND BRIEFS.

PROBATE JUDGE.

Discrimination against Judge of One County, see CONSTITUTIONAL LAW, 18.

As County Officer, see OFFICERS, 2.

Special Statute as to, see STATUTES, 5, 9.

NOTES AND BRIEFS.

Probate judge; necessity of uniformity in law regulating fees of. 665

PROHIBITION.

Prohibition lies to restrain the mayor of a town from imposing a fine upon a person for carrying deadly weapons, and from collecting the same, under an ordinance making such act an offense and punishing it by fine and imprisonment, where such ordinance is void because beyond the powers granted to the municipality by its charter. *Judy v. Lashley (W. Va.)* 413

PROXIMATE CAUSE.

The nervous prostration of a woman may be the proximate result of stealthily entering her home in the night-time and committing a trespass on her husband's property. *Watson v. Dilts (Iowa)* 559

NOTES AND BRIEFS.

Proximate cause; of injury by explosion of boiler. 411

Of payment of check forged by raising amount. 531

Of damage from fright. 560

Sickness and medical care following failure to deliver telegram. 608

PUBLICATION.

Of Summons in Garnishment Proceedings, see GARNISHMENT.

PUBLIC IMPROVEMENTS.

Municipal Liability for Injury by, see MUNICIPAL CORPORATIONS, 19.

See also TAXES, 16.

1. An ordinance providing for the construction of a cement sidewalk 20 feet wide on each side of a street, at the expense of the abutting property, is not unreasonable, where the locality is one of residence and business, the property is worth from \$150 to \$300 per front foot, and the existing walks, varying from 6 to 20 feet in width, are in bad condition. *Chicago v. Wilson (Ill.)* 127

2. The cost of a street improvement cannot be lawfully assessed on abutting property where the contractor is required by the ordinance to sustain all loss or dam-

age arising from the nature of the work to be done under the specifications, since this requirement would tend to increase the cost of the work. *Blochman v. Spreckles* (Cal.) 213

NOTES AND BRIEFS.

Public improvements; ordinance for; city council's power as to. 127

Due process of law as to; validity of frontage assessment; city's liability for damage by. 213

PUBLIC MONEY.

County Treasurer's Liability for Loss of, see COUNTY TREASURER.

NOTES AND BRIEFS.

Public money; gift of, to individual for private use. 293

Law of bailment applicable to custodians of. 303

PUBLIC POLICY.

See CONSPIRACY.

PUNITIVE DAMAGES.

See DAMAGES, 17, 18.

QUESTION FOR JURY.

See TRIAL, 7-16.

QUO WARRANTO.

1. Quo warranto may properly be invoked to oust a corporation from the right to manufacture oleomargarine, given to by its charter, where the business has been conducted in defiance of the laws of the state relating thereto, and in such a manner as to amount to an abuse of the corporate power. *State ex rel. Monnett v. Capital City Dairy Co.* (Ohio) 181

2. A proceeding in quo warranto to oust a corporation engaged in the manufacture of oleomargarine from the exercise of its right to be a corporation, because of its violation of statutes regulating the manufacture and sale of oleomargarine, is not barred by the fact that the criminal laws of the state provide for the punishment of such violations by fine. *Id.*

3. The superintendent of a municipal water-supply system has sufficient interest in the validity of a statute providing for the appointment of trustees and a new superintendent for the system to be entitled to maintain quo warranto proceedings to test its validity. *State ex rel. White v. Barker* (Iowa) 244

4. A resident of a city and contributor to the support of its water-supply system is interested in the appointment of trustees for the system under a state statute, so as to be entitled to maintain quo warranto proceedings to test the validity of the appointment under a statute authorizing any citizen having an interest in the question to institute the proceeding upon refusal of the county attorney to do so. *Id.*

57 L. R. A.

NOTES AND BRIEFS.

Quo warranto; for usurpation of office or franchise; to test right to office; who may maintain proceedings to declare void a legislative act. 244

RAILROADS.

Negligence of or towards Employees, see MASTER AND SERVANT.

Liability for Injury on Turntable, see NEGLIGENCE, 4, 5, 7.

Question for Jury as to Negligence on Railroad Bridge Used for Toll Bridge, see TRIAL, 14.

1. A traveler attempting to use a portion of a railroad bridge fitted for teams is charged with notice that the railroad company, in operating its trains over the bridge, has the right to make all usual and reasonable noises incident thereto, and must act for his own safety with reference to such right. *Kentucky & I. Bridge Co. v. Montgomery* (Ky.) 781

2. A railroad company operating a portion of its railroad bridge as a toll bridge for travelers with horses must keep a lookout for the purpose of discovering whether or not teams on the bridge have become so frightened by trains also on it as to be unmanageable and dangerous; and if so, so far as is reasonable, it must shut off steam and avoid unnecessary noise. *Id.*

NOTES AND BRIEFS.

Railroads; tax on rolling stock of. 52

Taxation of franchise of. 33

Consequential injury from operation of. 237

Negligence as to turntable; injury to child by. 562

RAPE.

That the act was accomplished by force will not prevent a conviction under a statute making it a felony to have carnal intercourse with an unmarried female of previously chaste character between the ages of fourteen and eighteen years. *State v. Hamey* (Mo.) 846

RATIFICATION.

By Depositor of Forged Checks, see BANKS, 12.

REAL PROPERTY.

Provisions for Registering Land Titles, see CONSTITUTIONAL LAW, 4, 5, 17, 25; JUDGMENT, 6; OFFICERS, 1.

1. It is not essential to a condition subsequent in a conveyance of property, that it be created by express words, or that there be any express power in the writings to make re-entry for condition broken, or to do anything equivalent thereto. *Glocke v. Glocke* (Wis.) 458

2. An aged parent having conveyed all his property to his son in consideration of the latter's promise to support the grantor for life, equity will treat the conveyance as

having been made on a condition subsequent, for breach of which the title to the property will revert to the grantor, whether the contract calls for maintenance and support generally, or for specific payments of money, or the delivery of property from time to time; and in case of such breach a court of equity will take jurisdiction to give the grantor a protective remedy by establishing his status as owner of the property and quieting his title thereto. *Id.*

NOTES AND BRIEFS.

Real property; Torrens system of registering land titles; classifying counties for purpose of; appointment of examiners of titles by judiciary. 297

Nature of interest of vendor or vendee in a land contract as real or personal property. 643

RECEIPT.

By Warehouseman, see BAILMENT, 6.
Forgery of, see FORGERY, 3, 4.

RECEIVERS.

NOTES AND BRIEFS.

Receivers; of union depot company, negligence of; railroad company's liability for. 391

REFERENCE.

Conclusiveness of Referee's Findings, see JUDGMENT, 7.

RELIGIOUS SOCIETIES.

Exemption of Parsonage from Taxation, see TAXES, 11.

REMAINDERS.

Transfer Tax on, see TAXES, 17-19.

REMOVAL OF CAUSES.

See also ESTOPPEL, 4.

An action to recover damages for the death of a person cannot be removed from a state court into a Federal court when one of the defendants is a resident of the state. *Cincinnati, N. O. & T. P. R. Co. v. Fennell (Ky.)* 266

NOTES AND BRIEFS.

Removal of causes; effect of appearance for purpose of, on right to object to jurisdiction; when Federal court acquires jurisdiction; what precludes removal; what suits removable. 121

RENT.

Liability for, of Tenant Holding Over, see LANDLORD AND TENANT, 4-6.

REPEAL.

Of Statute, see STATUTES, 9.

REPLEVIN.

NOTES AND BRIEFS.

Replevin; right to maintain injunction against, where adequate remedy at law. 633

57 L. R. A.

REPLY.

See PLEADING, 12.

REPRIEVE.

Power of Granting, see CRIMINAL LAW, 2, 3.

RESCISSION.

Of Contract, see CONTRACTS, 13, 14.

RESERVE.

Of Life Insurance Company, see INSURANCE, 6-8.

RES GESTÆ.

See also EVIDENCE, 27.

NOTES AND BRIEFS.

Res gestæ; declarations of employees. 186

RÉSUMÉ.

For Résumé of Contents of Book, see p. 961.

REVOCATION.

Of Will, see WILLS, 1.

RIOTOUS ASSEMBLAGE.

Merrymakers as, see MUNICIPAL CORPORATIONS, 18.

NOTES AND BRIEFS.

Riotous assemblage; unorganized assemblage of merrymakers as. 130

ROBBERY.

There may be sufficient force to constitute robbery, in grabbing a purse from one's hand so quickly that he has no opportunity to resist. *Jones v. Com. (Ky.)* 432

NOTES AND BRIEFS.

Robbery; by snatching pocketbook forcibly from another's hand. 432

What force is sufficient to constitute robbery: — (I.) Introductory; (II.) actual force: (a) snatching: (1) when there is resistance; (2) when there is no resistance; (3) when property is attached to the person so as to afford resistance; (b) when the taking is without knowledge of the person robbed; (III.) constructive force: (a) in general; (b) demand with overwhelming numbers or demonstrations of force; (c) threatening to charge with *crimen innotinatum*; (d) other threats of prosecution; (IV.) force used to obtain property under color of right or claim of ownership; (V.) force employed as a means of escape or to prevent a recaption of property taken without force; (VI.) decisions under special statutes; (VII.) miscellaneous cases; (VIII.) *Résumé*. 432

SALE.

Damages for Breach of Warranty, see DAMAGES, 2.

Estoppel of Lessor to Take Back Piano, see ESTOPPEL, 3.

Submitting to Jury Lessee's Authority to Sell Leased Piano, see TRIAL, 8.

The fact that lessees of a piano have

a retail store at which musical instruments are kept for sale, which is well known to the lessor, gives the lessees no right to sell the instrument. *Oliver Ditson Co. v. Bates* (Mass.) 289

NOTES AND BRIEFS.

Sale; contract for payment of instalments as delivered; seller's right to rescind on failure to pay instalment. 225

Of grain in public warehouse. 268

Of drug; implied warranty that drug of kind asked for. 428

SEWERS.

See DRAINS AND SEWERS.

SHERIFF.

Validity of Bond of Deputy Sheriff, see BONDS.

Unlawful Contract between Sheriff and Deputy, see CONTRACTS, 10.

Bill in Equity by, for Account against Deputy, see EQUITY.

Action by Personal Representative of, on Bond of Deputy, see EXECUTORS AND ADMINISTRATORS, 3.

NOTES AND BRIEFS.

Sheriff; illegal contract for sale of part of powers to deputy; liability of deputy on bond. 418

Special act relating to fees of. 665

SHIPPING.

Duty to Use Fender for Vessel, see MASTER AND SERVANT, 9.

SHOCK.

Damages for Causing, see DAMAGES, 8.

SICKNESS.

Resulting from Obstruction of Sewer; Municipal Liability for, see MUNICIPAL CORPORATIONS, 20.

SIDEWALKS.

Ordinance for Construction of, see PUBLIC IMPROVEMENTS, 1.

SMOKE.

Damages for, see DAMAGES, 15.

SNOW.

Negligent Removal of, from Street-Railway Track, see STREET RAILWAYS, 2.

NOTES AND BRIEFS.

Negligence in removing from street railway track. 466

SPECIFIC PERFORMANCE.

Of Contract against Public Policy, see CONTRACTS, 9.

Of Illegal Contract, see PLEADING, 2.

NOTES AND BRIEFS.

Specific performance; of contract not binding all parties; of illegal contract; lapse of time as bar to. 404

By personal representative of vendor. 644

57 L. R. A.

SPENDTHRIFT TRUSTS.

See TRUSTS, 3, 4, NOTES AND BRIEFS.

STATE.

NOTES AND BRIEFS.

State; right to bring suit against, without its consent. 293

STATUTE OF FRAUDS.

See CONTRACTS, NOTES AND BRIEFS.

STATUTES.

Constitutionality of, Generally, see CONSTITUTIONAL LAW.

Invalid in part.

1. The invalidity of one portion of a section of a statute providing for the taxation of the capital stock of corporations does not render the whole section void, where the remainder constitutes a complete system of taxation in itself, capable of being executed in accordance with the apparent intent of the legislature. *State v. Duluth Gas & W. Co.* (Minn.) 63

Title.

2. A provision of a statute prescribing penalties for peddling without a license is sufficiently covered by the title, "An Act to Provide a System of Revenue." *Rosenbloom v. State* (Neb.) 922

3. An act is not subject to the objection that it contains matter different from what is expressed in its title, where it is entitled, "An Act to Amend, Revise, and Consolidate the Several Acts Granting Corporate Authority to the City of Americus, to Confer Additional Powers upon the Mayor and City Council of Americus, to Extend the Corporate Limits of Said City, and for Other Purposes," because it withdraws from the city certain of its former powers by providing for a board of police commissioners which shall have the exclusive control of the police officers of the city, naming the first members of the board, prescribing the manner in which their successors shall be chosen, and setting forth their duties and powers. *Americus v. Perry* (Ga.) 230

General and special legislation.

4. A particular classification of persons may be valid if the object of the statute is to raise revenue, and invalid if the object is regulation. *Rosenbloom v. State* (Neb.) 922

5. A general law can be made applicable to the fixing of the compensation of probate judges throughout the state, so as to bring such legislation within the operation of a constitutional provision forbidding local or special legislation where a general law can be made applicable. *Henderson v. Koenig* (Mo.) 659

Construction.

6. A statute, the manifest purpose of which is to tax transfers of property, cannot be construed as imposing a direct tax upon the property to save it from being declared unconstitutional. *Re Pell* (N. Y.) 540

7. The provision that a tenant may, dur-

ing the term, remove fixtures erected by him, though after the term they are to be regarded as abandoned to the use of the landlord, made by Ga. Civ. Code, § 3120, must be construed to refer to trade fixtures only. *Wright v. Du Bignon* (Ga.) 669

8. A statute requiring partnerships organized under the laws of other states to furnish bonds before doing business in the state will not be construed as applicable to individual nonresidents in determining its constitutionality. *State v. Cadigan* (Vt.) 668

Repeal.

9. An amendment of a general law allowing fees to probate judges as compensation for their services, which declares that in all cities of a certain class such judges shall be compensated by a salary, violates a constitutional provision that the general assembly shall not indirectly enact a special or local law by the partial repeal of a general one. *Henderson v. Koenig* (Mo.) 659

NOTES AND BRIEFS.

Statutes; classification of counties for registration of land titles; when law general and uniform in operation; resolving doubts in favor of constitutionality of. 297

Title; sufficiency of. 922

Construction; of words "or" and "otherwise." 764

Presumption of validity of. 775

Valid; law not general in application. 766

Local law indirectly enacted by partial repeal of general law; act applicable to only one or a few cities; act relating to fees of sheriff of single county; special act regulating fees of probate judge; special act regulating proceedings in certain courts of particular city; when special legislation justified; passing special act where general law applicable; act regulating affairs of counties, cities, etc. 664

Retroactive; impairing value of vested estate; imposing tax on property previously exempt. 541

STONE CRUSHER.

NOTES AND BRIEFS.

Stone crusher; city's liability for injury to employee by. 219

STREET RAILWAYS.

As Carriers, see CARRIERS.

Evidence of Motorman's Declarations, see EVIDENCE, 27.

Taxation of, see TAXES, 8, 9, 10.

Negligence in Crossing Street-Car Track in Depression, see TRIAL, 11.

1. A motorman in charge of an electric car moving in the public street, where he has reason to expect little children are playing, must exercise a high degree of watchfulness in the operation of the car. *Sample v. Consolidated Light & R. Co.* (W. Va.) 186

57 L. R. A

2. A street-railroad company cannot remove snow from its tracks to the adjacent roadway in such a manner as to leave a deep ditch and render the street unsafe and dangerous for public travel, without liability for injuries to travelers caused thereby, although such liability is not imposed by the ordinance conferring its franchise. *Gerrard v. La Crosse City R. Co.* (Wis.) 465

NOTES AND BRIEFS.

Street railways; negligence in removing snow from track; contributory negligence in driving diagonally across track; question of, for jury. 466

Motorman's duty to keep lookout; no paramount right to street. 187

STRIKE.

Liability for Death of Servant by Mob of Strikers, see MASTER AND SERVANT, 11, 12.

NOTES AND BRIEFS.

Strike; right of workmen to quit work. 448

SUBLETTING.

Covenant against, in Lease, see LANDLORD AND TENANT, 1.

SUBROGATION.

Of Insurance Company, see INSURANCE, 22-24.

1. While subrogation is not founded on contract, and is a creation of equity existing solely for accomplishing the ends of substantial justice, there must, in every case where the doctrine is invoked, in addition to the inherent justice of the case, concur therewith some established principle of equity jurisprudence, as recognized and enforced by courts of chancery. *Meeker v. Larson* (Neb.) 901

2. One who furnishes money for the purpose of discharging a mortgage lien upon real estate cannot claim subrogation to the rights of the mortgagee, in the absence of an agreement or understanding that the mortgage is to be kept alive for his benefit, or that he shall be given a lien on the premises in lieu of the one which is discharged. *Id.*

NOTES AND BRIEFS.

Subrogation; right of; to rights of mortgagee; when one paying mortgage a volunteer. 901

SUCCESSION TAX.

See TAXES, 17-19.

SURRENDER.

Of Insurance Policy, see INSURANCE, 3, 4.

TAXES.

As Cloud on Title, see CLOUD ON TITLE. Legislative Power as to, see COURTS, 1. Enjoining Collection of, see INJUNCTION, 2, 3.

For License, see LICENSE, 3.

Erroneously Marking Taxes "Paid" on City Records, see MUNICIPAL CORPORATIONS, 1.

Invalidity of Part of Statute as to, see STATUTES, 1.

Classifying Persons for Purpose of, see STATUTES, 4.

Uniformity.

See also *infra*, 15; CONSTITUTIONAL LAW, 19-22.

1. The taxing power of the legislature is not restricted by any implied rule of fundamental law that taxes must be equal and uniform, in the absence of any such provision in the Federal or state Constitution. *State v. Travelers' Ins. Co. (Conn.)* 481

2. The privileges and immunities of citizens of other states, guaranteed by U. S. Const. art. 4, § 2, and U. S. Const. 14th Amend., are not violated by Conn. Gen. Stat. §§ 3836, 3916, taxing the resident stockholders of certain corporations in the town in which they reside, deducting from the market value of the stock the value of the capital invested in real estate on which the company pays taxes, but imposing a state tax on nonresident shareholders of 1½ per cent on the market value of their shares, without any provision for deduction of capital invested in real estate, since this law is not a hostile discrimination against citizens of other states in the enjoyment of property rights common to all, but provides for the state taxation of nonresident stockholders because it is impracticable to subject them to the municipal taxation that is imposed on the resident stockholders. *Id.*

Tax on franchise.

3. An exclusive privilege not enjoyed by natural persons, within the meaning of Stat. § 4077, relating to a franchise tax, is not created by a proviso in articles of incorporation, that the private property of stockholders shall not be subject to corporate debts. *Louisville Tobacco Warehouse Co. v. Com. (Ky.)* 33

4. The exemption of corporations which do not have any special privileges and franchises from the operation of a statute imposing a franchise tax on corporations which do have such franchises or privileges does not make the statute unconstitutional for lack of uniformity. *Id.*

5. An ordinary business corporation created under the general law, under which no special or exclusive privilege not allowed by law to natural persons can be obtained, is not subject to the franchise tax imposed by Stat. § 4077, on railway, gas, ferry, bridge, express, and every other like company, and every other corporation having "any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service." *Id.*

6. A public service which will render a corporation subject to the franchise tax imposed by Stat. § 4077, is not performed by a corporation engaged in the business of a tobacco warehouseman. *Id.*

57 L. R. A.

7. Corporate franchises are not taxable under Minn. Gen. Stat. 1894, § 1524, providing for listing "franchises" for taxation as a separate and distinct class of personal property, as that section applies only to private persons or others not falling within the provisions of § 1530 as to the taxation of the property of corporations and associations. *State v. Duluth Gas & W. Co. (Minn.)* 63

8. A street-railway company is not a "railroad company" within the meaning of Minn. Gen. Laws 1887, chap. 11, § 1 (Gen. Stat. 1894, § 1669), providing for the taxation of railroad companies by requiring them to pay a percentage on their gross earnings. *Id.*

9. The franchise of an electric light and power company which has a right to use streets and alleys of a city is subject to taxation under Const. art. 7, § 1, and Laws 1897, p. 136, authorizing in general terms the taxation of real and personal property, although there is no special provision of statute for ascertaining the value of the franchise. *Commercial Electric Light & P. Co. v. Judson (Wash.)* 78

10. An ad valorem tax upon the franchise of a street railway company is required by Const. § 174, which declares that all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value. *South Covington & C. Street R. Co. v. Bellevue (Ky.)* 50

Tax on parsonage.

11. The renting of a church parsonage, and using the rent to procure another residence for the parson, do not deprive it of its exemption from taxation, under a provision that exemption of parsonages shall not extend beyond the buildings and premises actually occupied as such. *Protestant Episcopal Church v. Prioleau (S. C.)* 606

Valuation; deductions.

12. The valuation by the state board of the franchises of a street railway company is conclusive as to its value for city assessment. *South Covington & C. Street R. Co. v. Bellevue (Ky.)* 50

13. An arbitrary increase, by the board of equalization, of the value of certain items of personal property of a corporation, in a lump sum, without any evidence upon which to act and without seeing the property, and the apportionment of the amount between the various items by the county auditor, cannot be objected to by the corporation, where it is neither alleged nor shown that it is at all prejudiced thereby, and there is no claim that there was any overvaluation. *State v. Duluth Gas & W. Co. (Minn.)* 63

14. A taxpayer who appears before a board of equalization and is heard upon the valuation of his property as fixed by the assessor without objecting to the manner in which the board is constituted cannot recover back the amount paid under the assessment as raised by the board, upon the ground that the board was illegally constituted. *Commercial Electric Light & P. Co. v. Judson (Wash.)* 78

15. The deduction from the value of the capital stock of a corporation in assessing it for taxation, of the total amount of corporate indebtedness, except indebtedness for current expenses, which is made by Minn. Gen. Stat. 1894, § 1530, is invalid because in violation of the constitutional requirement of equality and uniformity in taxation. *State v. Duluth Gas & W. Co.* (Minn.) 63

Enforcement.

16. A tax levied on real estate for general revenue purposes, or by way of special assessment for benefits received on account of local improvements, is not a debt, in the ordinary meaning of the word, against the owner of the property, to be enforced as a personal liability, but a charge upon the real estate against which assessed, to be enforced and collected by a sale of the property liable for the taxes so levied and assessed. *Philadelphia Mortg. & T. Co. v. Omaha* (Neb.) 150

Transfer tax.

See also STATUTES, 6.

17. A vested remainder cannot be made the subject of a transfer tax, although it does not come into possession of the remainderman until after the passage of the statute, since such tax would diminish the value of a vested estate, impair the obligation of a contract, and take private property for public use without compensation. *Re Pell* (N. Y.) 540

18. A tax on all remainders or reversions which vested prior to a certain date, but which shall not come into possession until after the passage of the act, even if it can be regarded as a tax on property, and not on transfers, is invalid as not bearing equally upon the entire class to which the property belongs. *Id.*

19. A tax on remainders when they come into possession, of 5 per cent on some, 1 per cent on others, and on others nothing, even if it can be regarded as a tax on property, and not on transfers, is void for not apportioning the burden equally among the owners of the estates sought to be taxed. *Id.*

NOTES AND BRIEFS.

Taxes; right to levy for public purposes only; for gift to individual for private use. 293

Franchise; on gas and water pipes and mains, enforced by methods provided by statute. 66

Franchise; included in term "property;" council's power to assess omitted property; strict construction of charters providing for exemptions; legislative power to provide for franchise tax; on rolling stock of railroad. 50

Franchise; not tax on property; how basis for, arrived at; acts of board of equalization judicial; collateral attack on acts of board. 79

Taxation of corporate franchises in the United States:—(I.) Proem: (a) scope of note; (b) definitions of terms employed; 57 L. R. A.

(II.) power and jurisdiction of a state to tax; (III.) some general principles; (IV.) what are franchises: (a) in general; (b) within tax laws; (c) nature as subjects of taxation; (V.) taxability of franchises: (a) when taxable; (b) when not taxable: (1) generally; (2) by the state; (3) locally; (c) exemptions; (d) property exempt as part of franchise; (VI.) franchise taxes: (a) what taxes are such; (b) what taxes that seem to be such are not; (c) taxes on capital stock; (d) interference with Federal agencies and burdens on Federal grants: (1) franchises: (a) railroads; (b) telegraphs; (c) bridges; (d) banks; (2) United States bonds; (3) patents and copyrights; (e) taxes on passenger traffic; (f) taxes on receipts, income, etc.: (1) corporations engaged in interstate or foreign commerce; (2) railroad, steamship, navigation, express, and telegraph companies generally; (3) miscellaneous corporations; (4) local taxes on receipts of local corporations; (g) taxes on insurance premiums: (1) in general; (2) domestic companies; (3) foreign companies; (h) taxes on bank deposits; (VII.) organizations subject to franchise taxes: (a) generally; (b) domestic corporations: (1) in general; (2) engaged in interstate commerce; (3) possessed of other franchises; (c) foreign corporations: (1) in general; (2) conditions upon the privilege of exercising corporate franchises; (3) what is doing business or employing capital within the state and the meaning of tax laws; (4) engaged in interstate commerce; (VIII.) limitations on franchise taxation: (a) constitutional; (b) double taxation; (IX.) valuation of franchises for the purposes of taxation; (X.) administration and relief; (XI.) conclusion. 33

On shares of nonresident stock; strict construction of exemption laws; lack of equality; discrimination between persons and classes. 482

Transfer tax; necessity of uniformity; state's power of taxation; right to classify for purposes of; retroactive statute imposing; vested right in exemption. 541

Classification for taxes; sufficiency of approximate equality. 352

Presumption that recording of payment rightfully done; city treasurer's duties in receiving and marking "paid" on records. 151

TELEGRAPHS.

Statute Fixing Liability for Mental Anguish from Failure to Deliver Message, see CONSTITUTIONAL LAW, 23.

Sufficiency of Compliance with Contract to Transmit Money, see CONTRACTS, 4.

Damages for Delay in Transmitting Message, see DAMAGES, 3-5, 10.

Damages for Delay in Delivering, see PLEADING, 7.

Admissibility of Evidence as to Directions for Delivering Message, see EVIDENCE, 31.

Delivery of Messages as Nuisance, see
NUISANCES.

NOTES AND BRIEFS.

Telegraphs; statute making liable for mental anguish from delay in delivering telegram; equal protection of laws denied by. 607

Failure to transmit or pay over money order; liability for mental suffering and mortification. 611

Recovery for mental anguish for failure to deliver message. 771

Liability for delay in delivering message; damages for delay. 905

Liability for use to which messages put by third persons. 614

Taxation of franchise of. 33

TENANCY.

By Entireties, see **HUSBAND AND WIFE**,
NOTES AND BRIEFS.

TENDER.

Of Check as Compliance with Telegraph Company's Agreement to Transmit Money, see **CONTRACTS**, 4.

NOTES AND BRIEFS.

Tender; time of making. 175

TICKET BROKERS.

See **EVIDENCE**, 10.

TICKETS.

See **CARRIERS**, 12-14.

NOTES AND BRIEFS.

See also **CARRIERS**.

Ticket; regulation against detached coupons; conductor's refusal to take ticket; husband riding on ticket bought by wife. 276

TIME.

See **HOLIDAY**.

TITLE.

Of Ordinance, see **MUNICIPAL CORPORATIONS**, 5.

Of Statute, see **STATUTES**, 2, 3.

TOLL BRIDGE.

Operating Railroad Bridge as, see **RAILROADS**; **TRIAL**, 14.

TORRENS LAW.

See **CONSTITUTIONAL LAW**, 4, 5, 17, 25;
JUDGMENT, 6; **OFFICERS**, 1.

TORTS.

NOTES AND BRIEFS.

Liability of infant for. 673

TOWER.

Enjoining Maintenance of, see **INJUNCTION**, 4.

NOTES AND BRIEFS.

Tower; on own land as nuisance. 546
57 L. R. A.

TRANSFER TAX.

See **TAXES**, 17-19.

TRESPASS.

A grantee of land over which a third person has been given a parol license to construct a ditch may maintain trespass in case the licensee attempts to act under the license after the grant. *Hicks Brothers v. Swift Creek Mill Co.* (Ala.) 720

TRIAL.

Argument to jury.

1. Counsel in arguing to the jury must not state facts of his personal experience, which are not in evidence, and are calculated to prejudice the jury. *Louisville & N. R. Co. v. Hall* (Ky.) 771

2. The pleadings should not be referred to by counsel in his closing argument to the jury for the purpose of claiming a change in the theory of defense, if they have not been given in evidence on the trial. *Id.*

Assessment of punishment by jury.

3. It was no essential part of a jury trial at common law that the jury should also fix the punishment if they convicted the prisoner. *State v. Hamey* (Mo.) 846

4. The adoption of a new constitution preserving the right of trial by jury "as heretofore enjoyed" does not include the right, which has existed by statute for many years, of having the jury assess the punishment in criminal cases whenever there is an alternative or discretion in regard to it. *Id.*

5. The assessment by the jury of the punishment in a criminal case when the statute imposes that duty on the court does not vitiate the verdict, but the court may ignore it, and assess the punishment itself. *Id.*

Special interrogatories.

6. While two special questions covering the same inquiry should not be put to a jury, yet if one covering some matter of another is so drawn as more definitely and pointedly to inquire as to a particular matter controlling the case, it should be given. *Vieth v. Hope Salt & Coal Co.* (W. Va.) 410

Questions for jury.

7. A jury is not bound to adopt the construction of a contract which will render it legal if it is equally capable of one which will render it illegal if other evidence in the case tends to show illegality. *United States Fidelity & G. Co. v. Charles* (Ala.) 212

8. In the absence of any evidence of authority on the part of the lessee of a piano to sell the same in an action by the lessor to recover possession of it from one who purchased it from the lessee, the jury cannot be permitted to consider the question of such authority. *Oliver Ditson Co. v. Bates* (Mass.) 289

9. The presumption of negligence arising from an injury to a passerby in a public street from a broken electric wire is not

overcome, so as to require the case to be taken from the jury, by testimony of defendant's employees that the wire was properly constructed and put up. *Boyd v. Portland General Electric Co. (Or.)* 619

10. The sufficiency of the fastening of a turntable to prevent injury to children playing on it is a question for the jury where it was undone by one of them. *Edgington v. Burlington, C. R. & N. R. Co. (Iowa)* 561

11. Whether or not a traveler in a cutter drawn by one horse is negligent in attempting to cross to the opposite side of the street-car track, which is in a depression about a foot deep, when his progress on the side on which he has been traveling is obstructed, and whether or not he does so in an ordinarily prudent manner, are questions for the jury. *Gerrard v. La Crosse City R. Co. (Wis.)* 465

12. The jury must decide whether or not a railroad employee is negligent in using a drainpipe upon a tender for a grab iron to assist him in climbing onto the tender, in the absence of such iron. *Coley v. North Carolina R. Co. (N. C.)* 817

13. The question as to the negligence of a carrier in failing to forward a corpse by a certain train is for the jury. *Louisville & N. R. Co. v. Hull (Ky.)* 771

14. A peremptory instruction for defendant cannot be given in an action against a railroad company operating a portion of its railroad bridge as a toll bridge, to recover for injuries to a traveler on the latter by negligently frightening his horse, where the evidence shows that while the horse was on the bridge it met a train having an engine at each end, and that those in charge of the second engine, although knowing the horse was frightened, took no steps to prevent an accident, but permitted the engine to throw out an unusual quantity of smoke, steam, and cinders, which caused the horse to become unmanageable and injure the plaintiff. *Kentucky & I. Bridge Co. v. Montgomery (Ky.)* 781

15. Whether or not a mercantile agency which receives information of an assignment on a general assignment blank, to which is added a clause stating that it was to secure an indorser, and transmits it as being a general assignment for creditors, exercises reasonable care and prudence, so as to relieve it from liability for libel, is a question for the jury. *Douglass v. Daisley (C. C. App. 1st C.)* 475

16. Though, in an action sounding in damages, there is an order at rules for an entry of damages, yet a plea of the general issue, or other issuable plea, filed in term, annuls that order; and the jury is properly sworn to try the issue, and not to inquire of damages. *Peters v. Jackson (W. Va.)* 428

Instructions.

17. Where a rule or principle of law is clearly declared by the court in its general charge, it is not error to refuse to repeat it 57 L. R. A.

in a special instruction. *Southern P. Co. v. Schoer (C. C. App. 8th C.)* 707

18. The instructions in an action for negligent injuries should confine the jury to a consideration of the acts of negligence alleged in the complaint. *South Covington & C. Street R. Co. v. Stroh (Ky.)* 875

19. There is no error in submitting to the jury a phase of the case which defendant's pleadings and the conduct of the court and parties throughout the trial show was understood to be presented by the complaint. *Boyd v. Portland General Electric Co. (Or.)* 619

20. It is not error to refuse to instruct the jury that a defendant is guilty of gross negligence, as distinguished from ordinary negligence on the one hand, and wilful or reckless negligence on the other, because there is no such legal degree of negligence as "gross" negligence, the word "gross" in this connection being a mere epithet used to characterize one of the two legal classes of negligence mentioned. *Purple v. Union P. R. Co. (C. C. App. 8th C.)* 700

Verdict.

See also *supra*, 5.

21. A verdict in an action of trespass on the case reading, "We, the jury, find for the defendants," (the plea being not guilty), is good. *Peters v. Jackson (W. Va.)* 428

NOTES AND BRIEFS.

Right to trial by jury; meaning of; jury's duty to assess punishment; duty to direct verdict; where facts undisputed. 847

Question of negligence and contributory negligence for jury. 308, 466

Question of law; only one construction to be reasonably drawn from testimony. 820

Submission to jury; particular negligence charged; refusal to produce document asked for, when found unfavorable. 875

Predicating instructions on fact as to which there is no evidence. 216

Instructions given, the law for the jury: duty to instruct as to theory not raised by pleadings or evidence. 329

TRUSTS.

Anti-Trust Act as Denial of Equal Protection of Laws, see CONSTITUTIONAL LAW, 10.

Insurance as Trust Fund, see INSURANCE, 25.

1. Trustees for the sale of land will not be permitted, directly or indirectly, to make profit for themselves out of the trust estate. *Frazier v. Jeakins (Kan.)* 575

2. A man who receives property in trust for the support of his wife and children cannot, after mingling the income with his own funds for a period of years without keeping or stating an account, and making improvements on the trust property, go back, charge himself with the income received, and credit the account with the cost of the improvements, leaving himself debtor

to the beneficiaries, on the theory that it was his personal duty to support his family, for the purpose of preventing his creditors from reaching the improvements. *National Valley Bank v. Hancock* (Va.) 728
Spendthrift trust.

See also **CREDITORS' BILL**, 1; **PLEADING**, 1.

3. An equitable life estate which shall be free from the debts of the beneficiary cannot be created where the statute provides that estates of every kind, holden or possessed in trust, shall be subject to debts and charges of the persons to whose use, or to whose benefit, they are holden or possessed, as they would be if those persons owned the like interest in things holden or possessed, as in the uses or trusts thereof. *Hutchinson v. Maxwell* (Va.) 384

4. In jurisdictions where spendthrift trusts are illegal, creditors may subject to their claims personal property in which the beneficiary in such an attempted trust is given an absolute equitable estate, and the rents, profits, and income of real and personal estate, which the beneficiary could have claimed under a direction to the trustee to use them for his proper and comfortable support and maintenance, although the trustee has a discretion as to what amount shall be so applied. *Id.*

Preference to cestui que trust; following trust fund.

See also **EVIDENCE**, 2, 3.

5. Misappropriation of a trust fund does not entitle the *cestui que trust* merely as such, and for that reason alone, to a preference, over general creditors of an insolvent trustee. *Lincoln Sav. Bank & S. D. Co. v. Morrison* (Neb.) 885

6. In order to obtain a preference over general creditors of an insolvent trustee, the *cestui que trust* must show that the estate out of which he claims such preference has been increased to some extent by the misappropriation of the trust property; and he is entitled to a preference to the extent of such increase only. *Id.*

7. Where a trustee mingles trust moneys with his own funds, the *cestui que trust* is entitled to a charge upon the whole; and, so long as any portion of the mass into which the trust fund has entered remains in any form, it is subject to such charge, and may be followed and claimed. *Id.*

8. A *cestui que trust* is not entitled to a preference over general creditors of an insolvent trustee, where the whole of a fund wherein the trustee has mingled his own money and that of the *cestui que trust* is used by the trustee in paying his debts. *Id.*

9. Property or assets of an insolvent trustee, acquired before, or with the proceeds of property held before, the trust money came into his hands, and not in any way mingled therewith, are not subject to any lien or claim of the *cestui que trust*, and the rights of the latter with respect thereto are those of a general creditor only. *Id.*

10. A change in the form of a portion of a fund in which money of a trustee per-

sonally and of the *cestui que trust* has been mingled is not necessarily a withdrawal of such portion; and when the trustee retains such portion and dissipates the remainder, the portion retained in the altered form is taken to represent such fund, and may be claimed by the *cestui que trust*. *Id.*

11. Where a portion of a fund made up of trust money and of individual money of the trustee is invested, and a profit results, the *cestui que trust*, in following the trust money into the investment, may claim such profits as the proceeds of the original fund upon which he had a charge,—at least to the extent of said charge upon the original fund. *Id.*

NOTES AND BRIEFS.

Trusts; in favor of infants; father's right to apply trust fund to their support. 729

Trust fund in insolvent bank; rights of creditors in. 886

Spendthrift trusts; rights of creditors in case of. 385

Trustee; right to purchase at sale. 575

TURNTABLE.

Negligence as to, see **NEGLIGENCE**, 4, 5, 7, **NOTES AND BRIEFS**; **RAILROADS**, 10.

USURY.

Conflict of Laws as to, see **CONFLICT OF LAWS**, 5, 6.

By Foreign Loan Association, see **BUILDING AND LOAN ASSOCIATIONS**.

1. A contract with a building and loan association for a loan, which provides for a fixed premium which, added to the interest reserved, exceeds the legal rate, is usurious. *Shannon v. Georgia State Bldg. & L. Asso.* (Miss.) 800

2. Where a debtor executes a note and mortgage for a loan of money at a lawful rate of interest, and, at its maturity, enters into a new contract with the lender for a further extension of the loan, which is tainted with the vice of usury, and the lender, by agreement, retains the note and mortgage as collateral security to the usurious contract, in a suit to enforce the mortgage security the lender is restricted in his recovery to the amount due on the indebtedness at the time of making the usurious contract, after which all interest is, by force of the statute, forfeited. *Chicago Lumber Co. v. Bancroft* (Neb.) 910

3. An assignee of property subject to a usurious mortgage may recover from the mortgagee the whole usurious interest paid by himself and his assignor. *Shannon v. Georgia State Bldg. & L. Asso.* (Miss.) 800

NOTES AND BRIEFS.

Usury; in contract of foreign building and loan association; law governing usury; to whom usury available; estoppel to claim or sue for usury. 801

Payment of indebtedness by payment of

illegal interest; effect of usurious agreement on prior contract free from usury; renewals of note on which usury charged. 910

VALUE.

Admissibility of Evidence of, see EVIDENCE, 32-34.

VENDOR AND PURCHASER.

Descent of Vendor's Interest in Land Contract, see DESCENT AND DISTRIBUTION.

NOTES AND BRIEFS.

Vendor and purchaser; contract for sale of land; notice from vendee's possession; vendor's title subject to levy. 644

VERDICT.

See TRIAL, 5, 21.

VESTED REMAINDERS.

Transfer Tax on, see TAXES, 17-19.

VOLUNTEERS.

Liability for Injury to, see MASTER AND SERVANT, 10.

WAIVER.

By Failure to Plead, see PLEADING, 2, 3.

NOTES AND BRIEFS.

Waiver; of lateness of accepting option. 175

WALL.

Liability for Fall of, see NEGLIGENCE, 2, 3.

NOTES AND BRIEFS.

Walls; left standing after fire, as nuisance. 133

WAREHOUSEMEN.

Taxation of, see TAXES, 6.
See also BAILMENT.

The value of wheat stored in a public warehouse at the owner's risk of fire cannot be recovered by the owner from the warehouseman in case of a subsequent fire, where the identical wheat stored was sold according to a custom of the warehouseman, known to the owner, to commingle grain so deposited for storage with like quality belonging to him, and from such mass to sell from time to time, and replenish with such other grain as should be brought to him for storage or that he should buy, and when the warehouse burned it contained enough wheat of the quality stored to replace the same, and the warehouseman had at all times kept on hand sufficient in quantity and quality to replace all wheat stored with him. *Moses v. Teetors* (Kan.) 267

NOTES AND BRIEFS.

Warehouse; bailment or sale of grain in public warehouse. 268

WARRANTS.

See ELECTRICAL USES AND APPLIANCES.

57 L. R. A.

WARRANTY.

Damages for Breach of, see DAMAGES, 2.

See also SALE, NOTES AND BRIEFS.

WATERING APPARATUS.

As Fixtures, see FIXTURES, 3.

WATERS.

Appointment of Managers of Water Supply System, see CONSTITUTIONAL LAW, 3, 8.

Enjoining Maintenance of Water Power, see INJUNCTION, 4.

Testing Validity of Appointment of Manager of Water Supply, see QUO WARRANTO, 3, 4.

WILLS.

Estoppel to Probate, see ESTOPPEL, 2.
Burden of Accounting for Mutilation of, see EVIDENCE, 8.

1. Revocation of a will may be effected by adopting its mutilation by vermin as such. *Cutler v. Cutler* (N. C.) 209

2. A will is not void because the witnesses signed before the testator, if all parties were present at the time of the execution and the signatures were affixed by each in the presence of the others. *Id.*

3. The widow of a beneficiary is not entitled to share under a will directing that in case of death of a beneficiary before the time for distribution arrives his share shall be paid over to his next of kin as, according to the statute of distributions, his personal estate would be divided and distributed. *Re Devoe* (N. Y.) 536

NOTES AND BRIEFS.

Wills; witnesses signing before testator; revocation of; mutilation by vermin. 210

Vested or contingent remainder; mode of interpreting where construction doubtful. 536

Devise for life, with power to dispose of; rights of creditor in property devised. 384

Limitation of time to offer for probate. 254

Effect of delay in probating wills:—(I.) Generally; (II.) where the estate is sold or mortgaged by the heirs; (III.) where the devisees are under disabilities; (IV.) where the will is concealed, lost, or destroyed; (V.) estoppel; (VI.) second wills and codicils; (VII.) suspension of probate proceedings; (VIII.) probate in solemn form and second probate; (IX.) wills from other states; (X.) statutory limitations; (XI.) summary. 253

WITNESSES.

1. Interested persons are by the law of Louisiana competent witnesses, and their testimony is binding on the court, unless overcome by counter testimony, or irreconcilable with the known facts of the case. *Marks v. New Orleans Cold Storage Co.* (La.) 271

2. A wife is a competent witness against

her husband in a prosecution for bigamy, under Neb. Code Civ. Proc. § 331, providing that husband and wife shall not be witnesses against each other except in criminal proceedings for a crime committed by one against the other. *Hills v. State* (Neb.) 155

3. Merely exempting a witness in a criminal case from liability to have his testimony used against himself in case he is subsequently prosecuted for an offense to which it relates is not sufficient to prevent his claiming the protection of a constitutional provision that no person shall be compelled to testify against himself in any criminal case, since the testimony so given may disclose facts upon which a successful 57 L. R. A.

prosecution against him may be founded. *Re Carter* (Mo.) 654

NOTES AND BRIEFS.

Witnesses; privilege; statute compelling witness to testify against himself. 654

Power of court to call and examine. 875

WRIT AND PROCESS.

Publication of Summons in Garnishment Proceedings, see GARNISHMENT.

NOTES AND BRIEFS.

Writ and process; power to change administrative and remedial process. 297

Service by publication in garnishment. 122

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